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May 14, 2019

Ms. Debra A. Howland
Executive Director and Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

**Re: DT 19-141: Petition of Consolidated Communications of Northern New England Company, LLC for Approval of Modifications to the Wholesale Performance Plan**

Dear Ms. Howland:

On February 28, 2019, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE ("Consolidated Communications") filed a petition with the New Hampshire Public Utilities Commission ("Commission") (and filed similar petitions with the Maine and Vermont Commissions, collectively the "Original Petition") proposing to modify the Wholesale Performance Plan ("WPP") *in part* to eliminate any requirement to track and report performance measurements, and pay associated penalties, that pertain to certain products or services provided pursuant to 47 U.S.C. § 271 from which the Federal Communications Commission ("FCC") granted forbearance to Bell Operating Companies ("BOCs") in 2015. *See Petition of U S Telecom for Forbearance Pursuant to 47 U.S.C. §160(c) from Enforcement of Obsolete ILEC Legacy Regulations that Inhibit Deployment of Next Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd 6157 (2015). Since that filing the Federal Communications Commission issued a second forbearance order on April 15, 2009. *Petition of US Telecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks,* Memorandum Opinion and Order, FCC 19-31 (rel. April 15, 2019) (hereinafter the "2019 Forbearance Order").

In light of these FCC Forbearance Orders, Consolidated Communications now seeks leave to amend its Original Petition pursuant to the Commission's Chapter Puc 200 Rules. Consolidated Communications hereby files an Amended and Restated Petition (the "Amended Petition"), which requests authorization from the Commission to withdraw the WPP in its entirety, pursuant to the Change of Law provisions, set forth in Section K the WPP.

Enclosed please find a Motion to Amend the Original Petition together with the Amended Petition of Consolidated Communications. Consolidated Communications is filing a similar motions and Amended Petitions today with the Maine and Vermont Commissions and is notifying its wholesale customers of the filing of the motions and Amended Petitions via an Accessible Letter. A copy of the Accessible Letter also is enclosed.

May 14, 2019

Consolidated Communications believes that the issues raised by the Amended Petition are purely a question of law (*i.e.*, whether the FCC's orders granting forbearance as to all fourteen of the section 271 checklist items constitutes a change in law under the WPP and therefore permit complete withdrawal of the WPP) and should be considered by the Commission on briefs. Therefore, Consolidated Communications respectfully requests the Commission schedule a conference for the purpose of developing a briefing schedule for the issues identified in Consolidated Communications' Amended Petition.

To facilitate such a schedule Consolidated Communications proposes the following filing dates:

June 7, 2019: Consolidated Communications files its initial brief
July 12, 2019: Intervening parties file reply briefs
July 26, 2019: Consolidated Communications files its reply brief

Enclosed, please find and original and six copies of the complete filing. An electronic copy of the complete filing will be submitted via email.

Respectfully submitted,

Patrick C. McHugh, Esq.
On behalf of Consolidated Communications

Cc: DT 19-141 Service List

To view this email as a web page, go here.


# Consolidated Communications Wholesale Customer Communication WPP Modifications Notification

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|---|---|
| Notification Date: | **May 14, 2019** |
| Effective Date: | **June 1, 2019** |
| Subject: | **Proposed WPP Modifications Filing** |
| Notification #: | **TRF 0018 - Proposed WPP Modifications Filing** |
| Related Letters: | **TRF 0017 - Proposed WPP Modifications Filing** |
| ME attachment: | **Consolidated Communications' Motion and Amended and Restated Petition filed in Maine Docket 2019-00045** |
| NH attachment: | **Consolidated Communications' Motion and Amended and Restated Petition filed in New Hampshire Docket DT 19-041** |
| VT attachment: | **Consolidated Communications' Motion and Amended and Restated Petition filed in Vermont Docket 19-0603-PET** |
| Target Audience: | **IXC, CLEC, Wireless, Reseller** |
| Area Impacted: | **Maine, New Hampshire, Vermont** |
| Contact: | **Consolidated Change Management at** ConsolidatedCMP@consolidated.com |

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**Dear Consolidated Communications Wholesale Customer:**

**This notice is being sent to notify facilities-based and resale Competitive Local Exchange Carriers (CLECs) that obtain local interconnection services, unbundled facilities or resold services from Consolidated Communications of Northern New England Company, LLC in Maine or New Hampshire (formerly Northern New England Telephone Operations LLC) or from Consolidated Communications of Vermont Company in Vermont (formerly Telephone Operating Company of Vermont LLC), collectively "Consolidated Communications – NNE," that Consolidated Communications – NNE is filing (i) a Motion to Amend its Petition For Approval of**

**Modifications to the Wholesale Performance Plan and (ii) the accompanying amended and restated petition ("Amended Petition") in proceedings pending before the Maine, New Hampshire and Vermont Public Utilities Commissions. The Amended Petition seeks to withdraw the Wholesale Performance Plan in its entirety ("WPP") effective June 1, 2019.**

