

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling That, Pursuant to)	
the Carve-Out Provisions of 47 U.S.C. § 251 (g),)	WC Docket No. 09-8
Interstate Originating Switched Access Charges,)	
Not Reciprocal Compensation Charges, Apply to)	
ISP-Bound Calls That Are Terminated via)	
VNXX-type Foreign Exchange Arrangements)	

COMMENTS

The National Exchange Carrier Association, Inc. (NECA), the National Telecommunications Cooperative Association (NTCA), the Independent Telephone and Telecommunications Alliance (ITTA), the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), the United States Telecom Association (USTelecom) and the Western Telecommunications Association (WTA) (collectively, the Associations)¹ hereby file their initial Comments on the Petition for Declaratory Ruling filed in the above-captioned proceeding by Blue Casa Communications, Inc. (Blue Casa).²

¹ NECA is a non-stock, non-profit association formed in 1983 pursuant to the Commission’s Part 69 access charge rules. *See generally* 47 C.F.R. § 69.600 *et seq.* NECA is responsible for filing interstate access tariffs and administering associated revenue pools on behalf of over 1200 incumbent local exchange carriers (“ILECs”) that choose to participate in these arrangements. NTCA represents more than 570 rural rate-of-return regulated telecommunications providers. OPASTCO is a national trade association representing approximately 520 small ILECs serving rural areas of the United States. ITTA is an organization of midsized ILECs that collectively serve over 30 million access lines in over 44 states and offer a diversified range of services to their customers. Most ITTA member companies qualify as rural telephone companies within the meaning of section 3(37) of the Communications Act of 1934, as amended (the “Act”). 47 U.S.C. §153(37). USTelecom is a leading national trade association representing communications service providers and suppliers for the telecommunications industry.

The Associations agree the Federal Communications Commission (Commission or FCC) should resolve the issues presented in Blue Casa’s petition by confirming that “virtual” NXX (VNXX) calls are non-local for purposes of intercarrier compensation and are subject to interstate or intrastate originating access charges, based on the actual location of the calling and called parties. In addition, the Commission should confirm that carriers deploying VNXX or similar arrangements involving disparate rating and routing treatment are responsible for the costs of transporting those calls to their networks when the Point of Interconnection (POI) is located outside the service territory of a rural incumbent local exchange carrier (ILEC). This issue is emblematic of the continuing disputes and opportunities for arbitrage inherent in the current intercarrier compensation system which requires comprehensive reform.

I. BACKGROUND

Blue Casa asks the Commission to declare originating interstate switched access charges (and not reciprocal compensation payments) apply to calls delivered to Internet Service Providers (ISPs) via VNXX arrangements.³ Blue Casa claims ISP-bound VNXX traffic is subject to originating interstate access charges under pre-existing FCC policy and that section

USTelecom’s carrier members provide a full array of voice, data, and video services across a wide range of communications platforms. WTA is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. Most members serve fewer than 3000 access lines overall and fewer than 500 access lines per exchange.

² Blue Casa Communications, Petition for Declaratory Ruling That, Pursuant to the Carve-Out Provisions of 47 U.S.C. § 251(g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That Are Terminated via VNXX-type Foreign Exchange Arrangements, WC Docket No. 09-8, at 1, 7 (Dec. 19, 2008) (*Blue Casa Petition*).

³ *Id.* at 4.

251(g) of the Act has “carved out” such traffic from the scope of traffic covered by section 251(b)(5).⁴

Blue Casa explains it provides local exchange service to residential subscribers in California.⁵ These subscribers make dial-up calls to ISPs that are located in distant exchanges outside Blue Casa’s local calling area. Blue Casa hands these calls off to other carriers for termination in distinct exchanges, but is required to rate these calls as “local” for customer billing purposes. Although Blue Casa has sought to obtain originating access payments for such calls, other carriers involved have refused to pay these charges and instead have sought to collect reciprocal compensation payments from Blue Casa. Blue Casa argues such calls have historically been treated as interexchange calls, and pursuant to the “carve out” provision of section 251(g) of the Act, are therefore exempt from the reciprocal compensation regime specified in section 251(b)(5).⁶

⁴ *Id.*

⁵ *Id.* at 1. It appears the issues raised in Blue Casa’s petition have been the subject of ongoing disputes before the California Public Utilities Commission (PUC). In *Pac West v. Blue Casa*, the California PUC held that the FCC has not exempted ISP-bound traffic exchanged between CLECs from state regulation, and in the absence of an interconnection agreement, it is reasonable to use the local tariff to fix rates for call termination. See *Pac-West Telecomm, Inc. v. Blue Casa Communications, Inc.*, Case 07-10-017, Decision Granting Complaint (Cal. PUC, July 10, 2008).

