

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 19-0603-PET

Petition of Telephone Operating Company of Vermont, LLC for approval of modifications to the Wholesale Performance Plan to be effective June 1, 2019	
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Order entered: 10/02/2019

PROCEDURAL ORDER GRANTING CONSOLIDATED'S MOTION TO AMEND AND RULING THAT THE WHOLESALE PERFORMANCE PLAN'S CHANGE OF LAW PROVISION IS APPLICABLE

I. INTRODUCTION

On May 14, 2019, Consolidated Communications of Vermont Company, LLC (formerly Telephone Operating Company of Vermont, LLC) ("Consolidated") filed a motion requesting to amend its petition filed in this proceeding on February 28, 2019 (the "Motion to Amend"). In the amendment, Consolidated requests the authorization of the Vermont Public Utility Commission (the "Commission")¹ to withdraw in its entirety the Wholesale Performance Plan approved by the Commission in Docket 7506 on March 25, 2015.²

On June 18, 2019, I issued an Order setting a briefing schedule for the parties to address the threshold question of law of whether the Federal Communications Commission's ("FCC") Forbearance Orders³ constitute a change in law as contemplated by the Change of Law provision of the Wholesale Performance Plan.

In today's order: (1) having heard no objections, I grant the Motion to Amend pursuant to Commission Rule 2.201(G)(1); (2) I conclude that the Forbearance Orders constitute a change

¹ Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

² *Petition of Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications, for waiver of certain requirements under the Performance Assurance Plan and Carrier-to-Carrier Guidelines*, Docket 7506, Order of 3/25/15.

³ *Petition of USTelecom 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) (the "2015 FCC Forbearance Order"); *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) (the "2019 FCC Forbearance Order") (collectively, the "Forbearance Orders").

of law under the Change of Law provision in the Wholesale Performance Plan; and (3) I direct Consolidated and the CLECs,⁴ consistent with the Change of Law provision, to consult and file a schedule for negotiating proposals for changing the Wholesale Performance Plan as proposed in Consolidated's Motion to Amend such that negotiations are completed within 90 days of the issuance of this order. Finally, as the Change of Law provision states: "Should the parties fail to reach agreement on revisions to the Wholesale Performance Plan within 90 days, the matter may be brought to the Commission(s)."

II. BACKGROUND

On February 6, 2002, the Commission, in a consultation report to the FCC under 47 U.S.C. § 271(d)(2)(B), recommended approval of an application to the FCC by Consolidated's predecessor, Verizon New England Inc. ("Verizon"), to offer InterLATA (i.e., long-distance) service in Vermont. As part of this recommendation, the Commission reviewed Verizon's compliance with the 14-point competitive checklist enumerated in 47 U.S.C. § 271(c) and Verizon's Performance Assurance Plan, a comprehensive, self-executing, wholesale service performance enforcement mechanism. The Performance Assurance Plan was developed to help ensure that Verizon provided adequate service to its wholesale customers and required Verizon to pay compensation to those customers when service was substandard. The Commission concluded that "the Performance Assurance Plan is consistent with the public interest, convenience, and necessity, as required under 47 U.S.C. § 271(d)(2)(B)" but "that is not to say that the Performance Assurance Plan is fully mature."⁵

On March 24, 2011, Verizon's successor owner and Consolidated's immediate predecessor owner, Telephone Operating Company of Vermont LLC doing business as FairPoint Communications ("FairPoint"), filed a petition with the Commission for a proceeding to consider

⁴ CLEC Association of Northern New England, Inc., which includes CRC Communications LLC doing business as OTELCO, FirstLight Fiber, Inc., and Biddeford Internet Corp. doing business as Great Works Internet along with Charter Fiberlink VT-CCO, LLC, (collectively the "CLECs"),

⁵ *Application of Verizon New England Inc. d/b/a Verizon Vermont for a Favorable Recommendation to Offer InterLATA Services Under 47 U.S.C. § 271*, Docket 6533, Order of 2/6/02 at 7. The FCC approved Verizon's request to provide in-region long-distance services in Vermont on April 17, 2002. See *Application by Verizon New England Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Vermont*, FCC Docket No. 02-7, Memorandum Opinion and Order date April 17, 2002, 17 FCC Rcd. 7625 (F.C.C.), 2002 WL 575615, at *1 ("FCC VT 271 Order").

its proposal to replace the Performance Assurance Plan with Simplified Performance Metrics Plan and a Wholesale Performance Plan.

