STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 19-041

CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND COMPANY, LLC

Petition for Approval of Modifications to the Wholesale Performance Plan

BRIEF IN RESPONSE TO PROCEDURAL ORDER

Charter Fiberlink NH-CCO, LLC and Time Warner Cable Information Services (New Hampshire), LLC ("Charter") and the CLEC Association of Northern New England ("CANNE") – which includes CRC Communications LLC d/b/a OTELCO, FirstLight Fiber, Inc., and Bidderford Internet Corp. d/b/a Great Works Internet –, hereby submit their Initial Brief in response to the New Hampshire Public Utilities Commission's (the "Commission") Order provided by the Executive Director on June 10, 2019 (the "Procedural Order").

I. BACKGROUND

On May 14, 2019, Northern New England Company, LLC d/b/a Consolidated Communications-NNE ("Consolidated") filed a motion to amend its initial petition in this proceeding, requesting that it be allowed to withdraw the current Wholesale Performance Plan (WPP) in its entirety.[1] On May 24, 2019, CANNE and Charter filed a response to Consolidated's motion ("CANNE-Charter Joint Response to Motion to Amend"), in which they stated that they did not object to Consolidated's motion, but that the amended petition required legal briefing and analysis to determine: 1) whether certain decisions by the Federal Communications Commissions ("FCC") related to forbearance of obligations under RBOC 271 of the Telecommunications Act of 1996 (on which Consolidated relies for its requested relief) constitute a

[1] Consolidated's initial February 28, 2019 petition had only sought to *modify* the WPP, not eliminate it entirely.

change of law within the meaning of the WPP; and whether any change in law requires the Commission to take any action related to the WPP.[2]

As more particularly discussed below, CANNE and Charter submit that the answer is no – the FCC orders do not constitute a change of law under the WPP.

II. THE FCC'S 2015 AND 2019 FORBEARNCE ORDERS DID NOT RESULT IN LEGALLY BINDING, MATERIAL CHANGES IN LAW THAT REQUIRE AMENDMENT OF STATE-BASED PERFORMANCE ASSURANCE PLANS

Section K of the WPP sets forth both the parameters and procedures for amending the plan when a change of law substantively affects material provisions of the plan. Section K contains a threshold condition that must be satisfied before it may be invoked. Section K is triggered only "[i]f any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP." Where parties disagree whether a change of law has taken place, only the State Commissions can make that determination – not Consolidated or any other party. As the New Hampshire Commission explained, "it is often the case that an FCC order or other change in law is subject to reasonable disagreement as to interpretation and effect." *Northern New England Telephone Operations, LLC D/B/A Fairpoint Communications – NNE — Petition for Approval of Simplified Metrics Plan and Wholesale Performance Plan,* DT 11-061, Order Approving Wholesale Performance Plan and Resolving Outstanding Issues, Order No. 25,623, at 24 (Jan. 24, 2014). The threshold criteria, a change in law, has not been satisfied in this case.

A. CHANGE OF LAW REQUIRES LEGAL ACTION WHICH, ON ITS OWN FORCE, ALTERS OR PREEMPTS THE TERMS OF AN AGREEMENT

A change of law is one that is *legally binding, material,* and would allow the party desiring the change to demand that the WPP be amended to reflect the change. Black's Law Dictionary defines "binding" to mean "having legal force to impose an obligation" and also to mean "requiring obedience."[3]

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[2] CANNE- Charter Joint Response to Motion to Amend at 3.

[3] *See* BINDING, Black's Law Dictionary (11th ed. 2019).

Accordingly, parties are permitted to invoke their change of law rights once a change of law event imposes some new obligation or requires obedience – that is, once a bill becomes effective, a judicial decision becomes final, or an FCC or Commission order takes effect that alters the present relationship of the parties.

