REDACTED FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Consolidated Communications of Pennsylvania Company, Inc. Consolidated Communications of Maine Company, Inc. Petition for Waiver of Section 61.41(c)(2) Of the Commission's Rules, and Such Other Relief as May Be Necessary, To Preserve Bifurcated Regulation Following the Merger of Marianna and Scenery Hill Telephone Company and Bentleyville Communications Corporation With and Into Consolidated Communications of Pennsylvania Company, Inc., and the Merger of Community Service Telephone Company With and Into Consolidated Communications of Maine Company, Inc.	))))))))))))))))))	WC Docket No. 19-____ Accepted / Filed SEP 11 2019 Federal Communications Commission Office of the Secretary

PETITION FOR WAIVER

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TABLE OF CONTENTS

SUMMARY

The Commission may waive its rules for good cause, to prevent undue hardship under an existing rule, or to better implement its policies on an individual basis. Such relief is merited here because the Commission's rules do not squarely address the acquisition and merger of rate-of-return study areas by and into a company that operates price cap study areas but wishes to continue to keep separate the rate-of-return and price cap operations. Thus, strict compliance with the rules for which waiver is sought herein does not appear to be feasible. Moreover, enforcement of the rules as written would cause undue hardship to the petitioners without furthering any substantive Commission policies.

In this case, operation of separate price cap and rate-of-return study areas within a single company, with all the safeguards that exist under FCC and state rules, will not disserve any Commission policy or threaten any harm to the public interest. Permitting these operations under a single corporate entity will permit a significant administrative expense reduction while posing no threat of harm to consumers, competition, or any FCC policy goal. Grant of the requested relief therefore can be expected to permit greater investment by petitioners in rural broadband infrastructure by freeing up scarce resources that otherwise would be consumed by complying with the rules as written. In the absence of the requested waiver, the company could lose as much as **[BEGIN CONFIDENTIAL INFORMATION]** **[END CONFIDENTIAL INFORMATION]** in revenue, which would impact the company's ability to invest in advanced infrastructure. Grant of the requested waiver will allow petitioners to avoid undue hardship and will encourage implementation of the Commission's policies in a manner than could not be done by strict enforcement of the rules. Expedited relief is respectfully requested.

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PETITION FOR WAIVER

Consolidated Communications of Pennsylvania Company, Inc. ("CCPC"), a wholly-owned subsidiary of Consolidated Communications, Inc. ("CCI"), and Consolidated Communications of Maine Company, Inc. ("CCMC"), also wholly-owned by CCI, hereby requests that the Commission grant relief from certain of its rules so that bifurcated regulation of CCPC, a Pennsylvania local exchange carrier ("LEC"), and CCMC, a Maine LEC, may continue notwithstanding an internal reorganization of the telecommunications companies owned by CCI, resulting in the merger and consolidation of rate-of-return telephone companies Marianna and Scenery Hill Telephone Company, a cost-based company, and Bentleyville Communications Corporation, an average schedule company, with and into CCPC, a price cap LEC, and the merger and consolidation of Community Service Telephone Company, an average schedule company, with and into CCMC, a price cap LEC. The public interest will be served by grant of this petition. Expedited relief is respectfully requested in light of the one-year transition prescribed in Section 61.41(c)(2) of the Commission's rules.

<u>BACKGROUND</u>

On July 3, 2017, CCI's LECs became affiliated with the LECs owned by FairPoint Communications, Inc. ("FairPoint") as part of a merger in which FairPoint became wholly-owned by CCI, and ultimately controlled by CCI's parent, Consolidated Communications Holdings, Inc. At the time, both CCI and FairPoint operated under bifurcated FCC regulation – that is, each company operated some LECs whose interstate access charges were governed by price caps but others whose interstate access charges were governed by rate-of-return regulation (cost-based as well as average schedule companies) pursuant to waivers previously granted by the Commission of Section 61.41(c)(2), the "all-or-nothing rule."[1]

In 2011, when the Commission adopted sweeping reforms to its universal service regime and interstate and intrastate inter-carrier compensation, it recognized FairPoint's then-unique status as a company operating under both rate-of-return and price cap regulation, and permitted continued operation under bifurcated pricing regulation during the inter-carrier compensation transition, effectively extending FairPoint's all-or-nothing waiver.[2]

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[1] 47 C.F.R. Section 61.41(c)(2). *See Consolidated Communications Holdings, Inc. Petition for Waiver of Section 61.41(c) of the Commission's Rules*, Order, WC Docket No. 15-74, 30 FCC Rcd 10844 (Wireline Comp. Bur. 2014); *China Telephone Company, FairPoint Vermont, Inc., Maine Telephone Company, Northland Telephone Company of Maine, Inc., Sidney Telephone Company, and Standish Telephone Company Petition for Conversion to Price Cap Regulation and for Limited Waiver Relief*, WC Docket No. 10-47, 25 FCC Rcd 4824 (Wireline Comp. Bur. 2010).

