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May 23, 2012

ELECTRONIC FILING

Honorable Jaclyn A. Brillig
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223

Re: Case 09-M-0527

Dear Secretary Brillig:

Pursuant to the Commission's May 9, 2012 Notice in this proceeding, enclosed please find the Statement of Verizon New York Inc. and Cellco Partnership d/b/a Verizon Wireless in Support of the Phase II Joint Proposal.

Respectfully submitted,

A handwritten signature in black ink that reads "Joseph A. Post".

Joseph A. Post

cc: Hon. Howard A. Jack
Hon. Eleanor Stein
Active Party List
Settlement Participant List

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

**Proceeding to Examine Issues Related to
a Universal Service Fund**

Case 09-M-0527

**STATEMENT OF VERIZON NEW YORK INC. AND
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS
IN SUPPORT OF THE PHASE II JOINT PROPOSAL**

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May 23, 2012

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IN SUPPORT OF THE PHASE II JOINT PROPOSAL**

Verizon New York Inc. and Cellco Partnership d/b/a Verizon Wireless (together, “Verizon”) respectfully submit this statement in support of the Phase II Joint Proposal (the “Joint Proposal,” or “JP”), which provides for the establishment of a State Universal Service Fund (“SUSF”) in New York and sets forth detailed provisions for the operation of such a fund.

I. INTRODUCTION

The forty-one Joint Proposal signatories¹ include the companies that would be eligible to apply for disbursements from the SUSF, the companies that will collectively provide the bulk of the contributions that will support the SUSF, and two state agencies —Department of Public Service Staff and the Department of State’s Utility Intervention Unit (“UIU”) — that are charged with protecting the public interest in matters related to regulated telephone services. The signatories have diverse and conflicting interests, and disagreed on virtually every significant issue that was considered in the Phase II litigation and addressed in Judge Jack’s Recommended Decision (“RD”). Some signatories opposed the creation of an SUSF; others supported it; and

¹ The active party list for Case 09-M-0527 identifies some 63 people and entities. However, that list includes duplicates (*e.g.*, separate listings for parties and the law firms that currently represent or formerly represented them), as well as a number of parties who in fact have played no active role in the proceedings. The forty-one signatories thus represent a substantial majority of the truly active parties. By Verizon’s calculations, only seven parties actively participated in some aspect of the Phase II litigation or settlement process, but did not become signatories to the Joint Proposal.

virtually every signatory disagreed as to the details of how such a fund should operate if one were established. Each of these conflicting positions was forcefully advocated by its proponents throughout the course of the proceeding. As the Joint Proposal recognizes, these disagreements would also have been reflected in the parties' exceptions to the RD and in their briefs opposing exceptions.² Yet despite their widely varying perspectives, these parties were able to hammer out the Joint Proposal and to reach agreement on one key point — that its provisions should be adopted by the Commission “as a full resolution of the Phase II issues.” This unanimity in the midst of conflict could not have been achieved if the Joint Proposal did not address, in a balanced and reasonable fashion, the widely varying interests and concerns that these parties brought to the negotiating table.

The principal issue considered by the Commission in deciding whether to adopt a Joint Proposal is whether the proposal is in the public interest. However, the “public” has widely varying interests. It includes individuals and businesses whose interests are aligned with those of the companies whose contributions will support the SUSF — as employees, investors, suppliers, customers, or simply as residents of the companies' service areas, who have an interest in economic conditions in those areas. It also includes individuals and businesses whose interests are similarly aligned with those of the companies that may be eligible to draw from the fund. In this respect, the diverse interests of the Joint Proposal signatories mirror the diverse interests of the public. The Joint Proposal's reasonable balance of the *signatories'* interests thus helps to ensure that it will advance the *public* interest as well. The Proposal's consistency with the public interest is also shown more directly by the fact that it is supported by both Staff and the UIU.

² See JP, Recitals, ¶ h.