The First Circuit, in reviewing a change of law provision in an interconnection agreement, found that where the FCC states that it does not intend to trigger change of law provision, a party cannot claim that the underlying FCC order constitutes a change of law. *Puerto Rico Telephone Co., Inc. v. SprintCom, Inc.*, 662 F.3d 74 (2011). The Court noted that only those changes in law which "by their own force alter or preempt the effect of the Agreement" would trigger the change of law provision. *Id.* at 92. It further pointed out that the FCC had made clear in the order at issue that it did not intend to alter existing contractual obligations – much like the FCC did in the two orders that Consolidated now claims require elimination of the WPP. *Id.* ("To the contrary, the FCC made expressly clear that this interim compensation regime 'does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions.') As explained further below, the Commission should reject Consolidated's interpretation of FCC orders which, by their own terms, do not constitute changes in law.

B. THE FCC ORDERS RELIED UP BY CONSOLIDATED DO NOT CONSTITUTE A CHANGE OF LAW

Consolidated claims that the FCC's 2015[4] and 2019[5] Orders granting forbearance from competitive checklist items found at 47 CFR 271(c)(2)(B) ("271 Requirements") not only triggered the

[4] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) From Enforcement of Obsolete ILEC Legacy Regulations that Inhibit Deployment of Next-Generation Networks, Lifeline and Link Up Reform and Modernization, Connect America Fund,* WC Docket Nos. 14-192, 11-42, 10-90, Memorandum Opinion and Order, FCC 15-166, 31 FCC Rcd. 6157 (rel. Dec. 28, 2015) ("*2015 Forbearance Order*")

[5] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks,* WC Docket No. 18-141, CC Docket No. 00-175, Memorandum Opinion and Order, FCC 19-31, 2019 WL 1651223 (rel. Apr. 15, 2019) ("*2019 Forbearance Order*") (FCC 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 redundant statutory requirement that BOCs provide nondiscriminatory access to poles, ducts, conduit, and rights-of-way.)

provisions of Section K of the WPP, but justify the complete elimination of the WPP. *See* Motion to Amend Petition. Consolidated is incorrect on both counts. Although the FCC has, in other contexts, signaled that forbearance may trigger change of law provisions,[6] it has not done so with respect to granting forbearance from 271 Requirements. To the contrary, in granting forbearance from Section 271 Requirements when issuing the *2015* and *2019 Forbearance Orders*, the FCC explicitly stated that it did not intend require changes to wholesale performance plans such as the WPP. *See 2015 Forbearance Order* ("Nothing in this Order prevents states from enforcing existing state requirements and/or adopting new provisions similar or equivalent to any of those from which we forbear here based on authority they have under state law.")

Consolidated's argument is further undercut by the fact that its only making this request now. If the FCC statement that its *2015 Forbearance Order* did not change state law somehow did change state law, that change took place in 2015. The WPP itself states:

> If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, Consolidated 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.

(Emphasis added.) If the *2015 Forbearance Order* "substantively affect[ed] any material provision of this WPP," and the WPP clearly requires Consolidated to ***"promptly convene negotiations"*** concerning such changes of law in order to conform the WPP to new law, then clearly Consolidated has sat on its purported rights since 2015 when Consolidated asserts the change supposedly occurred. The fact that it did not raise this issue sooner strongly suggests it did not believe a change of law had taken place.

Moreover, our research indicates that not a single RBOC (or RBOC successor), other than Consolidated, has requested that a state commission treat either the *2015* or *2019 Forbearance Order* as a basis for changing or eliminating wholesale performance plans. Even RBOCs like AT&T and Verizon are usually quick to act if there is any argument that they have been relieved of a regulatory obligation. If

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[6] See *Lifeline and Link Up Reform and Modernization, Connect America Fund,* WC Docket No. 11-42, 09-197, 10-90, Memorandum Opinion and Order, 30 FCC Rcd. 7818, para. 256 (*rel.* Jun. 22, 2015).

the *2015 Forbearance Order* or *2019 Forbearance Order* could be used to give RBOCs a self-effectuating basis for questioning, modifying, or eliminating any wholesale performance plans anywhere in the country, it would be highly odd for these two RBOCs to miss the chance to take advantage of the regulatory relief. The lack of such request suggests that they, like Charter and CANNE, read the FCC's words "Nothing in this Order prevents states from enforcing existing state requirements and/or adopting new provisions similar or equivalent to any of those from which we forbear here based on authority they have under state law" to carry their plain meaning.