[2] Specifically, in prescribing the transition to bill-and-keep for switched access rates and reciprocal compensation, the Commission found it appropriate to give rate-of-return carriers a longer transition period, and the Commission made no change to FairPoint's operation under

Under the FCC's rules, all three rate-of-return companies that are the subject of this petition, Marianna and Scenery Hill Telephone Company, Bentleyville Communications Corporation, and Community Service Telephone Company, have been reducing ICC not on the schedule adopted for price cap companies, under which charges went to zero (bill-and-keep) as of July 1, 2017 (terminating switched end-office charges and reciprocal compensation) and July 1, 2018 (terminating switched end-office and transport charges within the tandem serving area), but on the schedule adopted for rate-of-return companies, under which terminating switched end-office charges reciprocal compensation go to zero (bill-and-keep) as of July 1, 2020.[3] The Commission provided the extended transition for rate-of-return carriers to "moderate potential adverse effects on consumers and carriers of moving too quickly" through the transition to bill-and-keep.[4] Similarly, the Commission declined to impose on rate-of-return carriers a cap on originating intrastate access charges prior to the ICC transition for terminating access and reciprocal compensation, presumably persuaded by arguments that such reductions would overburden rate-of-return companies.[5]

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bifurcated regulation for purpose of its access charge and reciprocal compensation rules. *See Connect America Fund, et al.,* WC Docket Nos. 10-90 *et al.,* Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17934 (2011), *aff'd sub nom., In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (the "*ICC-USF Transformation Order*") (adopting different transition paths for inter-carrier compensation reform for price cap and rate-of-return carriers). In contrast, the Commission affirmatively recognized FairPoint's unique status in that order, and decided to treat the entire company as a price cap carrier for purposes of the new high-cost universal service support regime. *Id.* at 17713 ("we will, for the purposes of CAF Phase I, treat as price cap carriers the rate-of-return operating companies that are affiliated with holding companies for which the majority of access lines are regulated under price caps").

3 47 C.F.R. §51.909.

4 *ICC-USF Transformation Order,* 26 FCC Rcd at 17934.

5 *Id.* at 17936-37.

In similar fashion, the Commission adopted slightly different support mechanisms to ease the ICC transition for price cap and rate-of-return LECs, including different baselines for recovery, and an extended phase-down period for rate-of-return carriers before CAF-ICC support is eliminated.[6] In doing so, the Commission noted the downward trend in access revenues hitting rate-of-return carriers particularly hard, and cited the importance of providing certainty and predictability to rate-of-return service providers because they respond to market changes less ably than price cap carriers.[7] The Commission cited its interest in stability for carriers and consumers, and its equally important universal service goals, with emphasis on investment in broadband infrastructure.[8]

The FCC's Wireline Competition Bureau consented to the transfer of control of FairPoint to CCI in 2017 and found good cause to waive the all-or-nothing rule, Section 61.41(c)(2), in order for the companies to continue to maintain bifurcated regulation of their LEC operations following their merger, preserving the *status quo ante*.[9] Absent these waivers, each time a rate-of-return LEC (other than an average schedule company) becomes affiliated with a price cap LEC, the former would have to convert to price caps within one year.[10]

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[6] *Id.* at 17957-58, 17980-81 (adopting a five percent annual decrease in the recovery Baseline for rate-of-return carriers).

[7] *Id.* at 17977.

[8] *Id.* at 17962-63.

[9] *Joint Application of Consolidated Communications Holdings, Inc., and FairPoint Communications, Inc., to Transfer Indirect Control of Authorization Holders to Consolidated Communications Holdings, Inc.,* Memorandum Opinion and Order, 32 FCC Rcd 3820 (Wireline Competition Bur. 2017) (the "Merger Order").

[10] 47 C.F.R. §61.41(c)(2)-(3).

<u>Events Precipitating This Petition for Waiver of the Commission's Rules</u>

While the merger of FairPoint into CCI in 2017 did not result in any changes to the FairPoint LECs, in 2018 CCI began an internal reorganization, which continues in 2019, resulting in the consolidation of many of its subsidiaries (but not involving any change of control of any of the affected companies). The purpose of this internal reorganization and consolidation is to reduce the administrative and operating expenses of CCI, without changing the calculation of federal support or inter-carrier compensation rates.