The Joint Proposal is a pragmatic compromise, and

reflects a great deal of give-and-take among the Parties. It does not reflect any Party's view of the ideal resolution of all of the Phase II issues. Many, if not all, Parties would — absent a settlement — support different outcomes for specific issues in the exceptions process and/or in subsequent proceedings for reconsideration or judicial review.³

This is as true for Verizon as it is for other parties. Verizon strongly opposed the creation of any SUSF on legal and policy grounds in the litigated Phase II proceedings, and continues to adhere to the views of SUSF-related issues that are set forth in its testimony and post-hearing briefs. It nevertheless recognizes that the Joint Proposal addresses the concerns and advances the interests of each of the parties, and does so to a greater extent than any other feasible agreement— that is, any other agreement that would have gained the support of all of signatory parties — could have done.⁴ These facts warrant adoption of the Joint Proposal as a reasonable, balanced, tightly-integrated whole.⁵

³ *Id.* ¶ k.

⁴ For Verizon — and, presumably, for the other signatories — these interests and concerns were highly fact specific and depended on a careful analysis of the particular facts and circumstances disclosed by the record of the Phase II evidentiary proceedings. For this reason, Verizon's support of the Joint Proposal should not be taken as implying that it would support similar or even identical proposals in other states, involving other companies, where the relevant financial and other circumstances could be very different. Still less should it be taken as a sign of Verizon's support for universal service funds in general.

⁵ Alteration of individual terms in the Joint Proposal would disrupt the carefully crafted balance that it was intended to create. See JP ¶ 12(e). As the Commission recognized in its Settlement Guidelines, settling parties consent only to the precise deal that they have struck. See Cases 90-M-0255 and 92-M-0138, "Opinion, Order and Resolution Adopting Settlement Procedures and Guidelines" (Op. No. 92-2) (issued and effective March 24, 1992) ("*Guidelines Order*") at 25 ("As a general proposition, settlement agreements will not be modified by the Commission without giving parties an opportunity to re-negotiate or litigate the modified positions. In the event remand is not feasible, parties will be given a reasonable opportunity, under prevailing circumstances, to comment on any modification to a proposed settlement."); *id.*, Appendix B, at 8-9. (Although the Commission's Settlement Guidelines and Rule 3.9 were developed in the context of single-utility proceedings under rate-of-return regulation, and thus may not apply in their entirety in a case such as this one, they nevertheless furnish important and persuasive guidance on issues related to the value of settlements and the standards that should be applied in adopting joint proposals.)

II. THE JOINT PROPOSAL REASONABLY BALANCES THE CONCERNS AND INTERESTS OF THE PARTIES, AND ADOPTION OF ITS PROVISIONS WOULD THEREFORE BE IN THE PUBLIC INTEREST

As the Commission has stated,⁶

where a Joint Proposal has been submitted, our review is to determine whether the terms and conditions in the Joint Proposal are in the public interest. A review of that question is based on the Joint Proposal's balance among the following interests: protection of consumers, fairness to investors, and the long term viability of the utility. We also require that the terms of any Joint Proposal must be consistent with sound environmental, social, and economic policies and should produce results that are within the range of reasonable results that would be expected had the case been resolved through litigation. Finally, weight should be given to the fact that the Joint Proposal reflects agreement by normally adversarial parties.

Other factors, noted in the 1992 *Guidelines Order*, include “procedural soundness,” whether the settlement “is within the range of reasonable outcomes,” whether there is a “rational basis” for the Commission’s approval, and the “completeness of the record.”⁷

As we show below, these standards are met by the Joint Proposal.

A. THE JOINT PROPOSAL AVOIDS ANY NEED FOR LITIGATION OVER CONTESTED ISSUES, AND WILL THUS AVOID THE TIME, EXPENSE, AND UNCERTAINTY THAT WOULD BE ASSOCIATED WITH SUCH LITIGATION

As the *Guidelines Order* noted, parties to Commission proceedings enter into settlements primarily in order “to avoid unnecessary litigation.”⁸ Settlements eliminate the expense, time, and uncertainty associated with litigating regulatory issues before the Commission itself and in subsequent proceedings in the courts.

