STATE OF NEW YORK

PUBLIC SERVICE COMMISSION

Proceeding to Examine Issues Related	**Case 09-M-0527**
To a Universal Service Fund	

AT&T COMMUNICATIONS OF NEW YORK, INC.'S, AND ITS REGULATED AFFILIATES' REPLY STATEMENT IN OPPOSITION TO PHASE III JOINT PROPOSAL

Mary E. Burgess, Esq.
AT&T Communications of New York, Inc.
111 Washington Avenue
Albany, New York 12210

William K. Mosca, Jr., Esq.
Richard H. Rubin, Esq.
Bevan, Mosca, Giuditta & Zarillo, P.C.
222 Mount Airy Rd., Suite 200
Basking Ridge, New Jersey 07920

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AT&T COMMUNICATIONS OF NEW YORK, INC.'S AND ITS REGULATED AFFILIATES' REPLY STATEMENT IN OPPOSITION TO PHASE III JOINT PROPOSAL ("JP")

AT&T Communications of New York, Inc. ("AT&T") opposes the Phase III Joint Proposal ("JP") submitted by Verizon and other parties who do not want to see intrastate originating access charge reform accomplished in New York. AT&T's Statement in Opposition filed on January 4, 2013 demonstrated that the JP is not in the public interest and should be rejected. In contrast, the proponents of the JP have failed to provide any legitimate support for the JP's adoption.

INTRODUCTION

Simply stated, the JP proponents beg this Commission to ignore the carefully negotiated deal that led to the Phase II Settlement Agreement and Order, and materially and unfairly change that deal, without justification, to the detriment of AT&T, Sprint, other long distance providers and, most importantly, to the detriment of New York consumers. AT&T and other carriers have been overcharged for in-state access service for far too long, and had negotiated in good faith as part of the Phase II Settlement Agreement a path to rectify this injustice in Phase III proceedings. Now falsely claiming a "settlement" of Phase III issues, the JP proponents seek to strip out a key provision in the Phase II Settlement Agreement (a provision the Commission noted and approved in a confirming Order) that granted the Parties a shortened period to negotiate the remaining access issues, and in the event of an impasse, required immediate litigation.[1] The JP proponents

[1] As this Commission has ordered, the lack of consensus on a negotiated Phase III solution triggers litigation: "The Phase II Joint Proposal's provisions on scheduling consideration of Phase III issues also appear reasonable. They include a relatively short period to explore a collaborative, negotiated solution of those issues, **with a shift to litigation if unsuccessful…"** [emphasis added]. Joint Proposal and Settlement Agreement, Attachment I to Commission *Order Adopting Phase II Joint Proposal*, issued and effective August 17, 2012 (Case 09-M-0527), at p. 19.

claim that the JP "settles" all Phase III issues and obviates litigation, but that is demonstrably wrong. As Judge Stein correctly observed, there is no "consensus" or settlement of the key Phase III access issue. Thus, as agreed by all Parties last year, the Phase III litigation must commence immediately. Any other result would harm the public interest.

The Phase II Settlement Agreement language (including the path to Phase III litigation) was part of a carefully crafted "quid pro quo" involving resolution of Phase II USF issues. The "quid," which the JP proponents urged on all Parties in Phase II, was the resolution of all USF issues in Phase II, including payment into the USF by long distance providers in advance of any access reform. The "pro quo" was a provision that required collaborative negotiations for a short time period in Phase III, followed by a shift to litigation in the event of an impasse. Now with the "quid" of USF funding firmly secured, the JP proponents seek to eviscerate the "pro quo" of Phase III litigated proceedings by falsely claiming that the Parties have reached a consensus, when in fact the Parties have reached an impasse.

The FCC ICC Order is not a reason to delay litigation. By the time parties had signed the Phase II Settlement, the FCC ICC Order had been law for several months.[2] The ICC Order settled the terminating access issue, left the originating access issue unsettled, and invited the states to continue to act consistently with FCC policy in advance of any further federal action.[3]

[2] The Parties to the Phase II Settlement Agreement had all signed off on or before May 8, 2012. The FCC ICC Order was issued on November 18, 2011, almost six months earlier.

[3] FCC ICC Order at pp. 253, 254 and fn. 1375 ("We note that section 261(c) likewise preserves state authority to 'impose requirements on a telecommunications carrier for instrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access…'"). *Id.* at p. 278, fn. 1542: "Nor does this Order prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition." Importantly, fn. 1542 occurs in a textual reference appearing just before the FCC's conclusion that originating access rates must also fall to bill-and-keep over time.