Of relevance to this petition, two Pennsylvania-based rate-of-return LECs, Marianna and Scenery Hill Telephone Company, a, cost-based company, and Bentleyville Communications Corporation, an average schedule company, have been merged with and consolidated into CCPC, a price cap LEC, effective May 15, 2019. While all three LECs served study areas in Pennsylvania, there was and is no overlap in their respective study areas, nor is any telecommunications plant shared among them. Marianna and Scenery Hill Telephone Company and Bentleyville Communications Corporation no longer exist as companies, but their respective study area boundaries have not changed; the study areas now are served by CCPC, a LEC that also serves another study area (governed by price cap regulation). In similar fashion, Community Service Telephone Company, an average-schedule rate-of-return company based in Maine, was (along with five Maine price cap LECs under CCI's holdings) merged with and consolidated into CCMC (formerly Maine Telephone Company), a price cap LEC, effective March 6, 2019. There is no overlap in the respective study areas served by the Maine carriers that merged, nor is any telecommunications plant shared among them.

CCI believed that its 2019 consolidation of subsidiaries in Pennsylvania and Maine was permitted under the all-or-nothing rule waivers it had been granted in 2010, 2014 and 2017, described above. However, in informal conversations with Commission staff, it was suggested to CCI that a new waiver of Section 61.41(c)(2) of the Commission's rules may be necessary for CCPC and CCMC, both price cap companies, to operate the acquired rate-of-return study areas without converting them to price cap regulation within one year.[11] Moreover, upon examination of that and other FCC rules, CCI became concerned that strict compliance with the rules as written does not appear possible in the unique circumstances in which CCPC and CCMC find themselves. Accordingly, this petition was promptly prepared.

THE COMMISSION MAY WAIVE ITS RULES FOR GOOD CAUSE SHOWN

It is well established that the Commission may waive any of its rules for good cause shown.[12] The Commission may grant a waiver where particular facts make strict compliance with a rule inconsistent with the public interest.[13] In considering the merits of a waiver, the Commission takes into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[14] Waiver of a rule is appropriate if special circumstances warrant a deviation from the rule, and such deviation will serve the public interest.[15]

In this instance, granting the requested waiver is consistent with the *Merger Order* and other FCC precedent, and will better serve the public interest than strict enforcement of the all-or-nothing rule. The Commission has established complex rules governing inter-carrier

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[11] 47 C.F.R. §61.41(c)(2)-(3).

[12] 47 C.F.R. §1.3. *E.g., WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[13] *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[14] *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

[15] *Northeast Cellular*, 897 F.2d at 1166.

compensation and end-user pricing, with multi-year transitions requiring a number of pricing changes, and CCPC is nearing the end of that transition. Rate regulation today almost never requires reference to historic costs. Requiring CCPC to convert its rate-of-return study area to price caps within the next year would be disruptive and costly, with no clear public interest benefit. Conversely, the grant of the relief requested herein, which will preserve the *status quo ante* of the study areas of the companies that were merged with and into CCPC, will serve the public interest by avoiding costs and unnecessary disruption and allowing a smooth completion of the transitions set in motion in the *2011 ICC/USF Transformation Order*.[16]

SCOPE OF THE REQUESTED WAIVER

The petitioners CCMC and CCPC hereby request that the FCC waive Sections 61.41(c)(2) and (c)(3) to the extent necessary to permit the companies to continue operating under bifurcated interstate access charge regulation, that is, with price cap as well as cost-based and average schedule rate-of-return study areas, notwithstanding the merger of rate-of-return companies into the petitioners.

In addition, and for the same reasons that the Commission saw fit to ease the transition of rate-of-return carriers to bill-and-keep, at a slightly slower pace than that applicable to price cap carriers, so the Commission should waive its other pricing-related rules as necessary to apply to rate-of-return *study areas* operated by companies that also operate price cap study areas. Specifically, to the extent the Commission's Part 51, Subpart J ICC transition rules, its Part 61 tariffing rules, or its Part access charge 69 rules refer to a "price cap carrier" (Part 51), a "local exchange carrier" or "issuing carrier" (Part 61), a "price cap carrier" or "rate of return carrier"

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[16] *ICC-USF Transformation Order*, *supra*, note 2.

(Part 69), a "company" (Part 61), or simply a "carrier" (Parts 61 and 69), the petitioners hereby request waiver of those rules as necessary for those terms to be logically interpreted as referring to the *individual study areas* in the case of CCPC and CCMC, which will remain either price cap study areas or rate-of-return study areas subject to incentive-based regulation.

Further, the petitioners seek a waiver of the Commission's Part 51, Subpart J rules to permit CCPC and CCMC to the extent necessary for them to continue on the current transition path for CAF-ICC support for their rate-of-return study areas (reading "carrier" in these rules as "study area") and thereby avoid an expedited phase-down of CAF-ICC support that has not been imposed on other rate-of-return carriers.

