STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2019-00045

Consolidated Communications of Northern New England Company, LLC Request For Approval of Modifications to the Wholesale Performance Plan	))))	Consolidated's Comments on Recommended Decision

On August 28, 2019, the Presiding Officer issued a Recommended Decision on the legal question of whether the FCC's Forbearance Orders[1] issued in 2015 and 2019 constitute a Change of Law under Consolidated Communications of Northern New England Company, LLC's ("Consolidated's") Wholesale Performance Plan ("WPP"). As discussed in greater detail below, the Recommended Decision fails to consider the applicable legal standard, ignores the circumstances under which the WPP was adopted, misinterprets the Change of Law provision in the WPP, fails to consider and contradicts a controlling decision of the First Circuit Court of Appeals, and would perpetuate decades-old Section 271 competitive checklist items that the Federal Communications Commission ("FCC") has abandoned due to their harm to consumers in the current competitive environment. The Recommended Decision's interpretation of the Change of Law provision in the WPP is contrary to the FCC's Forbearance Orders and would lead to a result that is absurd and illogical. Accordingly, the Commission should reject the Recommended Decision and grant the relief requested in Consolidated's Amended Petition.

[1] Consistent with prior briefing in this proceeding, the term "FCC Forbearance Orders" used in these Comments 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 rel. 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)).

ARGUMENT

A. The Recommended Decision Fails to Consider the Applicable Legal Standard and Ignores the Circumstances Under Which the WPP Was Adopted.

The Recommended Decision does not specify the standard of review that it applied to the interpretation of the WPP. As stated in Consolidated's prior briefing, the rules of construction are well developed. An unambiguous contract is construed in accordance with the intention of the parties. *SC Testing Technology, Inc. v. Dep't. of Envtl. Prot'n*, 688 A.2d 421 (Me. 1996); *Found. for Seacoast Health v. Hosp. Corp. of Am.*, 165 N.H. 168, 71 A.3d 736 (2013). 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. *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."); *Found. for Seacoast Health*, 165 N.H. at 172. *See also 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."). Courts will avoid interpretations of contract terms that lead to absurd or illogical results. *Moody v. State Liquor & Lottery Comm'n*, 843 A.2d 43 (Me. 2004) (affirming lower court ruling that interpretation of contract would lead to absurd and illogical result).

Here, the Change of Law provision in the WPP states:

> 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.

The Change of Law provision is unambiguous. It is comprised of two concepts. First, the Change of Law clause identifies what <u>conditions</u> are necessary to trigger the change in law. As Consolidated explained in its briefing, the Change of Law provision requires three conditions to be met:

(1) the existence of a legislative, regulatory, judicial or other governmental decision, order, determination or action;

(2) that this governmental action substantively affects the WPP; and

(3) that the substantive effect be related to a material provision of the WPP.

Second, the Change of Law provision describes the <u>process</u> that the parties to the WPP will use when the three conditions are met. Specifically, "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." The separate and distinct purposes of the <u>conditions</u> clause and the <u>process</u> clause in the Change of Law provision are clear and unambiguous.

The Recommended Decision agreed with Consolidated's interpretation of the <u>conditions</u> clause. (RD at 8 ("The Commission agrees with Consolidated that the three conditions it describes are necessary to trigger the WPP.").) The Recommended Decision, however, misinterpreted the <u>process</u> clause as if it were a part of the <u>conditions</u> clause. Specifically, the Recommended Decision concluded (wrongly) that the <u>process</u> clause includes a "necessary predicate" to the three conditions:

> The WPP also states that if the three conditions are met, the parties will negotiate changes to the WPP "that are required to conform the [WPP] to

> applicable law." This language creates a necessary predicate that the governmental action in question requires a change to the WPP.
>
> The Commission finds that this necessary predicate has not been met. As CANNE states, the FCC, in the 2015 Forbearance Order, expressly stated that the forbearance in which it was engaging did not prevent "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.***" In the Commission's view, this plain statement by the FCC is dispositive of this issue: because the Forbearance Orders do not require changes to the WPP**.** Accordingly, there has not been a "change of law" within the meaning of the WPP.

Recommended Decision at 8-9 (emphasis added, footnote omitted).