This proceeding has raised a wide range of complex issues — many of them questions of first impression — that were vigorously contested by the parties. It generated a record consisting

⁶ Case 06-M-0377, “Order Allocating Property Tax Refunds” (issued and effective July 21, 2006), at 8.

⁷ *Guidelines Order* at 30-31.

⁸ *Id.* at 1. *See also id.* at 5.

of over eight hundred pages of hearing transcript, almost 100 exhibits, and several hundred pages of briefs marshaling the relevant facts and setting forth the parties' legal arguments. The RD's proposed resolution of these issues ran to some hundred and fifty pages and, as the Joint Proposal recites, would have been challenged from varying directions by the parties.⁹ These challenges would have been asserted in the exceptions process and then, in all likelihood, in requests for reconsideration or clarification of the Commission's final order and in proceedings for judicial review of that order. The costs to the parties and the State of carrying that process through to its conclusion would have been substantial, and the results probably would not have fully satisfied any participant (including the Commission, which would face the risk of an adverse decision on judicial review).

The Joint Proposal will enable the Commission, Staff, and the parties to avoid that cost and uncertainty. Moreover, each party set forth a *prima facie* factual and legal justification for its own preferred outcomes in the litigated portion of this proceeding — outcomes that ran the gamut from no SUSF to a virtually unlimited SUSF. The terms of the Joint Proposal, by striking a compromise among all of those positions, obviously is within the range of potential litigated outcomes.

B. THE JOINT PROPOSAL PROVIDES A SECURE SOURCE OF FUNDING FOR THE NYSTA SMALLER ILECs FOR A SIGNIFICANT PERIOD OF TIME

The record reflects a great deal of disagreement concerning whether an SUSF is needed to preserve universal service in the service areas of the NYSTA Smaller ILECs. Among the

⁹ The uncertainty surrounding the ALJ's recommendations was increased by the fact that the RD had been drafted before the FCC issued its order on universal service and intercarrier compensation in November 2011. For this reason, the parties were asked to address in their exceptions the impact of the FCC's actions on the RD's recommendations. Case 09-M-0527, "Notice Establishing Schedule for Filing Exceptions, Seeking Comment on Reassertion of Public Service Commission Jurisdiction over Wireless Telephone Companies for State Universal Service Fund Purposes, and Seeking Comment on Further Extension of the Transition Fund" (issued January 4, 2012) ("*Notice*"), at 1.

issues that have been addressed are whether, in the absence of those ILECs, end users' service needs could be adequately met by competitive service providers, and whether the ILECs could improve their financial outlook through increased efficiency, pursuit of additional revenue sources, and the adoption of fundamental changes to their business models, rather than through reliance on an SUSF.

The Joint Proposal avoids the need to resolve those issues by putting in place a secure and adequate source of financial support for the eligible ILECs for the four-year life of the plan.¹⁰ Under that mechanism, the eligible ILECs' need for funding will be determined through a conventional rate case mechanism, based on their regulated revenue requirements. As under the Transition Fund, basic service revenues will be imputed in such rate cases at a "benchmark" level of \$23/line/month; subject, however, to the proviso that ILECs that are currently below that rate will be allowed to transition to it through annual increases of \$3.50/line/month.¹¹ A limited grandfathering arrangement would be put in place for the three eligible companies that are already receiving disbursements from the Transition Fund.¹²

Thus, whether or not an SUSF is actually necessary to preserve universal service, the Joint Proposal will provide a significant additional measure of financial security, stability, and reduced uncertainty for the NYSTA Smaller ILECs.

In 2010, the Commission adopted the terms of an earlier joint proposal that established a four-month Temporary Transition Fund Extension ("TTFE"), concluding that the proposal would "help assure stable service and rates in [the Smaller ILECs' service] areas . . . ," and would thus

¹⁰ See JP ¶¶ 1(a), 2(a), 7.