On October 23, 2012, FairPoint filed a motion with the Commission for expedited approval of its proposed revision to the Performance Assurance Plan.

On June 12, 2013, the Commission approved FairPoint's proposed replacement of the Performance Assurance Plan with the Simplified Performance Metrics Plan and Wholesale Performance Plan because they "have helped ensure that wholesale service provided by FairPoint (and its predecessor, Verizon) to its competitors is adequate and comparable to the service provided to FairPoint's own retail operations."⁶

The parties subsequently continued their discussion of the Wholesale Performance Plan leading to its further modification under state law, which was separately approved by the Maine and New Hampshire Public Utilities Commission in 2014.

On March 25, 2015, the Commission also approved the modified Wholesale Performance Plan (the "2015 PUC WPP Order").⁷ The 2015 PUC WPP Order introduced the change of law provision into the adopted Wholesale Performance Plan.⁸

On December 28, 2015, the FCC issued the 2015 FCC Forbearance Order that granted forbearance of 13 of 14 items from the section 271(c)(2)(B) competitive checklist, which the petitioner, USTelecom, characterized as "outdated" regulations "whose costs far exceed any benefits."⁹ The 2015 FCC Forbearance Order also states that:

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.¹⁰

On February 28, 2019, Consolidated filed a petition requesting that the Commission modify the Wholesale Performance Plan to reflect both the 2015 FCC Forbearance Order and to make administrative changes to the Wholesale Performance Plan reflecting its ownership of the company.

⁶ *Petition of Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications, for waiver of certain requirements under the Performance Assurance Plan and Carrier to Carrier Guidelines*, Docket 7506, Order of 6/12/13 at 8.

⁷ Docket 7506, Order of 3/25/15.

⁸ *Id.* at 11-15.

⁹ 2015 FCC Forbearance Order at 2.

¹⁰ *Id.* at 3 n.4.

On April 15, 2019, the FCC issued the 2019 FCC Forbearance Order that granted forbearance from the remaining item of the section 271(c)(2)(B) competitive checklist “to eliminate unnecessary, outdated, and burdensome regulations that divert carrier resources away from deploying next-generation networks and services to American consumers.”¹¹

On May 14, 2019, Consolidated filed the Motion to Amend its February 28, 2019, petition to reflect its conclusion, based on the 2019 FCC Forbearance Order that:

[T]he FCC has now granted forbearance as to the entirety of the Section 271 competitive checklist items, Consolidated believes that the [Forbearance Orders] constitute changes of law under the Wholesale Performance Plan and that the Wholesale Performance Plan is no longer necessary to achieve the telecommunication policy goals of Section 271.¹²

Consistent with its conclusion, Consolidated requests that the Commission allow Consolidated to amend its petition to include a request that the Commission determine whether Consolidated may withdraw from the Wholesale Performance Plan in its entirety.

On May 24, 2019, the CLECs filed comments in response to the Motion to Amend (the “CLECs’ Comments”). In the CLECs’ Comments, the CLECs argue that the Forbearance Orders do not amount to a change in law as contemplated by the Wholesale Performance Plan. The CLECs request that the Vermont, New Hampshire, and Maine Public Utilities Commissions develop a coordinated schedule by which each Commission can consider Consolidated’s amended petition and conduct evidentiary hearings in a staggered manner to avoid conflicts. The CLECs do not object to the Motion to Amend.