The Recommended Decision misinterprets the Change of Law provision and, importantly, ignores the express requirement from the FCC (contained in a single footnote) that for the states to enforce existing requirements or adopt new provisions of a WPP type plan there must be "authority under state law" for the states to do so. In fact this single footnote does not support the denial of Consolidated's requested relief, but actually supports the granting of said relief. Neither the CLECs' briefs nor the Recommended Decision cite a single underlying Maine statute or other source of Maine law as support for the continued enforcement of the WPP. If "this plain statement by the FCC is dispositive of this issue," then the CLECs or the Recommended Decision must provide a source of Maine law to support the continued enforcement of the WPP. The simple fact, however, is that there is no such state law in Maine. And, even if there were such a law in Maine (which there is not), the Commission would have to take action pursuant to that law and allow Consolidated and others affected by that law to participate in the Commission's adjudicatory process. But there is no such law, and the substantive requirements of the WPP are not based in any way on state law. This is true of New Hampshire and Vermont state law as well.

There can be no dispute that the FCC's Forbearance Orders are "regulatory orders" that "substantively affect" "material provisions" of the WPP. The FCC determined in the Forbearance Orders that it is in the public interest to no longer enforce the Section 271 competitive checklist items contained in the WPP. (Consolidated's Initial Br. at 14-17.)[2] As such, the Forbearance Orders meet the three conditions stated in the Change of Law provision and constitute precisely the type of government action that the WPP intended to trigger the parties to make conforming changes to the plan.

Rather than follow the plain language of Change of Law provision, the Recommended Decision forces an unreasonable interpretation upon the <u>process</u> clause. When considering the <u>process</u> clause ("FairPoint and the parties . . . will promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law"), the Recommended Decision misinterpreted the word "required." As used in this context, "required" is synonymous with "needed" or "necessary." Thus, the <u>process</u> to conform the WPP to the change in law (here, the FCC's Forbearance Orders) is for the parties to negotiate revisions to the WPP necessary (or "required") to conform it to the change in "applicable law."[3] If "required" were intended to apply to the conditions, that concept would have been included in the <u>conditions</u> clause, not the <u>process</u> clause. The interpretation of the Change of Law provision advanced by the Recommended Decision elevates the <u>process</u> clause over the <u>conditions</u> clause in a way that is simply not supported by the structure of the Change of Law provision.

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[2] Rather than restate in full arguments made in prior briefing, Consolidated incorporates herein by reference its June 21 2019 Initial Brief and July 12, 2019 Reply Brief filed in this proceeding.

[3] As discussed in the preceding paragraph in the text and later in these Comments, the only "applicable law" that governs Section 271 competitive checklist items is federal law.

It is also important to recognize that the Recommended Decision fails to consider the circumstances under which the WPP was adopted, which is critical to a proper interpretation of the Change of Law clause. As Consolidated explained in its prior briefs, the WPP traces back to Section 271 of the Telecommunications Act of 1996 (the "Act."). (Consolidated's Initial Br. at 2-5.) The predecessor to the WPP, called the Performance Assurance Plan ("PAP") was adopted in 2002 for the purpose of ensuring that Verizon (Consolidated's predecessor) would keep local markets open to competition during its entry into the long-distance markets. (*Id*. at 5-6.) The WPP in place today is a "simplified" version of the PAP and, like the PAP, traces back to Section 271. (*Id.*) As stated above, there is no evidence on this record that the substantive requirements of the WPP are based in any way on state law, or that this Commission has jurisdiction under Maine law to impose the Section 271 competitive checklist items for which the FCC granted forbearance in the Forbearance Orders.[4] Accordingly, the only reasonable interpretation of the Change of Law provision is that it would be triggered by a change in federal law, not state law. Thus, the FCC's Forbearance Orders amending its Section 271 rules to grant forbearance as to all 14 of the Section 271 competitive checklist items are precisely the change in law that would trigger the obligation of the parties to conform the WPP.

By failing to to give appropriate consideration to the circumstances surrounding the formation of the WPP, the Recommended Decision misinterpreted the Change of Law provision. The Recommended Decision also misinterpreted a single FCC footnote which

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[4] As discussed in greater detail in Part B of these Comments, the States are preempted from enforcing the Section 271 competitive checklist items and there is no provision of Maine law that provides the Commission with authority to impose or enforce those checklist items.

expressly requires a state to have authority under state law to continue enforcing a WPP-like plan. Thus, this Commission should not adopt the Recommended Decision.

B. The Recommended Decision Fails to Consider and is Contrary to the First Circuit's Decision in *Verizon New England*.

The Recommended Decision places significant emphasis on a footnote from the FCC's 2015 Forbearance Order stating that "[n]othing 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.***" (RD at 9, emphasis added.) This single sentence, relegated to footnote 4 in the 2015 Forbearance Order, was plucked from more than 120 pages of the two FCC Forbearance Orders. Importantly, the FCC did not repeat footnote 4, or language similar that footnote, in its 2019 Forbearance Order.

