

STATE OF NEW YORK
DEPARTMENT OF PUBLIC SERVICE

Case 09-M-0527

Proceeding to Examine Issues Related to
A Universal Service Fund

DEPARTMENT OF PUBLIC SERVICE STAFF
STATEMENT IN SUPPORT OF JOINT PROPOSAL
and SETTLEMENT AGREEMENT

Maureen J. McCauley
Staff Counsel
Department of Public Service
Three Empire State Plaza
Albany, New York 12223
(518) 474-5474

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I. INTRODUCTION

This statement is submitted by Staff of the Department of Public Service (Staff) in support of a Joint Proposal and Settlement Agreement (Joint Proposal or JP) which arises from Phase III of Case 09-M-0527, a proceeding to examine universal service fund issues. The Joint Proposal was filed with the Secretary to the Public Service Commission on November 19, 2012. Signatories to the Joint Proposal include Verizon New York Inc., Cable Telecommunications Association of New York, Inc., NYSTA Smaller ILECs, Cellco Partnership d/b/a Verizon Wireless, Frontier Communications New York Incumbent Local Exchange Carriers, Time Warner Cable, Inc., tw telecom of new York l.p., Windstream Communications, Inc., New York State Department of State, Utilities Intervention Unit, and New York State Department of Public Service Staff.

II. JOINT PROPOSAL OVERVIEW

In its August 17, 2012 Order,¹ the Commission adopted a Joint Proposal which required parties in Case 09-M-0527 to begin negotiating Phase III issues, *i.e.*, intrastate access charges and the Targeted Accessibility Fund, thirty days after issuance of the Phase II Order. Collaborative negotiations did begin within that 30-day period. The Phase II Order limited collaboration without resolution to a sixty day period and called for litigation of unresolved issues to begin absent a settlement by October 17, which would have been the sixtieth day after issuance of the Phase II Order. On October 16, Verizon New York Inc. wrote a letter to ALJ

¹ Case 09-M-0527, *Universal Service Fund*, Order Adopting Phase II Joint Proposal (issued August 17, 2012) (Phase II Order).

Jack, the litigation judge assigned to this proceeding, requesting an opportunity through mid-November to pursue settlement. Based on that letter and disagreement with the settlement ALJ's ruling that settlement negotiations had reached an impasse, ALJ Jack scheduled a procedural conference for November 27, 2012 and ruled that if a Phase III Joint Proposal had been submitted before that date, "discussion of appropriate procedures for considering the proposal" would be included in the conference agenda.²

On December 7, 2012, ALJ Jack issued a ruling providing for submission of the Joint Proposal to the Commission and establishing a schedule for statements in support or opposition to the proposal as well as replies.³

III. JOINT PROPOSAL TERMS

a. Consideration of Intrastate Switched Access Additional Action Stayed

The Joint Proposal stays further action on intrastate switched access rates until 1) the Federal Communications Commission (FCC) issues an order in its Further Notice of Proposed Rulemaking, part of the FCC's November 18, 2011 *Report and Order and Further Notice of Proposed Rulemaking* (WC Docket 10-90 et al, 26 FCC Rcd) (*FCC FNPRM*) or 2) July 2014 if the FCC has not issued such an order by then.

b. Consideration of Changes to Targeted Accessibility Fund Programs, Services, and Contribution Formula Stayed

The Joint Proposal continues Targeted Accessibility Fund (TAF) programs, services, and the contribution formula funding those programs and services. Any proposals for changes to TAF may be raised 1) on January 1, 2016, the review date for Phase II Joint Proposal issues, 2) after the FCC issues an order in the *FNPRM*, or 3) upon a *prima facie* showing of sufficient impact by the *FNPRM* Order warranting Commission review.

c. Additional Terms

In addition to switched access charges and TAF provisions, the Joint Proposal reserves Commission authority to modify to modify terms, reserves Parties' rights to take any position

² Case 09-M-0527, *Universal Service Fund*, Phase III Procedural Ruling (issued November 1, 2012).

