

**BEFORE THE
STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

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

**STATEMENT OF THE NYSTA SMALLER ILECS IN SUPPORT OF THE
PHASE III JOINT PROPOSAL AND SETTLEMENT AGREEMENT**

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I. INTRODUCTION

Pursuant to the “Ruling on Phase III Procedure” issued in the above-captioned proceeding on December 7, 2012 (the “*Phase III Procedural Ruling*”), the NYSTA Smaller ILECs (which are identified in Attachment A), hereby provide this statement in support of the November 19, 2012 “Joint Proposal and Settlement Agreement” (the “*JPSA*”).¹ For the reasons stated herein, the NYSTA Smaller ILECs support the *JPSA* and request that the New York Public Service Commission (the “Commission”)² approve and adopt the *JPSA* in its entirety³ as the resolution of the Phase III issues in this proceeding as referenced in the *JPSA*.⁴ The NYSTA Smaller ILECs respectfully submit that such action by the Commission is consistent with and

¹ The NYSTA Smaller ILECs note that the attachment to the *Phase III Procedural Ruling* inadvertently failed to include Windstream New York, Inc. as one of the NYSTA Smaller ILECs, even though it was noted on the signature page of the NYSTA Smaller ILECs. Compare *Phase III Procedural Ruling*, Appendix A and Letter from Joseph A. Post, Deputy General Counsel – NY (Verizon) to the Honorable Howard A. Jack, Case 09-M-0527, dated November 19 2012 and Attached *JPSA*, Appendix A: Signatures at 7. The NYSTA Smaller ILECs respectfully request that this inadvertent oversight be corrected when action on the *JPSA* is taken.

² Based on the *Phase III Procedural Ruling*, it is uncertain whether the *JPSA* will be addressed directly by the Commission by Judge Jack or will be subject to a Recommended Decision by him. For convenience, the NYSTA Smaller ILECs intend their references to approval or action by the Commission approving the *JPSA* to include the recommendation by Judge Jack for such action if that is the chosen procedure used to review and address the *JPSA*.

³The *JPSA*’s substantive provisions are interdependent and represent a series of compromises that are, in turn, a cohesive whole.

advances the public interest.

The *JPSA* is a reasonable resolution of the issues in Phase III, provides for a result that is within the scope of potential litigated outcomes in this proceeding on all Phase III issues,⁵ and provides for a rational continuation of the existing intrastate exchange access rates and rate structures left unaffected by the actions of the Federal Communications Commission (“FCC”) arising from that taken in the FCC’s November 18, 2011 “Report and Order and Further Notice of Proposed Rulemaking.”⁶ Moreover, the *JPSA* provides a period of time within which the FCC may act on the issues related to various elements of intrastate exchange access (including originating exchange access) that have been raised in the Further Notice of Proposed Rulemaking portion (the “*FCC FNPRM*”) of the *FCC Transformation Order*.⁷ Awaiting any FCC action, in turn, allows the Commission the flexibility and opportunity to address and respond to such FCC action in the Commission’s consideration of what should be the appropriate intrastate originating access rate and rate structures in the State of New York. The ability to take into consideration what the FCC may do, also creates a greater potential for action by the Commission that assures New York local ratepayers’ interests are maximized based on whatever FCC structure is created from the *FCC FNPRM*. Accordingly, the *JPSA* advances the public interest in providing a rational and appropriate framework for maintaining the status quo with

⁴ See, *Phase III Procedural Order* at 4; see also *JPSA* at 1-2 (¶¶ 1(b) and 2(b)).

⁵ This aspect of the analysis of a settlement agreement was most recently articulated earlier in this proceeding when the Commission adopted and approved a settlement that resolved Phase II issues in this proceeding. See *Order Adopting Phase II Joint Proposal*, Case 09-M-0527, issued and effective August 17, 2012 at 13.

⁶ See generally *In the Matter of Connect America Fund et al., Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 10-90 *et al.*, 26 FCC Rcd 17663 (2011) (the “*FCC Transformation Order*”), *appeal pending*, In Re: FCC 11-161, No. 11-9900 (10th Cir.).