Whatever the FCC may have intended by footnote 4 back in 2015, it is clear the Commission must identify the specific Maine law conferring such jurisdiction on it to proceed as referenced in the Recommended Decision. This analysis must consider the holding in the First Circuit Court of Appeal's decision in *Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F.3d 1 (1st Cir. 2007) ("*Verizon New England*"). In that decision, the First Circuit considered appeals from the U.S. District of Maine and the U.S. District of New Hampshire that shared common legal issues involving Sections 251-252 and Section 271 of the Act. After its description of the "complicated dual regime" of regulation under Sections 251-252 and 271,[5] the First Circuit framed the issues on appeal as follows:

[5] As the First Circuit explained:

> Each case involves an application by Verizon under section 271 to enter the long-distance market--in one case from Maine, in the other from New Hampshire. In each instance, the resulting district court litigation has posed the question whether the state commission can insist (despite delisting [from Section 251-252]) that Verizon continue to provide the disputed network elements and do so at TELRIC pricing.

Id. at 7.

When examining grants of authority under Section 271, the First Circuit concluded that the states' role is limited to consultation with the FCC; all other authority under Section 271 being vested in the FCC by Congress:

> On appeal, the state commissions argue *inter alia* **that they can determine what elements Verizon is required to provide under section 271** and can set rate policy for those elements. . . .
>
> **We hold that the states' position is at odds with the statutory language, history and policy of section 271 and most relevant precedent**. Sections 251-52 provide for a dual federal-state regime: the FCC determines what UNE elements must be provided and sets pricing policy; state commissions oversee the adoption of agreements or SGATs providing such UNEs to competitors at prices based on those principles. 47 U.S.C. § 252(a), (b), (e), (f). . . . .
>
> **By contrast, *authority* under section 271 is granted exclusively to the FCC.** The FCC decides whether to grant section 271 approval; **states have no**

> [S]ections 251-52 require that the incumbents provide competitors various "network elements" (*e.g.*, local loops), as specified by the FCC from time to time, on an "unbundled" basis (such elements are commonly called "UNEs"). 47 U.S.C. § 251(c)(3). The pricing for such elements is determined by inter-carrier agreement or, if they fail to agree, by arbitration under state-commission supervision and subject to review in federal courts. *Id.* § 252(a). The FCC, with court backing, ultimately determined that such prices should be based on total long run incremental costs ("TELRIC" rates), which are highly favorable to the competitors.
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> * * * *
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> Until recently, there was a substantial overlap between what the FCC deemed required UNEs under sections 251-52 and the statutory list in section 271. But, as a result of FCC orders in 2003 and 2005, a number of the UNEs have been "delisted," so that incumbents including RBOCs are no longer required to provide them under sections 251-52. Further, where section 271 still requires network elements by RBOCs who provide long distance service, the FCC has said that TELRIC pricing would be inappropriate and that the traditional "just and reasonable" standard would apply, likely generating higher prices to be paid by the competitors.

Id. at 4-5 (footnotes and citations omitted).

> **more than a right to express views.** 47 U.S.C. § 271(d)(2)(B), (3). **The power to enforce the provision falls under the FCC's general powers**, *id.* § 271(d)(6); and the right to set prices for the elements flows from the FCC's power to set just and reasonable rates, *id.* §§ 201-202. **The contrast confirms that when Congress envisaged state commission power to implement the statute, it knew how to provide for it.**
>
> **The state commission's statutory arguments are unconvincing. That the states have an explicit consultative role under section 271 works against, rather than for, their claim of other powers.**

Id. at 7 (italic emphasis is Court's; bold emphasis added; citations and footnotes omitted).

Thus, by comparing the "dual federal-state regime" enacted by Congress for Section 251-252 to the more limited consultation-only role Congress afforded the states under Section 271, the First Circuit expressly concluded that Maine and New Hampshire received no grant of authority from Congress under Section 271 to determine which network elements Verizon (now Consolidated) must provide pursuant to Section 271 or how those elements are priced. Those determinations (and all other Section 271 determinations other than the state's "right to express views" in the Court's parlance) were granted solely to the FCC by Congress. *Id.* ("The state commission's statutory arguments are unconvincing. That the states have an explicit consultative role under section 271 works against, rather than for, their claim of other powers.").