³ Case 09-M-0527, *Universal Service Fund*, Ruling on Phase III Procedure (issued December 7, 2012).

regarding TAF or switched access charges in any proceeding, and contains miscellaneous provisions dealing with execution, interpretation, and conflict resolution.

IV. Standard of Review

The Commission's standard for reviewing settlement agreements such as this Joint Proposal, is found in *Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines*⁴ (Settlement Guidelines). These Settlement Guidelines establish the following criteria for deciding whether a settlement is in the public interest:

- a. A desirable settlement should strive for balance among (1) Protection of the ratepayers, (2) fairness to investors, and (3) the long term viability of the utility; should be consistent with sound environmental, social and economic policies of the Agency and the State; and should produce results that were within the range of reasonable results that would likely have arisen from a Commission decision in a litigated proceeding.
- b. In judging a settlement, the Commission shall give weight to the fact that a settlement reflects the agreement by normally adversarial parties.

This Joint Proposal was arrived at in full compliance with all Commission rules. All Parties had notice of settlement negotiations as required by 16 NYCRR §3.9(a) and had an opportunity to participate by teleconference. After thorough discussion, Parties with diverse interests compromised to reach the Joint Proposal outlined. As with most compromises, the individual components on which compromises were reached form a series of inter-related provisions comprising an agreement in totality. If that agreement is in the public interest, that is all that is required pursuant to the Commission's standard for reviewing whether a settlement is in the public interest.

V. The Joint Proposal Is in the Public Interest

Staff's recommendation to the Commission is that the Joint Proposal should be adopted because it is in the public interest.

⁴ Cases 90-M-0225 and 92-M-0138 – Opinion No. 92-2 (issued March 24, 1992).

a. Stayed Consideration of Additional Action Regarding Intrastate Switched Access

On November 18, 2011, the FCC issued a comprehensive order reforming universal service and terminating switched access charges. As a result, terminating switched end-office access and reciprocal compensation rates will be bill-and-keep by 2020. As part of this transition, the FCC established explicit funding to cover shortfalls covered by this revenue shift. However, the FCC deferred action regarding the originating component of switched access until it had an opportunity to review comments solicited in the *FNPRM*.

Before the FCC's November 18 Order, intrastate access charge reform was accomplished by separate commissions on a state by state basis. The November 18 Order denotes a shift to national policy concerns driving switched access reform. In its analysis regarding a prudent course of action, 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 . The possibility of end user rate increases for legacy network customers as the result of New York's reform of originating access taking place before FCC action was also a concern. Therefore, Staff concluded that not only was it prudent to wait for the FCC to address originating access as part of its overall reform of intercarrier compensation but also that acting before the FCC did could create a risk of inconsistent federal and state transition schedules and recovery mechanisms.

b. Stayed Consideration of TAF Services, Programs, and Contribution Formula

Currently, TAF costs for service and programs such as Lifeline, 911, and state relay services are adequate to fund these programs. In June 2011, a working group in this universal service proceeding examined TAF programs and costs and recommended no changes to TAF at this time. Staff concurs with that conclusion and points out that the Joint Proposal provides milestones for changes to TAF: January 1, 2016, and after the FCC issues an order in the *FNPRM* of sufficient impact that Commission review is warranted.

c. Agreement by Normally Adversarial Parties

One of the criteria of the Settlement Guidelines, used to determine if a proposed settlement is in the public interest, is whether "a settlement reflects the agreement by normally adversarial parties." This Joint Proposal is proposed by signatories representing large and small ILECs, CLECs, wireless and VoIP providers as well as two government agencies, a group unlikely to reach agreement on telecommunications issues given the diversity of the interests

they represent. Yet, all agree that Commission action regarding switched access should be stayed in order to avoid risking inconsistent federal and New York State action.

VI. CONCLUSION

The Joint Proposal entered into in this case comports with the Commission's Settlement Guidelines and is in the public interest for all of the reasons discussed above. Therefore, Staff respectfully requests that Your Honor find that the terms of the Joint Proposal are in the public interest and that you recommend that the Commission adopt the terms in their entirety.

Respectfully submitted,



Maureen J. McCauley
Staff Counsel

NYS Department of Public Service

Dated: January 4, 2013
Albany, New York