**In brief, Consolidated Communications – NNE proposes to eliminate the WPP in compliance with the FCC's Memorandum Opinion and Order in WC Docket No. 14-192, *Petition of US Telecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next Generation Networks*, (rel. December 28, 2015) and the FCC's Memorandum Opinion and Order, *Petition of U S Telecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks,* FCC 19-31 (rel. April 15, 2019).**

**Copies of the Motions and the Amended Petitions filed today with the Maine, New Hampshire and Vermont Commissions may be accessed at the links shown below in this letter.**

**Consolidated Communications' Motion and Amended and Restated Petition filed in Maine Docket 2019-00045**

**Consolidated Communications' Motion and Amended and Restated Petition filed in New Hampshire Docket DT 19-041**

**Consolidated Communications' Motion and Amended and Restated Petition filed in Vermont Docket 19-0603-PET**

**If you have any questions please reach out to Consolidated CMP at: ConsolidatedCMP@consolidated.com**

**BEFORE THE**

**NEW HAMPSHIRE**

**PUBLIC UTILITIES COMMISSION**

**Consolidated Communications of Northern New England Company, LLC**

**Docket – DT 19-041**

**Petition for Approval of Modifications to the Wholesale Performance Plan**

NOW COMES, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE ("Consolidated") and hereby respectfully requests leave to amend its Petition filed in this proceeding on February 28, 2019. In support of this Motion, Consolidated states as follows:

1. On February 28, 2019, Consolidated filed a Petition in this proceeding seeking approval of certain modifications to the Wholesale Performance Plan ("WPP") effective June 1, 2019 (the "Petition").

2. The gravamen of Consolidated's Petition was to obtain Commission authorization "to modify the WPP to eliminate any requirement to track and report performance measurements that pertain to certain products or services that the Federal Communications Commission ("FCC") granted Section 271 forbearance to Bell Operating Companies ("BOCs") and that are mutual obligations of all local exchange carriers ("LECs") under section 251(b)." (Petition, ¶ 1.) The specific products and services include "resale, number portability, and directory listings." (*Id.*) In addition, Consolidated proposed "a few substantive changes unrelated to the forbearance relief granted [by the FCC], such as to the

small sample rule, as well as certain administrative changes, such as to the company's name." (*Id.*)

3. The Petition explained that the FCC's Section 271 Forbearance Order[1] granted forbearance on 13 of 14 so-called "checklist items" from the section 271(c)(2)(B) competitive checklist, specifically items 1-2 (interconnection and access to UNEs), 7-9 (directory listings, white pages, numbering) and 11-14 (number portability, local dialing parity, reciprocal compensation, and resale). (Petition at ¶ 2.) In addition, the Petition stated that the FCC granted forbearance "from the independent unbundling items on the competitive checklist that do not reference or duplicate section 251 requirements," including "access to local loops, transport, switching, and access to databases (checklist items 4 - 6 & 10) as required under sections 271(c)(2)(B)(iv), (v), (vi), and (x)." (*Id.*)

4. The Petition noted that, as of the time of the 271 Forbearance Order, the FCC had not granted forbearance as to "checklist item 3", which provides an obligation and enforcement mechanism to provide access to poles, ducts, conduit, and rights-of-way in accordance with the requirements of Section 224." (*Id.* at ¶3.)

5. The WPP contains the following Change of Law provision in Section 1, paragraph K:

> **K. CHANGE OF LAW**
>
> If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint Communications and the parties to the respective Commission and Board dockets will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law.

[1] FCC's Memorandum Opinion and Order in WC Docket No. 14-192, Petition of US Telecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next Generation Networks, released December 28, 2015.

> Upon agreement, such revisions will be submitted jointly by the parties participating in the negotiations to the Commissions and Board for approval. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commission(s) and Board. Upon Commission or Board approval or resolution of such revisions, the revisions to the Maine or New Hampshire or Vermont WPP performance metrics and related bill credits will be retroactive to the effective date of the change in law, unless otherwise expressly ordered by the Commission or Board when the revisions to the WPP are approved.

6. After Consolidated filed the Petition in this proceeding and similar petitions in proceedings that are now pending in Maine and Vermont, Consolidated met with the Commission's Staff, as well as Staff from the Maine Commission and members of the Vermont Department of Public Service ("DPS"), and Intervenors in the three state proceedings to discuss modifications to the WPP as described in the Petition to conform the WPP in part to the change of law effected by the FCC's 217 Forbearance Order.

7. Thereafter, Consolidated and the Intervenors met for confidential settlement negotiations without the Commissions' Staffs and members of the DPS. Ultimately, the parties were unable to reach an agreement to amend the WPP.

8. In Section 5 of the Petition, Consolidated observed that given the FCC's grant of forbearance as to 13 of the 14 section 271 checklist items it would be fair and reasonable to withdraw the WPP in its entirety, and Consolidated reserved its right to seek such relief at a later time:

> Given the FCC's order forbearing from enforcing Section 271 competitive checklist items 1, 2, and 4 – 14, it would be fair and reasonable for Consolidated Communications to seek to withdraw the WPP in its entirety in the three NNE states. Consolidated Communications is not seeking to withdraw the WPP at this time, however, but reserves its right to seek such relief in the future.