Finally, the petitioners seek a waiver of the Commission's Part 54 rules to the extent necessary for them to receive high-cost support, low-income support, rural health care support and E-rate support without interruption or reduction due merely to the merger described herein. For example, Connect America Fund ("CAF") support is provided to price cap *carriers* (and their affiliated rate-of-return carriers) that have elected to make statewide service commitments,[17] lifeline support is made available to *eligible telecommunications carriers*,[18] and the rural rate under the rural healthcare telecommunications program is framed in terms of rates and services offered by the *telecommunications carrier*.[19]

[17] 47 C.F.R. §§54.310(b)

[18] 47 C.F.R. §54.403.

[19] 47 C.F.R. §54.607.

DISCUSSION

I. Enforcement of the Cited Rules Is Not Necessary To Serve FCC Policy

As acknowledged in the *Merger Order*, waiving the all-or-nothing rule has been found appropriate in many cases where efficiencies created by the purchase or sale of exchanges outweighed the threat of cost-shifting or gaming the system.[20] As the Bureau recognized in the *Merger Order*, LECs no longer are in a position to engage in improper cost-shifting or "gaming the system" because they may not convert to price caps, or revert from price caps to rate-of-return regulation, without prior FCC approval. Moreover, the consolidation of rate-of-return and price cap companies can have no effect on any of the companies' interstate access rates or universal service support. Even if cost-shifting were possible, neither their regulated rates nor their federal support amounts are based on their booked costs in the present regulatory environment. Under the Commission's rules, switched access charges, SLCs and ARCs for each study area continue to be governed by the Commission's ICC transition and pricing rules in the same manner as previously for each price cap and rate-of-return study area, without regard to actual costs.[21] Universal service support is governed by model-derived support allocations tied to broadband deployment requirements, all of which are unrelated to carriers' booked costs.[22] In

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[20] *Merger Order*, 32 FCC Rcd at 3831, *citing Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2706, n. 207 (1991) (subsequent history omitted).

[21] *See e.g., ICC-USF Transformation Order,* 26 FCC Rcd at 17982-83 (access recovery not to be adjusted to reflect rate-of-return carriers' switched access costs); *id.* at 17990-91 (full ARC revenues to be imputed to each carrier when CAF support is calculated; SLCs not modified).

[22] *E.g., ICC-USF Transformation Order,* 26 FCC Rcd at 17713 & n.203 (for companies under bifurcated regulation, where a majority of the access lines are under price cap regulation, high-cost universal service support was frozen and the companies treated as price cap for CAF purposes, without having to convert to price caps for inter-carrier compensation purposes, so "such companies in the future will receive support based on a forward looking cost model rather than

the present environment, enforcement of the all-of-nothing rule is not necessary to advance FCC policy or protect the public.

In the *Merger Order*, the Commission found that enforcing the all-or-nothing rule was deemed unnecessary to prevent the cost-shifting or "gaming the system" (switching back and forth between price cap and rate-of-return regulation) that the rule was designed to guard against, for several reasons. First, while the Bureau recognized that all the LECs remained under FCC and state regulation, their regulated interstate access rates are constrained by the Commission's rules phasing down interstate access charges, and cost-shifting would serve no purpose in rate-making. Second, cost-shifting would be of no avail in obtaining universal service support in high-cost areas because their high-cost support today dictated by the Connect America Fund cost model, not the companies' booked costs.[23] Forcing CCI's rate-of-return LECs (whether newly acquired or pre-existing) to adopt price cap regulation was ruled unnecessary for the protection of the public interest.[24]

Under the Commission's 2011 changes to its high-cost universal service support, rate-of-return companies affiliated with price cap companies, such as Marianna and Scenery Hill Telephone Company, are treated as price cap companies for purposes of the Connect America Fund, initially having their support frozen (Phase I), and then having it determined by forward-looking cost model, irrespective of historic costs and demand (Phase II, which is ongoing). "As a result, rate-of-return carriers affiliated with price-cap companies now receive the same type of

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their embedded costs"); *Connect America Fund*, Report and Order, 29 FCC Rcd 15644 (2014) (prescribing build-out and performance requirements for price cap carriers electing CAF Phase II support on a statewide basis).

[23] *Id.* at 3832.

[24] *Merger Order*, 32 FCC Rcd at 3830-32.

fixed universal service support that their price cap affiliates receive."[25] Such is the case with the support formerly received by Marianna and Scenery Hill Telephone Company and Bentleyville Communications Corporation, and now received by CCPC.

