

140 West Street  
27<sup>th</sup> Floor  
New York, NY 10007-2109  
(212) 321-8126  
joseph.a.post@verizon.com

**Joseph A. Post**  
Deputy General Counsel — New York



January 4, 2013

Honorable Jeffrey Cohen  
Acting Secretary  
New York State Public Service Commission  
Three Empire State Plaza  
Albany, New York 12223

**Re: Case 09-M-0527**

Dear Acting Secretary Cohen:

Pursuant to the December 7, 2012 “Ruling on Phase III Procedure,” enclosed please find the Comments of Verizon New York Inc. and Cellco Partnership d/b/a Verizon Wireless in Support of the Phase III Joint Proposal.

Respectfully submitted,

A handwritten signature in black ink that reads "Joseph A. Post".

Joseph A. Post

cc: Honorable Howard A. Jack (E-Mail)  
Honorable Eleanor Stein (E-Mail)  
Active Party List (E-Mail)  
Mr. Alan Flacks (U.S. Mail)

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**Proceeding to Examine Issues Related to  
a Universal Service Fund**

**Case 09-M-0527**

**COMMENTS OF VERIZON NEW YORK INC. AND  
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS  
ON THE PHASE III JOINT PROPOSAL**

**JOSEPH A. POST  
140 West Street — 27<sup>th</sup> Floor  
New York, NY 10007-2109  
(212) 321-8126**

**Counsel for Verizon New York Inc. and Cellco  
Partnership d/b/a Verizon Wireless**

**January 4, 2013**

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Through its issuance of a Further Notice of Proposed Rulemaking (“*FNPRM*”), the FCC has begun the process of developing a framework for addressing a variety of intercarrier compensation issues, generally moving toward a bill and keep regime. As part of that process, it has taken initial steps to reform originating switched access charges and anticipates completing originating access reforms in the near term.<sup>1</sup> The FCC’s framework will be nationwide in scope and will reflect that agency’s broad jurisdictional reach. By its very nature, it will have a profound effect on the telecommunications environment in New York and elsewhere. The Phase III Joint Proposal (“*JP*”) reflects the view of a large and diverse group of parties, including Department of Public Service Staff, that it would be a waste of the Commission’s time and resources to seek to develop its own approach to these issues, an approach that would in any event have to be re-evaluated in light of the FCC’s action on the *FNPRM*. Moreover, the Commission should not take the risk of adopting measures that may conflict with provisions of the nationwide plan, either directly or by disrupting what is likely to be a finely-tuned balance of

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<sup>1</sup> See *Connect America Fund*, WC Docket No. 10-90, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (rel. November 18, 2011) (“*Transformation Order*”), ¶¶ 1298-1305. The FCC has already resolved certain originating access issues in the *Transformation Order* itself, for example by capping such charges (*id.* ¶ 818), by reducing certain originating transport rates (¶ 801), and by issuing rules on the application of access charges to originating and terminating VoIP-PSTN traffic (¶¶ 933-975).

a myriad of conflicting interests, aimed at achieving some level of overall fairness for all market participants.

The JP also addresses issues related to the Targeted Accessibility Fund (“TAF”). *All* parties — even those few parties that oppose the JP’s treatment of access charges — agree that the TAF is working satisfactorily and that there is no need to consider changes to the TAF framework at this time. Accordingly, all parties support the JP’s proposal to defer any consideration of changes to the TAF until certain specified future milestone dates.

By ensuring that the Commission will be able to coordinate any further action it may take on access charges with decisions that will ultimately be made by the FCC pursuant to the *FNPRM*, the JP minimizes the risks that such actions will have a net negative impact on the people, businesses, and service providers in this State. It will also avoid the substantial expenditure of time and resources that would be required for unnecessary and counterproductive litigation of access-charge and TAF issues at this time. For these reasons, the JP will advance the public interest, and should be adopted by the Commission.<sup>2</sup>

## **I. THE JOINT PROPOSAL**

The JP is a settlement agreement through which a substantial majority of the parties propose an interim resolution of the key Phase III issues.<sup>3</sup> Specifically, it proposes to continue

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<sup>2</sup> The appropriate course of action for a state commission to follow at this time depends upon the specific circumstances that it faces, and a different balance of factors may apply where state litigation of discrete intercarrier compensation issues has already been completed and an initial decision has been issued, or where other circumstances differ materially from those presented in this State.

