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

Consolidated's Initial Brief on Change of Law

INTRODUCTION

On June 10, 2019, the New Hampshire Public Utilities Commission (the "Commission") issued a Secretarial Letter in the above-captioned proceeding requesting briefing on a single issue: "Do the FCC Forbearance Orders constitute a change of law as contemplated by Section K of the WPP?" In compliance with the Secretarial Letter, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE ("Consolidated" or the "Company") submits its initial brief on the change of law issue identified in the Secretarial Letter.

As discussed in greater detail below, Consolidated's obligations under the Wholesale Performance Plan ("WPP") trace back to the so-called Section 271 competitive checklist items that Consolidated's predecessor (Verizon New England Inc. ("Verizon")) undertook in a Carrier-to-Carrier ("C2C") and Performance Assurance Plan ("PAP") (collectively "PAP") negotiated in 2002. The obligations of the PAP were intended to ensure that Verizon (now Consolidated) continued to meet the Section 271 competitive checklist obligations after being allowed by the Federal Communications

Commission ("FCC") to enter the interLATA (*i.e.*, long distance) market.[1] Although the PAP was substantially simplified and renamed the WPP in 2015, its underlying purpose remained unchanged.

Recently, the FCC has concluded that decades-old federal telecommunication policies, including those embodied in the Section 271 competitive checklist, have outlived their useful lives and, through its Forbearance Orders,[2] has determined that the Section 271 competitive checklist items are no longer in the public interest. The FCC's Forbearance Orders substantively affect material provisions of the WPP and are squarely within the Change of law provision contained in Section 1(K) of the WPP.

BACKGROUND

A. Section 271 and the PAP.

1. The FCC's Order Granting Verizon's Application for Section 271 Authority.

On September 25, 2002, the FCC released a Memorandum Opinion and Order granting Verizon and its affiliates authority to provide in-region, interLATA service originating in the States of New Hampshire and Delaware pursuant to Section 271 of the Communications Act of 1934, as amended,[3] (the "FCC's Section 271 Order"). In the Introduction to this order, the FCC stated:

> 1. On June 27, 2002, Verizon New England Inc., Verizon Delaware Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX

[1] Only a subset of the Section 271 checklist items were included in the PAP, such as CLEC trunking and collocation that provide for interconnection of networks and access to UNEs, UNE transport and loops, and resale services.

[2] The term "FCC Forbearance Orders" used in this Brief refers to both the "2015 Forbearance Order" (*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*, Memorandum Opinion and Order, 31 FCC Rcd 6157 (FCC Dec. 28, 2015)) and the "2019 Forbearance 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*, Memorandum Opinion and Order, FCC 19-31 (FCC rel. April 15, 2019)).

[3] *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 (rel. Sept. 25, 2002).

> Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. (Verizon), jointly **filed this application pursuant to section 271 of the Communications Act of 1934, as amended,** for authority to provide in-region, interLATA services originating in the states of New Hampshire and Delaware. **We grant the application in this Order based on our conclusion that Verizon has taken the statutorily-required steps to open its local exchange markets to competition in New Hampshire** and Delaware.
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> 3. We wish to acknowledge the effort and dedication of the New Hampshire Public Utilities Commission (New Hampshire Commission) and the Delaware Public Service Commission (Delaware Commission) which have expended significant time and effort overseeing Verizon's implementation of the requirements of section 271 of the Act. **By diligently and actively conducting proceedings to set UNE prices, to implement performance measures, to develop Performance Assurance Plans (PAPs), and to evaluate Verizon's compliance with section 271 of the Act, the New Hampshire and Delaware Commissions laid the necessary foundation for our review and approval. We are confident that the New Hampshire and Delaware Commissions' efforts, culminating in the grant of this application, will reward New Hampshire and Delaware consumers by making increased competition in all markets for telecommunications services possible in these states.**

FCC's Section 271 Order, ¶¶ 1, 3 (footnotes omitted; emphasis added).

