STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 19-041

CONSOLIDATED COMMUNICATIONS OF NORTHERN NEW ENGLAND COMPANY, LLC d/b/a CONSOLIDATED COMMUNICATIONS-NNE

Petition for Approval of Modifications to the Wholesale Performance Plan

Order Addressing Question of Law and Directing Parties to Reopen Negotiations

O R D E R   N O. 26,299

October 14, 2019

APPEARANCES: Patrick C. McHugh, Esq., on behalf of Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications-NNE; Downs Rachlin Martin PLLC, by Nancy S. Malmquist, Esq., on behalf of Charter Fiberlink NH-CCO, LLC and Time Warner Cable Information Services (New Hampshire), LLC; Trina M. Bragdon, on behalf of the CLEC Association of Northern New England; and David K. Wiesner, Esq., on behalf of Commission Staff.

This order addresses Consolidated Communications' amended motion to withdraw in the entirety its Wholesale Performance Plan (WPP) and finds that, although a change of law has occurred, Consolidated is not authorized to withdraw the WPP as a result of those changes. The Commission directs the parties to reopen negotiations, as required under the WPP Change of Law Provision. The order also addresses the contingency that such negotiations may fail to produce an agreement.

I. PROCEDURAL HISTORY

On February 28, 2019, Consolidated Communications of Northern New England Company, LLC d/b/a Consolidated Communications-NNE (Consolidated), filed petitions in Maine, New Hampshire, and Vermont proposing modifications to its Wholesale Performance Plan (WPP) (Original Petition), pursuant to WPP Part H, the "Biennial Review" provision. The Commission issued an Order of Notice on March 8, 2019, and a Prehearing Conference and technical session were held on March 27, 2019. The Commission granted requests for intervention by the CLEC Association of Northern New England (CANNE)[1] and by the Charter Companies (Charter), which include Charter Fiberlink NH-CCO, LLC and Time Warner Cable Information Services (New Hampshire), LLC. The CANNE companies are excepted local exchange carriers (ELECs) under New Hampshire law, and the Charter companies are registered telecommunications carriers under N.H. Code Admin. Rules Puc 413. For convenience, all of the above intervenors will be collectively referred to herein as the "CLEC Intervenors." On April 4, 2019, the parties and regulatory staff of Maine, New Hampshire, and Vermont took part in a joint conference call during which Consolidated and the CLEC Intervenors indicated willingness to conduct confidential negotiations in an attempt to reach a settlement.

On May 14, 2019, Consolidated filed an Amended and Restated Petition for Approval of Modifications to the Wholesale Performance Plan (Amended Petition), in which Consolidated stated that it had met with the CLEC Intervenors for confidential settlement negotiations but was unable to reach an agreement to amend the WPP. *See* Amended Petition at 10. Consolidated proposed to withdraw the WPP in its entirety based on WPP Part K, the "Change of Law" provision. *Id*. at 3. Consolidated argues that the Change of Law Provision was triggered by the cumulative effect of two FCC forbearance orders: *In the Matter of 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*, 31 F.C.C. Rcd. 6157 (2015) (2015 Forbearance Order); and *In the Matter of Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(C) to Accelerate Investment in Broadband and Next-Generation*

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[1] The CLEC Association of Northern New England membership includes CRC Communications LLC d/b/a OTELCO, FirstLight Fiber, and Biddeford Internet Corp. d/b/a Great Works Internet.

Networks, 34 F.C.C. Rcd. 2590 (2019) (2019 Forbearance Order) (the 2015 Forbearance Order and the 2019 Forbearance Order are collectively referred to as the FCC Forbearance Orders).

On June 10, 2019, the Commission granted Consolidated's Motion to Amend Petition and set a briefing schedule asking the Parties to address the legal question: "Do the FCC Forbearance Orders constitute a change of law contemplated by Section K of the WPP?" Consolidated and the CLEC Intervenors filed initial briefs on June 21, 2019, and reply briefs on July 12, 2019. On September 11, 2019, as a supplemental reply, Consolidated filed its comments on the presiding officer's recommended decision in the parallel proceeding before the Maine Public Utilities Commission. On October 2, 2019, Consolidated filed a copy of the Vermont Public Utility Commission (Vermont PUC) Procedural Order Granting Consolidated's Motion to Amend and Ruling that the Wholesale Performance Plan's Change of Law Provision is Applicable.

