

STATE OF NEW YORK
PUBLIC SERVICE Commission

At a session of the Public Service
Commission held in the City of
Albany on September 15, 2011

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman
Patricia L. Acampora
Maureen F. Harris
Robert E. Curry, Jr.
James L. Larocca

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

ORDER MODIFYING TEMPORARY TRANSITION FUND EXTENSION

(Issued and Effective September 16, 2011)

BY THE COMMISSION:

INTRODUCTION

In Phase I of this proceeding, we issued an order approving terms and conditions of a joint proposal intended to temporarily extend the Transition Fund,¹ which the Commission had previously established in phasing out the former Intrastate Access Settlement Pool.² The extension provided for additional Transition Fund (TF) moneys of up to \$600,000 (the Temporary Transition Fund Extension, or TTFE), with contributions to that funding ceasing on the earliest of (a) September 30, 2011,

¹ Case 09-M-0527, *Universal Service Fund*, Order Adopting Phase I Joint Proposal (issued July 16, 2010)(Phase I Order).

² Case 02-C-0590, *New York Intrastate Access Settlement Pool, Inc. - Traffic Sensitive and Non-Traffic Sensitive Access Rates*, Order Adopting Comprehensive Plan (December 23, 2003)(TF Order).

(b) the date of completion of steps necessary to put into effect an order, if any, establishing a State universal service high cost fund (SUSF), or (c) the date the additional contributions equaled \$600,000. Under the terms of the Phase I Order, any unexpended amounts remaining in the TTFE at that time were to be returned, *pro rata*, to the carriers who contributed to the TTFE. The TTFE was intended to give us time to resolve Phase II of this proceeding, which is considering whether to create an SUSF to supersede the Transition Fund, while continuing support to certain incumbent local exchange carriers (ILECs) affected by the 2003 elimination of intrastate access charge pooling and reduction of access charges since then.

The Settlement Judge recently indicated that efforts to settle SUSF and access charge issues, and associated issues, have not produced a resolution. In addition, the assumption in the Phase I Order that we would be able to reach a final decision in Phase II by September 30 of this year has proven unduly optimistic. That process requires additional time.

Currently, \$300,000 has been collected from carriers pursuant to the Phase I order. At current rates of expenditure, that amount is estimated to suffice to cover the demands upon the fund through November of this year, if the fund continues. Moreover, at current rates of expenditure, the remaining \$300,000 committed as part of the TTFE, if collected, is estimated to meet the needs of the fund through April 2012.

Accordingly, notice issued on August 12, 2011, seeking comment by August 24, 2011, on a second interim extension of the Transition Fund, to avoid a gap between expiration of transition funding and ultimate resolution of Phase II issues. The notice indicated that we would consider whether to modify the Phase I Order's provisions that contributions to the TTFE cease on September 30, 2011, and all remaining amounts be returned to

contributors. The notice further stated that the Commission would consider whether, instead, to continue the TTFE beyond September, using the previously committed \$600,000 of total contributions approved in the Phase I Order. A number of parties responded to the notice on or before August 24, 2011.

By this order, we are further extending the TTFE, beyond September 30th.

COMMENTS RECEIVED

Verizon New York, Inc. (Verizon), rather than filing comments on the notice, filed a joint motion (Joint Motion) on behalf of itself and most of the other parties in the proceeding: the Cable Telecommunications Association of New York, Inc., (CTANY), Cellco Partnership d/b/a Verizon Wireless, Frontier Communications (Frontier), more than 30 New York State Telecommunications Association, Inc. rural ILEC members (NYSTA Smaller ILECs),³ the New York State Department of State Division of Consumer Protection's Utility Intervention Unit,⁴ the staff of the Department of Public Service, and three facility-based competing local exchange carriers (CLECs)--Level 3 Communications LLC, PAETEC Communications, Inc., and tw telecom of n.y. l.p. (Facility CLECs). The Joint Motion requests that we: (1) suspend proceedings in this Case 09-M-0527--as well as in Cases 09-C-0743 and 07-C-0347, which concern Verizon's intrastate switched access charges--for a time, pending Federal Communications Commission (FCC) action in current rulemaking proceedings concerning federal regulations on universal service

³ The NYSTA Smaller ILECs include all ILECs in New York State except Frontier, and its affiliated companies, and Verizon.

⁴ Formerly the New York State Consumer Protection Board.

funding and switched access charges;⁵ and (2) extend the TTFE to June 30, 2012, with a \$50,000 increase in its amount, to a total of \$650,000. CTANY, the Facility CLECs, Frontier, the NYSTA Smaller ILECs, and Verizon itself submitted comments in support of the Joint Motion.

Parties supporting the Joint Motion believe that the FCC intends to act expeditiously on access rate and universal service fund issues raised in the FCC CAF NPRM and competing plans filed in response by a group of carriers and by state members of the FCC's Federal-State Joint Board on Universal Service. The moving parties contend that the FCC's action in its rulemaking proceeding might have significant impact on core issues in Phase II and Phase III of the proceeding before us, and that it would be inefficient and counterproductive to ignore the implications of FCC action. They also state that collaborative discussions to date indicate that comprehensive discussion of both SUSF and access charge issues would be more productive than consideration of access charges alone. The moving parties conclude that temporary suspension of the proceedings will enhance administrative efficiency and optimize use of scarce resources for the Commission and parties.