Thus, just as the New Hampshire Commission had determined, the FCC found that Verizon had taken the steps required by Section 271 to open its local exchange markets in New Hampshire to competition. The FCC also found that the PAP would help ensure that those local markets remained open after Verizon received its Section 271 authorization. *Id.* ¶ 169 ("As set forth below, we find that the Performance Assurance Plans (PAPs) currently in place in New Hampshire and Delaware will provide assurance that the local market will remain open after Verizon receives section 271 authorization. We have examined certain key aspects of each PAP and we find that the plans are likely to provide incentives that are sufficient to foster post-entry checklist compliance."). The FCC's Section 271 Order acknowledged, with appreciation, that its grant of Section 271 authority to Verizon relied heavily on work performed by the Commission,

including the development of the PAP, and proceedings that "laid the necessary foundation" for the FCC's order. The Commission's proceedings most relevant to Verizon's Section 271 authorization were opened in 2001 for the purpose of facilitating the Commission's consultative role with the FCC related to Verizon's Section 271 application, including the review of Verizon's proposed C2C guidelines and PAP. *See, generally, Verizon New Hampshire, Section 271 Application Review*, Docket No. DT 01-051; *Verizon New Hampshire, Petition to Approve Carrier to Carrier Performance Guidelines and Performance Assessment Plan*, DT 01-006 (together, the "*Section 271 Review*"). On July 17, 2002, the Commission issued "Consultative Comments" in support of Verizon's Section 271 petition pending before the FCC (the "Section 271 Consultative Comments"). The Commission's Section 271 Consultative Comments to the FCC recognized that its "statutory authority to enforce payment of reparations and penalties to CLECs for substandard wholesale service is limited in such a way as to permit only the approval of a voluntary, self-executing [performance assurance] plan" and that "[s]uch a plan has been held by the FCC to be convincing evidence that the regional BOCs will continue provisioning high quality service to CLECs after it obtains Section 271 authority." Section 271 Consultative Comments at 18, 19. The FCC's description is similar. *See* 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").

Importantly, the Commission's Section 271 Consultative Comments to the FCC stated: "the NHPUC finds that Verizon NH has met the requirements of the Section 271 Competitive Checklist and that approval of its application for entry into the New Hampshire interLATA market would be in the public interest." Section 271 Consultative Comments at 20. The

Commission's findings were rendered nearly seventeen years ago, when competition in local exchange markets was in its infancy.

B. The Wholesale Performance Plan Replaces the PAP and the Commission Approves the Change of Law Provision in the WPP.

As the Commission is well aware, Verizon entered into a series of agreements with FairPoint Communications, Inc. ("FairPoint") at the end of 2006 to effect FairPoint's acquisition of the Verizon LEC properties in Maine, New Hampshire and Vermont. *See Verizon New England Inc. et al., Petition for Authority to Transfer Assets and Franchise*, Docket No. DT 17-011, Order No. 24,823 (Feb. 25, 2008) (the "Verizon-FairPoint Merger Order"). 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 its acquisition of the Verizon properties and operating franchises in the three states. In the Verizon-FairPoint Merger Order, the Commission acknowledged that "FairPoint agreed to work cooperatively with the CLECs and state regulatory authorities on a new performance assurance plan." *See* Verizon-FairPoint Merger Order at 31.

In September 2011, FairPoint and the CLECs began negotiating a replacement to the PAP, which had been in effect since 2002. After months of negotiations, FairPoint and the CLECs reached a stipulation leading to a resolution of all but three issues, and the stipulation gave rise to the WPP. *See Northern New England Telephone Operations, LLC d/b/a FairPoint Communications – NNE, Petition for Approval of Simplified Metrics Plan and Wholesale Performance Plan,* Docket No. DT 11-061, Order Approving Wholesale Performance Plan and Resolving Outstanding Issues, Order No. 25,623 at 1-3 (Jan. 24, 2014) (describing history of the PAP, the WPP and stipulation regarding the WPP) (the "Order Modifying WPP").

FairPoint and the CLECs briefed the three outstanding WPP issues and they were resolved by the Commission's Order Modifying WPP. One of the three issues was change of law. Although there

was no dispute between FairPoint and the CLECs that the WPP should contain a change of law clause, there was disagreement between FairPoint and the CLECs as to how a change of law should be given effect. While FairPoint preferred a self-effectuating change of law clause that would prevent any party from needlessly dragging out the amendment of the WPP to conform it to the change of law, the CLECs preferred that amendment of the WPP require Commission approval. Order Modifying WPP at pp. 14-17 (describing positions of the parties). In its decision, the Commission struck a compromise:

> With respect to the effects of changes in applicable law, we generally agree with Staff's recommendation and the Competitive Carriers' position that any revision of the WPP terms and conditions based on a change in law should be implemented only after review and approval by the Commission. We agree with Staff that it is often the case that an FCC order or other change in law is subject to reasonable disagreement as to interpretation and effect. Allowing FairPoint to prohibit opportunity for debate about such a change in law may have an adverse effect on the clearly-articulated, pre-determined measures and standards agreed to by opposing parties and incorporated in the WPP. . . .
>
> 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, <u>while effectuating the financial impact of any service or product delisting as of the time of the change in law</u>, 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.**

Id. at 24-25 (emphasis added).

