

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

Consolidated Communications Holdings, Inc. and Consolidated Communications, Inc. and Falcon Merger Sub, Inc. ("Consolidated") filed motions on January 10, 2017, April 3, 2017, and April 25, 2017, with the Vermont Public Service Board ("Board") requesting confidential treatment of certain information developed for purposes of analyzing the proposed transaction for which they seek approval from the Board that was included in prefiled testimony and exhibits. Consolidated represents that the information is competitively sensitive and that its disclosure would enable competitors to acquire information about how Consolidated intends to direct and manage the business affairs of the proposed combined company under scrutiny in this docket. Consolidated submitted averments to support its request for confidential treatment.

In this Order we grant in part and deny in part Consolidated's motion for a protective order for a period of 5 years. The protected information is listed in Attachment A to this Order.

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

Consolidated seeks confidential treatment of non-public, confidential and highly confidential financial projections, competitively sensitive information, and critical infrastructure information developed for purposes of analyzing the sale and merger transaction proposed in this proceeding. Consolidated maintains that the information for which it seeks

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.

protective treatment is financially and competitively sensitive, and that if competitors were able to access the information, they would be able to acquire information regarding: (1) how Consolidated intends to direct and manage the business affairs of the combined company, and (2) financial projections of the combined and stand-alone companies. Consolidated asserts that public disclosure of that information would cause cognizable harm by allowing competitors to adjust their business operations and/or marketing to compete more directly and effectively with Consolidated. Consolidated further contends that: (1) its financial viability is relevant to this proceeding, but due to the consolidated nature of its businesses, the information contains projections for unregulated as well as regulated aspects of Consolidated's business, and (2) confidential FairPoint financial projections have not previously been disclosed publicly.

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 for a period of 5 years, that disclosure of this information would cause a cognizable harm sufficient to warrant a protective order, and that there is good cause for protecting the information. This information generally relates to financial projections or estimates of savings expected to accrue due to the proposed acquisition. Therefore, we conclude that Consolidated has made a *prima facie* showing that confidential or highly confidential treatment is warranted for certain information, as identified in Attachment A to this Order, and we grant, in part, Consolidated's motion for a protective order accordingly.

However, we further find that Consolidated has not made a *prima facie* showing that the information contained in Exhibit DPS-WCM-4 attached to the direct testimony of Curtis Mills on behalf of the Vermont Department of Public Service ("Department") and in the direct testimony of Carol Flint on behalf of the Department is confidential. Consolidated's memorandum of law in support of the motion for confidential treatment describes the information as "taken from Consolidated confidential and highly confidential discovery attachments containing competitively sensitive information." However, the testimony filed by Ms. Flint appears to consist of summarized conclusions that are general in nature. These statements may have been made after review of confidential information, but they do not appear to reveal any such information. As to the service quality reports filed by Mr. Mills in his Exhibit DPS-WCM-4, these appear to be publicly filed at the corresponding state

commissions (California, Texas, and Illinois). The cover letters and documents do not indicate that they are confidential and, therefore, it appears that they would be publicly available at those agencies. As a result, we are not persuaded that Consolidated has made a *prima facie* showing that the public availability of either Exhibit DPS-WCM-4 or the summarized conclusions that Ms. Flint provides in her testimony based on that exhibit may cause cognizable harm to Consolidated. Therefore, we deny Consolidated's motion for protective treatment of Ms. Flint's direct testimony and Exhibit DPS-WCM-4.

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 information, and any testimony or documents that discuss or reveal documents that constitute 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 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 information, shall be permitted to give, hear, or review testimony given or held with respect to this 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

information. Such transcription shall be marked “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 information pursuant to this Order.

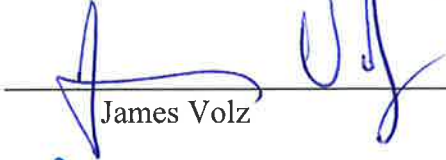
4. The Board retains jurisdiction to make such amendments, modifications, and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications, or additions resulting from a motion made pursuant to the Protective Agreement.

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 the exhibits and testimony listed in Attachment A to this Order shall expire 5 years from the date of this Order.

