

BEFORE THE
NEW YORK STATE
PUBLIC SERVICE COMMISSION

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Proceeding to Examine Issues Related to a
Universal Service Fund
-----x

Case 09-M-0527

**STATEMENT IN SUPPORT OF PHASE III JOINT PROPOSAL
ON BEHALF OF
TW TELECOM OF NEW YORK L.P.,
LEVEL 3 COMMUNICATIONS, LLC AND
WINDSTREAM COMMUNICATIONS, INC.**

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Dated: January 4, 2013

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On behalf of tw telecom of new york l.p., Level 3 Communications, LLC and Windstream Communications, Inc. (collectively, the “Facility CLEC Coalition”), the undersigned counsel respectfully submit this Statement in Support of the Phase III Joint Proposal in accordance with the Ruling on Phase III Procedure issued by Administrative Law Judge Howard A. Jack on December 7, 2012.

I. INTRODUCTION AND BACKGROUND

On August 17, 2012, the New York State Public Service Commission (“Commission”) issued an order adopting provisions of a Joint Proposal resolving the issues considered in Phase II of this proceeding.¹ Among other things, the Phase II Order established a limited term State Universal Service Fund (“USF”) and adopted provisions governing collaboration and litigation of issues in Phase III of the proceeding, concerning the Targeted Accessibility Fund (“TAF”) and intrastate access charges.

Pursuant to the Phase II Order, the parties to this proceeding engaged in collaborative discussions in an attempt to resolve the Phase III issues. As a result of that collaboration, a

¹ Case 09-M-0527 - Proceeding to Examine Issues Related to a Universal Service Fund, Order Adopting Phase II Joint Proposal (Aug. 12, 2012) (“Phase II Order”)

substantial majority of the parties executed a Joint Proposal and Settlement Agreement addressing the Phase III issues (the “Phase III Joint Proposal”). A copy of the Phase III Joint Proposal was filed with the Commission on November 19, 2012.

The Phase III Joint Proposal requests a Commission determination that no further action on intrastate access charges in New York is warranted at this time, pending further action by the Federal Communications Commission (“FCC”) on this issue.² If the FCC has not acted on this issue by July 2014, the Phase III Joint Proposal calls for the Commission to convene a meeting of all interested entities before an Administrative Law Judge “to discuss what, if any, action would be appropriate at that time.”³ The Phase III Joint Proposal also requests the Commission determine that no changes to the TAF are warranted at this time. Under the Phase III Joint Proposal, changes to the TAF would be considered in the proceeding to review issues related to the state USF that is scheduled to begin in January 2016 pursuant to the terms of the Phase II Order.⁴

As set forth herein, the Facility CLEC Coalition fully supports the Phase III Joint Proposal and requests the Commission adopt it in its entirety without modification.

² The FCC’s November 18, 2011 Report and Order and Further Notice of Proposed Rulemaking establishes a national standard of “bill-and-keep” for all interstate and intrastate access charges, which will eliminate all such charges when fully implemented. See WC Docket 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (Nov. 18, 2011) (the “FCC Order”). While the FCC Order includes a schedule for gradually moving intrastate terminating access charges to bill-and-keep, it did not include any immediate implementation steps for intrastate originating and transport switched access charges. Instead, the FCC Order included a Further Notice of Proposed Rulemaking (“FNPRM”) seeking comment on, among other things, appropriate reform for such charges.

³ Phase III Joint Proposal at ¶ 1(b)(2).

⁴ Id. at ¶ 2(b). Under limited circumstances, the Phase III Joint Proposal would permit proposals for TAF changes to be raised after either an FCC order on the switched access issues or any Commission review proceeding on access charges initiated in the event that the FCC has not acted on those switched access issues by July 2014. Id.

II. THE PHASE III JOINT PROPOSAL SATISFIES THE COMMISSION'S CRITERIA FOR REVIEWING SETTLEMENTS

The Commission's Settlement Guidelines⁵ set forth the standard to be used in assessing the reasonableness of settlements in Commission proceedings.⁶ The Settlement Guidelines require joint proposals to be "just, reasonable and in the public interest."⁷ In determining whether a joint proposal is in the public interest, the Commission has consistently considered the following factors:

- The settlement's consistency with law and the regulatory, economic, social and environmental policies of the Commission and the State;
- Whether the agreement compares favorably with the likely result of full litigation and is within the range of reasonable outcomes;
- Whether the settlement strikes a fair balance among interests of ratepayers, investors and the long-term soundness of the utility;
- Whether the settlement reflects the agreement of normally adverse parties;
- The existence of a rational basis for decision;
- The completeness of the record; and
- Whether the settlement is contested.⁸

The Phase III Joint Proposal is consistent with the New York State Public Service Law and Commission policy. The Phase III Joint Proposal produces a result that is rational and within the range of reasonable outcomes if the proceeding had resulted in a fully litigated

⁵ 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”).

⁶ “Settlements may be of entire cases or selected issues, and they may be styled as unitary agreements, presented to the Commission for approval or disapproval only in their entirety and not on a piecemeal basis.” Settlement Guidelines, Appendix B at 5.