The Original Petition, the Amended Petition, and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted at https://www.puc.nh.gov/Regulatory/Docketbk/2019/19-041.html.

II. POSITIONS OF THE PARTIES

A. Consolidated

Consolidated provided a history of the WPP, which originated in 2002 as a Carrier-to-Carrier Performance Assurance Plan (PAP). *See* Consolidated Brief, June 21, 2019 at 3. The PAP was a voluntary offer that Verizon, Consolidated's predecessor, asserted would ensure that it continued to meet its "competitive checklist" obligations under Section 271 of the Telecom Act after being authorized to enter the interLATA (*i.e.,* long distance telephone) toll market. *Id*. Consolidated pointed out that, in comments to the FCC, the Commission noted that its statutory authority to enforce payment of reparations and penalties to CLECs for substandard wholesale service is limited in such a way as to permit only the approval of a voluntary, self-executing plan. Consolidated further stated that such a plan has been held by the FCC to be convincing evidence that regional Bell operating companies (RBOCs) like Consolidated will continue provisioning high quality service to CLECs after they obtain Section 271 authority. *Id*. at 4.

In late 2006, Verizon entered into a series of agreements with FairPoint Communications, Inc. (FairPoint), Consolidated's immediate predecessor, that culminated in FairPoint's acquisition of Verizon's local exchange properties in Maine, New Hampshire, and Vermont. *Id*. at 5. When that transaction was approved in 2008, the Commission stated that "FairPoint agreed to work cooperatively with the CLECs and state regulators on a modified [PAP]." *Id*. After extensive negotiations, the WPP was approved on January 24, 2014. *Id*.

Consolidated contended that the Change of Law Provision in the WPP is unambiguous. *Id*. at 9. Consolidated argued that three elements must be shown to trigger the Change of Law Provision: (1) there must be a regulatory or other governmental decision, order, determination or action; (2) that order or other action must substantively affect a provision of the WPP; and (3) the affected provision must be a material provision. *Id*. at 10. Consolidated argued that the FCC Forbearance Orders meet all three elements. *Id*.

In its analysis, Consolidated contended that the first condition is met because the Forbearance Orders represent a regulatory or other governmental decision, order, determination, or action. *Id*. In support of that position, Consolidated stated that forbearance orders and change of law provisions are both common in the telecommunications industry, that the FCC has acknowledged and reconciled them in the past by applying new rules prospectively, except to the extent that parties are entitled to invoke change of law provisions, that the FCC has specifically observed that forbearance orders may trigger change of law provisions in ILEC agreements, and that the FCC has made clear that it considered other determinations a change of law. *Id* at 10-11.

Consolidated contended that the second and third conditions are met because material provisions of the WPP arose from the Telecom Act Section 271 competitive checklist. *Id*. at 12. Consolidated further argued that, once the checklist items are no longer required, the WPP is no longer required. *Id*. at 13. Consolidated supported those arguments by stating that the FCC has recognized that Telecom Act Section 271 is outdated, that continuing to enforce the checklist is not only not in the public's interest, but that it is contrary to the public interest, and therefore the FCC Forbearance Orders substantially affect the WPP in its entirety. *Id*. at 13-16.

Finally, Consolidated argued that the Commission has already determined that forbearance of a checklist item constitutes a change of law based on its order that, in the event of revision of the WPP terms and conditions based on a change of law, the "financial impact of any service or product delisting should be retroactive to the time of change in law," after review by the Commission. *Id*. at 16 (citing *Public Service Co. of N.H.*, Order No. 25,623 (January 24, 2014)).

B. CLEC Intervenors

The CLEC Intervenors asserted that the FCC Forbearance Orders do not result in legally binding, material changes of law that require amendment of state-based performance plans. *See* CLEC Intervenors' Brief, June 21, 2019 at 2. The CLEC Intervenors agreed that a change of law is triggered when a regulatory or other governmental decision, order, determination, or action substantively affects any material provision of the WWP. They did not put forward an equivalent to the three part test, advocating only for the Commission to be the decision-maker, citing its statement that "it is often the case that an FCC order or other change in law is subject to reasonable disagreement as to interpretation and effect." *Id*. (citing *Public Service Co. of N.H.*, Order No. 25,623 (January 24, 2014)).

