

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

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

REPLY COMMENTS OF THE NYSTA SMALLER ILECS

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Pursuant to the December 7, 2012 “Ruling on Phase III Procedure” issued in the above-captioned proceeding (the “*Phase III Procedural Ruling*”), the NYSTA Smaller ILECs (which are identified in Attachment A), hereby provide these reply comments to the oppositions filed by AT&T Communications of New York, Inc. (and its regulated affiliates) (“AT&T”) and Sprint Nextel Corporation (“Sprint”).¹ For the reasons stated herein, the *AT&T Opposition* and the *Sprint Opposition* should be rejected and the November 19, 2012 “Joint Proposal and Settlement Agreement” (the “*JPSA*”) should be approved and adopted in its entirety by the New York Public Service Commission (the “Commission”). This conclusion is amply demonstrated in the record in response to the *Phase III Procedural* ruling.² The parties supporting the *JPSA*, a

¹ See AT&T Communications of New York, Inc.’s and Its Regulated Affiliates’ Statement in Opposition to Phase III Joint Proposal, Case 09-M-0527, filed January 4, 2013 (“*AT&T Opposition*”); Sprint’s Statement in Opposition to Phase III Joint Proposal, Case 09-M-0527, filed January 4, 2013 (“*Sprint Opposition*”).

² Comments in support of the *JPSA* were filed by five (5) parties in addition to the NYSTA Smaller ILECs: (1) 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., Case 09-M-0527, filed January 4, 2013 (“*Facility CLEC Coalition Supporting Statement*”); (2) Department of Public Service Staff Statement in Support of Joint Proposal and Settlement Agreement, Case 09-M-0527, filed January 4, 2013 (“*Staff Supporting Statement*”); (3) Statement in Support of the Phase III Joint Proposal by Time Warner Cable Inc. and Cablevision Systems Corp., Case 09-M-0527, filed January 4, 2013 (“*TWC/Cablevision Supporting Statement*”); (4) Letter to Honorable Howard A. Jack, Administrative Law Judge from Tom Friel, Director, Utility Intervention Unit of the New York State Department of State’s Division of Consumer Protection, Case 09-M-0527, filed January 4, 2013 (“*UIU Supporting Statement*”); and (5) Comments of Verizon New York, Inc. and Cellco Partnership d/b/a Verizon Wireless on the Phase III Joint Proposal, Case 09-M-0527, filed January 4, 2013 (“*Verizon Supporting*”).

diverse group to be sure,³ has amply demonstrated, along with the NYSTA Smaller ILECs in their comments filed on January 4, 2013,⁴ that adoption of the *JPSA* in its entirety is consistent with and advances the public interest.⁵

Given that many of the contentions raised by Sprint and AT&T have effectively already been addressed by the demonstrations made in the *Supporting Statements* (and more specifically in the *Verizon Supporting Statement*), the NYSTA Smaller ILECs focus these reply comments on just two specific allegations raised by the opposing parties.⁶ NYSTA seeks to ensure that the record is clear that nothing in or leading up to issuance of the *JPSA* is contrary to the Commission's action in Phase II of this proceeding or the settlement agreement reached in that Phase.⁷

Statement"). These five sets of additional supporting comments along with those filed by the NYSTA Smaller ILECs are referred collectively herein as the "*Supporting Statements*."

³ *Accord Staff Supporting Statement* at 4-5; *TWC/Cablevision Supporting Statement* at 2.

⁴ *See generally* Statement of the NYSTA Smaller ILECs in Support of the Phase III Joint Proposal and Settlement Agreement, Case 09-M-0527, filed January 4, 2013 (the "*NYSTA Smaller ILECs' JPSA Supporting Statement*").

⁵ One additional party filed its view of the *JPSA* previously, and did not oppose it. *See* Letter of T-Mobile Northeast LLC to the Honorable Howard A. Jack, Case 09-M-0527, November 19, 2012 at 2.

⁶ The NYSTA Smaller ILECs note that, to the extent that any contention raised by either the *AT&T Opposition* or the *Sprint Opposition* is not addressed specifically herein, such contention should be rejected to the extent that it could, in any way, be viewed as a basis for opposing the *only* proper conclusion in this matter – that the *JPSA* should be adopted and approved by the Commission in its entirety.

⁷ *See Order Adopting Phase II Joint Proposal*, Case 09-M-0527, issued and effective August 17, 2012 ("Phase II Order"); *see also id.*, Attachment 1 "Joint Proposal and Settlement Agreement" ("Phase II Settlement Agreement").