It is highly significant to this proceeding that the Commission expressly stated that its compromise approach "would preserve our oversight of changes to the WPP**, while effectuating the financial impact of any service or product delisting as of the change in law** . . . ." In other words,

the Commission acknowledged that the FCC's delisting of competitive checklist items would be a change in law, and that such a change in law would trigger the Change of Law provision in the WPP.

C. The FCC Issues the Forbearance Orders Delisting All Section 271 Checklist Items.

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.

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]

The FCC's 2015 Forbearance Order 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

[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").

(checklist items 4 - 6 & 10) as required under sections 271(c)(2)(B)(iv), (v), (vi), and (x). *Id.* ¶ 24.[5] Note that the FCC had incorporated these checklist items into its administrative rules. *See, e.g.*, 47 C.F.R. § 53.1(b) "[t]he purpose of the rules in this part is to implement sections 271 and 272 of the Communications Act of 1934, as amended, 47 U.S.C. 271 and 272." *See also id.* § 51.305 (interconnection); *id.* § 51.307 (duty to provide access on an unbundled basis to network elements).

The FCC's 2015 Forbearance Order 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 granted 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.

Thus, the 2015 Forbearance Order and the 2019 Forbearance Order, in combination, effect the delisting of all 14 of the Section 271 competitive checklist items.

ARGUMENT

A. The FCC's Forbearance Orders are Change of law Based on the Plain Meaning of the WPP and the Commission's Order Modifying WPP.

1. The Change of Law Provision in the WPP is Unambiguous and Must Be Given its Plain Meaning.

The rules of contract construction are well developed. An unambiguous contract is construed in accordance with the intention of the parties. *Found. for Seacoast Health v. Hosp.*

[5] *See also id.* ¶ 25 ("[T]he 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.") (footnotes omitted). *See* also *id.* ¶ 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 obligations.").

Corp. of Am., 165 N.H. 168, 71 A.3d 736 (2013); *SC Testing Technology, Inc. v. Dep't. of Envtl. Prot'n*, 688 A.2d 421 (Me. 1996). A contract is ambiguous only when it is reasonably possible to give that provision at least two different meanings. *Villas by the Sea Owners Ass'n v. Garrity*, 2000 ME 48, ¶ 9, 748 A.2d 457. When interpreting a contract, the court reviews the document as a whole and considers the circumstances under which the parties entered into the contract. *Found. for Seacoast Health*, 165 N.H. at 172; *Pro Done, Inc. v. Basham*, 2019 WL 1967686, *3 (N.H. May 3, 2019) ("When interpreting a written agreement, we give the language used by the parties to the agreement its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated and reading the document as a whole."); *J & E Air, Inc. v State Tax Assessor*, 2001 ME 95, ¶ 13, 773 A.2d 452 ("We review the language of a contract in the light of the circumstances under which it was made to determine the intention of the parties.").

The Change of Law provision in Section 1, Part K of the WPP states:[6]

> **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**.
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> 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.

(Emphasis added.)

[6] Consolidated observes that the Change of Law provision in the New Hampshire WPP is identical to the Change of Law provision in the Maine and Vermont WPPs.

Thus, to trigger a change of law under the WPP, three conditions must be met. First, there must be a "regulatory . . . or other governmental decision, order, determination or action." Second, the government action must "substantively affect" a provision of the WPP. And third, the provision so affected must be a "material provision." If the parties can reach agreement on the conforming changes to the WPP, they will present them to the state regulatory agency for approval. If the parties cannot agree on the conforming changes, they will bring the matter to the state regulatory agency to conform the agreement.

Here, all three conditions to the change of law provision are met and the change of law provision in the WPP is triggered by the FCC Forbearance Orders. Given that each of the FCC's Forbearance Orders is a "regulatory . . . . or other governmental decision, order determination or action," Consolidated focuses its Brief on whether the orders "substantively affect[] any material provision of this WPP."