⁶ *Id.* at 2-3. Blue Casa recognizes the Commission’s recent decision responding to the court’s remand in *Worldcom v. FCC*, 288 F.3d 429 (D.C.Cir. 2002), which held ISP-bound traffic is subject to the reciprocal compensation provisions of section 251(b)(5). *Id.*, citing *High Cost Universal Service Reform; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP Bound Traffic; IP-Enabled Services*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (*ISP Order on*

II. DISCUSSION

VNXX-type arrangements have been a source of ongoing controversy for many rural and mid-sized ILECs. Calls made via VNXX arrangements are routed in the same manner as interexchange calls, incurring essentially the same costs, but the calls are often rated and compensated as if they were local. Through these arrangements, certain competitive local exchange carriers (CLECs) and wireless carriers expect ILECs not only to treat interexchange calls as “local,” but also expect ILECs to pay the costs of transporting such calls to exchanges located outside their service area. Moreover, CLECs then expect ILECs to pay them termination charges.

In these types of cases, VNXX is, in essence, a substitute for traditional foreign exchange (FX) service and/or “800 toll-free” services, but without compensation for the additional origination and transport costs incurred. FX service has traditionally been provided through dedicated facilities linking the terminating exchange (in this case, the exchange where the ISP is located) with the originating exchange. The carrier providing FX service to an ISP customer would bear the cost of transporting calls from the originating switch where the calls appear to be “local” to the non-local exchange, and this carrier would normally recover such costs from its end user (e.g., the ISP). Similarly, 800 “toll-free” service typically permits callers to make interexchange calls by dialing 800 or 888 NXXs, rather than a local NXX, and the originating LEC would be compensated for transmitting the calls to the point of interconnection (POI) via originating access charges.

Remand). It argues, however, that decision applied only to local ISP-bound traffic, not the interexchange ISP-bound traffic at issue in its petition. *Id.*

Unlike traditional FX or 800 toll-free services, however, VNXX arrangements enable carriers to avoid paying access charges. The carriers deploying VNXX and similar arrangements often argue that the originating rural ILEC should be required to bear the additional costs incurred when transporting the call to distant POIs, usually outside the ILEC's service territories. The terminating carrier and the ISP customers get a 'free ride' at the expense of customers in rural areas by virtue of having long distance interexchange calls treated as "local" when they are not.⁷

Based upon the Commission's long-standing "end-to-end" analysis, whereby the physical location of the customers determines the geographic end-points of the call, VNXX calls are interexchange and access charges apply. Nor are these calls subject to the *ISP Order on Remand* because that Order applies only to calls that originate and terminate in the same local calling area.⁸

⁷ Section 251(c)(2)(C) of the Act, 47 U.S.C. § 251(c)(2)(C), imposes a duty on ILECs only to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to whom the carrier provides interconnection" To the extent VNXX arrangements require an ILEC to provide service to a requesting carrier that goes beyond the services it provides to itself or other carriers, there is no basis under the Act for requiring such arrangements to be provided. Similarly, section 51.305(a)(2) of the Commission's rules, 47 C.F.R. § 51.305(a)(2), requires ILECs to provide interconnection "at any technically feasible point *within* the incumbent LEC's network" (emphasis added). ILECs thus are not required to provide interconnection arrangements, direct or indirect, that require transporting calls outside their own networks.

⁸ The U.S. Court of Appeals for the D.C. Circuit has recognized that the Commission's interim compensation provisions apply only to "calls made to [ISPs] located within the caller's local calling area." *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430 (D.C. Circuit 2002). By definition, VNXX calls are not included in that universe.