The JP proponents and other Parties to the Phase II settlement had full knowledge of the existence and import of the ICC Order at the time they signed the agreement. All Parties knew full well that the only remaining access issue to be litigated in New York involved **originating** access, and the agreement to settle or litigate this issue in Phase III was the price for having AT&T and Sprint support the Phase II settlement. The parties to the Phase II settlement should be held to their bargain.

In addition to seeking to strip out the material Phase II access litigation deal condition, the JP proponents also attempt to make two other points, neither of which merits any serious consideration: (1) only the FCC should address reductions in originating access charges in New York; and (2) the New York Public Service Commission ("Commission" or "PSC") is incapable of following the FCC's policy direction with respect to lowering originating access charges. These assertions are clearly erroneous and gratuitously insulting to this Commission and should be rejected out-of-hand.

THE COMMISSION SHOULD HONOR AND ENFORCE THE PHASE II SETTLEMENT AGREEMENT AND ITS ORDER APPROVING SAME BY ORDERING AN IMMEDIATE SHIFT TO PHASE III LITIGATION

The JP proponents attempt to create a fiction that the Phase III issues have been "resolved" by "consensus." There is no "consensus" supporting the JP, a document that Judge Stein criticized, and which clearly falls far short of the Commission's Settlement Guidelines. If adopted, the JP would contradict essential terms of the Phase II Settlement Agreement and Order, strike at the heart of the Commission's orderly processes and procedures, and shed further confusion on the enforceability of future utility industry settlement agreements.

The Phase II Settlement Agreement was an intensively negotiated, carefully crafted document that accommodated two competing concerns. On the one hand, the JP proponents

wanted to establish some certainty around a USF and wanted AT&T, Sprint and other carriers providing long distance services to contribute to the fund in advance of any access charge relief. On the other hand, AT&T and Sprint wished to ensure that, in return for their support for Phase II USF resolution, they would have a time certain for Phase III access negotiations, with swift recourse to litigation in the event of an impasse. The Phase II Settlement Agreement accommodated all Parties, and this Commission specifically noted the fairness of the provision limiting Phase III access negotiations and the resulting shift to litigation in case of impasse.[4]

The Parties knew at the time they signed the Phase II settlement agreement that originating access charges would be litigated in Phase III if the opposing sides could not come to terms. The FCC's November 2011 Intercarrier Compensation Order[5] settled the issue of intrastate terminating access charges, but left open the resolution of originating access charges. The Parties knew quite well that the FCC's reforms applied only to terminating access rates, and that, other than capping originating rates for most carriers, the FCC left originating access reform to further state proceedings. **When the Parties executed the Phase II settlement in early May of 2012, they had known for almost six full months that the only remaining access issues to be litigated in Phase III were the proper rates for *originating* access.**[6] No Party credibly can assert that it was either contemplated in the Phase II Settlement Agreement, or ordered by this Commission, that a proper settlement of the Phase III access issue could include *not* addressing

[4] *Order Adopting Phase II Joint Proposal*, issued and effective August 17, 2012 (Case 09-M-0527): "The Phase II Joint Proposal's provisions on scheduling consideration of Phase III issues also appear reasonable. They include a relatively short period to explore a collaborative, negotiated solution of those issues, **with a shift to litigation if unsuccessful…"** [emphasis added]. *Id.* at 19.

[5] *Connect America Fund*, et al., WC Docket No. 10-90 et al. (November 18, 2011) ("Intercarrier Compensation Order" or "ICC Order").

[6] The Phase II agreement and Order also permitted qualifying carriers to seek an addition to the USF established in Phase II, if necessary, to offset certain originating access reductions that the parties anticipated.

originating access – it was the only access issue that remained following the ICC Order, a fact well-known to all Parties when they executed the Phase II Settlement Agreement.

The Phase II Order adopted the Parties' negotiated Settlement Agreement, which unambiguously required them to commence litigation of the remaining issues in this docket if they failed to reach consensus in a collaborative proceeding. After presiding over the collaborative for the agreed period of time, Administrative Law Judge Stein issued a letter ruling on October 12, 2012, finding that **no consensus** had been reached:

> [A]s the long-time mediator of this [collaborative] process, [the JP] cannot fairly be termed "consensus." Although definitions of consensus do not require unanimity, ***in this case the group of dissenters represents the sector of the industry which would be most harmed by a Commission decision to defer decision on originating access***. ***The joint opinion of the remaining parties cannot in fairness be considered a consensus of the whole***. [emphasis added].

