

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

RULING ON PHASE III PROCEDURE

(Issued December 7, 2012)

HOWARD A. JACK, Administrative Law Judge:

BACKGROUND

On August 17, 2012, the Commission issued an order adopting provisions of a Joint Proposal establishing a limited term State Universal Service Fund, resolving the issues considered in Phase II of this proceeding.<sup>1</sup> The Phase II Order also adopted certain provisions governing collaboration and litigation of issues in Phase III of the proceeding, concerning the Targeted Accessibility Fund (TAF) and intrastate access charges. The terms adopted in the Phase II Order allowed up to 60 days for collaboration, but with the limitation that after 30 days of collaboration, absent a consensus of the parties that all Phase III issues could be resolved within the remaining 30 days, litigation of unresolved issues would commence.<sup>2</sup>

Collaboration commenced timely, but shortly before expiration of the initial 30-day period, the settlement judge advised the participants that, in her view, discussions had reached an impasse and the collaborative would not continue as then constituted. A substantial majority of the other parties in the proceeding wrote to me taking issue with Judge Stein's conclusion and seeking additional time to complete collaborative efforts toward a settlement agreement on all Phase III issues.

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

<sup>2</sup> *Id.*, Attachment I, subparagraph 11(b).

Those parties also cited the Commission's observation that, even if Phase III shifted to a litigation track, the parties were free to negotiate a settlement and seek a related modification of the litigation schedule whenever they believed additional collaborative discussions would bear fruit.<sup>3</sup>

Three parties that, earlier in this proceeding, have argued for priority consideration of intrastate access charge issues--AT&T Communications of New York, Inc. (AT&T), Sprint Nextel Corporation (Sprint), and T-Mobile Northeast LLC d/b/a T-Mobile (T-Mobile)--did not join in the request for additional time for collaboration. AT&T filed a letter in opposition to the requests. AT&T contended that the requisite "consensus" for additional collaboration was absent and, pursuant to the terms adopted in the Phase II Order, Phase III must shift to litigation. AT&T therefore asked that a prehearing conference be convened to commence litigation of Phase III issues.

Without resolving the question of whether the necessary consensus existed at the prescribed time in the collaboration effort, I issued a ruling stating my belief that the interests expressed by both the still collaborating parties and AT&T could be accommodated.<sup>4</sup> The ruling set a date of November 27, 2012, for a procedural conference for Phase III litigation, but noted that the parties interested in continued pursuit of settlement were free to continue to negotiate toward submission of a joint proposal to resolve all Phase III issues, including seeking support of parties that had not been satisfied with the direction of the negotiations. The ruling also stated that, if some or all parties had submitted a joint proposal before the procedural conference, the conference would include

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<sup>3</sup> Phase II Order, p. 19.

<sup>4</sup> Case 09-M-0527, Phase III Procedural Ruling (issued November 1, 2012).

discussion of appropriate procedures for considering the joint proposal, including any remaining opposition to it.

PHASE III JOINT PROPOSAL

On November 19, 2012, Verizon New York Inc. (Verizon) filed a "Joint Proposal and Settlement Agreement" (Phase III Joint Proposal) that most of the parties to this proceeding executed.<sup>5</sup> The Phase III Joint Proposal notes the November 2011 action of the Federal Communications Commission (FCC) on, among other things, intercarrier compensation for switched access-- establishing a national standard of "bill-and-keep" for all interstate and intrastate access charges, which will eliminate all such charges when fully implemented.<sup>6</sup> The FCC Order included establishment of a gradual schedule for moving all interstate and intrastate call terminating access charges to bill-and-keep. For intrastate terminating access charges, the Commission and New York carriers have begun implementing that schedule.<sup>7</sup> With respect to originating and transport switched access charges,

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<sup>5</sup> The signatory parties (JP Proponents) are: the New York State Department of Public Service staff (Staff); the Cable Telecommunications Association of New York, Inc. (CTANY); Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless); Frontier Communications New York Incumbent Local Exchange Carriers; Level 3 Communications, LLC (Level 3); the NYSTA Smaller ILECs (31 incumbent local exchange carriers listed in Appendix A); Time Warner Cable, Inc.; tw telecom of new york l.p. (tw telecom); Verizon itself; and Windstream Communications, Inc. (Windstream). See also p. 5 n. 9 *infra*.

