

BEFORE THE
NEW YORK STATE
PUBLIC SERVICE COMMISSION

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

Case 09-M-0527

**REPLY 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.**

Brian T. FitzGerald
Gregory G. Nickson
Cullen and Dykman LLP
99 Washington Avenue, Suite 2020
Albany, NY 12210
Tel: 518-788-9400
E-mail: bfitzgerald@cullenanddykman.com
gnickson@cullenanddykman.com

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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 Reply 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

The initial comments present two different viewpoints regarding whether the New York State Public Service Commission (“Commission”) should adopt the terms of the Joint Proposal and Settlement Agreement addressing the Phase III issues (the “Phase III Joint Proposal”), which calls for the Commission to postpone further access charge reform pending action by the Federal Communications Commission (“FCC”). The vast majority of providers of voice services in New York – including Verizon of New York Inc. (“Verizon”), Time Warner Cable Inc. (“TWC”), Cablevision Systems Corp. (“CSC”), the New York State Telecommunications Association, Inc. Smaller ILECs (the “NYSTA Smaller ILECs”), and the CLEC Facility Coalition, as well as the Department of Public Service Staff (“Staff”) and the Utility Intervention Unit – support the

Phase III Joint Proposal.¹ Like the Facility CLEC Coalition, these normally adverse parties believe that the Commission should conclude that further immediate access charge reform at the state level is not needed at this time and as a result the Commission should adopt the Phase III Joint Proposal in its entirety. These parties argue that further immediate originating access charge reform at the state level is not warranted, because the FCC is addressing access charge reform on a national level, and once the FCC acts there will likely be no need for this Commission to take further action. Commenters supporting the Phase III Joint Proposal also argue that further state-specific reductions to originating access charges at this time would harm New York local exchange carriers (“LECs”) and their customers and would therefore be contrary to the public interest on that basis as well.

Only two parties, AT&T Communications of New York, Inc. (“AT&T”) and Sprint Nextel Corporation (“Sprint”), urge the Commission to immediately continue with the access charge reform litigation phase of this proceeding, including the filing of testimony and holding a hearing. While acknowledging that the FCC is undertaking access charge reform on a nationwide level, these parties nonetheless allege incorrectly that it is against public policy for the Commission to delay further access reform at the state level.

As discussed more fully below, AT&T’s and Sprint’s arguments are flawed in many respects and should be rejected by the Commission.

II. THE PHASE III JOINT PROPOSAL IS NOT CONTRARY TO THE PHASE II JOINT PROPOSAL

AT&T and Sprint argue that the Commission should reject the Phase III Joint Proposal because it is contrary to the letter and spirit of the Phase II Joint Proposal approved by the

¹ AT&T’s and Sprint’s portrayal of the Phase III Joint Proposal as “Verizon-led,” ignores the reality that the proposal represents a settlement among a broad base of historically adversarial parties.

Commission in its Phase II Order.² The Phase II Joint Proposal includes a basic procedural timeline for Phase III collaborative negotiations and, if necessary, further litigation.³ It allowed up to 60 days for settlement negotiations, beginning 30 days after the issuance of the Phase II Order. Under the terms of the Phase II Joint Proposal (as adopted by the Commission), unless within the first 30 days of negotiations the parties reach consensus that all unresolved issues can be worked out within the remaining 30 days, collaboration would end and litigation of the unresolved issues would begin. AT&T and Sprint incorrectly argue that this provision of the Phase II Joint Proposal prevents the parties from now arguing that the Commission should not go forward with further access charge litigation.⁴

AT&T and Sprint mischaracterize the intent and purpose of the Phase III Joint Proposal. As Verizon noted in its initial comments, the Phase III Joint Proposal does not attempt to sidestep litigation; it is merely a proposal for managing it.⁵ Pursuant to the Phase II Order, the parties to this proceeding engaged in collaborative discussions in an attempt to resolve the Phase III issues. Because it did not appear that the parties would reach a consensus within 60 days of collaboration, the proceeding shifted to a litigation track. Thus, litigation has already begun.

However, as the Commission noted in the Phase II Order, “even if Phase III does shift to a litigation track, the parties would be free to resume negotiations toward a settlement, and seek related modification of the litigation schedule”⁶ The signatories of the Phase III Joint Proposal did just that. The Phase III Joint Proposal seeks modification of the litigation schedule

² See AT&T Initial Statement at 3-7; Sprint Initial Statement at 4; see also 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”).

³ Phase II Joint Proposal at ¶ 11(b).