On May 28, 2019, the Vermont Department of Public Service (the “Department”) filed comments on the Motion to Amend (the “DPS Comments”). The Department recommends that the Commission grant the Motion to Amend and opines that the issues presented “merit further interstate coordination between the Department and the Maine and New Hampshire Public Utilities Commissions.”¹³

On May 29, 2019, Consolidated responded to the CLECs’ Comments, observing that the CLECs do not oppose the Motion to Amend. Consolidated also asked that the Commission consider three legal issues for briefing, the first of which was whether the Forbearance Orders

¹¹ 2019 FCC Forbearance Order at 2.

¹² Motion to Amend at 4.

¹³ DPS Comments at 2.

are a change of law as contemplated by the Wholesale Performance Plan, and to rule on the petition solely as a matter of law without any fact-finding.

On June 5, 2019, the Department filed comments requesting that the Commission issue a briefing schedule for the threshold legal issue of whether the Forbearance Orders are a change of law as contemplated by the Wholesale Performance Plan.

On June 12, 2019, I issued an order setting a briefing schedule.

On June 21, 2019, the parties filed briefs (the “Consolidated Brief,” the “CLEC Brief,” and the “DPS Brief”).

On July 12, 2019, the parties filed reply briefs (the “Consolidated Reply Brief,” the “CLEC Reply Brief,” and the “DPS Reply Brief”).

On August 23, 2019, the Department filed comments (the “DPS Update”) representing that it had participated in an interstate conference call on August 2, 2019, with its counterparts on the Maine and New Hampshire Public Utilities Commissions, all of which agreed that the Forbearance Orders were not a change of law under the Wholesale Performance Plan. The Department also recommended that the Commission: (1) find that the Forbearance Orders are not a change of law; (2) direct Consolidated and the CLECs to resume negotiations as to the impact of the Forbearance Orders on the Wholesale Performance Plan; and (3) order an audit of the Wholesale Performance Plan if negotiation between the parties does not produce a resolution.

On August 28, 2019, the Maine Public Utilities Commission staff issued a recommended decision in the form of a draft Commission Order determining that the Forbearance Orders do not constitute a change of law within the meaning of the Change of Law provision (the “Maine Draft Order”).

On September 4, 2019, Consolidated provided an initial response to the DPS Update.

On September 11, 2019, the CLECs objected to Consolidated’s initial response to the DPS Update.

Also on September 11, 2019, Consolidated filed responses to both the DPS Update and to the Maine Draft Order.

No other comments have been filed.

III. CHANGE OF LAW PROVISION

The Change of Law provision in the Wholesale Performance Plan adopted by the Commission in the 2015 PUC WPP Order 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 revision to the WPP that are required to conform the WPP to applicable law. Upon agreement, such revision 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.¹⁴

When it adopted this provision, the Commission observed that this was new language being added to the Wholesale Performance Plan that had not previously been included in the Performance Assurance Plan.¹⁵

The Change of Law provision had been first proposed by FairPoint and would have allowed FairPoint to unilaterally modify the Wholesale Performance Plan when the law changed in such a way as to modify its legal obligations to its wholesale customers. The CLECs objected to FairPoint's proposal allowing for a unilateral change and modified the proposed Change of Law provision to require FairPoint and the CLECs to promptly renegotiate in good faith to amend the Wholesale Performance Plan based on a change of law.

FairPoint agreed that the renegotiation requirement was reasonable. The language above, which was preferred by the CLECs, was installed in the Wholesale Performance Plan adopted by the Commission and put into effect in June 2015 in Maine, New Hampshire, and Vermont.

IV. DISCUSSION AND CONCLUSION

Consolidated argues that the Forbearance Orders substantively affect material provisions of the Wholesale Performance Plan and are “squarely within the Change of Law provision”¹⁶ and that Consolidated's interpretation of the Change of Law provision “is consistent with the intention of the parties.”¹⁷

¹⁴ 2015 PUC WPP Order at 13.

