

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8881

Joint Petition of Consolidated Communications)
Holding, Inc., Consolidated Communications, Inc.,)
Falcon Merger Sub, Inc., FairPoint)
Communications, Inc., Telephone Operating)
Company of Vermont LLC, d/b/a FairPoint)
Communications, FairPoint Vermont, Inc., d/b/a)
FairPoint Communications, UI Long Distance, Inc.,)
and Enhanced Communications of Northern New)
England, Inc., for approval of a transfer of control)
by merger, pursuant to 30 V.S.A §§ 107, 108, 109,)
231(a), and 311)

Order entered: 3/27/2017

AMENDMENT OF PROTECTIVE ORDER OF FEBRUARY 9, 2017

I. INTRODUCTION

Consolidated Communications Holdings, Inc., Consolidated Communications, Inc., Falcon Merger Sub, Inc., FairPoint Communications, Inc., Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, FairPoint Vermont, Inc., d/b/a FairPoint Communications, UI Long Distance, Inc., and Enhanced Communications of Northern New England, Inc. (“Joint Petitioners”) seek an amendment to the Protective Agreement dated January 11, 2017, that the Board approved by Order of February 9, 2017. The proposed amendment (“Protective Agreement Amendment”), filed on March 17, 2017, would add the Communications Workers of America Local 1400 (“CWA”) and the International Brotherhood of Electrical Workers Locals 2320, 2326, and 2327, which form IBEW System Council T-9 (“IBEW”) (collectively the “Labor Intervenors”) as parties to the previously approved Protective Agreement.

The Joint Petitioners state in their motion that: (1) the Labor Intervenors wish to be bound by the terms of the Protective Agreement; (2) the parties to the Protective Agreement and the

Protective Agreement Amendment agree that certain allegedly confidential information is of such a highly confidential nature (referenced as “Allegedly Highly Confidential Information” in the Protective Agreement Amendment) that disclosure of such information to a party that is or will be engaged with the disclosing party in collective bargaining or business competition, including parties, intervenors, or other participants in this proceeding, would be commercially and/or competitively harmful to the disclosing party; and (3) a revised Schedule II, attached to the Protective Agreement Amendment, will be utilized. The proposed Protective Agreement Amendment states that:

Allegedly Highly Confidential Information consists of commercially and/or competitively sensitive data to be shared only with the Board and Department and with signatories to this Amendment; provided, however, that such Allegedly Highly Confidential Information has been, and will continue to be, withheld from Parties that are or will be engaged in collective bargaining or business competition with the disclosing Party, regardless of whether the Party from which the Allegedly Highly Confidential Information is withheld is a signatory to the Protective Agreement and/or to this Agreement.

The Joint Petitioners request approval of the Protective Agreement Amendment to facilitate the provision of allegedly confidential and highly confidential information in this proceeding, while preserving its confidentiality. The Joint Petitioners represent that the Vermont Department of Public Service (“Department”) and the Labor Intervenors support the motion.

II. DISCUSSION

Rule 26(c)(7) of the Vermont Rules of Civil Procedure, applicable to Board proceedings pursuant to Board Rule 2.214(A), authorizes the issuance of protective orders, for good cause shown, so as to protect “confidential research, development, or commercial information” from disclosure by the party or parties receiving it for purposes of discovery and presenting testimony in a given case.

We find good cause to order the implementation of the Protective Agreement Amendment and find that the resulting amended agreement is appropriate, useful, and reasonable, with the following clarification. Today’s Order shall govern only the protection of documents and information provided in disclosures and discovery. If a Party wishes to keep

confidential any material that is proffered for inclusion in the evidentiary record, that Party must present a properly supported motion for protection of that material.

III. ORDER

Therefore, IT IS HEREBY ORDERED that Allegedly Confidential Information and Allegedly Highly Confidential Information provided by a Party pursuant to the Protective Agreement dated January 11, 2107, and the Protective Agreement Amendment, dated March 17, 2017, shall be treated in this proceeding as follows:

1. The Protective Agreement Amendment, filed with the Board on March 17, 2017, and attached hereto, is approved and adopted as part of this Order.

2. The Protective Agreement Amendment defines “Allegedly Highly Confidential Information” as commercially and/or competitively sensitive data to be shared only with the Vermont Public Service Board (“Board”) and the Vermont Department of Public Service and with signatories to the Amendment; provided, however, that such Allegedly Highly Confidential Information has been, and will continue to be, withheld from Parties that are or will be engaged in collective bargaining or business competition with the disclosing Party, regardless of whether the Party from which the Allegedly Highly Confidential Information is withheld is a signatory to the Protective Agreement and/or to this Agreement.

