



EX PARTE

October 7, 2004

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68
Developing a Unified Intercarrier Compensation Regime, CC Docket
No. 01-92
Implementation of the Local Competition Provisions of the
Telecommunications Act of 1996, CC Docket No. 96-98**

Dear Ms. Dortch:

WilTel Communications, LLC ("WilTel") has consistently advocated for elimination of the discriminatory application of access charges to some forms of interexchange telecommunications but not to others. Accordingly, WilTel urges the Commission to reject requests to establish different compensation rules for so-called Virtual NXX ("VNXX") traffic than those that apply to all other, virtually identical interexchange traffic. Certain carriers are attempting to use VNXX arrangements to evade the access charges that other carriers are required to pay for telecommunications traffic that originates in one charging area and terminates outside that area. Rather than approving these efforts, the Commission should end such unlawful discrimination among similarly situated carriers.

WilTel has repeatedly pointed out that inconsistent application of switched access charges distorts the market and unfairly penalizes honest competitors. The Commission has recognized that, when one carrier can obtain a market advantage by avoiding access charges through aggressive regulatory positions, its competitors are put at an unfair disadvantage. And, while in the long term, comprehensive intercarrier compensation reform ultimately should address such regulatory arbitrage, in the short term the FCC must address market distortions caused by discrimination in the application of access charges. At a minimum, the Commission must not perpetuate such discrimination.

One of the more serious cases of access charge discrimination would occur if originating access charges were not applied to VNXX telecommunications traffic, where the called party is outside of the calling party's calling area but nevertheless is using a phone number from the calling party's calling area. Neither the established law nor pro-competitive public policy support the arguments of VNXX proponents that compensation arrangements that apply to telecommunications calls that originate and terminate in the same local calling area (or to traffic bound for Internet service providers operating in the

calling party's a local calling area) should apply to VNXX traffic when such compensation arrangements do not apply to other interexchange traffic. To the contrary, the Commission has made it clear that where the end points of a telecommunications call are in different calling areas, interstate or intrastate access charges apply. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1033-1038 (1996) ("*Local Competition Order*"), *subsequent history omitted*.

Applying the ISP-bound traffic compensation scheme to VNXX traffic could result in unlawful discrimination, in which providers of conventional long-distance services would be subject to access charges, while providers of virtually identical interexchange and toll traffic would be exempt from paying access charges and could even qualify to receive reciprocal compensation payments. Regardless of how the Commission decides the question of the proper compensation scheme for calls bound for Internet service providers in the calling party's local calling area, it cannot apply that regime to telecommunications traffic that is completed to a carrier's customer outside of the local calling area unless it is willing to extend the regime to any carrier that competes for the same traffic.

Importantly, a Commission decision to allow avoidance of originating access for interexchange traffic bound for a non-local ISP would almost certainly result in access avoidance and discrimination on other, non-ISP-bound calls. WilTel understands that some carriers who provide or claim to provide VNXX services to ISPs also provide it to other telecommunications customers, essentially completing normal voice toll calls using a VNXX mechanism. Originating traffic is routed via interconnection agreements to CLECs, who route the calls to distant calling areas for termination as regular telephone traffic. ILECs on the originating side believe that the call is a local call and therefore don't charge originating access (and in fact pay reciprocal compensation). By disguising long distance calls as local calls to avoid access charges and interstate and intrastate high cost mechanisms, these companies would obtain a non-market-based advantage over IXCs such as WilTel who continue to pay originating access for virtually identical calls.

Clearly, language granting the petitions of VNXX proponents could have the unintended effect of permitting access avoidance on all calls originated over LEC facilities, resulting in discrimination against those IXCs paying originating access. The entire industry will be looking closely at how the Commission addresses this issue because every company necessarily must structure its network arrangements to avoid access charges wherever that is legally permitted -- or in the current environment, "arguably" permitted under aggressive legal theories applied to take advantage of Commission silence.

Finally, applying the regime established for ISP-bound traffic to VNXX would cause widespread discrimination by undermining the basis on which carriers determine jurisdiction for purposes of applying the correct intercarrier compensation under the

current system, in which different rates apply depending on jurisdictional determinations. These determinations, in turn, depend on the end-to-end nature of the calls – *i.e.*, the location of the calling and the called parties. ILECs generally use Calling Party Number (“CPN”) data to determine the originating and terminating call locations. Except in the case of wireless-originated calls, use of CPN is generally an accurate way to determine jurisdiction. VNXX providers, however, misuse CPN to obtain a false jurisdictional parameter. By using the CPN of a charging area different from the actual destination of the call, VNXX providers avoid a jurisdictional determination that would cause them to pay originating access charges instead of being paid. Absent a universal jurisdictional parameter based on the end-to-end nature of a telecommunications call, companies will be free to develop their own mechanisms, resulting in discriminatory application of access charges.

For the reasons set forth herein, WilTel urges the Commission to hold that telecommunications calls to VNXX customers are not subject to the compensation regime established for ISP-bound calls.

Respectfully submitted,



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