The CCI LECs no longer are required to maintain separate books of account. In 2017 the FCC relieved price cap LECs of the obligation to keep separate federal regulatory books of account pursuant to Part 32 of the Commission's rules so long as they use Generally Accepted Accounting Principles ("GAAP") and comply with certain targeted accounting rules.[26] In so doing, the Commission recognized that federal rate regulation for almost all interstate services had become entirely divorced from carrier costs, rendering the Uniform System of Accounts requirements unnecessary.[27]

In 2018, rate-of-return carriers that elect incentive regulation for Business Data Services ("BDS") pursuant to Section 61.50 of the Commission's rules were relieved by the Commission of the obligation to perform cost studies,[28] granted relief from the cost assignment rules, allowed to use GAAP instead of Part 32 accounting rules,[29] relieved from *ex ante* price regulation of

[25] *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers, et al.,* WC Docket Nos. 17-144 et al., Report and Order, Second Further NPRM, and Further NPRM, 33 FCC Rcd 10403, 10406 (2018) (the "RoR BDS Order").

[26] *Comprehensive Review of the Part 32 Uniform System of Accounts*, *et al.*, WC Docket Nos. 14-130 *et al.*, Report & Order, 32 FCC Rcd 1723, 1740 (2017).

[27] *Id.* at 1737 (price cap regulation severed the link between telecom costs and prices). *See also Petition of U S Telecom for Forbearance*, 28 FCC Rcd 7627, 7654 (2013) (need for carrier cost information had significantly diminished under price caps and revised universal service high-cost support rules).

[28] *RoR BDS Order*, 33 FCC Rcd at 10447.

[29] *Id.* at 10451-52.

packet-based and higher-capacity TDM-based end-user BDS offerings,[30] and provided a path to elect incentive regulation for certain regulated Business Data Services.[31] In so doing, the Commission determined the relevant geographic market in which to evaluate whether competition is sufficient to justify removal of pricing regulation is the *study area*.[32] Having elected incentive regulation, CCPC and CCMC are in a position to demonstrate that their regulated services are competitive, and should be deregulated, *on a study area basis*. Section 61.50 of the Commission's rules, in fact, anticipates that a rate-of-return carrier electing to offer BDS under incentive regulation may be operating in multiple study areas.[33]

CCPC and CCMC elected BDS incentive regulation for their non-price cap study areas effective July 1, 2019.[34] CCPC and CCMC have moved the affected services (low-capacity TDM-based transport and end-user channel terminations, and other special access services that remain subject to *ex ante* price regulation)[35] into incentive regulation and filed new interstate BDS rates effective as of July 1, 2019.[36] As the Commission noted, electing incentive regulation effective as of July 1, 2019 leaves carriers with no opportunity to "game the system" prior to converting from rate-of-return to incentive regulation.[37]

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[30] *Id.* at 10440.

[31] *Id.* at 10449.

[32] *Id.* at 10433-35.

[33] 47 C.F.R. §61.50(e) ("A rate-of-return carrier offering business data services pursuant to this section may offer those business data services at different rates *in different study areas*") (emphasis added).

[34] Letter to Kris Monteith, Chief, FCC Wireline Competition Bureau, from Barbara Galardo, Consolidated Communications, Inc. (filed April 23, 2019).

[35] *See RoR BDS Order*, 33 FCC Rcd at 10416 & n. 85.

[36] *RoR BDS Order*, 33 FCC Rcd at 10419.

[37] *RoR BDS Order*, 33 FCC Rcd at 10412-13.

As of July 1, 2019, CCPC and CCMC have no justification for maintaining separate books of account for each study area within their control. The LECs no longer use regulated costs either to establish interstate rates or to calculate federal support. Continuing to keep separate regulatory books of account would negate the accounting, tax and other administrative cost-saving benefits of consolidating operating entities within a state. Nevertheless, each company will continue to separately track its revenues and demand by study area; this is possible because CCI billing systems identify demand and revenues by individual exchange, and each exchange belongs to only one study area. Thus, both CCPC and CCMC will be able to report revenues separately for each study area, to the extent regulatory demands continue to require it. For example, to the extent that price cap regulation and reporting or the telecommunications reporting worksheet require study area-specific revenues, CCPC and CCMC each will continue to have the capability to furnish the required data, notwithstanding this consolidation.

To the extent that CCPC or CCMC should seek to make a low-end adjustment to its capped interstate BDS prices,[38] the petitioners recognize that they would have the burden of demonstrating the provenance of the costs and revenues associated with each study area,[39] and therefore they must keep whatever accounts may be necessary to prove costs and earnings to the satisfaction of the Commission. In the event that either CCPC or CCMC seeks a low-end

[38] *See RoR BDS Order*, 33 FCC Rcd at 10430-31. *Cf.* 47 C.F.R. §61.50(f).

[39] *See RoR BDS Order*, 33 FCC Rcd at 10431 ("A carrier asserting a claim for a low-end adjustment bears the burden of showing that its return is below the prescribed benchmark and that the revised rate(s) are consistent with the benchmark").

adjustment, assuming it qualifies,[40] it is reasonable to expect that it would make the case to the Commission at that time as to whether the Commission should review the company's earnings across all study areas, or on a study area-specific basis. This is not a question the Commission need address in the context of the waiver sought here.