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, 2017
Attest: 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>
1/10/17 Motion		
1. Steven Childers (Consolidated)	Exhibit CCI-SLC-2 Direct Testimony at 9-10	Averment No. 1
4/5/17 Motion		
2. Joel Jeanson (Department)	Exhibit DPS-JFJ-2 Exhibit DPS-JFJ-3 Exhibit DPS-JFJ-6 Direct Testimony at 7-8, 12-18	Averment No. 1 Averment No. 1 Averment No. 1
3. Ardeth Smith (Department)	Exhibit DPS-AS-13 Direct Testimony at 11-12	Averment No. 2
4. Curtis Mills (Department)	Exhibit WCM-10 Exhibit WCM-11	Averment No. 2 Averment No. 2
5. Scott Wierson (Department)	Direct Testimony at 6, 16-17, 18-20, 22	Averment No. 2 (1st Amendment)
6. Randy Barber (Labor)	Exhibit RB-5 Direct Testimony at: 16, 19-20, 21, 25-28, 30, 35, 41	Averment No. 1
4/24/17 Motion		
7. Gabe Waggoner (Consolidated)	Exhibit CCI-GW-1	Averment No. 2 (2nd Amendment)
8. Michael Shultz (Consolidated)	Exhibit CCI-MJS-5 Rebuttal Testimony at 3-4, 12, 16	Averment No. 2 (2nd Amendment)
9. Steven Childers (Consolidated)	Exhibit CCI-SLC-3 Exhibit CCI-SLC-4 Rebuttal Testimony at 3, 7-8, 11, 13	Averment No. 1 (3rd Amendment) Averment No. 1 (3rd Amendment)

HIGHLY CONFIDENTIAL INFORMATION

<u>Witness</u>	<u>Document/Information</u>	<u>Averment</u>
4/5/17 Motion		
1. Joel Jeanson (Department)	Exhibit DPS-JFJ-5 Direct Testimony at 12, 19-21, 23-24	Averment No. 4
2. Curtis Mills (Department)	Exhibit DPS-WCM-5	Averment No. 2
3. Ardeth Smith (Department)	Exhibit DPS-AS-4 Exhibit DPS-AS-5 Exhibit DPS-AS-6 Exhibit DPS-AS-9 Direct Testimony at 15	Averment No. 3 Averment No. 3 Averment No. 5 Averment No. 3

PSB Case No. 8881 - SERVICE LIST

Parties:

William C. Black
PO Box 10452
Portland, ME 04104
william.c.black@me.com

(for Communications Workers of America
Local 1400) (for International Brotherhood of
Electrical Workers Local 2320, 2326 & 2327)

Debra L. Bouffard, Esq.
Sheehey Furlong & Behm
30 Main Street, 6th Floor
P.O. Box 66
Burlington, VT 05402-0066
dbouffard@sheeheyvt.com

(for Falcon Merger Sub, Inc.) (for
Consolidated Communications, Inc.) (for
Consolidated Communications Holdings, Inc.)

Daniel C. Burke, Esq.
Vermont Department of Public Service
112 State Street
Third Floor
Montpelier, VT 05620-2601
dan.burke@vermont.gov

(for Vermont Department of Public Service)

James Dumont
PO Box 229
Bristol, VT 05443
dumont@gmavt.net

(for Communications Workers of America
Local 1400) (for International Brotherhood of
Electrical Workers Local 2320, 2326 & 2327)

Owen McClain, Esq.
Sheehey Furlong & Behm P.C.
30 Main Street
P.O. Box 66
Burlington, VT 05402
omclain@sheeheyvt.com

(for Falcon Merger Sub, Inc.) (for
Consolidated Communications, Inc.) (for
Consolidated Communications Holdings, Inc.)

Paul J. Phillips, Esq.
Primmer Piper Eggleston & Cramer PC
100 East State Street
P.O. Box 1309
Montpelier, VT 05601-1309
pphillips@primmer.com

(for Fairpoint Vermont, Inc.) (for Telephone
Operating Company of Vermont, LLC) (for
Enhanced Communications of Northern New
England Inc.) (for Fairpoint Communications,
Inc.) (for UI Long Distance, Inc.)

Scott Rubin
333 Oak Lane
Bloomsburg, PA 17815-2036
scott.j.rubin@gmail.com

(for Communications Workers of America
Local 1400) (for International Brotherhood of
Electrical Workers Local 2320, 2326 & 2327)

Joslyn L. Wilschek, Esq.
Primmer Piper Eggleston & Cramer PC
100 East State Street
P.O. Box 1309
Montpelier, VT 05602
jwilschek@primmer.com

(for Telephone Operating Company of
Vermont, LLC) (for Fairpoint Vermont, Inc.)
(for Fairpoint Communications, Inc.) (for
Enhanced Communications of Northern New
England Inc.) (for UI Long Distance, Inc.)