The JP proponents' Statements completely ignore Judge Stein's finding and its import. Time Warner and Cablevision, for example, falsely claim that the JP supporters "represent market participants on ***all*** sides of the economic issues."[7] Other JP Proponents distort the facts and argue that the JP meets one of the requirements of the Commission's Settlement Guidelines, because it represents the agreement of "diverse" parties.[8] But most of them fail even to acknowledge, as Judge Stein did, that these "diverse parties" ***exclude*** the very companies who – together with their ratepayers and investors – will be "the most harmed" by the delays the JP proposes. This is not, as Verizon argues (at p. 5) "a narrow special interest group." Rather, it is,

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[7] Time Warner and Cablevision (collectively "Time Warner") Statement at p. 3 (emphasis added). It is farcical for these parties to claim the JP represents "all sides." These parties, like Verizon, are only on "one side" of the issue in New York: they want the status quo of high originating access charges. They are only on the other side of this argument in proceedings before the FCC and in other states, where they regularly contradict the position they advocate here.

[8] *See* Public Service Staff ("Staff") Statement at p. 3 ("[a]fter thorough discussion, Parties with diverse interests compromised to reach the [JP]"). *See also* NYSTA Smaller ILECs Statement at p. 6; tw telecom of new York l.p. *et al.* ("Facility CLEC Coalition") Statement at pp. 3-4; and Verizon New York Inc. and Cellco Partnership dba Verizon Wireless (collectively "Verizon") at pp. 3-5.

as Judge Stein found, an entire "sector of the industry" that has been seriously harmed by the burden of excessive (and implicit) access charges. Thus, the Phase II Order's requirement of "consensus" has not been met, and the Commission should not tolerate further delays to litigation on originating access charges.

Nor is the JP consistent with the Commission's Settlement Guidelines,[9] as some commenters contend.[10] Specifically, the JP (i) is contested, (ii) fails to "reach a balance" that has anything but negative effects upon IXCs and their ratepayers and investors; and (iii) does not produce a result within the reasonable range of outcomes of full litigation. Instead, the JP requires IXCs in New York to continue to pay inflated subsidies on originating access that, as the FCC found (and Verizon and Time Warner agree), harm competition and competitors, and provide no incentives for LECs to invest in "the all-IP broadband networks of the future.'"[11] Thus, in a very real way, the JP actually harms New York consumers, by forcing them to pay more than they should for various services, and by retarding the deployment of new technology. Any arguments that the JP complies with the Commission's Phase II Order or its Settlement Guidelines, or that the JP is in the public interest, are simply wrong and must be rejected.[12]

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[9] Case 90-M-0255 – Proceeding on Motion of the Commission Concerning its Procedures for Settlement and Stipulation Agreements, filed in C 11175; Case 92-M-0138 – In the Matter of the Rules and Regulations of the Public Service Commission Contained in 16 NYCRR, Chapter I, Rules of Procedure – Proposed Amendments to Subchapter A, General, Part 2, Hearings and Rehearings by the Addition of a New Section 2.6, Settlement Procedures, filed in C 11175, Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines, Opinion No. 92-2 (Mar. 24, 1992) ("Settlement Guidelines").

[10] *E.g.*, Staff Statement at. p. 3; Facility CLEC Coalition Statement at p. 3.

[11] FCC ICC Order at p. 209, para. 648. *See* Sprint Statement at pp. 3-4 for an explanation of how reducing originating access charges will also provide LECs with incentives to make the needed changes from TDM-based to IP-based infrastructures.

[12] It is especially disingenuous for Verizon to claim that, even under the JP, "litigation has begun," and that the JP is merely a "proposal to manage" the litigation. The JP is nothing of the sort. Instead, it avoids any consideration of a case schedule whatsoever until no sooner than July 2014 -- 18 months from now -- and even then offers only a vague suggestion that the Parties "convene" to determine "what, **if any**, action would be appropriate at that time" (emphasis added). It is thus patently absurd and insulting for Verizon to cast the wolf that is the JP in the clothing of

THE FCC ICC ORDER PERMITS THIS COMMISSION TO REDUCE ORIGINATING IN-STATE ACCESS RATES IN ADVANCE OF ANY FURTHER FCC ACTION

The FCC acted to reduce terminating access charges to bill-and-keep (and temporarily cap originating access charges pending reduction to bill-and-keep) because many states had failed to enact any access reform and appeared to be incapable of doing so. The FCC criticized state *inaction*, not state action, in addressing access reform.[13] It certainly and explicitly permits and encourages states to continue with access reform, even in advance of further FCC action. The FCC ICC Order specifically states that it does ***not*** "prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition."[14] Since the current New York proceeding covers both access reform and State Universal Service Fund issues (if any), there is ready opportunity in Phase III to consider any additional explicit subsidies that may be appropriate.[15]

It is particularly noteworthy that the very same Verizon that vociferously attacked state inaction on access charge reform in many states now begs this Commission to continue to

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a "litigation management" agreement -- the only thing the JP "manages" to do is to deny AT&T and other IXCs their side of the bargain with the JP proponents.