Before addressing the merits of the impact of the FCC's 271 forbearance on the change of law provision in the WPP, it is important to acknowledge that the concept of a change of law provision is not an anomaly in the telecommunications industry. In fact, change of law provisions are relatively common in a wide variety of telecommunications contracts. *See, e.g.*, *Rural Call Completion*, WC Docket No. 13-39, Third Report and Order, 33 FCC Rcd 8400, n. 161 (2018); *Rates for Interstate Inmate Calling Services,* WC Docket No. 12-375, Second Report and Order, FCC 15-136 (rel. Nov. 5, 2015) ¶ 213; *Connect America Fund*, WC Docket No. 10-90 *et al*., 26 FCC Rcd 17633, ¶ 815 (2011) ("*ICC-USF Reform Order*"). Since the incorporation in 1996 of the local competition provisions of Section 251 into the federal Communications Act, carriers have included "change in law" clauses in their interconnection agreements. *See, e.g.*, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F. 3d

964 (11th Cir. 2005); *ICC-USF Reform Order*, ¶ 815. The FCC has adopted numerous rules implementing and interpreting Section 251, noting that its new rules apply only prospectively, "as carriers re-negotiate expired or expiring interconnection agreements," but do not "alter existing contractual obligations, *except to the extent that parties are entitled to invoke contractual change-of-law provisions*." *Implementation of the Local Competition Provisions in the Tele*co*mmunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Red. 9151 (2001) (emphasis added), *remanded on other grounds, WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

In numerous situations, the FCC has acknowledged that its actions may have the effect of triggering change of law provisions in inter-carrier interconnection agreements and other telecommunications contracts. For example, in relieving incumbent local exchange carriers ("ILECs") from the obligation under Section 251(b)(4) of the Communications Act to offer Lifeline-discounted services at wholesale rates, the FCC observed: "Forbearance here may trigger change of law provisions in ILEC interconnection agreements." *Lifeline and Link-Up Reform Modernization*, Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 7818, ¶ 256 (2015). In its 2011 reforms of interstate and intrastate inter-carrier compensation regimes, the FCC adopted a rule prescribing "bill-and-keep" as the default compensation arrangement between LECs and carriers providing commercial mobile radio service ("CMRS") but declined to preempt existing agreements; the Commission nevertheless noted that agreements between such carriers typically include "change-of-law" provisions that automatically will trigger modifications in their compensation arrangements and "as a practical matter" cause these carriers to move to bill-and-keep upon the effective date of the new rule. *Connect America Fund et al.*, WC Docket No. 10-90 *et al*., Order on Reconsideration, 26 FCC Rcd 17633, 17635, ¶ 7

(2011). Finally, the original *ICC-USF Reform Order* expressly stated that the rules being adopted constituted a "change of law" which could trigger such contractual provisions. *ICC-USF Reform Order*, ¶ 815 ("We do, however, make clear *that our actions today constitute a change in law*, and we recognize that existing agreements may contain change-of-law provisions that allow for renegotiation and/or may contain some mechanism to resolve disputes about new agreement language implementing new rules") (emphasis added). Thus, it is commonly understood that an FCC action, including the FCC Forbearance Orders considered here, may trigger change of law provisions in telecommunications industry contracts.

2. The FCC's Forbearance Orders Substantively Affect Material Provisions of the WPP.

a. The Material Provisions of the WPP Arise From the Section 271 Competitive Checklist, Not New Hampshire Law.

As discussed in detail in the Background section of this brief, the WPP (and its predecessor PAP) emanated from the FCC's Section 271 approval process. The Commission's *Section 271 Review* was narrowly focused on Verizon's Section 271 obligations under federal law. The Commission's Consultative Comments focused on Section 271 and Verizon's compliance with the 14 checklist items. In fact, under the heading "Applicable Law," the Commission provides a detailed analysis of the Section 271 legal standard and precisely what a BOC must do to meet that standard. Consultative Comments at 7-10. Unquestionably, the Commission's *Section 271 Review* proceeding was not to adjudicate any issue of New Hampshire law. In fact, those proceedings were neither adjudicatory (neither was a "contested case") nor based on any New Hampshire statute or Commission regulation.[7] But for the

[7] As noted in its Consultative Comments, the Commission agreed with Verizon's argument that the Commission lacked authority under New Hampshire law to impose a PAP on Verizon that Verizon did not agree to adopt. Consultative Comments at 19 ("In NHPUC Order No. 23,940 (March 29, 2002), at pp. 62-66 and 80-84, we

consultative role that the Commission was fulfilling under Section 271, it never would have opened the *Section 271 Review* to provide "**Consultative** Comments" to the FCC.