9. On April 15, 2019, after Consolidated filed its Petition in this proceeding, the FCC released its Memorandum Opinion and Order in WC Docket No. 18-141, Petition of US Telecom

For Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next Generation Networks ("April 15, 2019 Memorandum Opinion and Order") . In its April 15, 2019 Memorandum Opinion and Order, the FCC granted forbearance, among other matters, as to checklist item 3 (the sole remaining section 271 checklist item):

> We grant U.S. Telecom's request for forbearance from the essentially duplicative requirement imposed as a condition of the BOC's provision of in-region long-distance service that a BOC provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way.158 We find that this remaining long-distance entry checklist item is redundant with section 224 obligations (including state-certified obligations pursuant to section 224(c)(2)), which remain in full force and effect, and that eliminating this obligation will remove any competitive distortions that may occur in the marketplace as a result of the disparate treatment of BOCs vis-à-vis other LECs. *Id* at ¶ 42.

10. Thus, when the 271 Forbearance Order and the April 15, 2019 Memorandum and Opinion and Order in WC Docket No. 18-141 are considered together, the FCC has granted forbearance as to all 14 of the section 271 competitive checklist items. Thus, Consolidated believes it has good grounds to amend its Petition in this Docket.

11. Because the FCC has now granted forbearance as to the entirety of the section 271 competitive checklist items, Consolidated believes that the 271 Forbearance Order and the April 15, 2019 Memorandum and Opinion and Order in WC Docket No. 18-141 constitute changes of law under the WPP and that WPP is no longer necessary to achieve the telecommunication policy goals of section 271.

12. The Commission's Chapter Puc 200 Rules govern procedure before the Commission. Pursuant to Puc 202.01 and Puc 203.07, Consolidated seeks leave to file an Amended Petition, in the form of Attachment A hereto, which requests authorization from the Commission to withdraw the WPP in its entirety.

13. Puc 203.10(a) states, in pertinent part:

> (a) The commission shall permit the amendment of any document filed with the commission provided:
>
> (1) The party requesting the amendment shall give notice of the request to all persons on the service list for the proceeding; and
>
> (2) The commission determines that the amendment shall encourage the just resolution of the proceeding and will not cause undue delay.

*See, e.g., Hampstead Area Water Co., Inc.*, 020813 NHPUC 25, 463 (Feb. 8, 2013) (finding that amendment of filing for temporary and permanent rates would not cause undue delay and would encourage just resolution of proceeding).

14. The Commission should grant Consolidated's Motion to amend its Petition because it will not unreasonably delay this proceeding or unreasonably adversely affect the rights of any party. The proceedings on Consolidated's Petition, and its similar petitions in Maine and Vermont, are in their early stages, and amending at this time will not cause any substantial disruption or delay of the proceedings. Furthermore, Consolidated believes that the proposed Amended Petition will not adversely affect the rights of any party and the parties will have adequate time and opportunity to consider the proposed Amended Petition. Therefore, the proposed amendment is warranted under the Commission's rules of practice and procedure.

15. Accordingly, for all of the foregoing reasons, Consolidated respectfully requests that the Commission grant it leave to file the Amended Petition attached hereto as Exhibit A. In addition, Consolidated believes that the central issue raised by the Amended Petition is purely a question of law (*i.e.*, whether the FCC's orders granting forbearance as to all 14 of the section 271 checklist items constitute change in law under the WPP and therefore permit complete

withdrawal of the WPP) and should be considered by the Commission on briefs. Therefore, Consolidated requests that the Commission schedule a conference for the purpose of developing a briefing schedule for the issues identified in Consolidated's Amended Petition.

WHEREFORE, Consolidated respectfully requests that the Commission:

1. Grant this motion and allow the Company to amend its Petition; and

2. Grant such further relief as may be just and appropriate.

Respectfully submitted:

CONSOLIDATED COMMUNICATIONS OF VERMONT COMPANY, LLC

By: _____
Patrick C. McHugh, Esq.

Certificate of Service

I hereby certify that on this 14th day of May, 2019, the undersigned caused a copy of the within Motion to be hand-delivered and/or sent via electronic mail to the Intervenors in this Docket and the Commission's Staff.

By: _____
Patrick C. McHugh, Esq.

