

October 23, 2008

EX PARTE

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

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; High-Cost Universal Service Support, WC Docket No. 05-337; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Intercarrier Compensation for ISP-Bound Traffic WC Docket No. 99-68; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135

Dear Ms. Dortch:

On October 22nd, 2008, on behalf of Level 3 Communications LLC ("Level 3"), Jamie Moyer, Michael Donahue, and Bill Hunt, of Level 3 and I met with Amy Bender, Acting Legal Advisor to Chairman Martin; Nick Alexander, Legal Advisor, Wireline, to Commissioner McDowell; Scott Bergmann, Senior Legal Advisor, Legal Advisor for Wireline Issues to Commissioner Adelstein; and Scott Deutchman, Competition and Universal Service Legal Advisor to Commissioner Copps. On October 23rd, Michael Donahue, Bill Hunt, and I met with Greg Orlando, Legal Advisor, Wireline to Commissioner Tate. Our presentations are summarized in the attached documents, which were distributed to the attendees.

Ms. Marlene H. Dortch
October 23, 2008
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Sincerely,



John T. Nakahata

cc: Amy Bender
Nick Alexander
Scott Bergmann
Scott Deutchman
Greg Orlando

ICC Reform Considerations

- ∴ As the FCC reviews a proposed order for ICC reform, the FCC should:
 1. Resolve *all* open questions around compensation for *all* locally-dialed (all or, if ISP bound only, ISP bound) traffic or uncertainty and continued litigation will plague the industry.
 1. Reaffirm the legal basis for the \$.0007 rate cap and that ISP bound compensation is owed for all traffic.
 2. Set a bright line rule that all traffic shall be rated based on calling and called party telephone numbers.
 1. Without clarification, carriers will continue to dispute whether and when originating access charges apply.
 2. Significant changes to access rates will have dramatic effects on the telecom industry, particularly CLECs, and mid-sized and small ILECs. Major changes in access rates need to be phased in over a longer period in order not create spontaneous market winners and losers, and to give carriers time to adjust.
 1. Stepping down intrastate access rates to interstate access rates is a major change that requires more than a two year window to smoothly transition and allow carriers to readjust business plans and models.
 2. A better approach would be to transition adjustments more smoothly over the ten year period, rather than front-loading reductions.
 3. Don't distinguish between residential and business telephone numbers for universal service contribution. This is unworkable for wholesale providers.

STATE COMMISSION DECISIONS ON THE *ISP REMAND ORDER*

State	Decision	Date	Cite	Rating Decision Basis	Rate Structure
Arizona	VNXX traffic defined as any ISP traffic terminating to an ISP physically located outside of local calling area where call originated. VNXX permitted so long as routed over direct end office trunks between CLEC and ILEC end office serving the local calling area of the originating end user; cost of the direct end office trunks to be paid for by CLEC.	12/5/06	In the Matter of Petition of Level 3 Communications LLC for Arbitration of an Interconnection agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act of 1996, Dockets Nos T-03654-05-0350; T-010051B-05-0350	To receive reciprocal compensation the ISP must be physically located within the local calling area from which the caller originated the traffic. For VNXX traffic, CLEC has to incur the additional costs of trunking to the local calling area from its network and receives no reciprocal compensation for terminating the traffic (bill and keep for VNXX)	\$.0007 for ISP traffic terminating to modem banks located in local calling area; bill and keep for all VNXX traffic with CLEC paying costs of trunking from its network to ILEC end offices.
California	If a carrier interconnects on an indirect basis, it must bear the responsibility for transport costs to get a VNXX call to the small LEC local calling area to the POI.	2/15/07	Opinion Regarding Treatment of Virtual NXX Calls with Respect to Small Local Exchange Carriers. Decision 07-02-031	Each party bears its costs of transport on its side of the POI and POIs within the CA PUC's 12-mile band for local calls are considered local. Compensation for ISP-bound traffic is per the FCC's ISP Remand Order. End user location, therefore, is irrelevant to this analysis. In Re Pac-West Telecomm, Inc. Application 04-11-005, Decision 05-06-028. California Public Utilities Commission, June 16, 2005, para. 6	Recip comp (local) by originating carrier; terminating carriers pays transport costs outside of local calling area.

California	<p>VNXX is interexchange, rated as local – subject to state jurisdiction.</p> <p>Originating carrier recovers from the terminating carrier the transport and facilities costs of bringing VNXX calls to the POI;</p> <p>The terminating carrier is receiving compensation for terminating the VNXX traffic.</p> <p>PUC ruled that 251(b)(5) and FCC Rule 51.703 (b) do not apply in the case of VNXX</p>	12/8/03	Pacific Bell V. PacWest, Decision 03-05-031West		
Florida	<p>Physical end points of a call determine the appropriate intercarrier compensation.</p> <p>If the physical end points are in the same LCA, the call should be considered local for intercarrier comp.</p> <p>If one end of the call is outside the local calling area, the call should be considered interexchange and is subject to originating access (billed by the carrier whose end user makes the VNXX call.)</p>	8/7/07	Petition of MCI Metro Transmission Services dba Verizon Access Transmission Services for Arbitration of Disputes Arising from Negotiation of Interconnection Agreement with Embarq Florida Inc., Docket No. 060767-TP	<p>Based upon state law:</p> <p>(1) if the physical end points of a VNXX call are within the local calling area, the call should be considered local for intercarrier compensation purposes;</p> <p>(2) if one of the physical end points of the call is outside of the local calling area, the call should be considered interexchange and subject to originating access charges – presumably intrastate or interstate depending upon physical location.</p>	Potential 3-tier structure – local, intrastate and interstate.