For the same reasons, enforcement of the Part 51, 61 and 69 rules exactly as written is not necessary to serve Commission policy, and in fact Commission policy will be better served in the case of CCPC and CCMC by reading the term "carrier" (and variants including "local exchange carrier" and "rate-of-return carrier") to refer to the individual study area. As explained above, the Commission deliberately adopted a different ICC transition and CAF-ICC support rules for rate-of-return entities based on its recognition of the difficulties those operators face and wanting to avoid an overly harsh transition for them. It will better serve the Commission's policies, including protecting consumers and promoting continued investment, especially in small and rural study areas, if the Commission grants the limited waivers of the "carrier" terminology in its Part 51, 61 and 69 rules as requested herein, to permit the continuation of the ICC transition to bill-and-keep and the CAF-ICC Baseline reductions in the rate-of-return study areas acquired by CCPC and CCMC.

Similarly, under Part 54 of the Commission's rules, the universal service support for which CCPC and CCMC qualify post-merger should be no different from the support for which they and their rate-of-return sister companies qualified pre-merger. The amounts that were associated with each individual carrier may be calculated in the same manner; the study areas

[40] For example, carriers that have voluntarily adopted GAAP or exercised downward pricing flexibility are ineligible for a low-end adjustment. *RoR BDS Order*, 33 FCC Rcd at 10431.

will remain intact; and the service obligations, whether defined by study area or by census block, will remain unchanged.

In sum, strict enforcement of the rules cited herein is not necessary to serve the public interest because other Commission rules rigidly control these carriers' rates and support. There simply is no possibility that cost-shifting could in any way affect either regulated services or universal service programs. The public interest will be better served by waiving the rules than by strict enforcement.

II. Strict Compliance With The Cited Rules Is Not Possible

The all-or-nothing rule provides that when a telephone company that is subject to price cap regulation (such as CCPC or CCMC) becomes affiliated with a telephone company that is not subject to price cap regulation, "the latter shall become subject to price cap regulation no later than one year following the effective date…and shall file price cap tariffs…."[41] While Marianna and Scenery Hill Telephone Company, Bentleyville Communications Corporation, and Community Service Telephone Company have ceased to exist as companies, making strict compliance with the rule impossible, it is at least arguable that the intent of the rule would be for their study areas to be converted to price caps. At a minimum, the effect of the rule in this case is ambiguous. A waiver therefore is requested to remove doubt.

In addition, the "all-or-nothing" rule does not apply to average schedule companies.[42] The rule permits an average schedule "company" to retain its average schedule status notwithstanding affiliation with a price cap company. It is not clear whether a company that

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[41] 47 C.F.R. §61.41(c)(2).

[42] *Id.* §61.41(c)(3).

ceases to exist (Bentleyville Communications Corporation or Community Service Telephone Company) may pass its average schedule status to the price cap affiliate acquiring its study area, though this would seem consistent with the rule's intent.

The Commission therefore should grant this petition and waive Section 61.41(c)(2) to remove doubt. To the extent that a waiver of Section 61.41(c)(3) also is necessitated by the internal reorganization described herein, CCPC and CCMC hereby request such a waiver to permit them to continue operating under the average schedule rules the study areas formerly belonging to Bentleyville Communications Corporation and Community Service Telephone Company, respectively.

Both Section 61.41(c)(2) and Section 61.41(c)(3) appear to be incapable of enforcement as written because Marianna and Scenery Hill Telephone Company, Bentleyville Communications Corporation, and Community Service Telephone Company have ceased to exist as "companies." In contrast, permitting continued operation on a bifurcated basis will serve the public interest for the same reasons the Commission previously has identified in support of prior all-or-nothing waivers, while avoiding unnecessary hardship as detailed below.

Moreover, it is unclear how certain sections of the Part 51, 61 and 69 rules discussed above would apply to CCPC and CCMC as written, but substituting "study area" for the term "carrier" (or "local exchange carrier" or "rate-of-return carrier") will permit seamless enforcement of the rules without any disruption to Commission policy or undue hardship to the petitioners.

III. <u>Waiver Is Necessary To Prevent Undue Hardship</u>

As stated above, it was not apparent to CCI at the time of the subject consolidation that its existing all-or-nothing waivers were insufficient. Upon learning that the waivers requested herein would be necessary, at a minimum, to remove uncertainty about the application of the rules as written to the unique circumstances presented in this case, CCI immediately developed this filing for the Commission's review. The FCC rules provide for a year after companies are combined before price cap conversion is required, but there seems to be neither guidance in the rules nor precedent in Commission orders for how to convert these rate-of-return study areas to price cap regulation in the current regulatory environment. Respectfully, therefore, CCI requests that the Commission waive its rules to the extent requested herein to avoid unnecessary distruption. This waiver request is submitted within the one-year timeframe allowed for conversion under the Commission's rules.