Having determined that the PAP arose from the Section 271 competitive checklist, there is no room for doubt that the current WPP did as well. As discussed in the Background above, the WPP is a simplified version of the PAP put in place to ensure FairPoint's (as Verizon's successor) continued compliance with the Section 271 competitive checklist. Order Modifying WPP at 23 ("[t]he WPP is simpler and more transparent than the PAP" and "we find that the WPP will contain all of the characteristics necessary for an appropriate performance assurance plan").

In sum, the WPP and the obligations therein, arose from the requirement to provide the 14 competitive checklist items in Section 271. Upon a finding by the FCC that those items are no longer required, it follows that the WPP is no longer required. The WPP is a "self-executing, wholesale service performance enforcement mechanism . . . intended to deter backsliding" of Consolidated's Section 271 competitive checklist obligations.

b. The FCC's Forbearance Orders Conclude that Enforcement of the Section 271 Competitive Checklist Items is No Longer in the Public Interest and Thereby Substantively Affect Material Provisions of the WPP.

Having traced the material provisions of the WPP back to the Section 271 competitive checklist items, the Commission must determine whether those material provisions are substantively affected by the FCC Forbearance Orders. 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

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concluded that our statutory authority to enforce payment of reparations and penalties to CLECs for substandard wholesale service is limited in such a way as to permit only the approval of a voluntary, self-executing plan.").

competitive checklist obligations would serve the public interest, the FCC took notice of the costs to the BOCs of complying with performance assurance plans. *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.*

The FCC used even stronger language in granting forbearance from the last remaining Section 271 checklist item. The FCC's 2019 Forbearance Order, issued just two months ago, states:

> **I. INTRODUCTION**
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> 1. In section 10 of the Communications Act, Congress gave the Commission the authority to forbear from enforcing statutory provisions and regulations that are no longer necessary in light of changes in the industry. **Today, we exercise that authority to grant relief from certain requirements that were first established more than two decades ago—in the early days of Bell Operating Company (BOC) entry into the long-distance telephone service market. At the time, Congress and the Commission had concerns about the ability of BOCs and other incumbent carriers to leverage their monopolies in the local telephone service market to dominate the long-distance market. Since then, the communications marketplace has undergone tremendous transformation, and these requirements have outlived their usefulness.** Accordingly, in this Memorandum Opinion and Order, we act on portions of a petition for forbearance filed by USTelecom—The Broadband Association (USTelecom). Specifically, we grant forbearance from: . . . (3) the redundant statutory requirement that BOCs provide nondiscriminatory access to poles, ducts, conduit, and rights-of-way. **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.**

2019 Forbearance Order, ¶ 1 (emphasis added).[8]

[8] Similar language can be found in the FCC's 2015 Forbearance Order at ¶ 2:

> In addressing USTelecom's petition, we continue our commitment to eliminating unnecessary burdens on industry and promoting innovation while ensuring our statutory objectives are met. We seek to benefit consumers by relieving carriers from having to focus resources on complying with outdated legacy regulations that were based on technological and market conditions that differ from today and instead allowing them to concentrate on building out broadband and investing in modern and efficient networks and services. We grant forbearance to the full extent supported by

As with the FCC's 2015 Forbearance Order, the FCC's analysis of the public interest in the 2019 Forbearance Order bears emphasis here:

> *50. Section 10(a)(3)—Forbearance Is Consistent with the Public Interest*. The public interest is not served by imposing redundant or additional compliance obligations on BOCs, but not their similarly situated LEC competitors. There is no good reason to continue to subject BOCs to the threat of enforcement action under two separate statutory provisions when other LECs are only subject to one statutory provision. Conversely, there is no good reason today to allow non-BOCs to avail themselves of two different causes of action while BOCs only have access to one. **We find that leveling the playing field and eliminating this redundant obligation applicable only to a subset of incumbent LECs will remove competitive distortions created by uneven compliance obligations.** Moreover, it will further regulatory parity among all categories of LECs with respect to pole attachment rights and obligations. For these reasons, **granting the requested forbearance from section 271 checklist item 3 would serve the public interest.**