⁴ The members of the Facility CLEC Coalition note that they were not signatories to the Phase II Joint Proposal.

⁵ Verizon Initial Comments at 10-11.

⁶ Phase II Order at 19.

to reflect the fact that the FCC is undertaking originating access charge reform and that its actions in this regard will likely eliminate the need for future Commission action. The Phase III Joint Proposal simply seeks to modify the litigation schedule to allow the FCC time to act prior to the Commission and the parties being required to expend significant resources associated with access charge litigation. As demonstrated in the Facility CLEC Coalition's initial comments, it is against public policy for the Commission to proceed further with access charge litigation at this time because it would be administratively wasteful, particularly given the clear intent of the FCC to bring access charges under a single federal regime.⁷

The Phase II Joint Proposal and the Phase II Order neither preclude the resolution now proposed in the Phase III Joint Proposal nor foreclose the parties from arguing that the Commission need not proceed further with access charge litigation at this time. In fact, the Phase II Joint Proposal specifically states that “[n]othing in this Settlement Agreement will prejudice the right of any Party to argue for or against Commission action with respect to the TAF or intrastate access charges in Phase III of this proceeding”⁸ Therefore, contrary to the arguments of AT&T and Sprint, the Phase III Joint Proposal is completely consistent with both the letter and spirit of the Phase II Joint Proposal.

III. THE PARTIES SUPPORTING THE PHASE III JOINT PROPOSAL ARE NOT ARGUING THAT INTRASTATE ACCESS CHARGE REFORM IS ENTIRELY UNNECESSARY OR THAT IT SHOULD BE POSTPONED INDEFINITELY

AT&T's and Sprint's initial comments incorrectly imply that the position of the signatories of the Phase III Joint Proposal is one of wholesale opposition to access charge reform. That is simply not the case. Rather, the supporters of the Phase III Joint Proposal appropriately recognize that the FCC is seeking to bring intrastate and interstate access charges

⁷ Facility CLEC Coalition Initial Comments at 4-6.

⁸ Phase II Joint Proposal at ¶ 11(a).

under a single federal regime,⁹ and thus it is unnecessary for this Commission to undertake further reform at this time, particularly while the industry is adjusting to the access rate changes mandated in the FCC Order.

Because the industry is still adjusting to the FCC's terminating access charge reform, immediate reform of originating access charges at the state level would have unreasonable financial repercussions for most, if not all LECs. Contrary to Sprint's claims, many of the entities affected by originating access rates do not have affiliated interexchange carriers ("IXCs") and thus would not be able to offset LEC losses with IXC gains.¹⁰ These LECs, which are currently required to provide non-affiliated IXCs equal access to their facilities, would experience an immediate and massive reduction in revenues if originating access charges are immediately reduced.¹¹

AT&T and Sprint allege that some of the signatories to the Phase III Joint Proposal have argued for immediate originating access charge reform in other fora.¹² This argument is a red herring and ignores the central purpose of the Phase III Joint Proposal — to defer further action by the Commission until the FCC has acted. The fact that other parties may have taken different positions in other jurisdictions in the past does not change the validity of the logic behind the Phase III Joint Proposal — *i.e.*, that the FCC Order reflects a rationale that uniform federal standards are necessary to reform access rates and to avoid inconsistent and administratively

⁹ 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").

¹⁰ Sprint Initial Comments at 5-6.

¹¹ Moreover, as acknowledged by AT&T in comments submitted to the FCC, "even where 'the originating incumbent LEC's affiliate is offering the long distance service,' there are many circumstances in which a reduction in originating access charges would cause a net loss of revenues for the LEC and its long-distance affiliate." Joint Comments of AT&T, Centurylink, Fairpoint, Frontier, Verizon and Windstream, Connect America Fund, et al., WC Docket No. 10-90 et al., filed August 11, 2011, at 27.

¹² AT&T Initial Comments at 12-14; Sprint Initial Comments at 2-3.

duplicative state actions. AT&T's argument in this regard is especially specious given that it recently recognized that it would be inappropriate to reduce originating access rates at the same time as terminating access rate reductions, and articulated policy rationale for this in joint comments submitted to the FCC.¹³

Moreover, the Phase III Joint Proposal does not seek to delay access charge litigation in New York indefinitely. Under Paragraph 1(b)(2) of the Phase III Joint Proposal, "if the FCC has not issued ... an order regarding the *FCC FNPRM* by July 2014, ... the Parties also respectfully submit that the Commission should direct an Administrative Law Judge to convene a meeting of all interested entities to discuss what, if any, action would be appropriate at that time." Thus, even if "originating access rate reform at the FCC is unlikely in the near future" as argued by Sprint,¹⁴ the Phase III Joint Proposal accounts for such a scenario.¹⁵