⁷ Id. at 8.

⁸ Settlement Guidelines at 30 and Appendix B at 8.

outcome. The Phase III Joint Proposal and the stipulations incorporated therein are the result of extensive negotiations and are supported by parties representing a broad range of diverse, often adversarial, interests — including the Commission’s Staff, the New York Department of State, an array of large and small incumbent local exchange carriers (“LECs”), cable operators and competitive LECs (“CLECs”). Thus, there is a rational basis for the Phase III Joint Proposal. Given these factors, the Phase III Joint Proposal clearly meets the public interest standard set forth in the Commission’s Settlement Guidelines and should be adopted by the Commission in its entirety, without modification.

III. THE COMMISSION SHOULD ADOPT THE JOINT PROPOSAL PROVISIONS AND CONCLUDE THAT FURTHER ACTION ON INTRASTATE ACCESS RATES IS NOT APPROPRIATE AT THIS TIME

A. It Is Against Public Policy for the Commission to Undertake Intrastate Access Charge Reform At This Time Because the FCC Is Already Doing So

With the issuance of the FCC Order, the FCC sought to bring intrastate and interstate access charges under a single federal regime. The FCC Order adopted comprehensive measures to uniformly reform such charges either directly through measures adopted in the Order or indirectly through measures proposed for further consideration in ongoing proceedings.

Specifically, the FCC Order unifies interstate and intrastate terminating access charges under Section 251(b)(5) of the Communications Act of 1934, as amended, and adopts a glide path to reduce gradually terminating access charges and reciprocal compensation charges to bill-and-keep by 2020.⁹ Among other things, the FCC Order: 1) adopts a uniform national regime for all telecommunications traffic exchanged with a LEC; 2) immediately caps all interstate and intrastate switched access rate elements for price cap carriers and all interstate elements and intrastate terminating rates for rate-of-return carriers; 3) adopts a six-year transition for price cap

⁹ See FCC Order, Fig. 9 at ¶¶ 270-271.

carriers and CLECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and CLECs that benchmark to rate-of-return carrier rates to reduce terminating interstate and intrastate access charge rates to bill-and-keep; and 4) adopts new revenue recovery mechanisms to mitigate the effect of intercarrier revenue reductions using a combination of end user recovery and a new Access Recovery Charge (“ARC”).

In addition, the FCC released an FNPRM proposing to eliminate originating switched access charges “at the conclusion of the ultimate transition to the new intercarrier compensation regime.”¹⁰ The FNPRM sought comment on the specific manner in which originating switched access, dedicated transport, tandem switching and tandem transport (in some circumstances), and other charges (including dedicated transport signaling and signaling for tandem switching) should be reformed.¹¹ The FCC now is reviewing the approximately one hundred comments submitted in response to the FNPRM.

In justifying its reforms, the FCC observed that a national uniform approach will create predictability for carriers and promote efficient pricing.¹² According to the FCC, “[a]dopting a uniform federal transition and recovery mechanism will . . . provide carriers with recovery for reductions to eligible interstate and intrastate revenue. As a result, states will not be required to bear the burden of establishing and funding state recovery mechanisms.”¹³ The FCC Order could not have made it clearer that the FCC intends to supplant state rate-making functions with respect to intrastate access charges.

¹⁰ Id. at ¶ 1298.

¹¹ Id. at ¶ 1297.

¹² Id. at ¶ 796.

¹³ Id. at ¶ 795.

The FCC Order reflects a rationale that uniform federal standards are necessary to reform access rates and to avoid inconsistent state actions. Further Commission action at this time would be unnecessary in light of, and inconsistent with, this FCC Order. With the issuance of the FNPRM, the FCC has already put in place a process to address originating access charge reform. Until the FCC takes action on originating access charges, there is no compelling reason for the Commission to take any further action at this time. Any action the FCC ultimately takes will impact the Commission's treatment of intrastate switched access rates. An FCC order that addresses intrastate switched access rates may in fact altogether alleviate the need for the Commission to undertake further intrastate access charge reform. Moreover, if the Commission proceeds with intrastate access charge reform now, it will run the risk that its action will need to be undone once the FCC issues an order pursuant to its FNPRM. The time and expense associated with further access charge reform in New York (and the possible undoing of such action) is an inefficient use of resources and contrary to public policy.

As noted above, the FCC has signaled a clear intent for a national access charge regime that governs both interstate and intrastate charges. Further access charge reform by the Commission may disturb the uniform scheme put in place by the FCC. Thus, instead of proceeding with access charge litigation at this time, the Commission and the parties to this proceeding should focus their resources on adhering to and implementing the comprehensive access charge reform regime and recovery mechanisms set forth in the FCC Order and any subsequent order.¹⁴

¹⁴ The Commission has already instituted a proceeding to address terminating access charge reform as set forth in the FCC Order. Case 12-C-0112 - In the Matter of Compliance with the Federal Communications Commission's Report and Order and Further Notice of Proposed Rulemaking, Released November 18, 2011, Order on Tariff Revisions to Reduce Terminating Intrastate Switched Carrier Access Charges and Reciprocal Compensation (May 24, 2012).