3. For each document or information response that a Party wishes to treat as Allegedly Confidential Information and/or Allegedly Highly Confidential Information, the disclosing Party must submit a detailed, document-specific (or information-specific) averment of the basis for such treatment that addresses the following, to the extent that the disclosing Party relies upon that factor as the basis for an assertion of confidentiality:

- a. Identification of the specific document or information for which confidential treatment is sought;
- b. Explanation of the degree to which the document or information contains a trade secret or other commercially sensitive information or is privileged;
- c. For documents and information alleged to contain Allegedly Confidential Information and/or Allegedly Highly Confidential Information,

- i. the extent to which the information is known beyond the disclosing Party and/or its parent or affiliates;
 - ii. the extent the information is known by employees and independent contractors;
 - iii. the measures taken to guard secrecy;
 - iv. the value of the information to the Party, its parent, its affiliates, and competitors;
 - v. the amount of effort or money used to develop the information;
 - vi. the ease or difficulty of others in acquiring or duplicating the information; and
 - vii. an explanation of how disclosure of the information could result in cognizable harm sufficient to warrant a protective order;
- d. Justification of the period during which the Party asserts that material should not be available for public disclosure;
- e. Explanation of whether partial disclosure or disclosure of redacted versions can adequately protect the Allegedly Confidential Information and/or Allegedly Highly Confidential Information; and
- f. Any other information that the Party seeking confidential treatment believes may be useful in assessing whether the document or information should remain confidential.

4. If a Party wishes to prefile any testimony or exhibits that include or otherwise disclose Allegedly Confidential Information and/or Highly Confidential Information, that Party must give five business days' advance notice to counsel for the Party or other person that designated the information as Allegedly Confidential and/or Allegedly Highly Confidential. Any Party may move the Board for an order that the testimony or exhibits be filed under seal or under other conditions to prevent unnecessary disclosure.

- a. If such motion is filed within the five business days' advance notice period, the proponent of the testimony and exhibits shall place them in a sealed record by filing such documents in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (exhibit, report, etc.), and a statement that it

shall not be opened or released from custody of the Clerk of the Board except by order of the Board or Hearing Officer.

Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information and/or Allegedly Highly Confidential Information but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement. The Board will then determine whether the proffered evidence should continue to be treated as confidential information and, if so, what protection, if any, may be afforded to such information.

b. If no such motion is filed by the end of the five business days' advance notice period, the testimony and exhibits may be filed as documents available for public access.

5. At any hearing or conference in this proceeding, no witness may be questioned with respect to any Allegedly Confidential Information and/or Allegedly Highly Confidential Information unless examining counsel has provided advance notice to counsel for any Party or other person that designated the information as allegedly confidential. To the extent possible, such notice shall be given prior to the commencement of the hearing or conference. Any Party may move the Board for an order that the testimony be received in camera or under other conditions to prevent unnecessary disclosure. If such motion is made, the Board will then determine whether the testimony should be received in camera or subject to other protection.

6. Upon receipt of an executed Protective Agreement signature form, that is, either Schedule IIa or IIb to the Protective Agreement, counsel for the disclosing Party shall forward one copy of the form to the Clerk of the Board.

7. All documents filed with the Board that are subject to the Protective Agreement as Allegedly Confidential Information and/or Allegedly Highly Confidential Information and any documents that discuss or reveal documents that constitute Allegedly Confidential Information and/or Allegedly Highly Confidential Information shall be placed in a sealed record by filing

such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the contents (discovery response, report, etc.), and a statement that it shall not be opened or released from custody of the Clerk of the Board except by order of the Board. Notwithstanding such a statement, the members of the Board, and any employee or consultant specifically authorized by the Board to assist the Board in this proceeding and any Hearing Officer appointed to this Docket, may have access to such sealed Allegedly Confidential Information and/or Allegedly Highly Confidential Information but shall not disclose the contents of any such sealed information to any person who has not agreed to be bound by the Protective Agreement.

8. The Board will retain jurisdiction to make such amendments, modifications, and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications, or additions resulting from a motion made pursuant to the Protective Agreement. Any Party or other person may apply to the Board for an amendment, modification, or addition to this Order.

9. The Board cautions the Parties that there must be a good-faith basis for all claims of confidentiality. Claims without such a basis may result in sanctions against the Party making the unfounded claim. A Party's public disclosure of information that it has designated as Allegedly Confidential and/or Allegedly Highly Confidential Information may indicate that the Party lacked a good-faith basis for that designation.

SO ORDERED.

Dated at Montpelier, Vermont, this 27th day of March, 2017.

_____	)	
	)	PUBLIC SERVICE
	)	
<u>s/Margaret Cheney</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/Sarah Hofmann</u>	)	

OFFICE OF THE CLERK

FILED: MARCH 27, 2017

ATTEST: s/Holly R. Anderson
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)