<sup>3</sup> Such a proposal would not be untimely even if the Phase III litigation has already begun. *See* Case 09-M-0527, “Order Adopting Phase II Joint Proposal” (issued and effective August 17, 2012), at 19 (“[E]ven if Phase III does shift to a litigation track, the parties would be free to resume negotiations toward a settlement, and seek related modification of the litigation schedule, at any time that they believe further collaborative discussions could prove fruitful.”).

current arrangements related to access charges and the TAF (except for further measures necessary to implement the *Transformation Order*) pending certain specified milestone events.

With respect to access charges, the JP proposes that the Commission take no additional action until the FCC issues an order addressing the switched access issues identified in the *FNPRM*. However, if the FCC has not issued an order addressing such issues by July 2014,<sup>4</sup> a meeting of all interested entities would be convened by the ALJ to discuss what, if any, action would be appropriate at that time.<sup>5</sup>

With respect to the TAF, the JP sets forth the view of its sponsors that no changes are necessary or warranted at this time.<sup>6</sup> Proposals for changes to the TAF could, however, be raised during the re-examination of the State Universal Service Fund (“SUSF”) that has been scheduled pursuant to the Phase II Joint Proposal and the Commission order adopting that proposal.<sup>7</sup> In certain cases, even if the SUSF review proceeding had not yet begun, TAF proposals could be considered on or after the date of an FCC order pursuant to the *FNPRM*, or in connection with an authorized review of switched access issues in July 2014.<sup>8</sup>

The JP is sponsored by a diverse roster of government agencies, incumbent local exchange carriers, CLECs, and cable and wireless providers, constituting the majority of the active parties in this proceeding. These parties normally have widely varying perspectives on

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<sup>4</sup> *I.e.*, the date of the third step in the transition mandated by the *Transformation Order*.

<sup>5</sup> JP ¶¶ 1(b)(1), 1(b)(2).

<sup>6</sup> *Id.* ¶ 2(a).

<sup>7</sup> See Phase II Joint Proposal ¶ 2(b); Case 09-M-0527, “Order Adopting Phase II Joint Proposal” (issued and effective August 17, 2012). That review would begin in January 2016.

<sup>8</sup> JP ¶ 2(b).

issues that come before the Commission, and it is rare to find them all on the same side of any single proposal. The sponsors are:

- New York State Department of Public Service Staff
- New York State Department of State, Utilities Intervention Unit<sup>9</sup>
- Cable Telecommunications Association of New York, Inc.
- Cellco Partnership d/b/a Verizon Wireless
- Frontier Communications New York Incumbent Local Exchange Carriers
- Level 3 Communications, LLC
- NYSTA Smaller ILECs (32 individual companies)
- Time Warner Cable, Inc.
- tw telecom of new york l.p.
- Windstream Communications, Inc.
- Verizon New York Inc.

The JP has been opposed only by AT&T and Sprint — two nationwide interexchange carriers with a narrow interest in encouraging immediate reductions in all switched access charges — and by Mr. Alan Flacks. T-Mobile, a wireless provider that has previously supported AT&T and Sprint on access charge issues, submitted a letter in this proceeding setting forth its position that: (a) “[t]he need for intrastate access charge reform in New York State has changed in light of [the *Transformation Order*]”; (b) “. . . T-Mobile does not oppose the provisions of the Joint Proposal relating to further action by the Commission with respect to switched access charges”; and (c) “. . . T-Mobile does not oppose the Commission’s adoption of the [JP], as

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<sup>9</sup> Although DOS/UIU is not listed in footnote 5 of the December 7, 2012 “Ruling on Phase III Procedure” (the “*Procedural Ruling*”), it is in fact a signatory to the JP.

long as the adopting order provides that any consideration of changes to the TAF proposed pursuant to paragraph 2(b) or otherwise will include a comprehensive review of the structure, purpose and necessity of the TAF.”<sup>10</sup>

## **II. THE COMMISSION SHOULD ADOPT THE JOINT PROPOSAL**

As the Commission has stated, “where a Joint Proposal has been submitted, our review is to determine whether the terms and conditions in the Joint Proposal are in the public interest.” In such a review, “weight should be given to the fact that the Joint Proposal reflects agreement by normally adversarial parties.”<sup>11</sup> Both conditions are met here.