⁷ See, e.g., *FCC Transformation Order* at ¶¶ 1298-1305.

respect to originating intrastate exchange access rate and rate structure issues coupled with the flexibility to address what possible future changes should occur based on FCC action.

Consequently, the NYSTA Smaller ILECs respectfully request that the *JPSA* be approved and adopted by the Commission as the current resolution of the Phase III issues in this proceeding.

II. APPROVAL AND ADOPTION OF THE *JPSA* ADVANCES THE PUBLIC INTEREST.

A. The *JPSA* Presents a Rational Approach to Addressing Issues that are Pending at the FCC.

The signatories to the *JPSA* have agreed to a resolution of the Phase III issues in this proceeding, providing for a time certain status check (*i.e.*, July, 2014) or reopeners based on the State Universal Service Fund adopted in Phase II of this proceeding or actions by the FCC in response to the *FCC FNPRM*.⁸ Awaiting further direction from the FCC, the Commission then can coordinate its action with that of the FCC, a result that would lead to rational policy making and therefore be in the public interest. As the Commission is well aware, the *FCC Transformation Order* provided far reaching policies regarding, among other matters, interstate and *intrastate* terminating access charges, including the establishment of rules to implement a *federal* recovery mechanism for certain access rate and revenue reductions arising from the method by which the FCC addressed terminating access.⁹ Admittedly, it is unknown when the FCC will act on the issues raised in the *FCC FNPRM*. However, the process proposed in the *JPSA* allows the Commission the flexibility to accommodate FCC action in the event that, for example, an additional recovery mechanism for originating intrastate access charges is created by the FCC, as it did for terminating access. As Staff indicated, allowing the Commission the

⁸ See *JPSA* at ¶¶ 1(b)(2) and 2(b).

⁹ See 47 C.F.R. §§51.915, 51.917.

flexibility to accommodate FCC action will avoid the potential for adverse impacts on state local rate structures that may not otherwise be required should the Commission act before the FCC.¹⁰

Moreover, the *FCC Transformation Order* is subject to appeals that have been consolidated in the United States Court of Appeals for the Tenth Circuit. The uncertainty associated with how the court may address those appeals is an independent basis for adopting the *JPSA*'s framework. The *JPSA*'s proposed process allows the Commission to accommodate court actions that may affect the *FCC Transformation Order*'s Universal Service and intercarrier compensation frameworks. For example, issues have been raised in the appeal of the *FCC Transformation Order* with respect to the compliance by the FCC with the requirements that Universal Service funds must be "sufficient" and "predictable."¹¹ Resolution by the court of these issues and others like them, may in turn require modification of the FCC's requirements under the *FCC Transformation Order*. Likewise, the treatment of terminating exchange access is also before the court, a resolution of which may also affect the method by which reductions in terminating exchange access revenues are recovered. Thus, any modifications arising from the court's review of the *FCC Transformation Order* may, in turn, also impact the Commission's resolution of Phase III issues by potentially placing additional pressures on state cost recovery and rate structures.

To this end, the NYSTA Smaller ILECs note that the reopeners in paragraph 2(b) of the *JPSA* associated with reopening the Targeted Accessibility Fund ("TAF") are particularly appropriate. As an existing state-sanctioned recovery mechanism, the TAF may provide a

¹⁰ See *Transcript*, Case 09-M-0527 (Prehearing Conference) (November 27, 2012) at 24:22 to 25:4.

vehicle for the Commission to consider recovery beyond that associated with rate increases, just as the FCC has done with the establishment of the Recovery Mechanism for certain terminating access charge elements (as discussed above). The NYSTA Smaller ILECs note that the TAF-related triggers – the review of the Phase II State Universal Service Fund, or subject to a described showing either FCC action on the *FCC FNPRM* or during the July, 2014 review – provides the same degree of decisional flexibility to the Commission to fashion intrastate exchange access policies for the State of New York that other aspects of the *JPSA* also provide.¹²

Accordingly, in the NYSTA Smaller ILECs' collective view, the *JPSA* provides a reasonable path forward for the Commission to determine that the Phase III issues are resolved for now. In light of the fact that the *JPSA* provides the Commission with the ability to await FCC action and determine what New York-specific resolution of any remaining issues is required, the framework envisioned by the *JPSA* provides the Commission additional decisional flexibility with respect to the Phase III issues. Furthermore, it would not be in the public interest to further expend potentially significant resources of the parties, especially those of the smaller ILECs, to proceed with full blown litigation when such expenditure of resources could be wasted should the FCC act before a final Commission decision is reached arising from an extensive litigated proceeding. For all of these reasons, the NYSTA Smaller ILECs respectfully submit that the adoption by the Commission of the *JPSA* is proper and will advance the public interest.