The CLEC Intervenors contended that, in general, a change of law must be legally binding and material, and that the action must have the legal force to impose an obligation and require obedience. *Id*. at 3. According to the CLEC Intervenors, the 2015 Forbearance Order does not prevent states from enforcing state requirements based on authority they have under state law. *Id* at 4. They also cited Consolidated's failure to promptly convene negotiations under the Change of Law Provision in 2015 as "strongly [suggesting] it did not believe a change of law had taken place" at that time. *Id*.

The CLEC Intervenors argued that the WPP constitutes a state law obligation that the FCC Forbearance Orders do not affect, because those orders specifically preserve the status quo. The CLEC Intervenors maintained that, because the states administer the WPP, only a change in the states' laws could justify a change to the WPP. *Id*. at 5-6. They further argued that the WPP does not depend on the Telecom Act Section 271 checklist obligations because Consolidated's wholesale obligations exist independent of those checklist obligations. *Id*. at 7. They pointed out that various FCC orders include discussion of PAPs as factors to consider, but not requirements, for Telecom Act Section 271 approval. *Id*. at 7-9.

C. <u>Consolidated Reply</u>

Consolidated replied that the WPP Change of Law Provision does not require an action to be legally binding or limit its application to decisions that by their own force alter or preempt the WPP. *See* Consolidated Reply Brief, July 12, 2019, at 2. Consolidated also disagreed with the CLEC Intervenors' claim that the FCC must expressly determine the effect of its orders on existing contracts, stating that the examples they cited are narrower than the case at hand. *Id*. In Consolidated's view, its interpretation of the Change of Law Provision is consistent with the intention of the parties. Consolidated objected to what it characterized as the CLEC Intervenors' efforts to insert new language into, and limit the impact of, the Change of Law Provision. *Id.* at 3-4.

Consolidated emphasized that the WPP arose out of federal law and not state law, claiming that the state commissions supported the construct of the PAPs within the confines of a narrow consultative role. According to Consolidated, the WPP only measures performance of the Section 271 checklist items, not any obligations imposed by state law, and the CLEC Intervenors also have failed to identify any state law upon which the WPP is based. *Id.* at 5-6.

In support of its arguments, Consolidated noted that the U.S. Court of Appeals for the First Circuit has confirmed that the states' role with respect to Section 271 is consultative, and, further, state laws attempting to re-impose requirements removed from Section 271 by the FCC are preempted. *Id.* at 6 (citing *Verizon New England, Inc. v. Maine Public Utilities Commission*, 509 F. 3d 1 (2007) (*Verizon New England*). According to Consolidated, the First Circuit's decision requires the Commission to reject the CLEC Intervenors' arguments that the WPP is founded in state law. *Id.* at 6-9.

Consolidated objected to the CLEC Intervenors' efforts to expand their arguments to issues not in the scope of the narrow question raised by the Commission. Consolidated contended that it never waived its right to invoke the WPP Change of Law Provision, and that the Commission's interpretation of the Change of Law Provision should be guided by principles of contract interpretation and not by what the parties may or may not have done after entering into the contract. *Id.* at 9-10. Consolidated also objected to the CLEC Intervenors' reliance on the 2015 Forbearance Order footnote stating that nothing in that order prevents states from enforcing other requirements that may exist under state law. *Id.* at 10. Consolidated pointed out that the FCC did not include a similar footnote in the 2019 Forbearance Order, reiterating that the FCC agreed to forbear in its continuing efforts to eliminate unnecessary, outdated, and burdensome regulations. *Id*. at 10-11. Finally, Consolidated argued that the Commission should give no weight to the argument that no other RBOC has used the FCC Forbearance Orders to make similar attempts to withdraw its PAP. Consolidated asserted that actions that any other RBOC may or may not take have no bearing on whether the WPP Change of Law Provision is triggered. *Id*.