First, AT&T claims that the review and approval of the *JPSA* is “contrary to the Parties’ Phase II Settlement Agreement and to the Commission’s Phase II Order approving that Agreement”⁸ because, according to AT&T, the parties agreed with a “litigation trigger”⁹ in the absence of consensus on Phase III issues. A somewhat similar claim is made by Sprint.¹⁰ As a corollary to this type of contention, AT&T also alleges that, since the signatories to the Phase II Settlement Agreement all recognized (at least according to AT&T) that litigation of intrastate access charges would be the result in the absence of consensus, action approving the *JPSA* “would set a troubling precedent for future Commission proceedings” in that “[n]o rational party would enter into settlement agreements knowing that the very nature, intent, letter and spirit of what was settled somehow was *not* settled, and in fact could be set aside at the whim of a subset of the settling parties in a later [Joint Proposal].”¹¹ These claims and concerns are baseless and should be rejected.

With respect to the claim that the lack of consensus on Phase III issues requires litigation, AT&T and Sprint apparently fail to grasp that the parties are, in fact, litigating Phase III issues. As Verizon properly points out in the context of the *Phase III Procedural Ruling*, “Judge Jack made the appropriate decision in ruling that within that litigation, it made sense to consider the interim resolution proposed by the [*JPSA*] first, before beginning detailed discovery and evidentiary proceedings on other issues.”¹² Moreover, as Judge Jack also indicated, “[e]ven if litigation has been triggered under the terms adopted there, the Phase II Order itself noted that a

⁸ *AT&T Opposition* at 3.

⁹ *Id.* at 4.

¹⁰ *See Sprint Opposition* at 4.

¹¹ *AT&T Opposition* at 6 (emphasis in original).

¹² *Verizon Supporting Statement* at 10.

negotiated settlement could arise during Phase III litigation and affect the litigation schedule. . . .”¹³ Thus, any claims made by AT&T and Sprint regarding an alleged end-run of the alleged litigation triggers in the Phase II Settlement Agreement are baseless and should be rejected.

Despite AT&T’s claims that adoption of the *JPSA* would place a chill on parties’ willingness to reach settlements,¹⁴ parties enter into settlement agreements based on the terms they negotiate. And, that is what occurred here.

AT&T agreed to the following provision, along with the other signatories to the Phase II Settlement Agreement.

Nothing in this Settlement Agreement will prejudice the right of any Party to argue for or against any Commission action with respect to the TAF or intrastate access charges in Phase III of this proceeding, including issues related to the advisability, establishment and operation of a separate recovery mechanism for revenue losses due to reductions in such charges, if such reductions are ordered. However, nothing in Phase III shall alter the terms of this Settlement Agreement, including but not limited to the Benchmark Rate established herein.¹⁵

Thus, the Phase II Settlement Agreement signatory parties, which included AT&T,¹⁶ retained their individual rights to pursue positions they deemed appropriate in Phase III.

Likewise, in light of paragraph 11(a) of the Phase II Settlement Agreement, Sprint’s contention – that the signatories to the *JPSA* are trying to “pick and choose the aspects” of the Phase II Settlement Agreement “that will be enforced”¹⁷ – is equally without merit. By giving

¹³ *Phase III Procedural Ruling* at 7.

¹⁴ Apparently in an effort to raise the bar, AT&T claims that approval of the *JPSA* could also have “deleterious consequences on future potential settlements involving various other regulated industries (e.g., power, gas, water.)” *AT&T Opposition* at 6, n. 7.

¹⁵ Phase II Settlement Agreement, paragraph 11(a) (emphasis added).

¹⁶ See Phase II Settlement Agreement, Appendix B (signature pages). Sprint was also a signatory to the Phase II Settlement Agreement. See *id.*

¹⁷ *Sprint Opposition* at 4.

proper credence to paragraph 11(a) of the Phase II Settlement Agreement and not ignoring it, Sprint's statement that "[a]ll aspects of the proposal should be implemented"¹⁸ is achieved.

Second, AT&T claims that, since all signatory parties to the Phase II Settlement Agreement knew what the Federal Communications Commission ("FCC") had done in the *FCC Transformation Order*,¹⁹ the only issue to be litigated in Phase III would be the "proper rate for originating access."²⁰ The NYSTA Smaller ILECs will not and need not comment at this time (but retain their right to do so) on AT&T's characterization of, summary of, or what AT&T apparently believes to be the proper level of intrastate access charges arising from the *FCC Transformation Order*.²¹ However, the NYSTA Smaller ILECs note that AT&T's claim that only rate issues may be litigated in Phase III is erroneous.²² Moreover, in light of its statements addressing the *FCC Transformation Order*, AT&T (as it must) acknowledges that the

¹⁸ *Id.*

¹⁹ 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.).