IV. THE PHASE III JOINT PROPOSAL IS IN THE PUBLIC INTEREST AND IS CONSISTENT WITH THE FCC ORDER

AT&T erroneously argues that the Phase III Joint Proposal is contrary and harmful to the public interest and is not supported by the FCC Order.¹⁶ Nothing could be further from the truth. As set forth in the Facility CLEC Coalition's initial comments as well as the initial comments of the many other signatories to the Phase III Joint Proposal, the Phase III Joint Proposal is in the public interest because it reduces the possible inefficiencies that would result from the Commission taking action prior to the FCC, does not disrupt the uniform regime put in place by the FCC, and does not immediately subject LECs and their customers to additional, state-specific

¹³ See Joint Comments of AT&T, Centurylink, Fairpoint, Frontier, Verizon and Windstream, Connect America Fund, et al., WC Docket No. 10-90 et al., filed August 11, 2011 at 26-28.

¹⁴ Sprint Initial Comments at 3.

¹⁵ This reopener provision also alleviates Sprint's concern regarding the FCC's transition of access charges on IP traffic potentially causing competitive distortion. See Sprint Initial Comments at 4-5.

¹⁶ AT&T Initial Comments at 7-11.

access rate reductions in the midst of the industry's implementation of significant, FCC-mandated rate reductions.

The FCC has already put in place a process to address originating access charge reform.¹⁷ Any action the FCC ultimately takes will impact the Commission's treatment of intrastate switched access rates, potentially eliminating the need for the Commission to undertake further intrastate access charge reform. The time and expense associated with further access charge reform in New York (and the costs inherent in the possible undoing of such action) is an inefficient use of resources and contrary to public policy.¹⁸ The Facility CLEC Coalition agrees with the vast majority of the parties in this proceeding that further access charge reform by the Commission may disturb the uniform scheme put in place by the FCC.¹⁹ Verizon (and others) correctly note that "immediately launching a Commission proceeding on the switched access issues not yet addressed by the FCC . . . would disserve the public interest by promoting inefficient litigation, duplicative proceedings, and industry disruption."²⁰

Moreover, as the Facility CLEC Coalition and Verizon made clear in their comments, state-specific originating rate reductions in New York would place an additional, unfair burden on New York LECs and their customers.²¹ Many such LECs are already struggling, and New York should not impose further, state-specific burdens on those LECs and their customers while they attempt to absorb the rate reductions the FCC has already mandated. The Facility CLEC

¹⁷ See FCC Order ¶¶ 1298-1305; Facility CLEC Coalition Initial Comments at 6; Verizon Initial Comments at 1; NYSTA Smaller ILECs Initial Comments at 3; Staff Initial Comments at 4; TWC and CSC Initial Comments at 1; UIU Initial Comments at 2.

¹⁸ See Facility CLEC Coalition Initial Comments at 6; Verizon Initial Comments at 8-9; NYSTA Smaller ILECs Initial Comments at 5; TWC and CSC Initial Comments at 3.

¹⁹ See Facility CLEC Coalition Initial Comments at 6; Verizon Initial Comments at 7-8; Staff Initial Comments at 4.

²⁰ Verizon Initial Comments at 10.

²¹ See Facility CLEC Coalition Initial Comments at 7-8; Verizon Initial Comments at 7-8.

coalition also pointed out that additional rate reductions in New York could deprive New York LECs of necessary federal support to help offset the existing rate reductions.²²

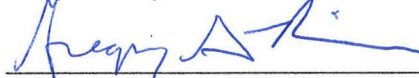
To avoid these undesirable consequences, the Commission should adopt the terms of the Phase III Joint Proposal.

V. CONCLUSION

For the reasons stated above, the Facility CLEC Coalition respectfully requests that the Commission reject the arguments of AT&T and Sprint and adopt the Phase III Joint Proposal in its entirety without modification.

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Respectfully submitted,



Brian T. FitzGerald
Gregory G. Nickson
Cullen and Dykman LLP
99 Washington Avenue, Suite 2020
Albany, New York 12210
Tel: 518-788-9400
E-mail: bfitzgerald@cullenanddykman.com
gnickson@cullenanddykman.com
*Attorneys for tw telecom of new york l.p.,
Level 3 Communications, LLC, and
Windstream Communications, Inc.*

²² See Facility CLEC Coalition Initial Comments at 8-9.