D. <u>CLEC Intervenors' Reply</u>

The CLEC Intervenors agreed with Consolidated that the WPP Change of Law provision is unambiguous, but they argue that Consolidated's interpretation is not based on the plain meaning of the provision. *See* CLEC Intervenors' Reply Brief, July 12, 2019, at 3. The CLEC Intervenors argued that the FCC Forbearance Orders do not affect any material provision of the WPP nor require revisions to conform the plan to applicable law, because the FCC explicitly left the determination to modify such plans to the states. *Id*. According to the CLEC Intervenors, if there had been a triggering of the Change of Law Provision, Consolidated had the practical obligation and self-interest to assert that a change of law had occurred, but it did not do so for years after the issuance of the 2015 Forbearance Order. *Id*. at 4.

The CLEC Intervenors contended that the WPP exists independently of Section 271 of the Telecom Act, pointing out that review of the Section 271 competitive checklist obligations necessarily includes a review of compliance with Section 251 obligations. *Id*. at 4-5. They argued that the WPP was never intended to measure performance solely under Section 271, asserting that Consolidated fails to recognize that the states have both the authority and the obligation to enable and foster local competition and the provision of wholesale services under Sections 251, 252, and 261 of the Telecom Act. *Id*. at 5. The CLEC Intervenors insisted that the justification and need for the WPP arise from Consolidated's wholesale obligations that continue independent of any Section 271 forbearance. *Id*.

The CLEC Intervenors questioned Consolidated's interpretation of and reliance on decisions made by the Commission, as well as in other states. *Id*. at 6. They asserted that Consolidated has overstated the effect of the Commission's acknowledgement that product or service delisting might occur, to mean that any change of FCC enforcement of Section 251 or 271 would require changes to the WPP. *Id*. at 7-8. According to the CLEC Intervenors, the Commission had affirmed its state law authority to order payments or penalties as reparations under RSA 365:29 or civil penalties under 365:41, and also by accepting a voluntary commitment under 365:3. They further maintained that Verizon had admitted that its PAP did not reduce the Commission's authority. *Id*. at 8-9.

Finally, the CLEC Intervenors addressed Consolidated's arguments applicable to Maine and Vermont. The CLEC Intervenors agreed with comments filed by the staff of the Vermont Department of Public Service that it is in the public interest to continue to enforce the WPP. *Id*. at 10-14.

E. Consolidated's Comments on the Maine Recommended Decision

After reviewing staff recommendations in the parallel proceedings in Maine and Vermont, Consolidated filed a supplemental reply including its comments to the Maine Public Utilities Commission's recommended decision. *See* Consolidated Cover Letter with Response to Recommended Decision at 1-2 (September 11, 2019). It did so under the assumption that New Hampshire Staff would recommended a similar interpretation of the WPP Change of Law Provision as the staffs in Vermont and Maine. *Id*. In its comments, Consolidated argued that the presiding officer's recommendation failed to consider the applicable legal standard, misinterpreted the Change of Law Provision, contradicted controlling precedent, and would lead to an absurd and illogical result. *See* Consolidated's Comments on Recommended Decision at 1 (September 11, 2019).

Consolidated reiterated its position that the WPP Change of Law Provision is unambiguous and should be construed in accordance with the intention of the parties. *Id*. at 2. According to Consolidated, the Change of Law Provision contains separate "condition" and "process clauses." Consolidated argued that the presiding officer's interpretation of the process clause, finding a "necessary predicate" in the clause that affects the threshold conditions, is erroneous. *Id*. at 3-4. Consolidated argued that, if a necessary predicate were intended, it would appear in the condition clause and not in the process clause. Consolidated asserted that the term "required" in the process clause is synonymous with "needed" or "necessary." *Id*. at 5. Consolidated reiterated its positions regarding the circumstances surrounding the WPP and that the Change of Law Provision can only be triggered by federal law without regard to state law. *Id*. at 6.

Consolidated also supplemented its arguments about the applicability of the holding in *Verizon New England*. *Id*. at 7-13. According to Consolidated, *Verizon New England* prohibits state enforcement of the WPP once the FCC Forbearance Orders eliminated Section 271 checklist compliance and confirmed that state jurisdiction over Section 271 checklist items is limited to a consultative role but is otherwise preempted. *Id*. at 10.

