

**BEFORE THE
NEW YORK PUBLIC SERVICE COMMISSION**

In the Matter of Company Exemptions
from the Requirement to Offer a Low-
Income Broadband Product.

Case No. 21-M-0290

**MOTION OF FRONTIER FOR AN EXEMPTION
OR A DECLARATORY RULING**

By this motion, the Frontier New York operating companies¹ request the Public Service Commission to (1) issue a declaratory ruling that the requirements of Gen'l Bus. L. § 399-zzzzz (the "GBL Statute") do not encompass or apply to Frontier's Digital Subscriber Line ("DSL") service, and/or (2) exempt Frontier New York's DSL service from the requirements of the GBL Statute to the extent such requirements might otherwise apply.² Simply put, Frontier New York's DSL-based service is not a "high speed broadband service" within the meaning of the statute, and an unreasonable interpretation thereof could be read to mandate the massive efforts and expenditures that would be required to provide the high speed service standards set forth in the GBL Statute.

¹ Frontier Telephone of Rochester, Inc. ("Frontier Telephone of Rochester"), Frontier Communications of Seneca-Gorham, Inc. ("Frontier Seneca-Gorham"), Ogden Telephone Company ("Ogden Telephone"), Frontier Communications of Sylvan Lake, Inc. ("Frontier Sylvan Lake"), Frontier Communications of New York, Inc. ("Frontier New York"), Citizens Telecommunications Company of New York, Inc. ("Citizens New York"), Frontier Communications of Ausable Valley, Inc. ("Frontier Ausable"), Frontier Communications of Rochester, Inc. ("Frontier Rochester"), and Frontier Communications of America, Inc. ("Frontier America") (collectively, "Frontier New York").

² In filing this motion, Frontier New York and affiliates respectfully reserve all rights concerning the lawfulness, propriety and implementation of the GBL Statute. Notably, several industry associations are challenging the legality of the GBL Statute in *New York State Telecommunications Association, Inc., et. al., v. Letitia A. James, in her official capacity as Attorney General of New York*, Docket No. 21 CV 2389 (USDC, EDNY) ("NYSTA v. James").

I. INTRODUCTION

The GBL Statute conflates several subjects within its text, requiring logical interpretation and application by the Public Service Commission. The GBL Statute appears to attempt to impose an obligation to provide a \$15 per month low-income product, at a “high speed broadband service” speed, on all providers of ill-defined “broadband service,” failing to recognize that various types of “broadband service” are not actually technically capable of providing “high speed broadband service” at the 25 Mbps level the statute attempts to mandate. The lack of clarity leaves open the unreasonable expectation that providers would be subject to the untenable requirement to invest significant resources and implement numerous technology and network changes to offer high-speed broadband at levels mandated by the GBL Statute, in areas where such speeds are not currently available – and all by June 15, 2021.

Frontier New York encompasses widely diverse service territories. These areas range from somewhat urban to suburban, rural and remote. As such, Frontier New York offers several types of fixed broadband services in New York State. In some areas Frontier New York is able to offer true high-speed broadband service through a fiber-optic network, where 50 Mbps is presently Frontier’s starting speed offer. In other areas of New York, Frontier New York offers internet access service over copper phone lines using DSL technology, which is not technically capable of consistently providing access speeds greater than 15 Mbps.³ Furthermore, much of Frontier New York’s investment in improving its DSL availability has occurred under the FCC’s 2015 CAF II

³ DSL technology faces many technical limitations, foremost among them the distance from the DSLAM to the customer premises. Even where speeds exceeding 15 Mbps over DSL might occasionally be possible, there exist other factors that limit the speed customer devices actually realize, such as busy hour usage, wi-fi in home, and number of devices connected at the premises.

program, a program that funded high-cost, rural areas, and required that recipients make broadband service of 10 Mbps downstream available to locations eligible under the program.

As the Commission is aware, Frontier New York is in the process of deploying significant amounts of fiber, as part of Frontier's capital investment expenditures in excess of \$83 million in New York during 2021-2023.⁴ The deployment of fiber is tremendously beneficial to New York, as fiber deployment allows Frontier to move current services off copper and offer high-speed broadband services capable of download speeds as fast as 1 Gbps. Frontier fully intends to meet the requirement of the GBL Statute where Frontier has fiber available and as Frontier passes additional locations with fiber in the future Frontier will make the low-income offer available.

Any attempt to require the consistent delivery of 25 Mbps through copper loops would require different network architecture, new equipment at Frontier New York's central offices, new equipment in the field, and alternative methods and procedures. Any such changes would constitute a new service rather than an upgrade to Frontier New York's existing DSL services. The extensive time, effort and money required would require the reallocation of capital and resources that are focused on forward-looking projects rather than backward-looking technology.

The mandates of the GBL Statute can be fulfilled by other providers who generally overlap Frontier's service territories, particularly in light of the fact the statute encompasses fixed wireless and satellite services. FCC data and mapping indicates that speeds equal to or exceeding 25 Mbps download and 3 Mbps upload through technologies such as cable, fiber, fixed wireless and satellite are available across the State. In fact, nearly 99% of New York State residents live in Census blocks with three or more providers while the remainder live in Census blocks with two providers.

