

NHPUC 11SEP19-03:50

September 11, 2019

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

**Re: DT 19-041: Petition of Consolidated Communications of Northern New England Company, LLC
for Approval of Modifications to the Wholesale Performance Plan**

Dear Ms. Howland:

As the parties well know, the above captioned proceeding pertains to Consolidated Communications' requests to modify or eliminate the Wholesale Performance Plan (the "WPP") in New Hampshire. Consolidated Communications cited the Change of Law provision in the WPP (Section 1, Part K of the WPP) as the basis for the requested changes with the foundation of these requests based upon two orders from the Federal Communications Commission (the "FCC"). These orders are referred to in various filings as the "FCC Forbearance Orders."¹ In summary, 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 Communications initiated similar proceedings before the Vermont and Maine Commissions at the same time it initiated this Docket.

This Commission, along with the other commissions, developed a briefing schedule to address a single issue. On June 10, 2019, this Commission issued a Secretarial Letter in which it (i) agreed with Staff's recommendations for proceeding in the Docket and (ii) directed the parties to address a single question of law: "[d]o the FCC Forbearance Orders constitute a change of law contemplated by Section K of the WPP?" The Vermont and the Maine Commissions directed the parties to address the same question in separate orders.

On August 23, 2019, the Vermont Department of Public Service ("VTDPs") filed with the Vermont Public Utility Commission ("VTPUC") an "Update and Recommendation." In that filing, the VTDPs recommended, among other things: "[t]hat the [Vermont] Commission find the FCC Orders are not a change of law under the WPP." See Telephone Operating Company of Vermont, LLC/modifications to Wholesale Performance Plan, Vermont Public Utility Commission Case No. 19-0603-PET, VTDPs Recommendation at p. 4. In the Maine Public Utilities Commission's WPP modification proceedings, the Presiding Officer issued on August 28, 2019, a Recommended Decision reaching the same conclusion as the VTDPs. See Consolidated Communications of

¹ Consistent with prior various filings in this Docket, the term "FCC Forbearance Orders" used in herein 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)).

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Northern New England Company, LLC, Requests for Approval of Modifications to the Wholesale Performance Plan, Maine Public Utilities Commission Docket No. 2019-00045, Recommended Decision at ps. 1, 8-9.

Both the VTDPs Update and Recommendation and the Maine Recommended Decision are contrary to the FCC Forbearance Orders. Both recommendation filings fail to consider any applicable legal standard and misinterpret the Change of Law provision in the WPP. Each filing is strikingly similar in that there is little legal analysis and a reliance on one phrase in Section 1, Part K of the WPP which refers to "changes to the WPP that are required to conform the [WPP] to applicable law." The Maine Recommended Decision also quotes from a single footnote from the 2015 Forbearance Order as support for the decision in which the FCC stated 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." *See ex. Maine Recommended Decision at p. 9 (citation from FCC 2015 Forbearance Order not included).*² Yet the Maine Recommended Decision cites no such state law. The Maine and Vermont filings also fail to consider and contradict a controlling decision of the First Circuit Court of Appeals, which is binding on Maine and New Hampshire jurisdictions, and is more than instructive in Vermont.

In its recommendation, the VTDPs stated that "[t]hese recommendations are consistent with those in the parallel proceedings taking place in Maine and New Hampshire." VTDPs Recommendation at p. 4. It therefore appears that the New Hampshire Commission's Staff made the same recommendation as the VTDPs and the Presiding Officer in Maine. In the event the New Hampshire Staff's recommendations are the same or similar to those of Vermont and Maine, the recommendations contain the same fundamental flaws and errors of law. There is no New Hampshire state law conferring jurisdiction on this Commission such that it effectively can overrule two FCC decisions. For this reason, I enclose for the Commission's consideration the reply comments filed today on behalf of Consolidated Communications in the Maine proceedings. Similar comments were filed in the Vermont proceedings as well.

Consolidated Communications notes that there is nothing the current procedural schedule permitting this filing. However, in light of the lack of a legal basis for the conclusions and recommendations in the VTDPs' filing and the Maine Recommended Decision, Consolidated Communications believes the Commission should be aware of and consider the serious flaws in the aforementioned analyses. Consolidated Communications certainly has no issue or objection to the other parties in this Docket filing a substantive response. By making the filing, it is not Consolidated Communications' goal to gain some unfair advantage over the other parties, but simply to ensure the Commission has all relevant information before it when making a decision on the question at issue at this point in the Docket.

² The quoted material emanates from footnote 4 in the 2015 Forbearance Order at page 3.

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Please do not hesitate to contact me if you have any questions concerning this filing. An original and six copies of this correspondence are hereby provided. An electronic copy of the complete filing will be submitted via email.

Respectfully submitted,

A handwritten signature in black ink, reading "Patrick C. McHugh", enclosed in a thin black rectangular border.

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

Cc: DT 19-141 Service List