Consolidated further asserted that the recommended decision would result in an absurd and illogical result, summarizing its arguments as follows: Section 271 checklist items arise exclusively under federal law; the FCC has granted forbearance from all 14 of the Section 271 checklist items; the FCC Forbearance Orders are based on certain express FCC findings; all three conditions to trigger the Change of Law Provision are met; the states maintain only a consultative role in Section 271 authority; and, notwithstanding footnote 4 in the 2015 Forbearance Order, states are preempted from continuing the Section 271 checklist items pursuant to federal or state law, under *Verizon New England*, and the FCC cannot sub-delegate that authority to the states. *Id*. at 13-14.

On October 2, 2019, Consolidated filed a copy of a Vermont PUC Procedural Order Granting Consolidated's Motion to Amend and Ruling that the Wholesale Performance Plan's Change of Law Provision is Applicable. In that order the Vermont PUC hearings examiner rejected the Vermont Department of Public Service's argument that the change of law is triggered only when a governmental decision requires action as a "necessary predicate." That order directed the parties to engage in negotiations for a 90-day period, following which any remaining unresolved issues would be brought back to the Vermont PUC for resolution.

III. COMMISSION ANALYSIS

We begin by examining the text of the WPP Change of Law Provision, which states:

> If any legislative, regulatory, judicial or other governmental decision, order, determination or action substantively affects any material provision of this WPP, FairPoint Communications 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. Should the parties fail to reach agreement on revisions to the WPP within 90 days, the matter may be brought to the Commission(s) 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.

WPP Part K; *see Northern New England Telephone Operations, LLC d/b/a FairPoint Communications-NNE*, Order No. 25,623 at 24-25 (January 24, 2014).

As Consolidated points out, the Change of Law Provision was designed to strike a balance between concerns about how FCC orders might be interpreted and applied, while preserving its ability to fully effectuate the financial impact of product or service delisting.

Both Consolidated and the CLEC Intervenors agree that that the WPP Change of Law Provision is unambiguous; however, they disagree on its interpretation. We generally agree with Consolidated's view that there are three factors to consider in evaluating whether the Change of Law Provision has been triggered: (1) whether the FCC Forbearance Orders are a regulatory or other governmental decision; (2) whether the FCC Forbearance Orders substantively affect any provision in the WPP; and (3) whether or not the affected provision is material. If all three factors are answered affirmatively, then the focus shifts to determining what revisions are necessary so the WPP is consistent with the change of law. Those revisions must be initially addressed by the parties through negotiation.

Turning to the parties' arguments, Consolidated effectively claims that the FCC Forbearance Orders are sufficient to trigger the WPP Change of Law Provision, and that the explicit public policy finding made by the FCC in issuing those orders is sufficient to justify the complete elimination of the WPP, because the WPP is solely a Section 271 enforcement mechanism. The CLEC Intervenors, by contrast, effectively claim that an FCC forbearance order could never be a change of law as contemplated by the WPP and that, absent state-initiated changes, the Change of Law Provision cannot be triggered. They highlight that, in the 2015 Forbearance Order, the FCC expressly stated that the forbearance which it granted 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." *See* 2015 Forbearance Order at 3, fn. 4 (the FCC further stated that it is "within the states' authority to decide whether or not to modify or eliminate [PAPs] that are in effect." *Id.* at 13, fn. 60). And they further argue that a change of law must also be legally binding in addition to material, or otherwise have the legal force to impose an obligation and require obedience.

We are unpersuaded by either party's arguments. We do not agree with Consolidated that the PAP/WPP is solely a creature of Section 271 of the Telecom Act, and therefore only subject to narrow consultative oversight by the states. Nor do we agree with the CLEC Intervenors that only a change in state law could trigger the Change of Law Provision. While it may be true that Verizon would not have agreed to the PAP if it did not want to apply for Telecom Act Section 271 approval to enter the interLATA toll market, the WPP is an agreement that exists independently from Section 271, was acceded to by Consolidated and its predecessors, and measures compliance with more than just Section 271.