In its 2002 comments on a petition for declaratory ruling filed by Sprint,⁹ NECA raised concerns about compensation shortfalls that rural ILECs experience when other carriers seek to use NPA-NXX codes with routing points that differ from rating points. While Sprint claimed in its petition that it cannot cost justify direct interconnection with each rural ILEC, NECA pointed out rural ILECs should not be forced to make significant new transport investments in order to reach interconnecting carriers that elect POIs outside the rural ILECs' serving areas, with the additional cost being recovered from rural end-users.¹⁰ NTCA similarly noted such arrangements would permit CMRS providers to obtain free transport services from ILECs and possibly require ILECs to pay transiting charges to intermediate carriers. CMRS providers would also receive compensation for terminating the traffic. In NTCA's view, this result was "totally contrary to the concept that local exchange carriers' obligations for interconnection are limited to their own network and service area."¹¹

In the absence of binding FCC guidance, state public utility commissions (PUCs) and courts have been addressing these issues in varying contexts. For example, in a number of cases,

⁹ See Reply Comments of the National Exchange Carrier Association, Inc., CC Docket No. 01-92 (Aug. 19, 2002), at 2-3

¹⁰ *Id.* at 3.

¹¹ NTCA Reply Comments, CC Docket No. 01-92 (Aug. 19, 2002), at 5. Since the Sprint petition was filed, other proposals have been advanced to assure that the financial obligation for transporting VNXX calls to distant exchanges or POIs is borne by the carrier responsible for designating that local calls be routed outside the local calling area. The 2006 Missoula Plan, for example, incorporated a "Rural Transport Rule" which would have required Track 1 carriers, rather than rural ILECs, to bear the financial obligations for interconnection transport between the "meet point" and the Track 1 carrier's network. See Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, to Kevin Martin, FCC, CC Docket No. 01-92 (July 24, 2006) (attaching the Missoula Plan, at Section II.E.3.e).

state PUCs have ruled the physical locations of the customers determine the proper jurisdiction of the call, and therefore dial-up calls to ISPs via VNXX arrangements are not local but are instead interexchange traffic subject to access charges.¹² In other cases, state PUCs have recognized that calls carrying disparate rating and routing instructions impose additional costs on ILECs and have either allowed ILECs to collect call origination charges for the cost of transport or have required the CLEC to bear the cost of the additional transport required to get VNXX calls to the distant exchange.¹³ And some states have simply ruled that VNXX may not be used

¹² See, e.g., *Petition of MCI Metro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Horry Telephone Cooperative, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Order Ruling on Arbitration, Docket No. 2005-188-C (SC PSC, Jan. 11, 2006) (finding that the physical locations of the originating and terminating customers determine the proper jurisdiction of a call, and, therefore, VNXX dial-up calls to ISPs located physically outside the calling area of the originating customer, does not constitute local "ISP-bound Traffic," but rather is interexchange traffic subject to appropriate access charges); *Global Naps v. Verizon*, 444 F.3d 59, No. 05-2657 (1st Cir., 2006) (finding the FCC did not preempt States from requiring payment of intrastate access for non-local VNXX ISP-bound calls, thereby affirming the Mass. Dep't of Tel and Energy's Dec. 12, 2002, finding that VNXX calls are to be rated as local or toll based on the geographic end points of the call.); *Level 3 Communications, LLC and SBC Communications, Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 for Rates, Terms and Conditions of Interconnection*, Arbitrator's Order 10, Docket No. 04-L3CT-1046-ARB, (Kan. CC, Feb. 7, 2005) (finding SBC's proposed contract language appropriately classified traffic according to FCC precedent and, therefore, issuing an order that VNXX ISP-bound traffic is not subject to reciprocal compensation).