¹¹ JP ¶¶ 3, 8.

¹² JP ¶ 8(d).

would “promote [its] policy of striving to maintain safe and reliable telecommunications service at just and reasonable rates for all New Yorkers.”¹³ Similar considerations apply *a fortiori* to this Joint Proposal, which provides four years, rather than four months, of additional financial support.

C. THE JOINT PROPOSAL REASONABLY LIMITS THE FINANCIAL RISKS TO THE CONTRIBUTING COMPANIES

The “flip side” of the financial support that an SUSF provides for eligible companies is the burden that it imposes on *other* regulated companies — those that will be net contributors to the fund. The record of this proceeding raises significant questions about the fairness of imposing such a burden, particularly on companies such as Verizon New York Inc. whose financial metrics are, in many respects, worse than those of most, if not all, of the NYSTA Smaller ILECs. The burden would also arguably be anticompetitive if imposed on the intermodal providers who compete with the eligible companies in their service areas. The Joint Proposal addresses these concerns in three key ways: by utilizing an imputed benchmark rate in eligible-company rate cases, by excluding intermodal providers from any contribution obligation, and by capping the total amount of money that can be disbursed by the SUSF over the four-year term of the Joint Proposal.¹⁴ These measures do not totally eliminate the burden and unfairness to the contributing companies, but they at least help to limit it, given the uncertainty of continued litigation.

¹³ Case 09-M-0527, “Order Adopting Terms of Phase I Joint Proposal” (issued and effective July 16, 2010) (“*TTFE Order*”), at 26-27.

¹⁴ JP ¶ 3.

D. THE JOINT PROPOSAL REASONABLY ALLOCATES THE BURDEN OF SUPPORTING THE SUSF

Numerous alternatives for allocating the contribution burden have been put forward in the parties' testimony and briefs, and in the RD. Ultimately, the signatories agreed on a modified version of the revenue-based formula that has been used for over two decades to support the Targeted Accessibility Fund ("TAF").¹⁵ This reliance on a formula that has long been used by the Commission for similar purposes is obviously reasonable and within the range of litigated outcomes. Indeed, the *TTFE Order*, in adopting a joint proposal that was similarly modeled on the TAF contribution formula, noted that:

We also find the provisions for determining TTFE contributions in proportion to regulated intrastate revenues, for determining eligibility in accordance with existing Transition Fund procedures with enhanced notice, and for administration by the TAF administrator in conformance with existing procedures to afford a practical, reasonable interim approach. These provisions build on experience, provide certainty, and should serve to minimize the costs of this interim support measure.¹⁶

E. THE JOINT PROPOSAL PROVIDES A REASONABLE PROCESS FOR CONSIDERATION OF SUCCESSOR ARRANGEMENTS

The parties recognize that once the Joint Proposal expires, the Commission will need to consider whether a successor funding arrangement should be put in place — *i.e.*, whether such an arrangement would be necessary, appropriate, reasonable, and lawful — and if so how that arrangement should operate. The Joint Proposal accommodates that need by: (a) requesting that the Commission initiate a proceeding after three years to consider successor arrangements; and

¹⁵ JP ¶ 5. The modifications to the TAF formula: (a) generally freeze contribution percentages at 2011 levels over the life of the JP (in order to avoid shifts caused by contributor migration from conventional to VoIP-based services); but (b) create an exception to the freeze, which would allow contribution percentages to be adjusted if contributors enter or leave the market. JP ¶ 6.

¹⁶ *TTFE Order* at 27. Like the TTFE, the SUSF established by the Joint Proposal will be administered by the TAF Administrator. JP ¶ 1(b). Also, with some modifications, eligibility for funding will be determined using the same basic rate case mechanism as was utilized under the TAF and the TTFE. *See generally* JP ¶ 8.