The interim resolution of Phase III issues that is proposed by the JP is manifestly in the public interest, as is explained further below. Moreover, that resolution is supported by a diverse group of government agencies and industry participants, constituting the majority of the active parties to this proceeding, and is opposed only by a narrow special interest group.<sup>12</sup> Indeed, except for T-Mobile (which does not oppose this JP), the line-up of sponsors and opponents is similar to that in Phase I, where the Commission noted:

The great majority of the active parties . . . support the Phase I Joint Proposal and represent a very diverse set of interests, including parties that are normally adversarial. In contrast, the three parties opposing the Phase I Joint Proposal [*i.e.*, AT&T, Sprint, and T-Mobile] all represent relatively

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<sup>10</sup> Case 09-M-0527, Letter from Christopher M. Arfaa to Hon. Howard A. Jack (November 19, 2012) (footnotes omitted). Nothing in ¶ 2(b) of the JP (addressing TAF issues) would prevent T-Mobile from raising, in any TAF review proceeding that is authorized by the JP, issues such as those set forth in T-Mobile’s last proviso. Indeed, JP ¶ 2(b) specifically states that “[i]f a proposal is raised pursuant to the preceding sentence, any other Party may make counter-proposals related to the TAF.”

<sup>11</sup> Case 06-M-0377, “Order Allocating Property Tax Refunds” (issued and effective July 21, 2006), at 8; Cases 90-M-0255 and 92-M-0138, “Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines” (Op. No. 92-2) (issued and effective March 24, 1992) (“*Guidelines Order*”), at 30-31.

<sup>12</sup> A settlement need not be unanimous to be adopted by the Commission. See Case 09-M-0527, “Ruling on Phase III Procedure” (issued December 7, 2012), at 7 (noting that the Commission had adopted an opposed joint proposal in Phase I of this proceeding).

consistent, narrower interests. We also consider it significant that those parties generally expected to bring a broader public interest perspective to the table — Staff, CPB [now DOS/UIU, a sponsor of the Phase III JP], and PULP — all support the Phase I Joint Proposal.<sup>13</sup>

**A. PROVISIONS RELATING TO THE TAF**

The JP reflects the view of its sponsors that the TAF is accomplishing its objectives and faces no imminent funding crisis, and that no action to change the models governing contributions to and disbursements by the TAF is necessary at this time. The sponsors nevertheless recognize that that situation may change, and accordingly the JP proposes that TAF issues can be re-visited at specified milestone dates in the future. If changes are needed in the future, the nature of that need, and the changes best suited to accommodate it, will become clearer with the passage of time. In the meantime, there is no benefit to wasting time and resources on what is — at present — only an academic issue.

At the November 27, 2012 Procedural Conference, in response to questioning from Judge Jack, no party objected to the TAF provisions of the JP.<sup>14</sup> Since those provisions are unopposed and will avoid unnecessary litigation, they should be adopted by the Commission.<sup>15</sup>

**B. PROVISIONS RELATING TO ACCESS CHARGES**

In proposing that further action by this Commission on access charges should await and be coordinated with action by the FCC pursuant to the *FNPRM*, the JP should *not* be understood as asking the Commission to conclude that there is no need for further access reform. Such a

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<sup>13</sup> Case 09-M-0527, “Order Adopting Terms of Phase I Joint Proposal” (issued and effective July 16, 2010), at 33 (footnotes omitted).

<sup>14</sup> Transcript of November 27, 2012 Procedural Conference (“Tr.”), at 22-23.

<sup>15</sup> In discussing the access-charge and TAF provisions of the JP separately, Verizon does not intend to suggest that the proposal should be considered as an à la carte menu of options, each of which can be considered in isolation. Rather, the JP is put before the Commission as an integrated whole. See JP ¶ 5(e).

conclusion would be premature, and wrong. Indeed, in the comments that it submitted to the FCC on the *FNPRM*, Verizon strongly supported prompt implementation of a downward transition for originating access, particularly with respect to charges for originating 8YY traffic. Thus, the issue addressed by the JP is not whether reform of originating access rates is “good” in the abstract — it is whether the public interest would be served by implementing such reform on a single-state, standalone basis without waiting to see how the FCC will address the issue. Verizon respectfully submits that such precipitate action would *not* be in the public interest.

There are two important reasons for deferring further action on intrastate originating access rates (and other access issues not addressed in the *Transformation Order*) pending action by the FCC on the *FNPRM*.