As described above, enforcement of the cited rules would serve no clear Commission goal in the present case, and indeed some of the applicable rules do not appear capable of enforcement precisely as written. In contrast, waiver of the rules will prevent undue hardship, justifying grant of the requested waivers.

To begin with, waiving the all-or-nothing rule will avoid imposing an unduly burdensome requirement that the company file new "price cap" tariffs by May 15, 2020. Complying with 61.41(c)(2)'s price cap tariff requirement, presumably requiring the reduction (zeroing out) of terminating access charges, and the elimination of CAF-ICC support, on an expedited schedule that has not been applied to other rate-of-return carriers, would result in a significant loss of revenues to the company, and directly detract from the resources that otherwise would be available for investment in broadband communications infrastructure.

Specifically, CCI estimates that, in the absence of the requested waiver, the required conversion would result in losses of approximately **[BEGIN CONFIDENTIAL INFORMATION]** **[END CONFIDENTIAL INFORMATION]** (Community

Service Telephone Company), **[BEGIN CONFIDENTIAL INFORMATION] [END CONFIDENTIAL INFORMATION]** (Marianna and Scenery Hill Telephone Company), and **[BEGIN CONFIDENTIAL INFORMATION] [END CONFIDENTIAL INFORMATION]** (Bentleyville Communications Corporation), or **[BEGIN CONFIDENTIAL INFORMATION] [END CONFIDENTIAL INFORMATION]** in total revenue. These are not amounts that a company of CCI's size readily could absorb.

Waiver of the all-or-nothing rule is appropriate where, as here, denial of a waiver will cause hardship without serving any discernible Commission policy goal. As explained in the Merger Order, waiving the all-or-nothing rule was found to be appropriate to prevent CCI from having to accelerate planned switched access rate reductions and the phase-out of CAF-ICC support, which would have worked a financial hardship on the affected CCI LECs as well as increased the company's administrative costs.[43]

In the case of the internal reorganization and consolidation of the Pennsylvania-based LECs affiliated with CCI, requiring conversion of the study area formerly served by Marianna and Scenery Hill Telephone Company to price caps, would be disruptive and costly to CCPC, requiring it to file a new "price cap" tariff within a year. As noted above, the company's switched interstate access rates are effectively capped today. Under incentive regulation, as of July 1, CCPC elected to provide its Business Data Services ("BDS") (to the extent they remain subject to FCC regulation) under a form of regulation similar to price caps. The goal of Section 61.41(c)(2) effectively will have been achieved without requiring strict compliance with the rule.

[43] *Merger Order*, 32 FCC Rcd at 3832.

In contrast, requiring CCPC to comply with the rule would only create disruption and add to CCPC's costs, with no apparent public interest benefit.

Under the current rules, the Commission regulates BDS for price cap carriers under rules that take into account whether the areas served are competitive or non-competitive based on a data collection that excluded non-price cap study areas.[44] It is not clear how BDS offered by companies that might be required to convert to price cap regulation under the all-or-nothing rule would be regulated under the current price cap rules. In contrast, affected BDS (low-capacity TDM-based transport and end-user channel terminations, and other special access services that remain subject to *ex ante* price regulation) offered by Marianna and Scenery Hill Telephone Company, Bentleyville Communications Corporation, and Community Service Telephone Company have been moved into incentive regulation as of July 1, 2019, obviating the need for the Commission to consider how three rate-of-return study areas should be regulated under a price cap mechanism that contains no competitive market data for these study areas.

At the very least, the Commission should remove ambiguity surrounding the effect of Section 61.41 on CCPC's and CCMC's operations. As noted above, it is unclear exactly how Section 61.41(c)(2) and (3) of the Commission's rules apply in a case where a rate-of-return cost-based or average schedule company is acquired by a price cap carrier and the former ceases

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[44] *See Business Data Services in an Internet Protocol Environment, et al.,* WC Docket Nos. 16-143, *et al.,* Report & Order, 32 FCC Rcd 3459, 3499 *et seq.* (2017) (setting out test for competitive price cap BDS markets in reliance on the 2015 Special Access Data Collection); *Business Data Services in an Internet Protocol Environment, et al.,* WC Docket Nos. 16-143, *et al.,* Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 4723, 4737 (2016) (describing in detail the 2015 Special Access Data Collection); *Special Access for Price Cap Local Exchange Carriers, et al.,* WC Docket Nos. 05-25 *et al.,* Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16325, 16328 (2012) (requiring only price cap carriers to respond to what would become the 2015 Special Access Data Collection).

to exist. Section 61.41(c)(3) permits an average schedule "company" to retain "its" average schedule status, upon being acquired by a price cap company, but is silent on the question of merging into the latter and ceasing to exist as a separate "company." At a minimum, therefore, the Commission should interpret these rules for the circumstances where, rather two companies than becoming affiliated, but continuing to exist, they merge into a single company, while separate study areas are maintained.

