

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2019-00045

January 13, 2020

NORTHERN NEW ENGLAND
COMPANY, LLC d/b/a CONSOLIDATED
COMMUNICATIONS-NNE
Request for Modification of the Wholesale
Performance Plan

ORDER

BARTLETT, Chair; WILLIAMSON¹ and DAVIS, Commissioners

I. SUMMARY

By this Order, the Commission finds that recent orders by the Federal Communications Commission constitute a change of law within the meaning of Part K of Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE's Wholesale Performance Plan. Accordingly, the Commission directs the parties to promptly convene negotiations in good faith concerning revisions to the Wholesale Performance Plan that are required to conform the Plan to applicable law.

II. BACKGROUND

In 2002, the Commission approved a Performance Assurance Plan (PAP), as a requirement for the entry of Verizon New England Inc., d/b/a Verizon Maine (Verizon) into the long-distance market. *Public Utilities Commission, Inquiry Regarding the Entry of Verizon-Maine into the InterLATA (Long Distance) Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-00849, Findings Report at 86 (Apr. 10, 2002). In the Commission's view, Verizon's PAP was "a comprehensive, self-executing enforcement mechanism intended to deter backsliding and the provision of substandard performance" with regard to Verizon's wholesale obligations to Maine's competitive local exchange carriers (CLECs). *Id.*

¹ Commissioner Williamson dissents in part from this Order, in that he would hold that the change of law provision was not triggered by the Forbearance Orders. Commissioner Williamson does, however, agree that the parties should negotiate changes to the WPP to address what Commissioner Williamson believes are inequitable remainders of the WPP's predecessor—the original Verizon Performance Assurance Plan. In Commissioner Williamson's view, Performance Assurance Plans, or now WPPs, were intended to foster and encourage competition until such time as the marketplace rendered them obsolete; these plans were never intended to be a permanent subsidy. Given the current competitive state of the telecommunications marketplace, these plans may no longer be necessary, and this proceeding presents a perfect opportunity for the parties and the Commission to review the WPP.

In 2008, FairPoint Communications, Inc. (FCI) acquired Verizon's operations in Maine. *Verizon New England Inc., et al., Inquiry Regarding the Entry of Verizon-Maine into the InterLATA (Long Distance) Re: Joint Application for Approvals Related to Verizon's Transfer of Property and Customer Relations to Company to be Merged with and into FairPoint Communications, Inc.*, Docket No. 2007-00067, Order (Feb 1, 2002). The FCI entity that provided service in Maine as the successor to Verizon was Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE (FairPoint). As a part of the FCI-Verizon Merger, FCI, and by extension FairPoint, assumed Verizon's obligations under the PAP. *Id.* at 34.

In 2011, FairPoint and several of Maine's CLECs began negotiating for a simplified replacement to the PAP. *Maine Public Utilities Commission, Investigation into Simplified Performance Assurance Plan (PAP) for Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE*, Docket No. 2009-00334, Order at 1 (July 29, 2014).² These negotiations ultimately resulted in a simplified version of the PAP known as the Wholesale Performance Plan (WPP). *Id.* at 14.

In 2017, Consolidated Communications, Inc. (CCI) acquired FairPoint's operations in Maine. *Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE, Request for Approval of Organization*, Docket No. 2016-00307, Order Approving Stipulation (June 5, 2017). As a part of the acquisition, CCI, and by extension the CCI subsidiary providing service in Maine, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE (Consolidated), assumed all of FairPoint's Maine regulatory obligations, including the WPP. *Id.* at 13.

On February 28, 2019, Consolidated filed a petition in the above captioned Docket requesting that the Commission approve modifications to the WPP. Among the modifications sought by Consolidated were the elimination of any requirement to track and report performance measurements for resale, number portability, and directory listings. Consolidated also sought other substantive and administrative changes. Consolidated proposed these changes pursuant to the Biennial Review Provisions in Part H of the WPP.³

Subsequent to Consolidated's February 28, 2019 filing, Consolidated and several northern New England CLECs (represented by the CLEC Association of Northern New

² FairPoint began simultaneous negotiation with CLECs in New Hampshire and Vermont, as the PAPs in all three northern New England states were functionally identical. Staff from the utility regulators in the three states participated jointly in the negotiations.