¹⁵ *See Id.* at 11-13.

¹⁶ Consolidated Brief at 2.

¹⁷ Consolidated Reply Brief at 3.

The CLECs assert that the change to the FCC rules alone are not a change in law because the change must be “legally binding” to implicate the Change of Law provision. Because the Forbearance Orders allow for state review before any amendment of the Wholesale Performance Plan, the CLECs argue that the FCC rule change is not binding, and the Change of Law provision is therefore not applicable. The CLECs further argue that the Forbearance Orders do not affect any material provision of the Wholesale Performance Plan because the FCC explicitly stated that “it is within the states’ authority to determine whether or not to modify the [Wholesale Performance Plan].”¹⁸

The Department contends that the Forbearance Orders do not constitute a change of law “because neither the FCC Orders nor other legal authority preclude states from individually exercising their authority to enforce wholesale performance obligations.”¹⁹ The Department argues that “despite the forbearance granted to Consolidated by the FCC, wholesale performance agreements continue to play an essential role in promoting a competitive telecommunications market and the FCC Orders do not preclude states from upholding such agreements.”²⁰ The Department asserts that the FCC very clearly stated that the 2015 FCC Forbearance Order does not affect any state wholesale performance plan in the following language:

[T]he [FCC] has clearly stated that the plans are administered by state commissions and derive from authority the states have under state law or under the [Telecommunications] Act [of 1996]. It is therefore within the states’ authority to decide whether or not to modify or eliminate plans that are in effect.²¹

Both the CLECs and the Department assert that eliminating the Wholesale Performance Plan, as requested by Consolidated in its amended petition, would have potential negative effects on the public because the Wholesale Performance Plan provides a safety net that ensures that the CLECs can adequately serve their customers.

Were the Commission to find that the FCC Orders are a change of law under the Wholesale Performance Plan and the Wholesale Performance Plan is subsequently eliminated, it would likely result in a stifling of competition, raising

¹⁸ CLEC Reply Brief at 3-4 (citing the 2015 Forbearance Order at ¶ 17).

¹⁹ DPS Brief at 1

²⁰ *Id.* at 2.

²¹ DPS Reply Brief at 2 (citing the 2015 Forbearance Order at ¶ 17, n. 60).

of prices and further reduction in already very limited telecommunications choices for consumers.²²

I am not persuaded by the arguments of the CLECs and the Department regarding the applicability of the Change of Law provision for two reasons.²³

First, the CLECs and the Department go beyond the plain language of the Change of Law provision and create an additional requirement that the change of law be binding such that it requires amendment to the Wholesale Performance Plan. They argue that the Forbearance Orders are not a change in law because the standards in the Wholesale Performance Plan are also required by state law.

The argument of the CLECs and the Department incorrectly inserts the word “required” to the preconditional language in the first clause of the first sentence of the Change of Law provision. The word “required” arises in the action language of the second clause of the first sentence of the Change of Law provision. That is, the Change of Law provision in its plain language says that, as a precondition, if any change of law affects the Wholesale Performance Plan then the parties must act by negotiating in good faith to determine whether that change is binding such that it requires modification of the Wholesale Performance Plan.

In failing to observe the plain language of the Change of Law provision, the CLECs and the Department overlook the fact that the provision was drafted by the CLECs to provide additional due process to ensure that the Change of Law provision did not allow a unilateral change of the Wholesale Performance Plan. The Change of Law provision thus allows the additional due process needed to ensure that the Commission can assess the effect of the change of law on the public good using its authority under state law, if the parties cannot negotiate an amendment.

The CLECs and the Department argue that the Change of Law provision is not applicable because the change of law, in the form of the Forbearance Orders, is a change to federal law, which the FCC does not require that the states apply, rather than a “binding” required change according to state law. This appears to result in the conclusion that the Change of Law provision is limited to state law changes, not “any legislative, regulatory, judicial, or other governmental

²² CLEC Reply Brief at 14 (citing DPS Brief at 5).