First, it is certainly no news to the Commission that the State’s incumbent local exchange carriers are facing severe financial challenges as a result of high fixed costs, asymmetric regulation, and the loss of customers to competition. Verizon New York Inc., for example, incurred net operating losses of some \$1.7 billion in the State in 2011, and net income losses of over \$2 billion, despite which it made new capital investments of over \$1 billion on a net cash flow basis.<sup>16</sup> Access reform therefore cannot be addressed in isolation, but requires consideration of eliminating or reducing legacy regulatory burdens on ILECs, which may help offset the impact of the resulting revenue loss to ILECs. The Commission need not fully accept the FCC’s view of the importance of nationwide uniformity in developing appropriate transitional arrangements,<sup>17</sup> in order to recognize that the FCC, with its nationwide scope, is better positioned

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<sup>16</sup> Verizon New York Inc. Annual Report to the Commission for 2011, Schedules 12 and 13. (Net income figures are net of Account 7355, Equity in Earnings of Affiliated Companies.)

<sup>17</sup> See *Transformation Order* ¶¶ 790-797.

to promote a balance in how access reform works with other regulatory policy changes, both by adopting reforms that apply to a wider range of services and to providers in all states, and by giving consideration to federal cost recovery mechanisms, such as those adopted in the *Transformation Order*.<sup>18</sup> It is for such reasons that diverse groups of affected interests — even those who had taken opposite sides in state access reform proceedings — were able to reach agreement on, and join in support of, nationwide proposals such as the *ABC Plan* that were a significant influence on the terminating-access scheme ultimately adopted by the FCC in the *Transformation Order*.

The second key reason militating against the type of “one-state solution” supported by AT&T and Sprint is efficiency. Any program adopted by this Commission in isolation could directly conflict with requirements imposed by the FCC in adopting a nationwide plan, or disrupt the finely tuned balance of puts and takes embodied in such a plan. In either case, action by the FCC would necessarily require that this Commission take a fresh look at any measures it had previously adopted — in effect, redoing work it had already done. Aside from the duplicative work involved, service providers and their customers would suffer from the disruption associated with a *second* major change in rate structures implemented shortly after the first.

Even if there were ultimately no conflict between measures adopted by this Commission and measures adopted by the FCC, litigating the issues here would require substantial expenditures of time and effort by the parties (including trial Staff), by the ALJ, by advisory Staff, and by the Commission itself — an expenditure that would be totally unnecessary in view of the fact that the FCC is already on the job. While independent consideration of the issues by

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<sup>18</sup> See, e.g., *Transformation Order* ¶¶ 917-920.

this Commission *might* result in earlier action on originating access rates, it would come at the cost of unnecessary litigation, the possibility of conflict with a later nationwide resolution, and the disruption and additional expense that would result from such a conflict.

There is no doubt that the expenditures of time, effort, and money required to litigate further access reform issues before this Commission would be substantial. AT&T itself has made it clear that it expects “detailed litigation” of such issues, including discovery.<sup>19</sup> Even under the highly optimistic schedule proposed by AT&T at the Procedural Conference,<sup>20</sup> about five and a half months would be required for such litigation, *not* including the time and effort necessary to review the record and briefs and to prepare a Recommended Decision and/or a final Commission order. More realistic assessments based on recent experience would likely double AT&T’s estimate, when all stages of the litigation are taken into account.<sup>21</sup>

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<sup>19</sup> Tr. at 17-18.

<sup>20</sup> Tr. at 20-21.

<sup>21</sup> For example, AT&T asserted in Phase I of this case that the litigation leading to the Commission’s 1998 access-charge/TAF order — Cases 94-C-0095 and 28425, “Opinion and Order Establishing Access Charges for New York Telephone Company and Instituting a Targeted Accessibility Fund” (Op. No. 98-10) (issued and effective June 2, 1998) — required seventeen months. Verizon, however, showed that the proceeding had actually begun earlier and ended later than AT&T had acknowledged. *See* Case 09-M-0527, Letter from Joseph A. Post to Hon. Howard A. Jack (May 7, 2010). The Commission noted in its Phase I Order that AT&T’s confidence that “all the issues in this case, including access charges, can be resolved within the time left [13 months] before the proposed TTFE expires,” seemed “questionable.”

Another reference point is provided by the evidentiary proceedings in Phase II of this case, which began with a procedural ruling issued on November 18, 2010 that set a schedule calling for the submission of post-hearing reply briefs on March 25, 2011. The record assembled in that case included an 825-page transcript and 95 hearing exhibits. A Recommended Decision was issued on January 4, 2012, and of course proceedings on exceptions would have added more time had the parties not been able to agree on a Phase II Joint Proposal that was adopted by the Commission and thus eliminated any need to issue a final order on the merits.