2019 Forbearance Order, ¶ 50 (bold emphasis added).

These findings by the FCC are important to the Commission's determination of whether the FCC's Forbearance Orders are a change of law under the WPP. The FCC has recognized that decades-old regulatory requirements applicable to the local exchange market, dating back to the "early days of Bell Operating Company [] entry into the long-distance telephone service market" have "outlived their usefulness" due to the "tremendous transformation" in the communications marketplace in the ensuing decades. Not only are these outdated requirements no longer useful, the FCC has concluded that continuing to enforce them is not in the public interest.

The FCC Forbearance Orders substantively affect the Section 271 competitive checklist items. The FCC has determined that times have changed, markets have evolved, and the Section 271 competitive checklist is no longer needed to ensure that BOCs keep local exchange markets open gaining entrance to the long-distance market. Importantly, the FCC found that these

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> the record, and in accordance with our statutory obligation to assess whether a rule is necessary under section 10, and whether forbearance is consistent with the public interest. This action modernizes our rules by removing outmoded regulations, while preserving requirements that remain essential to our fundamental mission to ensure competition, consumer protection, universal service, and public safety.

requirements are not just outdated, but continuing to enforce them against the BOCs distorts the market and is contrary to the public interest. The granting of forbearance as to all checklist items, and the required FCC public interest findings that accompany the FCC's forbearance determinations, substantively affect the checklist items in the WPP. Thus, the FCC Forbearance Orders clearly and unequivocally (i) constitute a change in existing law and (ii) trigger the change of law provision in the WPP.

c. The Commission Has Already Determined the FCC's Forbearance Orders Are a Change in Law that Trigger the Change of Law Provision in the WPP.

Finally, and perhaps most dispositive of the issue, the CLECs are well aware and have been on notice for over five (5) years that FCC forbearance of a checklist item(s) would constitute a change of law that triggers the Change of Law provision in the WPP. This Commission has previously acknowledged that FCC forbearance of a checklist item would constitute a change of law that triggers the Change of Law provision in the WPP. This Commission's intent is unmistakable. When discussing the merits the retroactive application of a change of law in the Order Modifying WPP, the Commission expressly stated:

> 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.**

Order Modifying WPP at 25 (emphasis added).

The only "delisting" that the Commission could have been referencing was the FCC's actions delisting (*i.e.*, forbearing enforcement) of the Section 271 competitive checklist items. The CLECs could not reasonably have thought to the contrary and Consolidated notes that no party to the earlier WPP proceedings filed any Motion for Rehearing or a Motion for

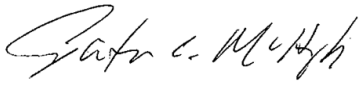
Clarification of the issue. Thus, the Commission has itself already answered precisely the question it has directed (and the Vermont and Maine Commissions have directed) the parties to brief in this proceeding. The question of "Do the FCC Forbearance Orders constitute a change of law as contemplated by Section K of the WPP?" must be answered in the affirmative. Any argument to the contrary is not well founded.

CONCLUSION

For all of the reasons stated above, Consolidated respectfully requests that the Commission issue an order: (a) confirming that the Forbearance Orders are a change in law and trigger the Change of Law provision in the WPP; (b) granting Consolidated the relief requested in its Amended and Restated Petition filed in this proceeding on May 14, 2019; and (c) granting such additional and further relief as is just and reasonable in the circumstances.

Dated at Manchester, New Hampshire, this 21st day of June, 2019.

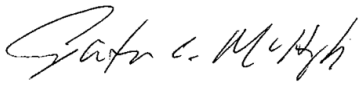
CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND COMPANY, LLC D/B/A/ CONSOLIDATED COMMUNICATIONS – NNE



Patrick C. McHugh, Esq.
770 Elm Street
Manchester, NH 03101
(603) 591-5465
Patrick.McHugh@Consolidated.com
Counsel for Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE

Certificate of Service

I hereby certify that on this 21st day of June, 2019, the undersigned caused a copy of the foregoing to be hand-delivered and/or sent via electronic mail to the lntervenors in this Docket and the Commission's Staff.



Patrick C. McHugh, Esq.