C. WHOLESALE PERFORMANCE ASSURANCE PLANS CONSTITUTE OBLIGATIONS UNDER STATE, NOT FEDERAL, LAW

In 2006, the Vermont Public Service Board ("PSB") determined that carriers have a continuing obligation to meet the requirements of their performance assurance plans ("PAP") under state law, notwithstanding FCC decisions that might modify certain related federal obligations. *In Re Verizon New England Inc.,* Order No. 6932, VT PSB at 18 (Feb. 27, 2006). In a proceeding in which Verizon sought an amendment to its interconnection agreements with certain competitive carriers pursuant to changes to the FCC's rules, the Vermont PSB found that Verizon had made certain commitments under Vermont Law and subject to Vermont PSB approval, and that such commitments should be honored until the modifications were made according to procedural requirements as set forth under the existing contracts, including state law. *Id.* Further, the Vermont PSB said:

> [W]hile the Board did anticipate further changes to the PAP, those changes were anticipated to constitute further improvements after inter-LATA entry. Nothing in the 2002 Order suggests that the [VT PSB] anticipated organic changes to the PAP as the FCC modified its interpretation of Section 251. Least of all is there any evidence that the [VT PSB] anticipated that the significance and effect of the PAP would decline dramatically as significant UNEs . . . became unavailable in certain portions of the state.
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> [T]he Board in the 271 Docket relied on the fact that Verizon would continue to provide certain UNEs described in the competitive checklist . . . . The Board's advice to the FCC was used by the FCC in granting Verizon inter-LATA authority. Having collected the prize, Verizon cannot now escape its promises.

Similar to the Verizon proceeding before the Vermont PSB, here the Commission relied on Consolidated's agreement to meet the requirements of the WPP, which are intended to prevent

Consolidated's "backsliding" after it obtained inter-LATA authority from the FCC. The FCC's forbearance orders, therefore, do not allow Consolidated to forego the promises made under the WPP.

Neither the *2015 Forbearance Order* nor the *2019 Forbearance Order* implicates the change of law provision set forth in the WPP because, by their terms, they explicitly preserve the status quo: (a) existing state requirements and (b) the states' ability to adopt new provisions. Had the law changed, then at a minimum, existing state provisions would have changed and in this context, such changes would have very likely affected states' ability to adopt new provisions.

Both the FCC and USTelecom (the petitioner in both forbearance proceedings) explicitly acknowledged that states have authority, pursuant to state law or federal law, to administer wholesale performance assurance plans. *See 2015 Forbearance Order* at 17 and note 60. Nothing in the *2019 Forbearance Order* modifies the FCC's statement in the *2015 Forbearance Order* regarding states authority to administer wholesale performance assurance plans. *See 2019 Forbearance Order*. In its Petition, USTelecom itself noted that "the Commission has clearly stated that the plans are administered by state commissions and derive from authority the states have under state law or under the Act. It therefore remains within the states' authority to decide whether or not to modify or eliminate plans that are in effect." *See 2015 Forbearance Order* at note 60, citing 2014 USTelecom Forbearance Petition at 27.

It is settled law that states are authorized to administer wholesale performance assurance plans like the WPP. Because states have jurisdiction over these plans, the applicable law for any change of law analysis is the governing state law. As a policy matter, it is reasonable that state law controls because the metrics considered under wholesale performance plans are localized to individual geographic markets. There were no changes in state law that justify a change to the WPP. Moreover, the FCC's decision not to enforce the Section 271 Requirements does not affect such state law – which (again) is the relevant law applicable to the WPP.