²⁰ *AT&T Opposition* at 6 (footnote omitted). AT&T claims that the Phase II Settlement Agreement and Phase II Order "permitted qualifying carriers to seek an addition to the USF established in Phase II, if necessary, to offset originating access reductions that the parties anticipated." *Id.*, n.6. While AT&T is correct that parties (not just "qualifying carriers") could seek a "separate recovery mechanism for revenue losses due to reductions in such charges, if such reductions are ordered" (Phase II Settlement Agreement at ¶11(a)) (or as AT&T states "an addition to the USF"), there is no basis for AT&T's claim that "parties' anticipated" reductions in intrastate access charges. Paragraph 11(a) of the Phase II Settlement Agreement quoted above specifically notes the retention of positions on *all* Phase III issues and those issues obviously included rate levels.

²¹ See *AT&T Opposition* at 7-14. The NYSTA Smaller ILECs also reserve their right to address Sprint's similar contentions regarding access charge levels (*see, e.g., Sprint Opposition* at 5) when and if necessary.

²² Of course, in addition to any intrastate access rate structure issues, if the *JPSA* is not approved, further action on all Phase III issues would be required since Targeted Accessibility Fund issues were tied to the resolution of the access charge issues, as reflected in the paragraph 2(b) of the *JPSA*. See *JPSA* at ¶2(b).

Commission is not required to act on intrastate access issues at this time. Further, as stated above, all signatories to the Phase II Settlement Agreement specifically preserved their rights regarding Phase III, including the ability to propose the *JPSA*.

AT&T acknowledges that the FCC's decision "makes it quite clear that the states *may* continue to act to reduce access charges, as long as state policy is in line with the FCC's overall policy favoring total access reform."²³ Thus, by its own statement, AT&T agrees that the Commission is not required to act; the use by AT&T of the word "may" in its statement demonstrates that Commission action to address long-term intrastate access issues is permissive. Moreover, as Sprint notes, the *FCC Transformation Order* addressed requirements applicable to a portion of originating access.²⁴ Nonetheless, the FCC sought further comment on the remaining originating access issues. Consequently, the Commission and the parties are still left to guess the specifics of what the FCC's ultimate "overall policy favoring total access reform"²⁵ may actually be with respect to originating access or how the FCC may determine to implement any such decision regarding originating access. Accordingly, awaiting FCC action and understanding the structure that arises from it would avoid two extensive litigations that could arise – the current litigation that AT&T and Sprint seek to make unnecessarily costly and

²³ *AT&T Opposition* at 10 (emphasis added).

²⁴ As noted by Sprint, the FCC addressed access charges with respect to Voice over Internet Protocol ("VoIP") traffic. See *Sprint Opposition* at 4-5. Such intrastate access charges are those associated with intrastate toll traffic that "originates and/or terminates in [Internet Protocol] format. . . ." 47 C.F.R. §51.913(a)(2). The originating VoIP aspect of the *FCC Transformation Order* currently is the direct subject of an appeal filed by the parent company of Windstream New York, Inc., and thus all rights associated with that appeal are retained as is true for *all* of the other appeal issues. See *NYSTA Smaller ILECs' JPSA Supporting Statement* at 4.

²⁵ *AT&T Opposition* at 10.

extensive at this time and the second litigation of actions deemed necessary by the Commission to address FCC actions. Such a result is improper and unnecessary.

As indicated in the *NYSTA Smaller ILECs' JPSA Supporting Statement*,²⁶ the public interest would be advanced by the Commission awaiting whatever further FCC action may be forthcoming. The *JPSA*'s limited periods of time within which the Phase III issues would be resolved on an interim basis provide the Commission the necessary flexibility to react to and implement any actions in response to further FCC decisions²⁷ and the currently pending appeal of the *FCC Transformation Order*. Moreover, awaiting further FCC action provides the Commission and the affected parties the opportunity to focus their resources on the myriad of implementation requirements arising from the *FCC Transformation Order* and identifying the additional future impacts of such requirements, rather than adding to them, thereby allowing a greater understanding of what the additional future impacts of the FCC's requirements will be on their operations. These types of additional future impacts are unquestionably relevant to the public interest determination that the Commission will need to make and the absence of knowing them now is an independent basis for concluding that approval of the *JPSA* is in the public interest.

²⁶ See *NYSTA Smaller ILECs' JPSA Supporting Statement* at 2-3, 4-5.

²⁷ The concept of the Commission waiting for further FCC action was also noted in other *Supporting Statements*. See, e.g., *Facility CLEC Coalition Supporting Statement* at 8-9; *TWC/Cablevision Supporting Statement* at 3 (“Disparate outcomes could result in regulatory as well as economic waste.”); *Staff Supporting Statement* at 4; *UIU Supporting Statement* at 2.


Accordingly, for the reasons stated herein as well as the *NYSTA Smaller ILECs' Supporting Comments*, the NYSTA Smaller ILECs respectfully submit that the public interest is advanced by the adoption and approval by the Commission of the *JPSA* in its entirety.

Date: January 18, 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.