

STATE OF VERMONT
PUBLIC SERVICE BOARD

Case 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: 5/4/2017

PROTECTIVE ORDER FOR CONFIDENTIAL TREATMENT OF EVIDENCE

I. INTRODUCTION

Fairpoint Communications, Inc., Telephone Operating Company of Vermont, LLC, Enhanced Communications of Northern New England Inc., Fairpoint Vermont, Inc., and UI Long Distance, Inc. "FairPoint") filed a motion with the Vermont Public Service Board ("Board") on April 3, 2017, related to the confidential treatment of certain Allegedly Confidential Information and Allegedly Highly Confidential Information that the Vermont Department of Public Service ("Department") and the Labor Intervenors in this proceeding have referenced or used in their respective prefiled testimony. FairPoint represents that the information is competitively sensitive and that its disclosure would enable competitors and members of the public to acquire information not otherwise publicly available concerning: (1) FairPoint's current and projected financial condition; (2) communications providers with whom FairPoint actively does business under its Wholesale Performance Plan in Vermont; (3) FairPoint's unregulated, competitive service offerings; and (4) FairPoint's network and business operations. FairPoint submitted averments in support of its request for confidential treatment.

In this Order we grant in part and deny in part FairPoint's motion for a protective order for a period of 5 years for certain information and indefinitely for Exhibit DPS-SAW-5 and the related testimony of Scott Wierson.

II. DISCUSSION

To promote full understanding of the basis for its decisions, the Vermont Public Service Board ("Board") has actively taken steps to limit the amount of information subject to protective orders. The Board has encouraged parties to remove material from that protection to the extent possible. The Board requires petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.¹

Generally, the Board resolves disputes about information only when there is a disagreement about its confidential nature.² However, even when the motion is uncontested the Board will review the motion and supporting averment or averments to ensure that the moving party has presented a *prima facie* case for keeping the document or information under seal. In determining whether to protect allegedly confidential information, the Board considers three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information which should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?
- (3) Has the party seeking protection shown "good cause" for invoking the Board's protection?³

¹ *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Docket No. 6545 ("Entergy Docket"), Order of 11/9/01 at 5-6.

² *Id.* at 6.

³ *See, e.g., Entergy Docket*, Order of 3/29/02 at 2.

FairPoint maintains that the identified information is confidential or highly confidential and that public disclosure of the information would place FairPoint at a competitive and commercial disadvantage and cause significant harm to FairPoint in relation to any person or entity with whom FairPoint must compete or negotiate in a competitive marketplace. With respect to the identified highly confidential information, FairPoint avers that disclosure to the Labor Intervenors or to any individuals who provide advice to the Labor Intervenors in relation to their collective bargaining negotiations could place FairPoint at an unfair disadvantage in upcoming collective bargaining negotiations. FairPoint further asserts that all of the allegedly confidential and highly confidential material should be protected from public disclosure indefinitely.

We have reviewed the motion and supporting materials, and we have applied the existing standard. We conclude that certain of the redacted information is commercially sensitive information that should be protected, that disclosure of that information would cause a cognizable harm sufficient to warrant a protective order, and that there is good cause for protecting that information. Therefore, we conclude that FairPoint has made a *prima facie* showing that confidential or highly confidential treatment is warranted for the information identified in Attachment A to this Order, and we grant, in part, FairPoint's motion for a protective order accordingly.

However, we further find that FairPoint has not made a *prima facie* showing that the information contained in the exhibit identified as Exhibit DPS-FWL-3 is confidential. While FairPoint's Averment No. 2 describes the information as providing "the identities of the communications providers with whom FairPoint actively does business under [its Wholesale Performance Plan]," the exhibit filed by the Vermont Department of Public Service ("Department") as an attachment to the prefiled direct testimony of Curtis Mills is referred to within Mr. Mills's testimony as a listing of "all Competitive Local Exchange Carriers (CLECs) that are 'eligible' to operate in Vermont."⁴ We are not persuaded that FairPoint has made a *prima facie* showing that a listing of CLECs eligible to operate in Vermont – and who, therefore, are eligible to do business with FairPoint and other incumbent local exchange carriers – is not publicly available through other sources and therefore warrants protection. In

⁴ F. Wayne Lafferty, Department pf. at 10 and exh. DPS-FWL-3.

fact, to be authorized to provide service in Vermont, each CLEC must register with the Board and obtain a certificate of public good. Such authorization is a public document. Each CLEC also must file a public annual report under 30 V.S.A. § 22. In light of this information, it is hard to see how the list of CLECs should be treated as confidential. Therefore, we deny FairPoint's motion for a protective treatment of Exhibit DPS-FWL-3 attached to and referred to within Mr. Mills's testimony.

With respect to the duration of protection of the information found to be confidential or highly confidential in this Order, we grant FairPoint's request for indefinite protection of the information contained in Exhibit DPS-SAW-5 and referred to in Mr. Wierson's prefiled direct testimony regarding FairPoint's network structure because the exhibit and testimony reveal infrastructure details, the disclosure of which could result in cognizable harm to FairPoint or its customers.