¹³ See, e.g., *Verizon v. Peevey, et al.*, 462 F.3d 1142 (9th Cir. 2006) (affirming a California PUC order directing payment of reciprocal compensation for VNXX ISP-bound traffic [rather than access charges], but also allowing the ILEC to collect call origination charges for the cost of transport to a distant point of interconnection outside the originating party's calling area.); *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Rulemaking 95-04-043, *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, Investigation 95-04-044, Opinion Regarding Treatment of Virtual NXX Calls with Respect to Small Local Exchange Carriers (Cal. PUC, Feb. 15, 2007) (finding that while the ILEC must pay reciprocal compensation to the CLEC for terminating such VNXX calls, the CLEC, as a *quid pro quo* for receiving reciprocal

in their state until concerns about how ILECs will be adequately compensated for the use of their networks to carry interexchange traffic are addressed.¹⁴

Section 1.2 of the Commission's rules permits the Commission to issue declaratory rulings "terminating a controversy or removing uncertainty."¹⁵ Ongoing disputes regarding the treatment of VNXX calls as local or non-local traffic, as well varying jurisdictional classifications and cost recovery methods for the additional transport costs required by calls with disparate rating and routing instructions, warrant a decision by the Commission with respect to the issues presented in Blue Casa's petition. The Associations accordingly support issuance of a declaratory ruling to the effect that VNXX calls are non-local for purposes of intercarrier compensation, and are subject to interstate or intrastate originating access charges based on the actual location of the calling and called parties. In addition, the Commission should re-confirm that under 47 C.F.R. 51.305(a)(2) ILECs have no obligation to provision extraordinary network, routing, or transport arrangements at the request of another carrier where such arrangements are outside their network, or are more than what the ILEC does for itself or for other carriers. To do

compensation, must bear the cost of additional transport required to get the VNXX call to a physical location where it would be considered "local").

¹⁴ See *Level 3 Communications LLC v. Qwest Corporation*, Order on Reconsideration (Iowa U.B., July 19, 2006) (The Iowa UB decided that a CLEC could not use VNXXs for calls in Iowa unless and until the CLEC addressed the need to ensure adequate payment for the use of the ILEC network when it delivers these calls to CLECs.); *Level 3 Communications LLC*, Docket No. T-03654A-05-0350, Docket No. T-01051B-05-0350, Decision No. 68817, (Ariz. CC, June 29, 2006) (finding the "record before us does not contain sufficient information to allow us to make a complete analysis of the public interest as it relates to VNXX ... [and] that Level 3 should not use VNXX to provide service to ISPs and VoIP providers"); *Global Naps v. Verizon*, 454 F.3d 91 (2nd Cir. 2006) (upholding the Vermont PSC's use of its Local Calling Areas for intercarrier compensation purposes and the PSC's order for GNAPs to cease VNXX operations in Vermont).

¹⁵ 47 C.F.R. § 1.2.

otherwise would result in originating rural ILECs subsidizing certain wireless carriers, CLECs, and their ISP customers.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, INC.

March 12, 2009

By: Richard A. Askoff



Teresa Evert
Senior Regulatory Manager

Its Attorney
80 South Jefferson Road
Whippany, NJ 07981
(973) 884-8000

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ Daniel Mitchell
Daniel Mitchell
Karlen Reed
Regulatory Counsel
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT OF
SMALL TELECOMMUNICATIONS
COMPANIES

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations
21 Dupont Circle NW, Suite 700
Washington, DC 20036

(202) 659-5990

INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE

By: /s/ Joshua Seidemann
Joshua Seidemann
Vice President, Regulatory Affairs
Independent Telephone &
Telecommunications Alliance
1101 Vermont Avenue, NW, Suite 501
Washington, DC 20005
(202) 898-1520

UNITED STATES TELECOM
ASSOCIATION

By: /s/ Glenn Reynolds
Glenn Reynolds
607 14th Street, N.W. Suite 400
Washington, DC 20005-

WESTERN TELECOMMUNICATIONS
ALLIANCE

By: /s/ Derrick Owens
Derrick Owens
Director of Government Affairs
317 Massachusetts Ave. N.E.,
Suite 300 C
Washington, DC 20002
(202) 548-0202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Associations' Comments was served this 12th day of March, 2009 by electronic filing, and email to the persons listed below.

By: /s/ Elizabeth R. Newson
Elizabeth R. Newson

The following parties were served:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554

Victoria Goldberg
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC. 20554
Victoria.goldberg@fcc.gov

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, SW
Washington, DC 20554
fcc@bcpi.web