**BEFORE THE**

**NEW HAMPSHIRE**

**PUBLIC UTILITIES COMMISSION**

**Consolidated Communications of Northern New England Company, LLC**

**Docket - DT 19-041**

**Petition For Approval of Modifications to the Wholesale Performance Plan**

**Amended and Restated Petition for Approval of Modifications to the Wholesale Performance Plan**

NOW COMES, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE ("Consolidated Communications") and hereby submits this Amended and Restated Petition requesting the New Hampshire Public Utilities Commission (the "Commission") eliminate the Wholesale Performance Plan ("WPP" or "Plan") in its entirety, effective June 1, 2019. Consolidated Communications is filing a similar Amended and Restated Petition (the "Amended Petition") this same day with the Maine Public Utilities Commission and the Vermont Public Utility Commission. In support of this Amended Petition, Consolidated Communications states as follows:

## I. INTRODUCTION

1. On February 28, 2019 Consolidated Communications filed a petition with the Commission (and filed similar petitions with the Maine and Vermont Commissions, collectively the "Original Petition") proposing to modify the WPP *in part* to eliminate any requirement to track and report performance measurements, and pay associated penalties, that pertain to certain products or services provided pursuant to 47 U.S.C. § 271 from which the Federal Communications Commission ("FCC") granted forbearance to Bell Operating Companies ("BOCs") in 2015. *See Petition of U S Telecom for Forbearance Pursuant to 47 U.S.C. §160(c) from Enforcement of Obsolete ILEC Legacy Regulations that Inhibit Deployment of Next Generation Networks*, Memorandum Opinion and Order, 31 FCC Rcd 6157 (FCC Dec.

28, 2015) (hereinafter the "2015 Forbearance Order"). At that time, the FCC had eliminated all but one of the remaining checklist obligations under Section 271(c)(2)(B) of the federal Communications Act of 1934 (as amended, the "Communications Act") on the basis of the "transformative changes" in the market for local exchange carrier ("LEC") services, where "competitors offer many different services that do not depend on BOC compliance with the checklist obligations." *Id.* ¶ 28. As the FCC stated in announcing the decision, "A number of these rules were pre-conditions to the ability of the former 'Baby Bell' telephone companies to offer long distance telephone service, a process that was completed over a decade ago. With the long distance service market very different today than it was then, these rules generally no longer are necessary to protect consumers or competition." *FCC Eliminates Dated Phone Industry Rules,* FCC News Release (rel. Dec. 17, 2015), available at: www.fcc.gov (emphasis added).

2. More recently, the FCC released its April 15, 2019 Forbearance Order, whereby it granted forbearance from: (1) the requirement that independent rate-of-return carriers offer long-distance telephone service through a separate affiliate; (2) nondiscriminatory provisioning interval requirements applicable to BOCs and independent price cap carriers; and (3) the final remaining statutory requirement under the Section 271(c)(2)(B) competitive checklist, namely, that BOCs provide nondiscriminatory access to poles, ducts, conduit, and rights-of-way in accordance with Section 224 of the federal Communications Act. *Petition of U S Telecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks,* Memorandum Opinion and Order, FCC 19-31 (FCC rel. April 15, 2019) (hereinafter the "2019 Forbearance Order"). The FCC explained: "In taking this action, we continue the Commission's efforts to eliminate unnecessary, outdated, and burdensome regulations that divert carrier resources away from deploying next-generation networks and services to American consumers." *Id.* ¶ 1. Accordingly, and as explained in greater detail below, Consolidated Communications now proposes to eliminate the WPP in its entirety.

3. In the Original Petition, Consolidated Communications proposed that the Maine, New Hampshire and Vermont Commissions (collectively the "NNE Commissions") consider all such modifications to the plan in a single proceeding pursuant to the Biennial Review provisions set forth in Section 1, Part H of the WPP. Consolidated Communications reserved its right to invoke the applicable provision in the WPP related to a change of law. *See* Original Petition, p. 4, n. 8. Given recent developments, more fully explained below, Consolidated Communications now invokes the change of law provision Section 1, Part K of the WPP, and withdraws its request to review the revisions to the WPP under the Biennial Review provisions of the WPP. As with the Original Petition, however, Consolidated Communications does not seek retroactive treatment for the relief requested herein to the date of the actual change of law. Instead, Consolidated Communications requests that the Commissions grant relief effective as of June 1, 2019 (understanding the NNE Commissions will render a decision on the relief requested herein after said date).

4. Section II of this Amended Petition discusses the circumstances that gave rise to the WPP, and its predecessor known as the Performance Assurance Plan (the "PAP"). Section III of this Amended Petition explains why Consolidated Communications' requested relief is just and reasonable given the current state of the telecommunications market and recent developments under federal law. Consolidated Communications' requested relief is set forth in Section IV.

## II. ORIGIN OF THE PAP & WPP

5. On July 31, 2001 this Commission opened an inquiry into the entry of Verizon New England Inc. d/b/a Verizon- New Hampshire ("Verizon") into New Hampshire's interLATA (long distance) telephone market pursuant to Section 271 of the Act. On June 27, 2002, Verizon filed an application with the FCC pursuant to Section 271 of the Act requesting authority to provide in-region, interLATA services in New Hampshire. Section 271(d)(2)(B) of the Act required the FCC to consult with the state regulatory commission

of any state that is the subject of a 271 application to verify the BOC's compliance with the requirements of subsection 271(c) of the Act. Accordingly, this Commission provided Consultative Comments to the FCC on July 17, 2002, regarding its review of Verizon's compliance with Section 271 of the Act based upon the findings reached in NHPUC Docket DT 01-151 to the effect that Verizon New Hampshire complies with the requirements of Section 271(c). *See* Consultative Comments of the New Hampshire Public Utilities Commission on Verizon New Hampshire's compliance with Section 271 of the Telecommunications Act of 1996, WC Docket No. 02-157, July 17, 2002 (the "2002 NHPUC Consultative Comments").