<sup>6</sup> See WC Docket 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (November 18, 2011)(FCC Order).

<sup>7</sup> Case 12-C-0112 - *Compliance with the Federal Communications Commission's Report and Order and Further Notice of Proposed Rulemaking*, Order on Tariff Revisions to Reduce Terminating Intrastate Switched Carrier Access Charges and Reciprocal Compensation (issued May 24, 2012)(Terminating Access Charge Order).

however, the FCC Order did not include any immediate implementation steps, but included a Further Notice of Proposed Rulemaking (FNPRM) seeking comment on, among other things, an appropriate transition path to bill-and-keep. The Phase III Joint Proposal, if adopted by the Commission, would conclude that further action on intrastate access charges in New York is not warranted at this time, pending further FCC action addressing the switched access issues identified in its FNPRM. If the FCC has not acted on those issues by July 2014, however, the Phase III Joint Proposal would call for convening a meeting of all interested entities before an Administrative Law Judge "to discuss what, if any, action would be appropriate at that time."<sup>8</sup>

The Phase III Joint Proposal would also determine that no changes to the TAF are warranted at this time. It would provide for consideration of changes to the TAF again in the proceeding to review issues related to the State Universal Service Fund that is scheduled to begin in January 2016 pursuant to the terms of the Phase II Order. In addition, the Phase III Joint Proposal would, under limited circumstances, permit proposals for TAF changes to be raised after either an FCC order on the switched access issues raised in its FNPRM 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.<sup>9</sup>

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<sup>8</sup> Phase III Joint Proposal, ¶1(b)(2).

<sup>9</sup> Although T-Mobile did not execute the Phase III Joint Proposal, it submitted a letter dated November 19, 2012, indicating that it did not oppose adoption of that joint proposal on condition that future consideration of the TAF include examination of the TAF's structure, purpose, and necessity.

THE PROCEDURAL CONFERENCE

At the November 27, 2012, procedural conference, Verizon and Verizon Wireless reiterated the view that the Phase III "litigation trigger" under the Phase II Order had not occurred, so that consideration of the Phase III Joint Proposal should be taken up before proceeding to any steps in litigation. If litigation is viewed as having been triggered under the terms of the Phase II Order, however, they proposed a bifurcated Phase III with the Phase III Joint Proposal considered first. They suggested allowing three to four weeks for simultaneous submission of statements in support or opposition and an additional two weeks for submission of replies, then oral argument before me, if I deemed it useful, followed by a recommended decision and Commission action on the Phase III Joint Proposal. If necessary as a result of the Commission declining to adopt the provisions of that joint proposal, another procedural conference would be held to address the specific issues and detailed schedule for litigation of the unresolved Phase III issues. Representatives of CTANY, Staff, the NYSTA Smaller ILECs, as well as the representative of Level 3, tw telecom, and Windstream, spoke in support of the Verizon and Verizon Wireless comments.

AT&T continued to insist that the litigation stage of Phase III has been triggered and strongly objected to any bifurcation giving priority to consideration of the Phase III Joint Proposal. AT&T maintained that: (1) it has been seeking Commission action to reform access charges for many years; (2) access charges have already been deferred through the first two phases of this proceeding; (3) the provisions of the FCC Order were known to and taken into account by the parties in agreeing to the Phase III collaboration and litigation trigger provisions of the joint proposal adopted in the Phase II Order;

(4) the Phase III Joint Proposal does not offer a substantive resolution of access charge issues, but merely delays action further; (5) key parties to this proceeding have previously litigated these access charge issues to resolution in other jurisdictions; and (6) the proposal to bifurcate Phase III with priority for considering the Phase III Joint Proposal is just another attempt at delay and is inconsistent with the limited collaboration timeframe the Commission adopted in the Phase II Order. AT&T offered a proposed litigation schedule commencing with discovery this month, initial and reply testimony filed in mid-February and mid-March 2013, respectively, evidentiary hearings in April, and initial and reply briefs submitted in May 2013. Mr. Alan Flacks, appearing *pro se*, and a representative of Sprint supported AT&T's comments.