III. THE WPP'S EXISTENCE DOES NOT DEPEND ON SECTION 271 OBLIGATIONS

Consolidated's motion is based on the false premise that there is an inexorable link between Section 271 obligations and the WPP. While no doubt the WPP's predecessor, the Performance Assurance Plan, was developed as part of Verizon's efforts to obtain Section 271 approval, including in the Northern New England States, the validity of and need for the WPP does not depend on Section 271 obligations. The justification and need for the WPP arises from Consolidated's wholesale obligations, which exist with or without Section 271 approval.

As mentioned previously, the FCC's *2015 Forbearance Order* unequivocally states that it does not affect any state wholesale performance plan. In that Order, the FCC said, "[T]he [FCC] has clearly stated that the plans are administered by state commissions and derive from authority the states have under state law or under the Act. It is therefore within the states' authority to decide whether or not to modify or eliminate plans that are in effect." *2015 Forbearance Order* at ¶ 17, fn. 60. Further, regarding performance measurement and enforcement requirements themselves, the FCC said, "Nothing in this Order prevents states from enforcing existing state requirements and/or adopting new provisions similar or equivalent to any of those from which we forbear here based on authority they have under state law." *Id.,* ¶ 2, fn. 4

The independence of wholesale performance plans from Section 271 obligations was established at the outset. Beginning with the earliest Section 271 approvals, the FCC went out of its way to state that wholesale performance measurement and enforcement systems are neither required for, nor dependent for their existence, upon Section 271 approval. In the December 1999 New York approval order, the FCC was explicit:

> The Commission previously has explained that *one factor* it *may* consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market. . . . Although the Commission strongly encourages state performance monitoring and post-entry enforcement, *we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval. . . .*
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> We also believe that it is important to evaluate the benefits of these reporting and enforcement mechanisms in the context of other regulatory and legal processes that provide additional positive incentives to Bell Atlantic. It is not necessary that the state

> mechanisms alone provide full protection against potential anti-competitive behavior by the incumbent.

In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, ¶¶ 429-430 (rel. Dec. 22, 1999) (emphasis added; footnotes omitted).

In nearly identical language six months later, the FCC again emphasized that while a wholesale performance monitoring and enforcement plan might be one factor to consider in evaluating a Section 271 application, a performance plan was not a necessary prerequisite to approval.

> The Commission previously has explained that one factor it may consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market. Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval.

In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 420 (rel. June 30, 2000) (footnotes omitted).

In the April 2001 Massachusetts Section 271 approval order, the first in the Verizon region, which also at the time included the current Consolidated territories in Maine, New Hampshire, and Vermont, the FCC reiterated yet again that a performance plan was not a *sine qua non* of Section 271 approval:

> The Commission previously has explained that one factor it may consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market. Although the Commission strongly encourages state performance monitoring and post-entry enforcement, it has never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval.

In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 236 (rel. Apr. 16, 2001) (footnotes omitted). By that point, performance monitoring and enforcement plans had become commonplace. "We note that in all the applications that have been granted to date, each contained an *enforcement* plan to protect against backsliding after entry into the long-distance market." *Id.* Still, however, at no time did the FCC *require* such a plan for Section 271 approval.

Subsequent Section 271 applications that were filed in the same region where a previous application had been granted typically used the already-existing performance plan as a template. By the time the orders addressing the Northern New England state approvals were issued (a year after Massachusetts), the FCC had stopped discussing whether a plan was needed. Instead, it accepted as a given that a plan was in place and simply evaluated the plan in the state under consideration, in discussions that became shorter and more perfunctory with each passing approval.[7] At no time, however, has the FCC altered its position that a plan was not an absolute necessity under Section 271 or, conversely, that Section 271 obligations were necessary to the existence of a performance plan.