When the Maine and New Hampshire Commissions asserted that they possessed independent state law authority to regulate those Section 271 checklist items, the First Circuit rejected those arguments with similar force:

> **Neither state agency spends much time identifying pertinent state statutes or rules to support the orders.** But, as already noted, interconnection affects both intrastate as well as interstate services . . .; and state utility statutes tend to be broadly drafted. **Yet even if state utility statutes might otherwise authorize state regulation of facilities that affect intrastate and interstate commerce, the real barrier to the present claims grounded in state law is federal preemption.**

> State regulation, even when authorized by local law, must give way not only "where Congress has legislated comprehensively" in a field with an aim to occupy it, **but also "where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress." In this case both of the specific outcomes that the state agencies seek to dictate are in direct conflict with specific FCC policies adopted pursuant to its authority under the 1996 Act.**
>
> One issue is whether the states can require that section 271 elements be priced at TELRIC rates. The FCC orders provide carriers the authority to charge the potentially higher just and reasonable rates, in order to limit subsidization and to encourage investment by the competitors. To allow the states to require the lower TELRIC rates directly conflicts with, and undercuts, the FCC's orders. **Under preemption principles the state orders must in this respect give way.**
>
> **The other issue is whether the states can require the RBOCs to provide to competitors unbundled elements that have been delisted under sections 251-52 and are not within the list of elements required under section 271.** . . . **The problem for the states is the FCC's delisting was intended to free the carriers from such compulsion.**
>
> Depending on the circumstances, making a monopolist share what used to be called "essential facilities" can promote competition; **but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition in the long run**. This view underlies the delisting order. **For a state to require such sharing where the FCC thinks compulsion is detrimental is no different than insistence on TELRIC pricing in contravention of the FCC's mandate for a different pricing scheme.**

Id. at 8-9 (emphasis added; citations and footnotes omitted).

Thus, *Verizon New England* establishes—without any room for argument—that when the FCC determined that the Section 271 competitive checklist items should no longer be enforced, the states have no ability to continue to enforce the continued provision of those items under either federal law (because Section 271 authority is vested solely in the FCC) or state law (because state law is preempted by the Congressional grant of Section 271 authority to the FCC).[6]

[6] Since the First Circuit's 2007 decision in *Verizon New England*, the Sixth, Seventh, Eighth, Ninth and Eleventh

The Recommended Decision flatly contradicts the First Circuit's decision. The FCC's Forbearance Orders were issued for the express purpose of relieving Consolidated and other RBOCs from outdated restrictions imposed by Section 271 that were based on decades-old technology and market conditions and were no longer beneficial to consumers:

> 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 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.

2015 Forbearance Order, ¶ 2 (emphasis added; footnote omitted).

The FCC's more recent 2019 Forbearance Order includes similar language:

Circuits have agreed, holding that the 1996 Act does not authorize state commissions to implement Section 271 terms:

> As a Bell operating company, AT & T must comply with the requirements of § 271, including those requirements that the FCC has removed from the purview of § 251. But the authority of state regulatory commissions under § 271 is limited. The FCC alone enforces § 271, subject only to the requirement that it "consult" with state commissions "to verify the compliance of the Bell operating company" with the statute's substantive mandates. 47 U.S.C. § 271(d)(2)(B), (d)(6). None of this gives state commissions authority to enforce § 271, as every federal court of appeals to consider the issue has concluded. *See Verizon New England, Inc. v. Maine Pub. Utils. Comm'n,* 509 F.3d 1, 7–8 (1st Cir.2007); *Ill. Bell Tel. Co. v. Box,* 548 F.3d 607, 613 (7th Cir.2008); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n,* 530 F.3d 676, 682–83 (8th Cir.2008); *Qwest Corp. v. Ariz. Corp. Comm'n,* 567 F.3d 1109, 1116 (9th Cir.2009); *BellSouth Telecomms., Inc. v. Ga. Pub. Serv. Comm'n,* 555 F.3d 1287, 1288 (11th Cir.2009). If the commission thinks AT & T is not honoring its § 271 obligations, the 1996 Act gives the commission recourse: file a complaint with the FCC. *See* 47 U.S.C. § 271(d)(6)(B).

BellSouth Tel., Inc. v. Kentucky Pub. Serv. Comm'n, 669 F.3d 704, 708 (6th Cir. 2012).

I. INTRODUCTION

> 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).

