



Patrick C. McHugh
770 Elm Street
Manchester, NH 03101
603-591-5465
patrick.mchugh@consolidated.com

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May 29, 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:

On May 14, 2019, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications – NNE (“Consolidated” or the “Company”) filed a Motion to Amend its initial Petition filed in the above-referenced proceeding on February 28, 2019 (the “Motion”). As explained in greater detail in the Motion, Consolidated requested leave to amend its Petition to seek Commission authorization to withdraw from the Wholesale Performance Plan (“WPP”) in light of two Forbearance Orders issued by the Federal Communications Commission (“FCC”)¹ that granted forbearance as to the entirety of the Section 271 checklist items. (Motion, ¶¶ 3-12.) An Amended and Restated Petition, which the Company sought leave to file, was attached to the Motion.

On May 24, 2019, The CLEC Association of Northern New England, Inc. (“CANNE”),² Charter Fiberlink NH-CCO, LLC and Time Warner Information Services (New Hampshire), LLC (collectively, the “CLECs”) filed a “Response to Motion to Amend Petition” (the “CLEC Response”).

As an initial matter, Consolidated observes that the CLEC Response does not argue that the Motion to Amend should be denied. Accordingly, the Commission should grant Consolidated’s Motion and accept the Amended and Restated Petition for filing in this proceeding.

The Company further observes that there is not much disagreement between Consolidated and the CLECs regarding the fundamental issues in this proceeding. The CLECs agree that there are

¹ The FCC’s Forbearance Orders are Petition of U S 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 (2015) and Petition of US 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).

² CANNE includes CRC Communications LLC d/b/a OTELCO, FirstLight Fiber, Inc., and Biddeford Internet Corp. d/b/a Great Works Internet.

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important issues of law raised by the Amended and Restated Petition that the Commission must resolve. (CLEC Response at 3 (“The CLECs agree that two of the fundamental issues presented by Consolidated’s Amended Request requires legal briefing and analysis.”).)

Consolidated believes that the Commission should initially consider three legal issues for briefing:

- I. Whether the FCC’s Forbearance Orders are a “change in law” under the WPP;
- II. The source of the Commission’s jurisdiction, under state or federal law, to require Consolidated to continue to be subject to the WPP in light of the Forbearance Orders; and
- III. Even if the Commission determines it has jurisdiction, whether the public interest requires that the 271 checklist items be enforced against Consolidated given the FCC’s Forbearance Orders.

Consolidated submits that the Commission can decide each of these issues as a matter of law and without the need to develop a factual record.³ For example, if the Commission determines that the FCC’s Forbearance Orders are a “change in law” and the Commission has no jurisdiction to require Consolidated to continue to be subject to the WPP in light of the change in law, or that there is no legal basis for any continuing obligations under Section 271⁴ after the FCC’s Forbearance Orders, then Consolidated must be relieved of its Section 271 WPP obligations.

When the Commission decides the legal issues on briefs, Consolidated believes that this proceeding could be resolved completely. If issues remain after briefing that cannot be resolved as a matter of law on briefs, however, the Commission can then determine what procedural tools are best suited to resolving any remaining issues. For example, if the Commission rules on the legal issues and determines that a factual record is necessary to decide specific non-legal issues, it could allow discovery on those issues of fact at a later stage of the proceeding when those issues are more capable of clear identification. Until the legal issues have been resolved and the disputed material factual issues identified, the parties should not be exposed to the resource-intensive discovery process on a broad range of issues that are neither relevant to nor probative of an issue that is determinative of the outcome of the proceeding. Thus, the briefing process will promote efficiency overall, and avoid discovery until discovery is determined to be necessary.

³ The CLEC Response identifies two fundamental issues that require legal briefing: (1) whether the FCC decisions cited by Consolidated constitute a change of law within the meaning of the WPP; and (2) whether any change in law requires the Commission to take action related to the WPP. (CLEC Response at 3.) Consolidated believes that these issues are subsumed within the three issues identified by Consolidated in the text above.

⁴ Section 251 obligations that are similar to or duplicative of Section 271 checklist items may still be enforceable through interconnection agreements and Section 208 complaints to the FCC, but the WPP arose from the protections afforded by Section 271 (which the FCC has determined are no longer in the public interest), not Section 251.

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The CLECs agree that there are important legal issues for the Commission to decide in this proceeding, and those issues of law do not require the development of a factual record. For the reasons state in this letter, as well as in the Motion to Amend, the Commission should confirm the legal issues upon which it desires briefing and establish a briefing schedule. If it desires, the Commission could coordinate with the Maine and Vermont Commissions to accept briefing on the same sets of issues to streamline the briefing process. Alternatively, Consolidated requests a case conference to discuss the appropriate procedure for addressing the legal issues relevant to this proceeding and any factual issues that may remain after the legal issues have been decided.

Please do not hesitate to contact me if you have any questions concerning this filing. An original and six copies of this correspondence is 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