Both Consolidated and FairPoint have obtained waivers of the Commission's all-or-nothing rule to continue operating certain LEC affiliates as rate-of-return carriers notwithstanding their affiliation with price cap companies. The Commission has stated that granting such waivers poses "minimal threat" of improper cost-shifting or "gaming the system," the perceived risks that the rule was designed to prevent. The Commission found this to be so for several reasons, including (a) that the merged entity's subsidiaries will continue to be subject to FCC and state regulatory jurisdiction, (b) that study areas would continue to be separately operated, and (c) that separate books of account would be maintained by each carrier.[45] All but the last continue to be valid today. While CCPC and CCMC do not intend to maintain separate books of account for their price cap, average schedule, and cost-based rate-of-return study areas, as explained above, the FCC has deemed this requirement outdated in light of changes to its pricing and support regimes. The Commission therefore should find that granting the requested waiver in this case will better serve the public interest than strict enforcement of the rule (if such even is possible).

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45 *Merger Order*, 32 FCC Rcd at 3832.

Further, to the extent necessary, the Commission should waive its pricing-related rules set forth in Parts 51 (Subpart J), 61 and 69 to permit the term "carrier" or "company" to refer to the *study area* (as applicable) in the case of CCPC and CCMC. Grant of this waiver, as with the all-or-nothing waiver, will avoid the uncertainty and potential administrative expense associated with trying to fit these study areas into rules written for "carriers" but just as easily applied to individual study areas. The study areas that formerly were operated by Marianna and Scenery Hill Telephone Company, Bentleyville Communications Corporation, and Community Service Telephone Company will not become price cap carriers but will be subject to incentive-based regulation, if the waivers requested herein are granted. They are very small study areas serving rural areas. Continuing the extended transition under the inter-carrier compensation rules for these three rate-of-return study areas will "moderate potential adverse effects on consumers and carriers of moving too quickly" through the transition to bill-and-keep and the phase-down of CAF-ICC support.[46] Avoiding an unduly harsh result in this manner will serve the public interest.

For similar reasons, the petitioners respectfully request waiver of the FCC's Part 54 rules to the extent necessary to ensure the continued distribution of much-needed high-cost support for the CCPC and CCMC study areas. Such a waiver, permitting the term "carrier" or "telecommunications carrier" under the Part 54 rules to refer to the *study area* (as applicable) in the case of CCPC and CCMC, will serve the public interest by eliminating uncertainty, avoiding unnecessary administrative expense, and preventing disruption in support. The acquired rate-of-return study areas in this case are small, rural areas characterized by high costs and a high

[46] *CAF-ICC Transition Order,* 26 FCC Rcd at 17934.

percentage of low-income populations. Grant of the requested waiver will avoid rate shock to customers in these areas and enable the CCI companies to fulfill the voice and broadband service obligations to which they have committed.

In sum, waiver of Sections 61.41(c)(2) and (c)(3) and the Part 51, 54, 61 and 69 rules rules cited herein, to the extent necessary to permit CCPC and CCMC to operate under bifurcated regulation consistent with past practice, that is, with price cap as well as cost-based and average schedule rate-of-return study areas, will serve the public interest, remove doubt, and prevent undue hardship.

CONCLUSION

Commission policy favors regulatory restraint where enforcement of a rule is unnecessary to protect consumers or otherwise ensure just and reasonable practices.[47] Commission precedent is replete with waivers of the all-or-nothing rule where enforcement of the rule would work an undue hardship, and the public interest would be better served by waiver.

For the reasons stated herein, waiving the all-or-nothing rule as requested herein will serve the public interest by permitting CCPC and CCMC to maintain the *status quo* under bifurcated regulation, and avoid unnecessary financial burdens and administrative expenses, with no threat of harm to the public interest. Waiver of the Parts 51 (Subpart J), 54, 61 and 69 rules to the extent described herein will facilitate those same ends, and will serve the public interest by avoiding rate shock to end-users.

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[47] *E.g., Business Data Services in an Internet Protocol Environment, et al.,* WC Docket Nos. 16-143, *et al.,* Report and Order, 32 FCC Rcd 3459, 3499 (2017).

REDACTED FOR PUBLIC INSPECTION

Expedited relief is hereby requested in light of the one-year transition prescribed in Section 61.41(c)(2) of the Commission's rules.

Respectfully submitted,

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