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[7] *In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Vermont,* CC Docket No. 02-7, Memorandum Opinion and Order, FCC 02-118, ¶¶ 74-78 (rel. Apr. 17, 2002); *In the Matter of Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Maine,* CC Docket No. 02-61, Memorandum Opinion and Order, FCC 02-187, ¶¶ 74-78 (rel. June 19, 2002); *In the Matter of Application by Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Hampshire and Delaware,* WC Docket No. 02-157, Memorandum Opinion and Order, FCC 02-262, ¶¶ 169-171 (rel. Sept. 25, 2002).

Another indicator that the WPP exists independently of Section 271 obligations is the document itself. Simply stated, nowhere in the Plan does it state that its existence depends on any Section 271 obligation of Consolidated, or that the absence of a Section 271 obligation absolves Consolidated from its obligation to comply with the WPP. The term "271" appears but once in the WPP, and that is in a citation in a footnote explaining why statistical testing should be used to determine compliance with parity metrics. See WPP, Appendix 1, page 99, fn. 16. Instead, the plan is called more generally a "Wholesale Performance Plan." The document (as Consolidated proposes to amend it) begins with an Introduction stating:

> This document and its appendices describe the wholesale services metrics and performance standards applicable to Consolidated Communications of Northern New England Company, LLC and Consolidated Communications of Vermont Company, LLC (collectively "Consolidated Communications"). . . . The WPP is a self-executing remedy plan that ensures Consolidated Communications will provide services, access and interconnection to Competitive Local Exchange Carriers ("CLECs") in Maine, New Hampshire and Vermont (collectively "Northern New England" or "NNE") consistent with the requirements of the Communications Act of 1934, as amended, State law and regulation, and stipulations between the CLECs and Consolidated Communications.

WPP at 1. By its terms, therefore, the WPP derives its authority from a number of sources, including state law and regulation and stipulations entered into by Consolidated. Those stipulations, moreover, are incorporated into state Commission orders that have the force of law.[8]

IV. THE FCC'S 271 FORBEARANCE ORDERS DO NOT INVOKE THE CHANGE OF LAW PROVISION SET FORTH IN SECTION K OF THE WPP

As explained above, Section K of the WPP is triggered only "[i]f any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP." The threshold question is not satisfied in this case. As set forth above, the existence of the WPP is not dependent upon Section 271 obligations. It is the other way around: the

[8] *See, e.g., Northern New England Telephone Operations, LLC D/B/A Fairpoint Communications – NNE — Petition for Approval of Simplified Metrics Plan and Wholesale Performance Plan,* DT 11-061, Order Approving Wholesale Performance Plan and Resolving Outstanding Issues, Order No. 25,623 (Jan. 24, 2014); *id.,* Order Approving Amendment to Wholesale Performance Plan, Order No. 25,705 (Aug. 8, 2014).

WPP exists to ensure that Consolidated provides its wholesale customers with adequate and nondiscriminatory service, and the FCC considered the existence and provisions of the WPP and its predecessor the PAP as one factor — among multiple factors — in determining whether the public interest was satisfied by the grant of a Section 271 application. The Commission's interest in and authority over Consolidated's wholesale service performance is not affected by the FCC's recent action. The FCC's forbearance from Section 271 obligations does not by itself eliminate the need for regulation and measurement of Consolidated's behavior toward its wholesale customers. Even if the FCC's forbearance orders constituted a change in law (which they do not), forbearance itself does not affect any substantive obligation under the WPP. Section K, therefore, is inapplicable and, as a result, Consolidated's petition should be denied.

V. CONCLUSION

In conclusion, CANNE and Charter urge the Commission to determine that, under the terms of the WPP, no change in law has taken place and no revision or elimination of the WPP may take place at this time. Consolidated will have the right to request changes to or elimination of the WPP during the next biennial review process and interested parties will have the opportunity to participate in that review.

Dated: June 21, 2019

Respectfully submitted,

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