(b) permitting the four-year term of the SUSF to be extended “if necessary to allow sufficient time to complete” that proceeding.¹⁷

F. THE JOINT PROPOSAL PRESERVES THE COMMISSION’S ABILITY TO MODIFY ITS TERMS WHERE CONSISTENT WITH APPLICABLE LAW

The Joint Proposal explicitly recognizes the Commission’s position that its responsibilities under the Public Service Law may require it to modify the adopted terms of a settlement in certain cases where the circumstances and assumptions on which the settlement was based significantly change. The so-called “Reservation Clause” — ¶ 10 of the Joint Proposal — accommodates that reserved authority. Importantly, recital paragraph (ℓ) of the Joint Proposal states that “[t]he Reservation Clause is intended to reflect, and not to expand, contract, or otherwise alter, applicable law relating to the Commission’s rights, powers, and obligations to alter an approved [*i.e.*, adopted] settlement agreement.” In particular, the Clause does not purport to confer on the Commission any powers it does not already have under applicable law to modify the terms of a settlement agreement once they are adopted in a Commission order.

G. THE JOINT PROPOSAL MAKES REASONABLE ARRANGEMENTS FOR SUBSEQUENT (“PHASE III”) PROCEEDINGS

On occasion, the scheduling of the various phases of this proceeding has itself become a contentious issue, as reflected in the debate over the provisions of the TTFE settlement that related to the timing of the Commission’s consideration of access charge reform.¹⁸ Accordingly, the signatory parties found it advisable to include in this Joint Proposal an agreement concerning the scheduling of “Phase III” issues. That agreement is set forth in ¶ 11(b) of the Joint Proposal.

¹⁷ JP ¶¶ 2(b), 2(c), 4(b).

¹⁸ See generally *TTFE Order* at 28-35.

H. THE SETTLEMENT PROCESS THAT LED TO THE JOINT PROPOSAL WAS PROCEDURALLY FAIR

On or about January 30, 2012, a notice of impending settlement negotiations was sent to the parties, filed with the Secretary, and copied to the Administrative Law Judge.¹⁹ The notice stated that “[t]he parties to the discussions will include all parties to this proceeding who wish to participate.” The subject matter of the negotiations was specified as “any or all of the recommendations set forth in the [RD], and such other, related issues as the parties wish to discuss.” On February 1, 2012, Judge Jack submitted a memorandum to the Commission stating that “[t]he notice [of impending negotiations] and its timing appear to me to be adequate to afford all interested parties a reasonable opportunity to participate in the negotiations.”

Numerous settlement discussions, with substantial participation by the parties, were held over the ensuing four months. All participants were notified of the date, time, and call-in number for subsequent meetings, both orally at prior meetings, and through follow-up emails.²⁰ All parties were given the opportunity to state their views, to participate in the negotiations, to ask questions concerning other parties’ positions and proposals, and to submit their own written proposals or comments for circulation among the parties. Without breaching the obligation of confidentiality that surrounds settlement discussions, Verizon can state that the calls were lively and reflected a wide variety of views and interests. Proposals were presented and discussed, alternatives were examined, compromises were struck, and ultimately, an agreement began to emerge. Once tentative agreement had been reached on the outlines of a settlement, the parties

¹⁹ A revised notice was circulated on February 1.

²⁰ Notice by U.S. Mail was provided to one party who indicated that he preferred that form of notice.

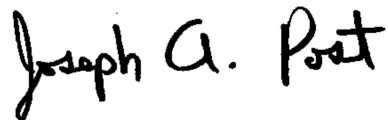
shifted their focus to working out details and embodying their understanding in a definitive, final Joint Proposal, which was submitted to the Commission on May 8.²¹

These steps amply met the need for a fair and inclusive settlement process.

III. SUMMARY AND CONCLUSION

For the reasons set forth above, the Commission should adopt the provisions of the Joint Proposal in their entirety.

Respectfully submitted,

A handwritten signature in black ink that reads "Joseph A. Post". The signature is written in a cursive, slightly slanted style.

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Partnership d/b/a Verizon Wireless**

May 23, 2012

²¹ A corrected version of the Joint Proposal was filed on May 11.