

STATE OF NEW HAMPSHIRE**Inter-Department Communication****DATE:** June 4, 2019**AT (OFFICE):** NHPUC**FROM:** ~~Kath~~ Mullholand, Director – Regulatory Innovation and Strategy Division**SUBJECT:** Docket DT 19-041 Consolidated Communications
Petition for Approval of Modifications to the Wholesale Performance Plan
Re: Petitioner's pending *Motion to Amend Petition*
Staff Report and Recommendation**TO:** Commissioners
Debra A. Howland, Executive Director**CC:** David K. Wiesner, Director, Legal Division
Mary Schwarzer, Staff Attorney**I. PROCEDURAL BACKGROUND**

On February 28, 2019, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications (Consolidated) filed petitions in New Hampshire, Maine and Vermont proposing modifications to its Wholesale Performance Plan (WPP) (Original Petition). Consolidated is a successor company designated as a Regional Bell Operating Company (RBOC) with certain obligations under federal law pursuant to the Telecommunications Act of 1996, (47 U.S.C. § 102, et. seq.).

The Commission issued an Order of Notice on March 8, 2019 and a prehearing conference and technical session were held on March 27, 2019. The Commission granted requests for intervention by the CLEC Association of Northern New England (CANNE) whose membership includes: CRC Communications LLC d/b/a OTELCO; FirstLight Fiber; and Biddeford Internet Corp. d/b/a Great Works Internet, and by the Charter Companies (Charter): Charter Fiberlink NH-CCO, LLC; and Time Warner Cable Information Services (New Hampshire), LLC; collectively the "CLEC Intervenors". On April 4, 2019, the parties and Staff took part in a joint conference call during which Consolidated and the CLEC Intervenors indicated willingness to conduct confidential negotiations in an attempt to reach a settlement. On May 14, 2019, Consolidated filed an Amended and Restated Petition for Approval of Modifications to the Wholesale Assurance Plan (Petition to Amend). On May 24, 2019, the CLEC Intervenors filed a Response to Consolidated Communications Motion to Amend Petition (Response). On May 29, 2019, Consolidated filed a Reply to CLEC's Response to Consolidated Communications Motion to Amend Petition (Reply).

II. SUBSTANTIVE BACKGROUND

As an RBOC, Consolidated's predecessor, Verizon, had the opportunity to enter the then highly-profitable, in-region, interLATA toll market¹, so long as it made a showing that it complied with the competitive checklist set out in 47 U.S.C. § 271(c)(2) (Competitive Checklist). As part of that showing, Verizon proposed a Performance Assurance Plan (PAP) that would measure its performance and provide sufficient self-effectuating penalties to serve as a deterrent to backsliding. FairPoint Communications, Inc. (FairPoint) adopted the PAP when it acquired Verizon's assets in 2007. FairPoint proposed a simplified WPP to replace the existing PAP which went into effect in June 2015 in all three northern New England states. Consolidated adopted the WPP when it merged with FairPoint pursuant to a stipulation that included the following provision:

II.14. Consolidated/FairPoint shall not seek to replace or repeal the NNETO [e.g., FairPoint] WPP prior to March 31, 2019, except to the extent permitted and pursuant to the processes set forth in NNETO WPP Section H (FairPoint and CLEC Biennial Review) and Section K (Change of Law) therein.

III. CONSOLIDATED'S PENDING MOTION TO AMEND

In its Original Petition, Consolidated proposed modifications to the WPP to eliminate requirements regarding products or services for which the Federal Communications Commission (FCC) granted forbearance, as well as other substantive and administrative changes unrelated to the FCC's forbearance actions. Consolidated proposed these changes pursuant to the Biennial Review provisions in Section 1, Part H of the WPP and the Change of Law Provisions in Section 1, Part K (Part K). In its Amended Petition, Consolidated seeks authorization to withdraw the WPP in its entirety effective June 1, 2019, pursuant to the change of law provisions set forth in Part K of the WPP. In the alternative, Consolidated requests that the Commission adopt the limited relief it seeks in its Original Petition.

Part K, the change of law provisions, states:

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.

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

¹ "LATA" in InterLATA is Local Access and Transport Area, which defines the geographical area to which an area code is assigned. In-region interLATA service is long distance service between end users located in different area codes, but within the region served by the RBOC. Verizon, once it received 271 approval in all of its states, could provide long distance services between the area codes assigned to the eastern seaboard from Maine to Virginia, including Pennsylvania and West Virginia.

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.

In support of its request, Consolidated relies on the Section 271 Forbearance Order² and the Checklist 3 Forbearance Order, which Consolidated claims constitute a change of law under the WPP and grant forbearance on each of the elements of the Competitive Checklist. Consolidated contends that the issues raised in its Petition to Amend are purely questions of law and proposed a briefing schedule for the consideration of these questions. Consolidated asks the Commission to: a) find that the FCC's Forbearance Orders are a change of law contemplated by Part K; b) find that Part K requires a Commission determination that the WPP must conform to such a change in law; c) find that the FCC Forbearance Orders render the WPP moot; or d) in the alternative, adopt the relief sought in Consolidated's Original Petition.

In their response, the CLEC Intervenors do not object to Consolidated amending its petition, but disagree that the matters raised are purely questions of law. The CLEC Intervenors assert there are two issues that require briefing: whether the FCC Forbearance Orders cited by Consolidated constitute a change of law within the meaning of Part K; and, whether any change of law requires the Commission to take action related to the WPP.

The CLEC Intervenors assert that changes to an RBOC's Section 271 obligations do not constitute a change of law, but even if they did, such changes do not require the Commission to modify the terms of the WPP. The CLEC Intervenors point out that the Section 271 Forbearance Order acknowledges the states' authority to determine whether to modify plans like the WPP. *See* Section 271 Forbearance Order, fn. 4.

The CLEC Intervenors go on to assert that if no change of law has occurred the Commission must deny Consolidated's request and keep the WPP in place until an actual change of law occurs, or until the next Biennial Review of the WPP. Should the Commission find that a change of law has occurred that requires consideration of the merits of Consolidated's request, the CLEC Intervenors contend the the Commission should review Consolidated's performance under the WPP and the impact on competitors.

Consolidated's Reply reiterates its request that the Commission schedule three questions for briefing.

² *See* FCC 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. (Section 271 Forbearance Order) and FCC 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*, released April 15, 2019 (Checklist 3 Forbearance Order). The petitioner, US Telecom, is a national trade association representing ILECs, of which Consolidated is a member.

IV. STAFF RECOMMENDATION

At the prehearing conference, Staff announced it was working with the Maine and Vermont state commissions, and will endeavor to come up with an efficient and coordinated process for joint review of those issues that apply throughout the region. Consistent with that goal, the staffs of the three northern New England Commissions have worked together to develop a single recommendation for our commissions.

With respect to Consolidated's request to modify its Original Petition, Staff recommends that the Commission grant Consolidated's Motion to Amend, because the CLEC Intervenors do not object to Consolidated's proposed amendment, and all parties wish to resolve the matters at issue.

Staff further recommends that the parties brief the following question: "Do the FCC Forbearance Orders constitute a change of law contemplated by Section K of the WPP?" This question is a threshold question that must be answered before the Commission can proceed with establishing a procedural schedule. In all three states, staff have agreed to recommend establishing a simultaneous briefing schedule for this question. While the Commission could pose additional questions at this time, Staff has given interstate uniformity greater weight in recommending that only one question be briefed at this time.

Staff recommend that the Commission ask all parties to file briefs no later than June 21, 2019, and to file reply briefs, if desired, no later than July 12, 2019.

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Service List - Docket Related

Docket# : 19-041

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