6. In addition to its review and findings in DT 01-151, the Commission's Consultative Comments relied on findings reached in two other investigations undertaken at approximately the same time, including an examination of Verizon New Hampshire's proposed Carrier-to-Carrier ("C2C") Guidelines and Performance Assurance Plan ("PAP") in Docket DT 01-006 (the "PAP Docket").[1] The Commission issued initial orders and orders on reconsideration in the PAP Docket (Orders No. 23,940, dated March 29, 2002, and No. 23,976, dated May 24, 2002. As explained by the Commission in Order No. 23,976, "With this approval, Verizon will have a performance plan in place that the FCC has found satisfactory for meeting the requirements of Section 271." *Id.* at p. 12. The Commission further noted that "[T]he NHPAP as proposed by Verizon is not and need not be an exclusive plan. The NHPAP exists within the universe of our traditional statutory authority, acceded to by Verizon, which acts as an insurance policy to deter backsliding by Verizon. *Id.* at p. 16. *See also* 2015 Forbearance Order ¶ 32 ("the state utility commissions structured the PAPs to include performance measurements and standards to ensure compliance with the 271 checklist items after the BOCs entered the in-region long distance market").

7. The NNE Commissions structured the PAP and its successor WPP to include performance measurements and standards intended to ensure continued compliance with the section 271 competitive checklist after Verizon (now Consolidated Communications) entered the long distance market. Following its

[1] The Commission also relied on findings in its review of Verizon New Hampshire's TELRIC pricing of UNE Remand elements in DT 01-206.

review of Verizon New Hampshire's application for entry into the in-region interLATA (long distance) telecommunications market pursuant to Section 271 of the Telecommunications Act of 1996, the Commission stated in its recommendations to the FCC, "We assure the FCC that the exercise of our traditional statutory authority in conjunction with the Verizon NH PAP will best serve the public interest in New Hampshire."[2] The Commission's findings were rendered more than seventeen years ago when competition in local exchange markets was in its infancy.

8. As the NNE Commissions well know, Verizon entered into a series of agreements with FairPoint Communications, Inc. ("FairPoint") at the end of 2006 related to FairPoint's acquisition of the Verizon LEC properties in northern New England. On behalf of its operating subsidiaries, FairPoint, agreed to adopt the New Hampshire PAP (as well as the Maine and Vermont PAPs) upon the closing of and in connection with its acquisition of the Verizon properties and operating franchises in the States of Maine, New Hampshire and Vermont. In its Order approving the merger agreement in which FairPoint took over the northern New England territory of Verizon in Docket No. DT 07-011, the Commission (via its adoption of a settlement agreement with the Commission's Staff[3]) conditioned its approval, among other things, on the filing of a simplified PAP by FairPoint . Then in September 2011, FairPoint and the CLECs began negotiating for a replacement to the existing C2C Guidelines and the PAP, both of which had been in effect since 2002 when the Commission approved their implementation for Verizon. Ultimately, after months of negotiations, FairPoint and the CLECs reached two (2) separate settlement stipulations leading to a resolution of all but three (3) issues and these stipulations gave rise to the WPP. These negotiations led to intricately detailed metrics with accompanying financial penalties tied to the monthly recurring charges issued by FairPoint to the carriers ultimately purchasing the specific service elements measured by the metrics.

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[2] 2002 NHPUC Consultative Comments at 19-20.

[3] *See* NHPUC Docket DT 07-011, Settlement Agreement Among the Joint Petitioners and Commission Staff, effective as of the 23rd day of January, 2008, at Exhibit 2, Section 6.c.

9. This Commission resolved the three (3) outstanding issues via its Order No. 25,623, dated January 24, 2014, in Docket DT 11-061. The change of law was one of the issues litigated by the parties and decided by the Commission. With respect to the change of law issues, the Commission held in part that:

> We agree with Staff that FairPoint had raised a valid point that certain legal or regulatory changes may be very clear, even if others are subject to reasonable dispute. This concern may be addressed by permitting revisions to WPP performance metrics and related billing credits to be retroactive to the effective date of the change in law once the revisions have been reviewed and approved by the Commission. This approach would preserve our oversight of changes to the WPP, while effectuating the financial impact of any service or product delisting as of the time of the change in law, thereby diminishing any incentive to unnecessarily delay the state regulatory approval process. We therefore direct FairPoint and the other Joint Movants to develop specific language for inclusion in the change in law provisions of the WPP in order to effect this modification.

*See Order No. 25,623, Petition For Approval of Simplified Metrics Plan and Wholesale Performance Plan,* Docket No. DT 11-061, at p. 25, January 24, 2014.

