

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

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

PHASE III PROCEDURAL RULING

(Issued November 1, 2012)

HOWARD A. JACK, Administrative Law Judge:

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, beginning 30 days after the order issued. They also provided, however, that:

Unless the Parties' consensus on the thirtieth day after the [date for commencing collaborative discussions] is that there is a reasonable possibility [sic] that all unresolved issues can be resolved by the sixtieth day, collaboration will end and litigation of all unresolved issues will begin.<sup>2</sup>

Notice of commencement of collaborative negotiations under the aegis of Settlement Judge Eleanor Stein issued on September 13, 2012. On October 16, 2012, however, Verizon New York Inc. (Verizon) filed a letter on behalf of itself and a substantial majority of the other parties in the proceeding

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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).

(collectively, the "Signatories").<sup>3</sup> The letter states that on October 12<sup>th</sup> Judge Stein advised the collaborative participants that, in her view, discussions had reached an impasse and "the collaborative will not continue as presently constituted."

The Signatories, noting that they comprise a diverse group with widely varying interests, declare that they respectfully disagree with Judge Stein and believe, based on exploratory discussions both within and outside the collaborative, they can enter into a Joint Proposal resolving Phase III issues. The Signatories cite the Commission's statement that, even if Phase III shifts to a litigation track, the parties are free to negotiate a settlement and seek a related modification of the litigation schedule whenever they believe additional collaborative discussions would bear fruit.<sup>4</sup> Consistent with the Commission's observation, the Signatories say they might be able to complete a proposal by the end of October, but ask to be allowed a "reasonable opportunity" through mid-November to do so. They also request that approval proceedings for such a joint proposal be the first order of business in litigation of unresolved Phase III issues. The Signatories maintain that such a proposal would obviate the need for "what would undoubtedly be lengthy and burdensome evidentiary hearings on the merits of the access [charge] and TAF issues."

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<sup>3</sup> The parties joining Verizon were: Department of Public Service staff; the Cable Telecommunications Association of New York, Inc.; Cellco Partnership d/b/a Verizon Wireless; Frontier Communications New York Incumbent Local Exchange Carriers; Level 3 Communications, LLC; the NYSTA Smaller ILECs (31 incumbent local exchange carriers listed in Appendix A); tw telecom of new york l.p.; and Windstream Communications, Inc.

<sup>4</sup> Phase II Order, p. 19.

Notably missing from the Signatories were 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).<sup>5</sup> On October 18, 2012, AT&T filed a letter in opposition to the Signatories' requests. AT&T contends that, as of the thirtieth day after the commencement date for Phase III negotiations, there was no "consensus" of the parties on the likelihood that all unresolved Phase III issues could be resolved by the sixtieth day. AT&T suggests that, since it and Sprint have been "the two biggest proponents of access reform" and did not join in the Signatories' position, the requisite consensus was lacking. Therefore, AT&T insists, according to the terms adopted in the Phase II Order, Phase III must now shift to litigation. It states that proponents of access charge reform are finally due their opportunity to develop a record on which the issue can be decided. AT&T accordingly requests that a prehearing conference be convened to commence litigation of Phase III issues. Neither Sprint nor T-Mobile -- nor any party other than the Signatories and AT&T -- has submitted a position on the question.

Without resolving the thorny question of whether on the thirtieth day after the Phase III collaboration commencement date a "consensus"<sup>6</sup> that all unresolved Phase III issues could be resolved by the sixtieth day existed, I believe the interests

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<sup>5</sup> See, e.g., Case 09-M-0527, Order Adopting Terms of Phase I Joint Proposal (issued July 16, 2010), pp. 17-21.

<sup>6</sup> Although I do not believe a "consensus" as required by the Joint Proposal adopted in the Phase II Order demands unanimity, whether one can be said to exist without the agreement of the several parties that have most strenuously pressed for priority consideration of intrastate access charge reform remains problematic.

expressed by both the Signatories and AT&T can be accommodated. As AT&T requests, I am setting a date for a procedural conference for Phase III litigation. Because of other commitments, that conference will not be held until Tuesday, November 27, 2012, at 10:00 a.m. It will occur in the Third Floor Hearing Room at the Commission's offices at Three Empire State Plaza in Albany.

It is not clear right now, in advance of the procedural conference, what specific issues and procedural steps Phase III litigation will entail, including the extent to which evidentiary hearings might be included. Pending the conference, the Signatories are free to continue to negotiate toward submission of a Phase III Joint Proposal -- and to seek the support of parties like AT&T that thus far have not been satisfied with the direction of the negotiations. If some or all parties have submitted a Phase III Joint Proposal before the date set above, the conference will include discussion of appropriate procedures for considering the proposal, including any remaining opposition to it. There might not be a great difference between consideration of a Phase III Joint Proposal that is strongly opposed and "full litigation" in which a coalition of parties has presented a consolidated position. A Phase III Joint Proposal might serve to simplify any litigation process considerably. Potential signatories should contemplate whether their commitment to a Phase III Joint Proposal would be conditioned on its acceptance, or whether they would be willing to commit to it as a consolidated litigation position. In any event, parties should come prepared to discuss appropriate procedures and schedule for litigation of all remaining

unresolved Phase III issues and identification of any remaining issues of material fact requiring examination in evidentiary hearings.

(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