Parties supporting the Joint Motion also say that its provisions on suspension of proceedings and extension and enhancement of the TTFE are not severable and that some of the supporting parties would not support the proposed suspension without the proposed extension and enhancement of the fund, or *vice versa*. CTANY states expressly that it opposes extension of

⁵ *Connect America Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, *Developing a Unified Intercarrier Compensation Regime*, CC Docket Nos. 01-92, 96-45, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (February 9, 2011)(FCC CAF NPRM).

the TTFE if the Joint Motion is not granted. The NYSTA Smaller ILECs propose that, if we do not approve the Joint Motion, we extend the TTFE until at least December 31, 2011.

AT&T Communications of New York, Inc., Teleport Communications, Inc., and ACC Communications, Inc. (AT&T) and Sprint Nextel Corporation (Sprint) submitted comments opposing any extension of the TTFE beyond September 30, 2011. They argue that the Phase I Order established a schedule for Phase II and the TTFE, and that extension of the TTFE would adversely affect contributors by requiring additional contributions after September 30th and by preventing refund of *pro rata* shares of contributions made to the TTFE before that date. AT&T also claims the TTFE is inconsistent with the nondiscrimination requirement of §254(b)(4) of the federal Communications Act of 1934, as amended (FCA),⁶ because the TTFE collects only from LECs and interexchange carriers, not from other carriers in the marketplace. An extension of the TTFE would continue the violation of that provision, AT&T contends. While AT&T and Sprint oppose TTFE extension, their comments make clear their greater concern is that the proceedings progress to resolve issues surrounding intrastate switched access rates. No party filed a timely response to the Joint Motion.⁷

DISCUSSION

In our Phase I Order we explained that the TTFE would preserve the *status quo* availability of financial support where needed for basic local residential telephone service in rural areas of the State with limited alternatives to regulated service. We found that the TTFE would help ensure stable service and rates in those areas, while providing time to

⁶ 47 U.S.C. §254(b)(4).

⁷ AT&T filed a late response opposing the Joint Motion on September 8, 2011.

resolve issues concerning whether to establish an SUSF and, if so, what features it should have. We concluded that the TTFE would promote our policy of seeking to maintain safe and reliable telecommunications services for all New York customers at just and reasonable rates, and thus was in the public interest.⁸

None of the parties, whether those supporting the Joint Motion or those opposing TTFE extension entirely, argues that these circumstances have changed. Although the parties and we assumed last year that Phase II could be completed and any requirement for an SUSF that might be created to succeed the TTFE could be implemented by September 30th of this year, that assumption has not proved to be the case. It is not possible at this stage of the proceedings in Phase II for us to reach a decision before the TTFE as currently limited expires. Additional time is required for completion of Phase II and it remains important to preserve the *status quo* in providing needed financial support to help maintain stable service and rates in rural areas with limited alternatives to ILEC service. Simply extending the TTFE will not increase the \$600,000 that we found to be a very small overall cost to the customers of contributing companies.⁹ Thus, for the same reasons we articulated in the Phase I Order, we find that extension of the TTFE is in the public interest.

We do not agree with AT&T that the TTFE is inconsistent with or in violation of FCA §254(b)(4). That provision does not apply to state regulatory commissions. Section 254(b)(4) sets forth one of six principles that subdivision 254(b) requires the FCC and its Federal-State Joint

⁸ Phase I Order, *supra*, pp. 26-27.

⁹ *Id.*

Board on Universal Service to use as a basis for establishing federal universal service support mechanisms.¹⁰ In any event, the TTFE is not itself a universal service fund. It is an extension of the Transition Fund, which the Commission established to ease the adjustment of ILECs to the consequences of phasing out intrastate access charge pooling and loss of revenue from accompanying reductions in access charges.¹¹ The TTFE merely extended the anticipated exhaustion date of the Transition Fund, to preserve the *status quo* pending a decision in Phase II of this proceeding on whether to create a universal service fund.¹²

We are not prepared to act yet on the Joint Motion. We do not, however, view our action today as inconsistent with or prejudicial to that motion. Today, we address only the exigent circumstance of the impending expiration of the TTFE at the end of this month, before we are able to resolve the issues in Phase II of this proceeding. We do that by eliminating the termination and refund requirement that would otherwise apply on September 30, without increasing its amount or establishing a new termination date. We will consider what action to take with respect to the Joint Motion in due course.

The Commission orders:

1. Collection and distribution of the \$600,000 funding amount approved for the Temporary Transition Fund Extension, adopted and incorporated in the Order Adopting Terms of Phase I Joint Proposal issued in this proceeding on July 16, 2010, shall continue in accordance with the provisions set forth in paragraphs 3, 4, and 6 of Appendix A of that order, pending the exhaustion of that \$600,000 or further order of the Commission.

¹⁰ See introductory clause of subdivision 254(b).

¹¹ TF Order, *supra*, pp. 3-5.

¹² Phase I Order, *supra*, pp. 2-3.

2. This proceeding is continued.

By the Commission,

JACLYN A. BRILLING
Secretary