10. The WPP in its current form went into effect in June 2015 in all three northern New England states.

## III. DISCUSSION AND APPLICABLE CHANGE OF LAW

### *A. Change of Federal Law*

11. The FCC's 2015 Forbearance Order granted forbearance with respect to all but one of the Section 271(c)(2)(B) competitive checklist obligations still in effect at that time (having previously forborne from the checklist obligations as they applied to unbundling of broadband network elements). 2015 Forbearance Order ¶ 15. As required by Section 10 of the Communications Act, 47 U.S.C. §160, the FCC found that (as to narrowband services) these checklist items were no longer necessary to ensure just and reasonable rates, terms, and conditions, nor to protect consumers, and that forbearance would serve the public interest. *Id.* ¶¶ 11-15.

12. In its 2015 Forbearance Order, the FCC forbore from enforcing those remaining Section 271 competitive checklist items that also are addressed by Section 251 of the Communications Act. These include checklist items 1-2 (interconnection and access to UNEs), 7-9 (directory listings, white pages, numbering) and 11-14 (number portability, local dialing parity, reciprocal compensation, and resale), which establish interconnection and access obligations that duplicate requirements that are mandated under section 251 and are codified in the Commission's rules implementing section 251. *Id.* ¶ 16.[4]

13. The FCC also granted forbearance in 2015 from the independent unbundling items on the competitive checklist that do not reference or duplicate Section 251 requirements. These include access to local loops, transport, switching, and access to databases (checklist items 4 - 6 & 10) as required under sections 271(c)(2)(B)(iv), (v), (vi), and (x). *Id.* ¶ 24.[5]

14. In 2015 the FCC retained only competitive checklist item 3, which provides an obligation and enforcement mechanism to ensure that BOCs provide access to poles, ducts, conduit, and rights-of-way in accordance with the requirements of Section 224 of the Communications Act. *Id.* ¶ 19. However, just a few years later, the FCC ultimately did grant forbearance from that last statutory checklist requirement, finding it to be redundant of obligations applicable to all LECs under Section 224 of the Act. *See* 2019 Forbearance Order ¶ 42. In taking this action, the FCC found it would serve the public interest to eliminate this and other federal obligations that have "outlived their usefulness," in light of "tremendous transformation" in the telecommunications marketplace. *Id.* ¶ 1. The FCC specifically

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[4] *See also id.* ¶ 18 ("the substantive section 251 obligations will continue to be enforced through interconnection agreements and through complaints filed under section 208 of the Act").

[5] *See also id.* ¶ 25 ("the scope of the independent checklist items is different from the section 251 unbundling requirements. While the independent checklist items create obligations for BOCs that are broader than the obligations imposed by section 251(c)(3) because the former do not hinge on a finding of impairment, the BOCs are not required to provide access to the independent items under the cost-based standard in 252(d)(1) as they must for section 251 UNEs. BOCs must instead provide access at a rate governed by the "just and reasonable" standard established under sections 201 and 202, which applies to all telecommunications services for which forbearance has not been granted. *See also* ¶ 35 "Section 251 and its cost-based pricing requirements remain the primary unbundling requirement for the BOCs, and we find that it is not necessary to retain the [non-duplicative] checklist obligation").

ruled that outdated, unnecessary and burdensome regulations "divert carrier resources away from deploying next-generation networks and services to American consumers." *Id.*

15. The cost of compliance with duplicative and unnecessary regulations cannot be dismissed. Section 10 of the Communications Act requires the FCC to assess whether a regulation remains "necessary" and whether forbearance would serve the public interest. *See, e.g.,* 2015 Forbearance order ¶2. The FCC consistently has noted that consumers benefit when carriers are relieved from "having to focus resources on complying with outdated legacy regulations that were based on technological and market conditions that differ from today." 2015 Forbearance Order ¶2. In finding that forbearance from the Section 271 competitive checklist obligations would serve the public interest, the FCC took notice of the costs to the BOCs of complying with performance assurance plans ("PAPs"). *Id.* ¶17. The FCC found that forbearance would be more consistent with the public interest than continued enforcement of the checklist, allowing the affected carriers "to concentrate on building out broadband and investing in modern and efficient networks and services." *Id. See also* 2019 Forbearance Order ¶ 1. Forbearance thus allows the FCC to eliminate burdensome, unnecessary and outmoded regulations while still preserving its ability to ensure competition, protect consumers, promote universal service, and further public safety. 2015 Forbearance Order ¶ 2.

16. While it is within the states' authority to decide whether or not PAPs (or in this case, the WPP) should be modified or revised, 2015 Forbearance Order ¶17, the states may not continue to enforce provisions of the Communications Act from which the FCC has forborne. 47 U.S.C. § 160(e). Thus, the FCC's decision to forbear from enforcement of Section 271 checklist obligations effectively requires the proponents of the WPP to justify its continued enforcement. States must follow the example of the FCC and consider the substantial competitive gains in the local communications marketplace since the last BOC was admitted into the in-region interLATA service market in 2003. Enforcement of Section 271 checklist items, and maintenance of a costly and outdated enforcement mechanism such as the

WPP, no longer can be justified. Consolidated, therefore, believes this Commission (as well as the Maine and Vermont Commissions) should withdraw the WPP due to changes in federal law. Otherwise the WPP Change of Law provision is rendered meaningless.