When read together: (1) the FCC's Forbearance Orders find that consumers would be harmed by the continued enforcement of the Section 271 checklist items because those rules have outlived their usefulness, and (2) *Verizon New England* prohibits the states from requiring Consolidated and other RBOCs to continue providing those same Section 271 obligations. *See Verizon New England*, 509 F.3d at 9 ("In this case both of the specific outcomes that the state agencies seek to dictate are in direct conflict with specific FCC policies adopted pursuant to its authority under the 1996 Act. . . . The problem for the states is the FCC's delisting was intended to free the carriers from such compulsion."). Any state action that continues those outdated and burdensome checklist obligations frustrates

Congressional intent and will retard the "deploy[ment] of next-generation networks and services to American consumers." 2019 FCC Forbearance Order, ¶ 1.

Thus, whatever the FCC intended by footnote 4 in the 2015 Forbearance Order,[7] it certainly did not intend for the states to proliferate the very same "unnecessary, outdated, and burdensome regulations" for which the FCC granted forbearance.[8] Any order by the Commission that has the effect of continuing to impose Section 271 obligations upon Consolidated, directly or indirectly, is preempted by the FCC's Forbearance Orders and the Change of Law provision in the WPP should be interpreted consistent with the FCC's public policy findings and thereby avoid federal preemption.

C. The Recommended Decision Produces an Interpretation of the Change of Law Provision in the WPP that is Absurd and Illogical.

Summarizing the key points addressed in these Comments and Consolidated's prior briefing on the Change of Law provision demonstrates that the Recommended Decision's interpretation of the WPP is absurd and illogical:

The Section 271 Competitive Checklist Items in the WPP Arise Exclusively from Federal Law.
Consolidated's Initial Brief at pp. 2-6.

The FCC Has Granted Forbearance as to All 14 of the Section 271 Competitive Checklist Items Through the FCC's 2015 and 2019 Forbearance Orders.

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[7] Footnote four does not apply to Maine in any event. The footnote refers to obligations that arise under State law. As discussed above an in Consolidated's prior briefing in this proceeding, the Section 271 obligations in the WPP arise solely from federal law, not state law. (Consolidated's Initial Br. at 2-5.) That said, there is no state law source for such obligations in any event.

[8] Nor could the FCC subdelegate to the State's its Congressionally-delegated authority over Section 271. *See United States Telecom. Ass'n v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004) (rejecting FCC's delegation of authority to states to make impairment determination pursuant to Section 251(d)(2) of the Act; "A general delegation of decision-making authority to a federal administrative agency does not, in the ordinary course of things, include the power to subdelegate that authority beyond federal subordinates. It is clear here that Congress has not delegated to the FCC the authority to subdelegate to outside parties."). Thus, to the extent the Recommended Decision treats footnote 4 of the 2015 Forbearance Order as authorizing the States to perpetuate Section 271 obligations, the FCC has no authority to clothe the States with such authority. Congress gave the FCC no ability to subdelegate Section 271 authority to the States.

Consolidated's Initial Brief at pp. 6-8.

The FCC's Forbearance Orders Are Based on Findings that:

- **Section 271 was enacted in the 1996 Act to address Congressional and FCC "concerns about the ability of . . . 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"**
- **The Section 271 competitive checklist items have "outlived their usefulness"**
- **Forbearance is in the public interest 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.

All Three Conditions to the WPP Change of Law Provision Are Met By the FCC's Forbearance Orders.
Consolidated's Initial Brief at pp. 12-17.

Congress Granted All Section 271 Authority to the FCC Except For a Limited Consultative Role Carved Out for the States.
Consolidated's Reply Brief at pp. 6-9.

Regardless of Footnote 4 in the 2015 Forbearance Order, the States are Preempted from Continuing the Section 271 Competitive Checklist Items Pursuant to Federal or State Law Under *Verizon New England* and Congress Did Not Authorize the FCC to Subdelegate it's Section 271 Authority to the States.
Consolidated's Comments on Recommended Decision at 7-12 & n. 8.

Based on all of these points, the Recommended Decision's interpretation of the Choice of Law clause is both absurd and illogical. Rather than "eliminate unnecessary, outdated, and burdensome regulations that divert carrier resources away from deploying next-generation networks and services to American consumers," the Recommended Decision would perpetuate decades-old regulations that have outlived their usefulness. The Change of Law provision in the WPP was intended to allow the WPP to keep pace with changes in the law that substantively affect material provisions of the WPP. It is difficult to

imagine changes in the law that would better fit within the WPP's Change of Law provision than the FCC's Forbearance Orders. The unambiguous language of the WPP should be given its plain meaning consistent with the findings and conclusions that support the FCC's Forbearance Orders.

CONCLUSION

For all of the reasons stated above and in Consolidated's prior briefing, Consolidated respectfully requests that the Commission issue an order: (a) confirming that the FCC Forbearance Orders are a change in law that 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: September 11, 2019

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