⁴ Case 20-C-0267, Order Approving Frontier Action Plan May 13, 2021.

Finally, and importantly, Frontier is participating in the current Federal Emergency Broadband Benefit Program (“EBB”). As this program does not have a minimum speed requirement, Frontier has made its DSL eligible under the program. When coupled with the federal credit being provided, customers that are eligible and qualify for the EBB will be paying \$0 per month for their broadband service for the duration of the EBB. This provides an opportunity for customers in Frontier New York’s footprint to be covered by either the GBL where fiber is available, or the EBB where Frontier provides broadband using DSL technology.

II. DISCUSSION

The Commission is given broad authority under the GBL Statute to establish exceptions to the 25 Mbps+ mandate “where such download speed is not reasonably practicable.” In fact, the New York State Attorney General readily acknowledges that “[q]ualifying providers can also seek exemptions from PSC under the statute.”⁵ It is simply not reasonably practicable to include the Frontier New York DSL internet access service within the scope of the statute and as such an exemption is fully warranted.

The GBL Statute subsection (1) definition of a “broadband service” and subsection (2) mandates appear to mistakenly presume that any “mass-market retail service that provides” internet connectivity is capable of providing “high speed broadband service” at the 25 Mbps level. That is simply not the case. As such, any interpretation of the GBL Statute to require 25 Mbps speeds from *any and all* internet access services is entirely unreasonable and impracticable.

⁵ *NYSTA v. James*, Defendant’s Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, Doc. No. 19, filed May 17, 2021, at 9, *citing* GBL §§ 399-zzzzz(2) and (5).

Given that the GBL Statute conflates “broadband service” and “high speed broadband service,” it is incumbent on the Commission to interpret the statute in a logical and lawful manner. The Commission may accomplish this by either (1) determining through a declaratory ruling that the requirements of the GBL Statute do not encompass or apply to Frontier New York’s DSL service or (2) utilizing the clear authority in the statute to exempt Frontier New York’s DSL service from the impracticable 25 Mbps+ requirement (to the extent such requirements might otherwise apply).

The GBL Statute specifically provides that the 25 Mbps mandate is “subject to exceptions adopted by the Public Service Commission where such download speed is not reasonably practicable.”⁶ Notably, this provision is distinct from and far broader than the requirements applicable to the “small-company” case-by-case exemption in subsection (5) of the Statute. The small-company exemption requires a showing that compliance “would result in unreasonable or unsustainable financial impact on the broadband service provider,” and thus requires the submission of detailed financial data. No such data is required for the subsection (2) exemption, which merely requires the Commission to conclude that offering the 25 Mbps+ download speed is “not reasonably practicable.”

The obligations under subsection (2) of the GBL Statute thus only apply to true “high speed broadband service,” rather than all broadband service offerings, as defined in subsection (1). It is eminently reasonable for the Commission to decide that the term “high speed broadband service” in subsection (2) – which is not specifically defined in the GBL Statute – means a “twenty-five

⁶ Gen’l Bus. L. § 399-zzzzz(2).

megabits per second download speed” broadband service – which is also referenced in subsection (2). Given that Frontier New York’s DSL service is not technically capable of consistently meeting that 25 Mbps high speed standard, that DSL service is not within the scope of the GBL Statute.

In fact, the New York State Attorney General recently noted to a U.S. District Court that “it is not even clear that many or even most of [NYSTA’s] members will be required to comply with the [GBL Statute].” The Attorney General specifically addressed DSL service, stating that “[b]ecause it appears that Verizon New York’s DSL service cannot meet the speed requirements of the statute, it may not be subject to the law.⁷

Given that any mandate to provide a minimum download speed of 25 Mbps is “not reasonably practicable”⁸ for the reasons noted above, the Commission should exempt the Frontier New York DSL service from the requirements of the GBL Statute (to the extent such requirements apply), as the Commission is explicitly authorized to do under subsection (2).

Finally, it is important to note that nothing in the GBL Statute requires providers to change their networks or the nature of the services they offer to meet a 25 Mbps threshold. Rather, the objective of the GBL Statute was to reduce the price of existing “high speed” broadband offerings for qualified low-income consumers, not to require providers to create and offer new services over new networks.

⁷ Defendant’s Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction, *NYSTA v. James*, Doc. No. 19, filed May 17, 2021, at 9.

⁸ GBL Statute, subsection (2).

III. CONCLUSION

For the reasons discussed above, the Public Service Commission should respectfully issue a declaratory ruling that the requirements of Gen'l Bus. L. § 399-zzzzz do not encompass or apply to Frontier's Digital Subscriber Line service and/or exempt Frontier New York's DSL service from the requirements of the GBL Statute to the extent such requirements might otherwise apply.

Dated: June 3, 2021

Respectfully submitted,

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