### *B. Enforcement of WPP Change of Law Provision*

17. Given the FCC's orders forbearing from enforcing the Section 271 competitive checklist items, its findings that the market has substantially changed and the parties' failure to conform the WPP accordingly (discussed below), Consolidated Communications now seeks a Commission Order finding that the WPP should be withdrawn in its entirety, consistent with the Change of Law provisions expressly set forth in the Commission's January 24, 2014 Order No. 25,623 in Docket DT 11-061, and as required under the Change of Law provisions of the WPP.[6]

18. Consolidated Communications' Original Petition sought only to take an incremental step – one that would place Consolidated Communications on a somewhat more level playing field with other local exchange carriers ("LECs") operating in the state, consistent with marketplace realities and the FCC's 2015 Forbearance Order. Consolidated noted in the Original Petition, ¶ 5, however, that given the 2015 Forbearance Order, it would be fair and reasonable to seek to withdraw the WPP in its entirety, and that it reserved the right to seek such relief in the future. Negotiations with the

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[6] Section 1, Part K of the WPP reads as follows:

> **K. CHANGE OF LAW**
>
> If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint and the parties to the respective Commission and Board dockets will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law.
>
> Upon agreement, such revisions will be submitted jointly by the parties participating in the negotiations to the Commissions and Board for approval. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commissions and Board. Upon Commission or Board approval or resolution of such revisions, the revisions to the Maine or New Hampshire or Vermont WPP performance metrics and related bill credits will be retroactive to the effective date of the change in law, unless otherwise expressly ordered by the Commission or Board when the revisions to the WPP are approved.

Intervenors to this docket failed to achieve a resolution, however, and now the FCC has taken further deregulatory steps. At this point, all provisions] of the WPP are outdated and unenforceable and the WPP should be withdrawn.

19. Further negotiations with Intervenors will not be fruitful. Without discussing confidential settlement negotiations, Consolidated Communications notes that some of the Intervenors have proposed new metrics associated with pole attachments – notwithstanding this Commission's recent docket regarding utility pole attachment issues. *See* Docket No. DRM 17-139, Puc 1300 Utility Pole Attachment Rules (ss by # 12574, eff 9-1-18). For example, counsel for the CLEC Association of Northern New England stated during a proceeding before the New Hampshire Commission that "...it may be appropriate to look at other metrics that reflect more current needs in the marketplace and among them may be pole attachments." *See* Transcript of Prehearing Conference, NHPUC DT 19-041, p. 16, March 27, 2019 (Attachment A hereto). Such changes are outside the scope of the change of law provisions in the WPP and, in fact, run counter to current federal law. Particularly in light of the 2019 Forbearance Order expressly addressing pole attachments, it is time for this Commission to apply the change of law to the WPP.

20. Each of the FCC's 2015 Forbearance Order and its 2019 Forbearance Order clearly constitutes a "regulatory...or other governmental decision, order, determination or action substantively affects any material provision of this WPP." By these orders, the FCC has granted forbearance as to all of the Section 271(c)(2)(B) checklist obligations. Accordingly, this Commission is prohibited from applying or enforcing those checklist items and the WPP must be eliminated in its entirety. *See* 47 U.S.C. §160(e) ("A State commission may not continue to apply or enforce any provision of this Act that the [Federal Communications] Commission has determined to forbear from applying").

21. Imposing regulatory burdens and financial penalties on one carrier (the incumbent LEC) that are not imposed on all competing carriers provides an unfair competitive advantage to the carriers

not so burdened. Under Section 251(b) of the Communications Act, all LECs – incumbents as well as competitors – are subject to resale, number portability, dialing parity, reciprocal compensation and other obligations, yet only one entity (the incumbent LEC) is subject to potential penalties under the WPP for non-compliance with these and similar obligations. The FCC has found that competitive market conditions prevent BOCs and other incumbent LECs from discrimination in their provisioning of local exchange and exchange access services. *E.g.*, 2019 Forbearance Order ¶ 33. To the extent any pockets of the service area are devoid of competition, regulations *other than the Section 271 checklist* are sufficient to prevent harm to consumers. *Id.* Yet the WPP continues in effect, the burden of compliance continuing to impose costs and uncertainty on Consolidated Communications and it alone. This type of discriminatory regulation is harmful to competition, discourages investment in the network and services, and disserves the public interest. *See* 2019 Forbearance Order ¶ 1; 2015 Forbearance Order ¶ 2.

22. Given that negotiations with the Intervenors to this docket failed to achieve a resolution of the issues raised in the Original Petition, Consolidated Communications now respectfully seeks a Commission finding that, as a legal matter, (i) the FCC's 271 Forbearance Orders constitute a change in law consistent with the Change of Law provisions considered and expressly ruled on in the Commission's January 24, 2014 Order No. 25,623 in Docket DT 11-061 and memorialized in Section 1.K. of the WPP itself, and (ii) pursuant to Section 1.K of the Plan, the WPP must be revised to conform the Plan to applicable federal law, which, given the breadth of the FCC's 271 Forbearance Orders, means the Plan should be eliminated in its entirety.