²³ I have no opinion at this time, having made no findings, as to whether eliminating the Wholesale Performance Plan would have a negative effect on the public good.

decision, order, determination, or action substantively affects any material provision” of the Wholesale Performance Plan as stated in the Change of Law provision proposed by the CLECs and agreed to by Consolidated’s predecessor.

The argument of the CLECs and the Department also fails to appreciate that the origin of the Wholesale Performance Plan is a consultation report to the FCC under 47 U.S.C. § 271(d)(2)(B). That consultation report recommended approval of an application to the FCC by Consolidated’s predecessor, Verizon, to offer long-distance service in Vermont. While a product of state law, the Wholesale Performance Plan arose because of federal application requirements.

Second, the CLECs and the Department conflate the issues of determining whether the Forbearance Orders are an applicable change of law with whether the Wholesale Performance Plan should be eliminated, as if the first determination will automatically lead to the second. But the two are separate decisions that are protected as such by the Change of Law provision. In accordance with the plain language of the provision, once a change of law implicates use of the Change of Law provision, the determination as to whether or how to amend the Wholesale Performance Plan is subject to good-faith negotiation by the parties. If such an amendment cannot be negotiated, then the Commission(s) may “consider the merits of Consolidated’s Amended Request, i.e. whether particular metrics should be removed from the Wholesale Performance Plan, [and] the Commission[s] should set a schedule to consider evidence regarding Consolidated’s performance under the WPP and its impact on CLECs.”²⁴

The Change of Law provision protects the interests of the CLECs and the Department by ensuring that they have an opportunity to fully present their concerns with the Forbearance Orders and their impact, if any, on the delivery of telecommunications services as protected by state law. As the Department observes, the Forbearance Orders themselves also address and protect the jurisdiction and oversight of the Commission(s) pursuant to the Telecommunications Act of 1996. “It is therefore within the states’ authority to decide whether or not to modify or eliminate plans that are in effect.”

²⁴ CLECs Comments at 4. *See also* DPS Update at 4 (while the Department recommends that the Commission find that the Forbearance Orders are not a change of law, it also recommends that the Commission direct the renewal of the negotiations between Consolidated and the CLECs. If negotiations are unsuccessful, the Department further recommends that an audit be conducted of the Wholesale Performance Plan, pursuant to Section 1, Part 1 of the Wholesale Performance Plan, which may also be appropriate as part of this review).

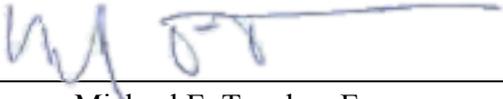
Determining that the Change of Law provision is applicable is a necessary threshold decision that allows for an assessment of the effects of the Forbearance Orders on the Wholesale Performance Plan, first by the parties in negotiation and then, if necessary, by the Commission(s) in follow-up proceedings. Having made that threshold decision here, the parties may now fully address in good-faith negotiations whether Consolidated may withdraw in its entirety the Wholesale Performance Plan approved by the Commission in Docket 7506 on March 25, 2015.

V. ORDER

To ensure that thorough assessment of the amended petition begins consistent with the interests of the parties, I grant the Motion to Amend and conclude that the Change of Law provision in the Wholesale Performance Plan is applicable. Consistent with the Change of Law provision, I direct Consolidated and the CLECs to consult and file a schedule for negotiating proposals for changing the Wholesale Performance Plan, as proposed in Consolidated’s Motion, so that their negotiations are completed within 90 days of the issuance of this order.

SO ORDERED.

Dated at Montpelier, Vermont, this 2nd day of October, 2019.



Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: October 2, 2019

Attest: 

Deputy Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 19-0603-PET - SERVICE LIST

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