[13] *See e.g.*, Connect America Fund, et al., WC Docket No. 10-90 et al. Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, February 9, 2011, p. 171 at fn. 819 (citing information that "few states have moved to complete parity between intrastate and interstate switched access rates and structures"). *Accord,* FCC ICC Order at p. 267, para. 794: "[W]e are concerned that many states will be unable to complete reforms in a timely manner or will otherwise decline to act."

[14] Connect America Fund, et al., WC Docket No. 10-90 et al. (November 18, 2011) ("FCC ICC Order") at p. 278, fn. 1542. *See* AT&T Statement at pp. 10-11. Thus the Facility CLEC Coalition (at p. 5) is wrong that the FCC ICC Order completely "supplant[s] state rate-making functions" for intrastate access charges. Indeed, as Sprint (at p. 3) notes, the FCC has even envisioned the possibility that it might "defer to the states to create a transition to bill-and-keep for originating access." FCC ICC Order at p. 447, para. 1302.

[15] This also negates arguments that Commission action to reduce excessive originating access rates would be economically burdensome for LECs. *See* Facility CLEC Coalition Statement at pp. 7-8, Verizon Statement at p. 7.

engage in the same delaying tactics that Verizon has long decried. [16] Those arguments could not be more diametrically opposed to Verizon's arguments here (at pp. 7&8) that "precipitate action [to reduce originating access rates] would *not* be in the public interest" and that litigation now in New York is "an expenditure that would be totally unnecessary in view of the fact that the FCC is already on the job." It would be well for Verizon and other JP proponents such as Time Warner[17] to acknowledge that they continue to urge upon this Commission the very approach they have condemned elsewhere. This Commission should recognize and reject these contradictory arguments.

THIS COMMISSION IS PERFECTLY CAPABLE OF REDUCING ORIGINATING ACCESS RATES CONSISTENTLY WITH FCC POLICY

There is no risk associated with having this Commission decide the Phase III access issue as part of the litigation it has already ordered to commence. It has planned to do so all along, following the conclusion of Phases I and II. Staff and UIC, however, join Verizon and others now arguing for further delay, citing "uncertainty of outcome" as to the FCC's ultimate decision

[16] *See* AT&T Statement Opposing Joint Proposal at pp. 8-11 and fns. 17-20, showing that Verizon's position here is inconsistent with the positions it argued over many years in numerous states, including New Jersey, Ohio, Washington and Wisconsin. There Verizon unequivocally asserted that excessive access rates – both terminating and originating – "place a disproportionate burden on other carriers in the state and ultimately their customers;" "lead to inefficient and undesirable economic behavior;" and "distort the playing field" and that it is "***not in the public interest . . . to require Verizon and other carriers and their long-distance customers to continue subsidizing [a LEC] for one moment longer.***" (emphasis added).

[17] *See* Sprint Statement at p. 3 quoting Time Warner's February 24, 2012 Comments to the FCC (at pp. 18-19) that "there is no reason to adopt a substantially different approach for originating access" and that it should tie terminating and originating access together "in terms of the timing of rate reductions" because "the policy rationales for reducing terminating rates apply equally to originating rates." A few weeks later, Verizon approvingly referenced Time Warner's comments in its FCC Reply Comments and quoted another commenter's assertion that "'[a]ll of the reasons that the [FCC] articulated for reducing and then eliminating terminating access charges in favor of a bill-and-keep regime ***apply equally, if not more so, to originating access charges*.**'" Reply Comments of Verizon, Connect America Fund, et al., WC Docket No. 10-90 et al., filed March 30, 2012, at pp. 4-5 (emphasis added; citations omitted).

on originating access charges,[18] and claiming that the ordered litigation "might not be a prudent use of state resources."[19] There is no likelihood of inconsistent State and Federal outcomes or wasted resources, and to argue otherwise demeans this Commission's analytical abilities and mocks the Phase II Order approving the settlement agreement, which the Commission executed with full knowledge of the existence and meaning of the FCC ICC Order.

The ICC Order made crystal clear that "originating access charges for all telecommunications traffic subject to our comprehensive intercarrier compensation framework should ultimately move to bill-and-keep,"[20] and it provided the roadmap of a several-year reduction schedule with associated rates for terminating access. The FCC's access policy is equally clear both to the Parties to the Phase III proceedings and to the Commission as well. There is no realistic risk to the public interest associated with this Commission continuing to exercise its jurisdiction over originating access charges for the purpose of establishing rational rates consistent with the FCC's directive. In fact, only the Commission's failure to act in accordance with its Phase II Order (and thereby further slowing down the process for access reform in this state) poses any legitimate risk to the public interest.