¹¹ 47 U.S.C. §§254(b)(5), 254(d), 254(e); *see also* Uncited Joint Universal Service Fund Principal Brief (Deferred Appendix Appeal), IN RE: FCC 11-161, No. 11-9900 (10th Cir) filed October 23, 2012 at 29-33, 36 -39.

¹² In the event that the *JPSA* is not adopted, the NYSTA Smaller ILECs do not oppose T-Mobile Northeast LLC's suggestion that if the TAF is reopened, all aspects of the TAF should be examined. *See* Letter of T-Mobile Northeast LLC to the Honorable Howard A. Jack, Case 09-M-0527, November 19, 2012 at 2.

B. The *JPSA* was Achieved Through the Combination of Meaningful Collaborative Discussions Between and Among a Wide Diversity of Parties.

The signatories to the *JPSA* represent a diverse group of carriers and entities (incumbent local exchange carriers, competitive local exchange carriers, IXC operations of signatories, wireless carriers, and cable television entities) and representatives of the consumers including the Commission Staff and the Department of State Utility Intervention Unit. These entities engaged in meaningful, good faith collaborative discussions that resolved the Phase III issues as reflected in the *JPSA*. The NYSTA Smaller ILECs respectfully submit that the agreement by such a diverse group demonstrates the balanced and considered approach to resolving all of the Phase III issues as contained within the *JPSA*. This fact alone, in the NYSTA Smaller ILECs' view, provides additional and independent support for the conclusion that the *JPSA* is in the public interest.

III. CONCLUSION

For all of the reasons stated herein, the NYSTA Smaller ILECs respectfully submit that the public interest is advanced by the adoption of the *JPSA*. The *JPSA* reflects a reasoned compromise of the signatory parties' respective positions on Phase III issues. Consequently, the NYSTA Smaller ILECs respectfully request the *JPSA* be approved promptly and adopted in its entirety. In adopting and approving the *JPSA*, the Commission will avoid the prolonged and otherwise protracted expenditure of resources that extensive litigation of these issues at this time may create, and reach a resolution of Phase III issues that is in the public interest.

Accordingly, the NYSTA Smaller ILECs respectfully request that a recommendation be made promptly to the Commission that it should adopt the *JPSA* in its entirety.

Date: January 4, 2013

Respectfully submitted,

The NYSTA Smaller ILECs

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Attachment A
NYSTA Smaller ILEC Members

Armstrong Telephone Company
Berkshire Telephone Corporation
Cassadaga Telephone Corporation
Champlain Telephone Company
Chautauqua & Erie Telephone Company
Chazy & Westport Telephone Corporation
Citizens Telephone Company of Hammond, New York, Inc.
Crown Point Telephone Corporation
Delhi Telephone Company
Deposit Telephone Company, Inc.
Dunkirk & Fredonia Telephone Company
Edwards Telephone Company, Inc.
Empire Telephone Corporation
Fishers Island Telephone Corporation
Germantown Telephone Company, Inc.
Hancock Telephone Company
Margaretville Telephone Company
Middleburgh Telephone Company
Newport Telephone Company
Nicholville Telephone Company
Oneida County Rural Telephone Company
Ontario Telephone Company, Inc.
Oriskany Falls Telephone Corporation
Pattersonville Telephone Company
Port Byron Telephone Company
State Telephone Company
Taconic Telephone Company
Township Telephone Company, Inc.
Trumansburg Telephone Company
Vernon Telephone Company, Inc.
Warwick Valley Telephone Company
Windstream New York, Inc.