For these reasons, it would be against public policy for the Commission to undertake any further intrastate access charge reform at this time.

B. Additional Intercarrier Compensation Reductions at This Time Would Unduly Burden Local Exchange Carriers and Their Customers

Immediate action on intrastate originating access charge reform by the Commission would also harm the public interest by placing an unnecessary burden on LECs that are already grappling with substantial terminating rate decreases that just now are going into effect and will be phased in over the next six years (for price cap LECs) or nine years (for rate-of-return LECs). LECs are in the midst of adjusting their business models to reflect the significant reduction in revenue that will result from transitioning to a bill-and-keep system for terminating intrastate access. An immediate, additional reduction in intrastate originating access charges due to action at the state level would place an undue financial stress on LECs.

Furthermore, there are fewer public policy reasons for immediately reforming and reducing intrastate originating access charge rates than there are for terminating access charge rates. Intrastate originating access charges have not resulted in the arbitrage problems, such as “traffic pumping” and “phantom traffic”, alleged to be associated with terminating access charges. As the FCC recognized in its Order, terminating access is “the principal source of arbitrage problems today” and the “concerns . . . with respect to network inefficiencies, arbitrage, and costly litigation are less pressing with respect to originating access.”¹⁵ Unlike with terminating access charges, there is essentially no opportunity for LECs to recover from end users the revenue lost from rate reductions. In the typical toll call flow, the interexchange carrier (“IXC”), not the originating LEC, has a customer relationship with the end user for the relevant service, and the originating LEC is providing a service to the IXC. Thus, it is more rational for

¹⁵ FCC Order at ¶¶ 35, 777.

the IXC, not the end user, to compensate the originating LEC for that service, and without originating access, LECs are essentially forced to make their networks available to IXCs at no charge.

Immediate reduction in intrastate originating access charge rates could also burden customers. End user customers are already being asked to take on a significantly greater share of the cost of local service through terminating access reform and, ultimately under bill-and-keep, will pay all costs. Additional local rate increases needed to support reductions in originating access revenue would be excessive and detrimental to end-users at this time. LECs have limited ability to recover lost access charge revenues, and therefore additional access charge reductions at the state level at this time could greatly impact the amount of capital a LEC can invest in its network and operations. Constraints on system investments could negatively impact innovation and service quality. Furthermore, adjusting to the FCC's reformation of the terminating access and reciprocal compensation regimes, and resulting business changes, will take time for both carriers and consumers, and unintended consequences cannot be known until the federal reform process runs its course.

C. Premature Implementation of Originating Access Charge Reductions May Reduce or Eliminate New York LECs' Ability to Obtain Support from Future Federal Recovery Mechanisms

Another reason for the Commission to not undertake access charge reform at this time is that premature implementation of originating access charge reductions may preclude New York LECs from being able to avail themselves of future, federal recovery mechanisms that would benefit the LECs and their customers. Under the FCC Order, proposed federal funding for rate-of-return and price cap carriers is tied to the levels of intrastate access reductions mandated

under the FCC Order.¹⁶ Notably, the FCC stated that “although states are free to lower intrastate access rates more quickly than specified by our reform, doing so would not increase the ARC or ICC-replacement CAF support to carriers in such states.”¹⁷ Thus, if New York modified its intrastate access rates before the FCC acts on this issue, due to the mechanics of the recovery mechanisms outlined in the FCC Order, such an action may reduce a LEC’s ability to recover future FCC reductions in the form of an ARC. Such a scenario would burden New York LECs and is not in the public interest.

IV. THE COMMISSION SHOULD ADOPT THE PROVISIONS OF THE JOINT PROPOSAL PROVIDING FOR THE CONTINUATION OF THE TAF

As noted above, the Phase III Joint Proposal calls for the continuation of the TAF under its current terms and conditions, including its current contribution mechanism and list of funded programs and services. The Facility CLEC coalition believes that under its current terms, the TAF is operating effectively and efficiently and will accomplish its intended purpose through at least 2015. However, should the need arise, the Phase III Joint Proposal would allow entities to seek modification of the TAF under limited circumstances.

Given that no party has objected to the continuation of the TAF under its current terms and the TAF is operating as intended, there is no basis for modifying the TAF at this time. Continuation of the TAF under its current terms is reasonable and, therefore, the Commission should adopt the Phase III Joint Proposal’s TAF provision without modification.

¹⁶ Id. at ¶ 851.

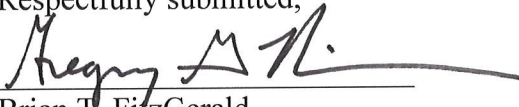
¹⁷ Id. at ¶ 915, fn 1808.

V. CONCLUSION

For the reasons stated above, the Facility CLEC Coalition respectfully requests that the Commission adopt the Phase III Joint Proposal in its entirety without modification.

Dated: January 4, 2013

Respectfully submitted,



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