Finally, a proceeding on access charges before the New Jersey Board of Public Utilities (Docket No. TX08090830, *In the Matter of the Board’s Investigation and Review of Local Exchange Carrier Intrastate Exchange Access Rates*) — often cited by AT&T as a benchmark — began with a prehearing order issued on December 17, 2008, which set a schedule looking to the filing of post-hearing reply briefs in November 2009 and a decision in December of that year — *i.e.*, a one-year schedule. However, the schedule was subsequently modified and the Board did not issue its final order until February 2010 — a period of a little under 14 months

(continued ...)

For these reasons, the action urged by Sprint and AT&T — *i.e.*, immediately launching a Commission proceeding on the switched access issues not yet addressed by the FCC — would disserve the public interest by promoting inefficient litigation, duplicative proceedings, and industry disruption. The JP provides the best solution for avoiding these undesirable consequences, and should be adopted by the Commission.<sup>22</sup>

Finally, we note that nothing in any prior Commission order pre-judges the approach taken by the JP. AT&T argued at the Procedural Conference that adopting the JP would be tantamount to delaying litigation on access charges, in violation of the Phase II Joint Proposal that had already been adopted by the Commission.<sup>23</sup> That argument is specious. For all practical purposes, the Phase III litigation *has* already begun, and the issue of whether and when it was *required* to begin is thus moot. Judge Jack made the appropriate decision in ruling that within that litigation, it made sense to consider the interim resolution proposed by the JP first, before beginning detailed discovery and evidentiary proceedings on other issues. Consideration of the JP does not sidestep litigation — it is a proposal for managing it. Nothing in the Phase II Joint

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(...continued)

from pre-hearing order to final order on the merits. That 14-month schedule depended upon an extremely short interval between the completion of briefing and the issuance of a decision by the New Jersey Board.

<sup>22</sup> As noted previously, these comments do not address whether the situation might be different if comprehensive evidentiary proceedings on access charges had already been conducted by this Commission, and if a slate of measures based on that record had already been adopted. However, even in Pennsylvania, where that *was* the case, the Public Utility Commission found it advisable in light of the FCC's involvement to suspend implementation of rate changes it had previously adopted, and to indefinitely defer further proceedings on originating access. *See* Docket Nos. 1-00040105, C-2009-2098380, *et al.*, and M-2012-2291824, "Opinion and Order" (Pa. PUC; adopted July 19, 2012; entered August 9, 2012), at 57-59.

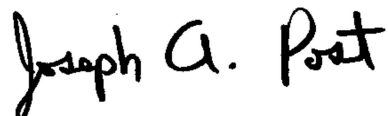
<sup>23</sup> *See* comments of Mary Burgess, Esq. for AT&T at the November 27, 2012 Procedural Conference, Tr. at 17 ("To allow the JP to go forward without having a fully litigated process would contravene the Phase II Joint Proposal and would undermine the commission's longstanding tradition honoring settlements."). *See also* Tr. at 18-19 ("It is time for Your Honor and the commission to honor the agreement that we all signed in Phase II and give AT&T our day in court.").

Proposal rules out the resolution now proposed in the Phase III JP. Indeed, the Phase II Joint Proposal carefully noted, in ¶ 11(a), that “[n]othing in this Settlement Agreement will prejudice the right of any Party to argue for or against any Commission action with respect to the TAF or intrastate access charges in Phase III of this proceeding . . . .” The JP certainly puts forward a proposal related to “Commission action with respect to the TAF or intrastate access charges” within the meaning of ¶ 11(a).<sup>24</sup>

### III. SUMMARY AND CONCLUSIONS

For the reasons set forth above, the Commission should adopt the Phase III Joint Proposal.

Respectfully submitted,



**JOSEPH A. POST**  
140 West Street — 27<sup>th</sup> Floor  
New York, New York 10007-2109  
(212) 321-8126

**Counsel for Verizon New York Inc. and Cellco  
Partnership d/b/a Verizon Wireless**

**January 4, 2013**

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<sup>24</sup> AT&T’s argument that the JP is inadmissible since it does not propose a “substantive resolution” of the originating access issue (*see* Tr. at 19) should be rejected. As Judge Jack has already noted at page 8 of the December 7, 2012 *Procedural Ruling*, the terms of the JP would “resolve [the remaining intrastate access charge issues] temporarily by maintaining the *status quo* for a time, pending FCC action that might significantly influence the issues’ long-term resolution.” But in any event, AT&T’s argument is a semantic and metaphysical one. The issue before the Commission is not whether the resolution proposed by the JP is “substantive,” but whether its adoption would be in the public interest.