In support of those conclusions, we look to the prior statements of Consolidated and its predecessor, FairPoint. For example, the WPP at 93 (Appendix 1) states that "[p]erformance measures that have a parity standard are metrics where both [Consolidated's] local wholesale service (CLEC) and [its] retail service (ILEC) performance are reported." That section specifically references the Section 251(c)(2)(C) obligation for facilities to be provided by ILECs to CLECs on a basis "that is at least equal in quality to that provided by the local exchange carrier to itself." Consolidated effectively recognized that distinction in its Original Petition, clarifying that it was "not proposing to eliminate WPP provisions that apply to products or services, such as unbundled loops or transport, that are additional obligations of [ILECs] under section 251(c)."

This is consistent with our understanding of the WPP, which is a self-executing plan that was created *to replace* Verizon's PAP. The WPP was required by the Commission to address concerns that FairPoint, a small telephone company with no experience as an RBOC, would adequately step into the shoes of an RBOC, and continue to discharge competitive responsibilities that FairPoint was unfamiliar with and which had not been required of it previously. According to the terms of the Settlement Agreement in Docket No. DT 07-011, adoption of the PAP, and its successor WPP were offered by FairPoint to ensure that FairPoint would provide services to CLECs consistent with requirements of the Communications Act of 1934, state laws and regulations,[2] and stipulations between CLECs and FairPoint. *See* DT 07-011, *Settlement Agreement Among the Joint Petitioners and the Commission Staff,* January 24, 2008.

In that Settlement Agreement, Verizon, FairPoint, and Staff agreed, in pertinent part, as follows: (i) Section 2, paragraph e: "Telco [FairPoint] will be subject to the Performance Assurance Plan (PAP) in effect as of the Merger closing date (see section 6 below) and will not challenge the jurisdiction of the state utility regulatory commission to enforce the PAP;" (ii) Section 2, paragraph f: "Nothing herein constitutes an admission by FairPoint that Telco is [an RBOC] within the meaning of the Communications Act or applicable regulations or should be treated as [an RBOC] for any purpose other than as FairPoint expressly agrees in this Settlement Agreement;" and (iii) Section 6, paragraph c: "After the Merger closing date, FairPoint will work cooperatively with the CLECs and state utility regulatory staff in good faith to develop and

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[2] Such state laws and rules now include RSA 362:8, I and III, and N.H. Code Admin. Rules Puc 407. In enacting RSA 362:8, I and III, in connection with telephone industry deregulation, the legislature expressly preserved the Commission's regulatory authority over ILECs under the federal Communications Act of 1934, as amended (including Section 251 obligations), and also with respect to "obligations that relate to the provision of services to [CLECs], interexchange carriers, and wireless carriers, regardless of technology." The purpose and design of the WPP falls squarely within the scope of that preserved regulatory authority.

implement a simplified, uniform PAP applicable to Telco in Maine, New Hampshire and Vermont. FairPoint agrees to begin this process by proposing for consideration by the CLECs a revised PAP that could be implemented in all three states." That Settlement Agreement was approved by the Commission, with certain conditions, in Order No. 24,823 (February 25, 2008). In essence, FairPoint was adopting the PAP to reassure the parties and the Commission that it intended to honor commitments made by Verizon, despite its stance that, because it was not an RBOC, it was not subject to Section 271.[3]

Because the WPP is not limited to Section 271 checklist items, it would be improper to permit its withdrawal merely as a result of the FCC Forbearance Orders. The states' role in ensuring that Section 251 and other remaining market-opening provisions of the Telecom Act are met is not preempted by FCC forbearance from enforcing the Section 271 checklist items, as confirmed by the FCC itself in the 2015 Forbearance Order. Further, the First Circuit decision cited by Consolidated is inapposite because, as noted above, the WPP is not limited to enforcement of Section 271 checklist items.[4] Continued enforcement of the WPP would support, and not frustrate, the federal competitive regime.

We give weight to the fact that neither of the FCC Forbearance Orders calls for states to make changes in wholesale performance plans, while the 2015 Forbearance Order expressly acknowledges that it remains within the states' authority to decide whether to modify or eliminate such plans that are in effect. As both Consolidated and the CLEC Intervenors acknowledge, when the FCC intends for its orders to trigger existing change of law provisions, it

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[3] The FCC ultimately determined that FairPoint was an RBOC. *See* 23 FCC Rcd. 514, January 9, 2008, ¶ 33.