With respect to the litigation schedule AT&T proposed, Verizon and Verizon Wireless expressed doubt that discovery could be completed within the time allotted before filing of testimony. They also commented that the two weeks proposed between filing of reply testimony and commencement of evidentiary hearings, as well as between filing dates for initial and reply briefs, seemed too tight. AT&T countered that the parties had previously conducted discovery on the access charge issues in litigation in other states, but would not object to an additional week between filing initial and reply briefs. Several other parties also urged that more time be allotted between filing reply testimony and beginning evidentiary hearings and between filing dates for initial and reply briefs.

I also asked whether any party opposed the provisions of the Phase III Joint Proposal concerning the TAF. None expressed any opposition.

DISCUSSION

I appreciate the concern opponents of the Phase III Joint Proposal express that giving it procedural priority will further delay in consideration of intrastate access charge reform. If that joint proposal goes to the Commission as the first step in Phase III litigation and the Commission adopts it, further effort to reform access charges will be put off for as much as another year and a half, depending on when the FCC takes action on its FNPRM. Even if the Commission declines to adopt the Phase III Joint Proposal, its consideration will likely take several months before litigation of remaining access charge issues can resume.

AT&T insists that the "consensus" necessary to keep collaboration on a negotiated resolution to Phase III going had failed by the time specified in the Phase II Order, triggering litigation; that priority consideration of such a negotiated resolution now is therefore inconsistent with the provisions adopted in the Phase II Order; and that, in any event, the terms of the Phase III Joint Proposal do not resolve the Phase III access charge issues, but merely delay their resolution. I need not rule on whether or not the required consensus had failed at the time prescribed in the Phase II Order. Even if litigation has been triggered under the terms adopted there, the Phase II Order itself noted that a negotiated settlement could arise during Phase III litigation and affect the litigation schedule, as the signatory parties to the Phase III Joint Proposal observed.<sup>10</sup> Moreover, the Phase III Joint Proposal does not have to be unopposed to be submitted to the Commission for decision.<sup>11</sup>

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<sup>10</sup> See p. 2 n. 3 *supra*.

<sup>11</sup> *E.g.*, the Commission adopted an opposed joint proposal in Phase I of this proceeding. Case 09-M-0527, Order Adopting Terms of Phase I Joint Proposal (issued July 16, 2012).

AT&T's argument that the terms of the Phase III Joint Proposal do not resolve, but only delay resolution of, intrastate access charge issues is both correct and incorrect. In the first place, access charge reform in New York has already begun, with the Commission order directing carriers to file tariffs reducing terminating access charges.<sup>12</sup> True, the terms of the Phase III Joint Proposal would not resolve the remaining intrastate access charge issues for the long term. They would, however, resolve those issues temporarily by maintaining the *status quo* for a time, pending FCC action that might significantly influence the issues' long-term resolution. A ruling in favor of considering the Phase III Joint Proposal as the first order of business now will preserve the ability of the Commission to determine whether temporarily maintaining the *status quo*--pending FCC action on the access charge issues that are the subject of the FNPRM--better serves the public interest than proceeding to a long-term decision on remaining intrastate access charge issues prior to FCC action on them. In contrast, a ruling to proceed directly to discovery and evidentiary hearings on the remaining Phase III access charge issues, as AT&T, Sprint, and Mr. Flacks urge, would effectively moot the alternative presented in the Phase III Joint Proposal and would deny the Commission the opportunity to consider and decide which of those options is preferable in the public interest. I conclude that preservation of the Commission's ability to consider and make a determination on the alternatives of adopting or rejecting the Phase III Joint Proposal is the proper course of action.

Accordingly, I am establishing a schedule for submission of initial statements and replies in support of or opposition to the Phase III Joint Proposal. Given the impending

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<sup>12</sup> Terminating Access Charge Order, *supra*.

holidays, I am inclined to allow about four weeks rather than three for submission of initial statements. Statements are due on the following dates:

Initial statements in support or opposition	January 4, 2013
Reply statements	January 18, 2013

I reserve decision on whether to schedule oral argument on the Phase III Joint Proposal.

(SIGNED)

HOWARD A. JACK

**APPENDIX A**

**NYSTA SMALLER ILECs MEMBERS**

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