### C. At a Minimum, this Commission Should Grant the More Limited Relief Sought in the Original Petition pursuant to the WPP Change of Law Provision.

23. In the 2015 and 2019 Forbearance Orders, as previously noted, the FCC found that the Section 271 competitive checklist obligations are no longer necessary to ensure just and reasonable rates, terms, and conditions, or to protect consumers, and that forbearance is in the public interest.

Should the Commission decide that the elimination of the WPP in its entirety is not warranted, then, at a minimum, the Commission should conform the WPP to applicable law.

24. Specifically, the FCC forbore from enforcing checklist items for which other Section 251 safeguards already address and duplicate the narrowband obligations. These include checklist items 1-2 (interconnection and access to UNEs), 7-9 (directory listings, white pages, numbering) and 11-14 (number portability, local dialing parity, reciprocal compensation, and resale), which establish interconnection and access obligations that duplicate requirements that are mandated under section 251 and are codified in the Commission's rules implementing section 251. The FCC also granted forbearance from the independent unbundling items on the competitive checklist that do not reference or duplicate section 251 requirements. These include access to local loops, transport, switching, and access to databases (checklist items 4 - 6 & 10) as required under sections 271(c)(2)(B)(iv), (v), (vi), and (x). Because Section 251(b) obligations apply equally to all local exchange carriers, and because the FCC eliminated the duty to comply with the above-referenced Section 271 requirements, all metrics and all associated penalties applicable exclusively to Consolidated Communications should be, at a minimum, eliminated from the WPP pursuant to the Change of Law provisions therein.

## IV. Consolidated Communications' Requested Relief

For all the reasons stated in this petition, Consolidated Communications respectfully requests the Commission:

A. Find, as a legal matter, that the FCC's 2015 and 2019 Forbearance Orders constitute an applicable "legislative, regulatory, judicial or other governmental decision, order, determination or action that substantively affects a material provision[s]" of the Wholesale Performance Plan;

B. Find, as a legal matter, that the "Change of Law" provision set forth in Section 1, Part K of the WPP requires a Commission determination that the WPP must be conformed to such applicable change in law;

C. Find that the FCC's 2015 and 2019 Forbearance Orders render the WPP moot and , therefore, Consolidated Communications shall no longer be subject to any provisions of the Plan and that the Plan shall be withdrawn in its entirety; or,

D. Should the Commission find as a legal matter that the FCC's 2015 and 2017 Forbearance Orders do not constitute a change of law and/or that the Change of Law provision in the WPP does not require the Plan be withdrawn or substantially revised to conform to the applicable change of law, Consolidated Communications urges the Commission to adopt the limited relief requested in its February 28, 2019 petition as repeated herein; and,

E. Make such other findings as it deems appropriate that are consistent with Consolidated Communications petitions and in the public interest.

Dated: May 14, 2019

Robert D. Meehan

Robert D. Meehan | Director – Regulatory Affairs
Consolidated Communications
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**Attachment A**

**NHPUC DT 19-041**

**Transcript of Prehearing Conference, March 27, 2019**

**STATE OF NEW HAMPSHIRE**

**PUBLIC UTILITIES COMMISSION**

**March 27, 2019** - 2:06 p.m.
Concord, New Hampshire

RE: **DT 19-041**
**CONSOLIDATED COMMUNICATIONS:**
**Petition for Approval of**
**Modifications to the Wholesale**
**Performance Plan.**
***(Prehearing conference)***

**PRESENT:** Chairman Martin P. Honigberg, Presiding
Commissioner Michael S. Giaimo

Doreen Borden, Clerk

**APPEARANCES:** **Reptg. Consolidated Communications:**
Patrick H. McHugh, Esq.

**Reptg. Charter Fiberlink NH-CCO, LLC and Time Warner Cable Information Services:**
Nancy S. Malmquist, Esq. (Downs...)

**Reptg. CLEC Association of Northern New England (CANNE):**
Gregory M. Kennan, Esq. (Fagelbaum...)

**Reptg. PUC Staff:**
David K. Wiesner, Esq.
Mary Schwarzer, Esq.
Kath Mullholand, Dir./Regulatory Innovation & Strategy

Court Reporter: Steven E. Patnaude, LCR No. 52

# I N D E X

to look at the overall balance of metrics before removing any. And need to look at the performance under the metrics that are being removed. If they're removing metrics or if metrics are to be removed, some of the dollars at risk, it may be appropriate to shift them to balance the metrics that Consolidated consistently misses.

If circumstances have changed such that it's appropriate to remove some of the metrics, it may be appropriate to look at other metrics that reflect more current needs in the marketplace, and among them may be pole attachments.

The Commissions, we agree, should take a consolidated or at least a joint -- coordinated, excuse me, a coordinated approach to any proposed changes, and we're glad to hear that. And we don't think that the Commissions are necessarily limited to any 60-day time period to get this done. It took several years the last time. And we certainly hope it doesn't take that long this time, but it is a complicated issue.