[4] In *Verizon New England*, the First Circuit decided that state commissions lack authority to require that Section 271 elements be priced at total long run incremental cost (TELRIC) rates or to require that RBOCs provide to competitors pursuant to Section 271 unbundled elements that have been delisted under Sections 251-252. Neither type of state action is at issue here, so Consolidated's reliance on that precedent is unavailing. *See Verizon New England*, 509 F. 3d at 12.

knows how to do so. We give no weight to Consolidated's argument that the FCC did not discuss PAPs in the 2019 Forbearance Order, as that order granted forbearance from only one Section 271 checklist item related to access to poles, ducts, conduits, and rights of way, and those are not items subject to WPP metrics.

Based on our analysis, we find that the FCC Forbearance Orders do constitute a change of law as contemplated by the WPP Change of Law Provision, because certain determinations in the FCC Forbearance Orders may substantively affect certain material provisions of the WPP. We do not, however, find that the FCC Forbearance Orders support withdrawal of the WPP in the entirety, and we therefore do not authorize Consolidated to withdraw or terminate the WPP based on the Change of Law Provision as a result of the FCC Forbearance Orders.

Because the WPP Change of Law Provision is applicable, Consolidated is required to negotiate with the CLEC Intervenors for a period of 90 days to attempt to reach agreement regarding any necessary revisions to the WPP. While Consolidated and the CLEC Intervenors engaged in negotiations regarding necessary or desired changes to the WPP for a period of time following the filing of the Original Petition, they have not engaged in negotiations based on the Amended Petition.

We therefore will direct Consolidated to negotiate with the CLEC Intervenors for a period of 90 days regarding any revisions to the WPP necessitated by the FCC Forbearance Orders, as required under the WPP Change of Law Provision.[5] If the parties successfully negotiate modifications, then they shall present the results of those negotiations to the Commission for approval. If the negotiations are unsuccessful, then a schedule will be

[5] A directive to negotiate is consistent with the Vermont PUC's October 2, 2019 Procedural Order.

established for further adjudicative process to determine whether to approve any modifications to the WPP.

Finally, we note another significant provision of the WPP, which pertains to the Commission's authority to audit the WPP, as set out in Part I, Commission Audits:

> The Wholesale Performance Plan shall be subject to an independent audit at the direction of the Commission or Board no more frequently than once every two years to determine FairPoint's compliance with the terms of the WPP, including the measurement, reporting, and bill crediting requirements. Any modifications or corrections resulting from such an audit will be applied across the three state territories, as applicable. The results of any individual Commission or Board directed audit will be shared with the CLECs and the other Commission(s) or Board. The costs of employing an independent auditor to conduct any such audit shall be borne by FairPoint.

The most recent audit of the PAP was conducted prior to approval of the WPP. The current WPP has never been audited. It has been traditional to audit the various performance assurance plans prior to the implementation of extensive changes, as the audits are helpful in disclosing problem areas in measurement and performance. Therefore, if further negotiations between the parties prove unsuccessful, we may consider establishing a schedule for an audit of the existing WPP, as well as a review of all WPP provisions affected by the FCC Forbearance Orders, to better inform the determination whether to approve modifications to the WPP.

Based upon the foregoing, it is hereby

ORDERED, that Consolidated is not authorized to withdraw or terminate its Wholesale Performance Plan based on the Change of Law provision of that Plan as a result of the FCC Forbearance Orders; and it is

FURTHER ORDERED, that the parties shall reopen negotiations with respect to modification of the WPP pursuant to Consolidated's Amended Petition and the WPP Change of

Law Provision, such negotiations to be completed within 90 days of the date of this order; and it is

FURTHER ORDERED, that, should the Parties successfully negotiate modifications, they shall present the results of their negotiations to the Commission for approval; and it is

FURTHER ORDERED, that, in the event that negotiations are unsuccessful, a schedule be established for further adjudicative process to determine whether to approve any modifications to the WPP.

By order of the Public Utilities Commission of New Hampshire this fourteenth day of October, 2019.

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