AT&T fully expects the Commission's decision here will be consistent with the FCC's well-articulated goal, and there is **no** reason why **any** party to the JP would or should doubt the

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[18] Staff Statement at p. 4 ("Staff considered uncertainty of outcome regarding an FCC order on originating access and the likelihood that the FCC would not tailor reform specifically to New York"); Utility Intervention Unit ("UIU") Statement at p. 2 (Commission might reach "a result that would perhaps eventually be contradicted by the FCC"); NYSTA Smaller ILECs Statement at p. 2 (referencing "whatever FCC structure is created"); Facility CLEC Coalition at p. 6; Time Warner Statement at p. 3 ("[d]isparate outcomes could result in regulatory as well as economic waste. . . [and] threatens to inject regulatory uncertainty"); Verizon Statement at p. 1 ("the Commission should not take the risk of adopting measures that may conflict with the provisions of the nationwide plan").

[19] UIC Statement at p. 2. *See also* Verizon Statement at p. 2 (the JP "avoid[s] the substantial expenditure of time and resources that would be required for unnecessary and counterproductive litigation"). None can or do refute the fact that all parties were well aware of the FCC ruling months in advance of settling Phase II, and had full knowledge that Phase III litigation would address originating access charges.

[20] FCC ICC Order at p. 278, para. 817.

Commission's abilities to carry out this responsibility. The FCC's clear direction eliminates any concern that there might be an inconsistency, "significant" or otherwise, between this Commission's and the FCC's treatment of originating access rates.[21] The FCC ICC Order also eliminates the need to address LEC costs in Phase III litigation, since the FCC de-links access rates from their miniscule costs.[22] This is sure to lead to a speedy process and a policy-based resolution.

The JP proponents' essential argument – that this Commission is incapable of crafting an order in state proceedings consistent with the FCC ICC Order – defies logic and invests too little confidence in this Commission. In fact, the only potential difference between this Commission's anticipated action on originating access charge reform and the FCC's policy direction is the rate of decline from current rates to bill-and-keep – the state can actually proceed *faster* than the federal timetable. And critically in this regard, the FCC has already determined that such differences are ***permissible***.[23]

CONCLUSION

The JP is flatly inconsistent with the Commission's Phase II Order and the Phase II Settlement Agreement it approved, and the delay the JP proposes disserves the public interest. As Sprint states (at p. 4), "[t]he Commission cannot allow the LECs to pick and choose the

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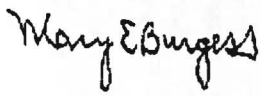
[21] *See* Facility CLEC Coalition Statement at p. 6 ("Further access charge reform by the Commission may disturb the uniform scheme put in place by the FCC").

[22] *See* FCC ICC Order at p. 245, para. 746 & fn. 1309 ("reject[ing] claims that bill-and-keep does not allow for sufficient cost recovery" and noting the "forward-looking incremental cost of terminating traffic [is] extremely low, and very near $0—certainly much lower than current switched access charges, and even many reciprocal compensation rates").

[23] The FCC ICC Order (at p. 278, fn.1542) expressly states that it does ***not*** "prevent states from reducing rates on a faster transition provided that states provide any additional recovery support that may be needed as a result of a faster transition."

aspects of the Phase II [Settlement Agreement] that will be enforced." Rather, the Commission should end the foot-dragging and direct the Parties to comply with the Phase II Order's unambiguous terms by immediately commencing litigation. Doing so will finally enable it to implement the long-delayed reductions in originating access charges that are necessary to benefit New York consumers, competition and the public interest, and move the JP proponents beyond a position leaving them (in Verizon's own words) "frozen in place . . . [and] unable to forego the legacy subsidies inherent in the existing system."[24]

Respectfully submitted,



Mary E. Burgess, Esq.
AT&T Communications of New York, Inc.
111 Washington Avenue
Albany, NY 12210
(518)463-3148
mb2692@att.com

William K. Mosca, Jr., Esq.
Richard H. Rubin, Esq.
Bevan, Mosca, Giuditta & Zarillo, P.C.
222 Mount Airy Rd., Suite 200
Basking Ridge, New Jersey 07920
(908)753-8300
wmosca@bmgzlaw.com

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[24] Comments of Verizon and Verizon Wireless, Connect America Fund, et al., WC Docket No. 10-90 et al. (April 18, 2011) at p. 2.