For the remaining information that we have determined is confidential or highly confidential, we grant protection for a period of 5 years. FairPoint has not demonstrated that the identified information warrants protection indefinitely. Instead, we find that a period of 5 years will provide adequate protection for the performance-based and therefore competitively sensitive Exhibits DPS-WCM-2, DPS-SAW-8, DPS-WCM-7 and the Direct Testimony of Randy Barber related to synergy savings on page 25, and for the collective bargaining sensitivity of Exhibit DPS-SAW-10, as well as DPS-WCM-7.

III. ORDER

IT IS HEREBY ORDERED that the information and documents in Attachment A to this Order shall be treated in this proceeding as follows:

1. All testimony, affidavits, transcripts, exhibits, and other documents that are subject to this Order as confidential or highly confidential information, and any testimony or documents that discuss or reveal documents that constitute confidential or highly confidential material, 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 case number of the proceeding, the nature of the content (*e.g.*, exhibit, report, etc.), and a statement that it shall not be opened or released from the custody of the Clerk of the Board except by order of the

Board. Notwithstanding such a statement, the members of the Board, any employee or consultant specifically authorized by the Board to assist the Board in this proceeding, and any Hearing Officer appointed in this case may have access to such sealed confidential or highly confidential information, but shall not disclose such information to any person.

2. At any hearing or conference in this proceeding, no persons, other than those who have agreed to be bound by this Order and any Protective Agreement approved in this case, and those whom the Board has expressly authorized to have access to this confidential or highly confidential information, shall be permitted to give, hear, or review testimony given or held with respect to this confidential or highly confidential information.

3. Each Board stenographer or reporter in this proceeding shall acknowledge and be bound by this Order. Each such Board stenographer or reporter shall be instructed to and shall start a separate transcription for testimony or discussion on the record of confidential or highly confidential information. Such transcription shall be marked "Confidential" or "Highly Confidential" and shall be sealed and filed with the Clerk of the Board, and copies of the same shall be made available only to those persons authorized to view such information. Such transcription shall, in all other respects, be treated as confidential or highly confidential information pursuant to this Order.

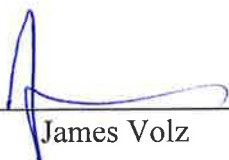
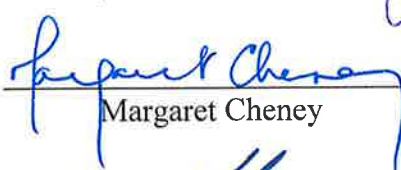
4. The Board retains jurisdiction to make such amendments, modifications, and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications, or additions resulting from a motion made pursuant to the Protective Agreement.

5. Any party or other person may apply to the Board for an amendment, modification, or addition to this Order.

6. The confidential or highly confidential treatment of Exhibits DPS-WCM-2, DPS-WCM-7, DPS-SAW-8, and DPS-SAW-10 and the Direct Testimony of Randy Barber related to synergy savings provided for in this Order shall expire 5 years from the date of this Order. The confidential treatment of Exhibit DPS-SAW-5 shall be provided indefinitely.

SO ORDERED.

Dated at Montpelier, Vermont, this 4th day of May, 2017.

 James Volz	)	PUBLIC SERVICE
	)	
	)	
 Margaret Cheney	)	BOARD
	)	
	)	
 Sarah Hofmann	)	OF VERMONT
	)	
	)	

OFFICE OF THE CLERK

Filed: May 4, 2017Attest: 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)

ATTACHMENT A

CONFIDENTIAL INFORMATION

<u>Witness</u>	<u>Document/Information</u>	<u>Averment</u>
1. Randy Barber (Labor)	Direct Testimony at 25 (FairPoint Attachment 2 to Labor 1-4)	Averment 1
2. Curtis Mills (DPS)	Exhibit DPS-WCM-2 (FairPoint Attachment 1 to DPS-FP-2-22)	Averment 2
3. Scott Wierson (DPS)	Exhibit DPS-SAW-5 (FairPoint Attachment 3 to DPS-FP-2-16)	Averment 3
	Exhibit DPS-SAW-8 (FairPoint Attachment 1 to DPS-FP-2-14)	Averment 4
	Direct Testimony at pp. 19-20 (FairPoint Attachment 1 to DPS-FP-2-13)	Averment 5

HIGHLY CONFIDENTIAL INFORMATION

<u>Witness</u>	<u>Document/Information</u>	<u>Averment</u>
1. Curtis Mills (DPS)	Exhibit DPS-WCM-7 (FairPoint Attachment 1 to DPS-FP-2-24)	Averment 6
2. Scott Wierson (DPS)	Exhibit DPS-SAW-10 (FairPoint Attachment 1 to DPS-FP-2-5)	Averment 7

PSB Case No. 8881 - SERVICE LIST

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