³ Under the Biennial Review provisions of the plan, at least 60 days prior to the next biennial anniversary of the plan, which was June 1, 2019, Consolidated Communications is permitted to provide notice of proposed modifications to all eligible CLECs and regulators in Maine, New Hampshire, and Vermont.

England or CANNE) began negotiations regarding Consolidated's proposed modifications. Consolidated and CANNE kept the Staffs of the Maine, New Hampshire, and Vermont regulatory agencies (the Staffs) generally apprised of the progress of the negotiations.

The negotiations were unsuccessful; consequently, on May 14, 2019, Consolidated filed a motion to amend its initial petition. Instead of modifying the current Wholesale Performance Plan (WPP), as originally sought, Consolidated's amended petition seeks to withdraw the WPP in its entirety. Consolidated's justification for withdrawing the WPP rests on its interpretation of recent orders of the Federal Communications Commission (FCC), and their application to the "change of law" provisions in Part K of the WPP.

On May 15, 2019, the Commission solicited comments on Consolidated's motion. CANNE was the only party to respond to Consolidated's motion. In their May 24, 2019 response, CANNE indicated that it did not object to Consolidated's motion to amend its petition, as Consolidated likely would simply withdraw its current petition, and file a new petition seeking the relief sought in its motion. Given the foregoing, the Presiding Officer granted Consolidated's motion.

In the June 4, 2019 Procedural Order granting Consolidated's motion to amend its petition, the Presiding Officer also requested briefing from the parties on the threshold legal question of whether the FCC orders cited by Consolidated constituted a change of law within the meaning of Part K of the WPP.⁴

The Parties filed their initial briefs on June 21, 2019 and reply briefs on July 12, 2019.

On August 28, 2019, the Presiding Officer issued a Recommended Decision in this matter. Parties filed responses to the Recommended Decision on or before September 13, 2019.

On November 22, 2019, the Commission held oral argument in this matter during which both Consolidated and CANNE presented argument.

III. LEGAL STANDARD

The provision at issue in this proceeding is the Change of Law provision in Section 1, Part K of the WPP:

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

⁴ The New Hampshire and Vermont Staffs also requested briefing from the parties on the same question with the same filing deadlines.

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.

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.

IV. POSITIONS OF THE PARTIES

A. Consolidated

In Consolidated's view there are three conditions that must be met to trigger a change of law under the WPP: (1) the existence of a legislative, regulatory, judicial or other governmental decision, order, determination or action; (2) that the above action substantively affect the WPP; and (3) that the substantive effect be related to a material provision of the WPP. *Consolidated Brief* at 9. Consolidated argues that all three conditions have been met.

First, Consolidated contends that two FCC orders qualify as "legislative, regulatory, judicial or other governmental decision, order, determination or action" under the WPP: *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, FCC 15-166 (rel. Dec. 28, 2015) (2015 Forbearance Order); and *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 (rel. April 15, 2019) (2019 Forbearance Order and collectively with the 2015 Forbearance Order the Forbearance Orders). *Consolidated Brief* at 10. Second, because the Forbearance Orders alter the FCC's enforcement of requirements for the entry into the long-distance market by carriers such as Verizon (271 Checklist Items), and, in Consolidated's view, the WPP is predicated on the 271 Checklist Items, the Forbearance Orders substantively affect the WPP. Third, given the predication of the WPP on the 271 Checklist Items, that substantive effect on the WPP is, by definition, material. *Id.* at 15-17.

In its exceptions to the Recommended Decision, Consolidated disagreed with the Presiding Officer's conclusion that the Forbearance Orders do not constitute a change of law under the WPP. In Consolidated's view, the Presiding Officer's conclusions were contrary to the FCC's Forbearance Orders and would lead to a result that is absurd and illogical. As Consolidated reads the change of law provision, the first part of the provision describes the conditions necessary to trigger the provision (the "conditions clause") and the second part on the provision describes the process that will occur if the provision is triggered (the "process clause"). Consolidated argues that the Presiding Officer incorrectly construed the provision by merging the two clauses and holding that the language in the process clause that speaks to changes required to conform the WPP to the change in law is a necessary predicate to triggering the WPP. In Consolidated's view, the two clauses serve separate and distinct purposes, and the Presiding Officer erred by reading them as a cohesive whole.

B. CANNE

CANNE puts forward several arguments as to why the Forbearance Orders do not constitute a change of law under the WPP. First, CANNE argues that in order for a party to invoke a change of law provision, an event must have occurred which "imposes some new obligation or requires obedience" and that "alters the present relationship of the parties." *CANNE Brief* at 3. According to CANNE, the FCC imposed no such obligation on the WPP with the Forbearance Orders; CANNE cites the 2015 Forbearance Order which states: "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." *2015 Forbearance Order* at fn. 4.

CANNE also argues that if the 2015 Forbearance Order constituted a change of law, then under the terms of the WPP Consolidated should have broached the issue in 2015.⁵ *CANNE Brief* at 5. In addition, CANNE argues that the obligations imposed by the WPP are state law obligations and not federal law obligations which would trigger Park K of the WPP. *Id.* at 5-6. Finally, CANNE argues that there is no "inexorable link" between the WPP and the 271 Checklist Items. *Id.* at 7-10.

In its comments on the Recommended Decision, CANNE agreed with the analysis put forward by the Presiding Officer and urged the Commission to adopt the Recommended Decision.⁶

⁵ The change of law provision in the WPP states that in the event of a change of law, the parties will "promptly convene negotiations in good faith concerning revisions to the WPP that are required to conform the Plan to applicable law."

⁶ CANNE also suggested some minor technical changes to the Recommended Decision.

V. DISCUSSION AND DECISION

The Commission agrees with Consolidated that the three conditions it describes are necessary to trigger the WPP. There is no dispute that "a legislative, regulatory, judicial or other governmental decision, order, determination or action" exists and is at issue in this proceeding. Thus, the Commission finds that the first of the three conditions is satisfied. With regard to the second condition, the Commission finds that the Forbearance Orders "substantively affect" the WPP. Here, the Commission agrees with Consolidated that, with the Forbearance Orders, the FCC has altered the way in which it enforces entry into the long-distance market; essentially, the FCC no longer requires carriers to abide by the obligations in Section 271.

The central question in this matter then becomes whether or not the Forbearance Orders "materially affect" the WPP. Consolidated argues that if the Forbearance Orders substantively affect the WPP, that effect must necessarily also be material. The Commission disagrees with Consolidated on this point. In the Commission's view, the WPP arises out of two separate sources of law: Section 271 and Sections 251 and 252. If portions of the WPP are derived from Sections 251 or 252, then any change brought forth by the Forbearance Orders—which forbear from enforcement of Section 271—would not necessarily materially affect those portions of the WPP. If, however, *any* material portion of the WPP is derived from Section 271, then those provisions of the WPP would be materially affected.

The Commission agrees with Consolidated and finds that, at least in part, material provisions of the WPP were intended to address Section 271 checklist items. It then follows that the Forbearance Orders substantively and materially affect the WPP, thus satisfying the three predicate conditions for the triggering of the WPP's change of law provision. The Commission disagrees with the position of CANNE and the Presiding Officer that in order to trigger the change of law provision, and thus mandate negotiation among the parties, the Commission must first find that changes to the WPP are necessary in order to conform the WPP to applicable law. In the Commission's view, determining which, if any, provisions must be changed to conform the WPP with the Forbearance Orders is the entire point of the mandatory negotiation language in the change of law provision. In this regard, the Presiding Officer put the cart before the proverbial horse.

To be clear, all the Commission is deciding today is whether the parties must negotiate pursuant to the change of law provision; the Commission makes no findings with regard to which, if any, provisions of the WPP need to be modified. Accordingly, the Commission directs the parties to engage in negotiations in compliance with the change of law provision.⁷ Finally, and in accord with the Commission's findings in this

⁷ The Commission recognizes the prior findings of the Commission's counterparts in New Hampshire and Vermont, and that the parties may currently be in Part K negotiations in those states. Accordingly, the Commission directs the parties to make a

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 11(D) of the Commission's Rules of Practice and Procedure (65-407 C.M.R.ch. 110) within **20** days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought. Any petition not granted within **20** days from the date of filing is denied.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21** days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.