Illinois	<p>Ruled that virtual NXX traffic to ISPs is governed by FCC regime.</p> <p>Said issues re what the ILEC charges the CLEC must be taken to the FCC.</p> <p>Also ruled that virtual NXX traffic to non-ISPs is subject to bill and keep.</p>	7/24/02	<p>Essex Telecom, Inc. v. Gallatin River Communications, LLC, Case No. 01-0247, Order; Global NAPs Illinois, Inc. Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon North, Inc., f/k/a GTE North Incorporated and Verizon South, Inc., f/k/a GTE South Incorporated, Docket No. 02-0253, Arbitration Decision</p>	<p>VNXX services are exchange services, not exchange access services, and that access charges should not be associated with such services. P 17, Docket No. 02-0253, Arbitration Decision</p>	Bill and keep
Michigan	<p>ILECs have a statutory option to address VNXX traffic on a retail pricing basis through tariffs, i.e. ILECs may opt to charge retail subscribers toll charges for VNXX, thereby allowing them to impose access charges on the traffic.</p>	7/1/08	<p>In the matter of the petition of Sprint Communications Company, LP for arbitration pursuant to Section 252 (b) of the Telecommunications Act of 1996 to establish an interconnection agreement with CenturtyTel Midwest – Michigan, U-15534</p>	<p>Legislation passed by the MI Legislature based upon “gap” in federal jurisdiction over VNXX mandated that a call made to a called party who is not located within the geographic area of the caller’s local calling area is not a local call if the tariff of the provider originating the call does not classify the call as a local call (MCL 484.2304(9), 2005); MECA citing in workshop to para 10 of ISP Remand to validate this result for ISP bound traffic.</p>	<p>Depending upon the option created, 3 rates exist – local, intraLATA and interLATA</p>

New York	<p>Ruled that calls to virtual NXX codes customers will be handled on a bill and keep basis, and are not entitled to reciprocal compensation.</p> <p>CLECs must arrange to transport traffic from the edge of the service area (Verizon was ordered to implement tariff terms for third-party transport from the ITC meet point to the Verizon tandem).</p> <p>May not charge CLECs access charges for virtual NXX traffic.</p> <p>And CLECs must establish direct trunking when call volumes beyond the DS-1 level.</p>	7/30/01	<p><i>Joint Petition of AT&T Communications of New York, Inc., TCG New York, Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York, Inc., Case 01-C-0095, Order Resolving Arbitration Issues</i></p>	<p>Single /MOU recip comp rate structure for ISP traffic:</p> <p>Defers to FCC’s rate mechanism in the ISP Remand Order -- “The Commission finds that the FCC’s order speaks for itself, and there is no need for the agreement to include any terms, conditions or rates for the internet traffic that the FCC order addresses.”</p> <p>Page 25, Case 01-C-0095, Order Resolving Arbitration Issues</p>	Local rate
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Ohio	Access charges apply to “non-local” ISP-bound calls – including those delivered to the POI in the same LCA as the originating caller but terminated to an ISP physically located outside the LCA.	7/5/2007	In the Matter of the Petition of Verizon Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with United Telephone Company of Ohio d/b/a Embarq, <i>Arbitration Award</i> (April 18, 2007), <i>Order on Rehearing</i> (July 25, 2007), Case No. 06-1485-TP-ARB.	Since FCC has not pre-empted the commission’s ability to apply access charges to non, local ISP-bound calls, the commission can utilize its Local Service Guidelines that any end user call originating and terminating within a local calling area, shall be treated as a local call – all others subject to access charges. pp. 6-7, Case No. 06-1485-TP-ARB.	3 rates – local, intrastate & interstate
Pennsylvania	VNXX is non-local traffic and, therefore, subject to existing access charge regime (ALJ Recommended decision). Requires that the ISP have a physical local presence by virtue of how VNXX is defined. The remand order only applies to such traffic originating and terminating within a single local calling area.	10/19/2007	Petition of Core Communications Inc. for Arbitration of Interconnection Rates, Terms and Conditions with the Untied Telephone Company of Pennsylvania, dba Embarq Pursuant to 47 USC 252(b), Recommended Decision, Docket No. A-310922F7002	References applicability of Remand Order only to “calls between dial up users and ISPs in a single local calling area” and cites to federal cases since then (i.e. Global NAPS).and the FCC’s amicus brief. (see pp. 10-13)	2-tier rate structure: (1) Remand Order regime for ISP traffic in the same local calling area; (2) State access charge regime for balance of Core’s ISP-bound traffic.

Texas	<p>Made a distinction between “local” ISP-bound traffic—for which they had set a rate—and FX ISP-bound traffic—for which there was no rate.</p> <p>Under the terms of the <i>ISP Remand Order</i>, in their view, if it was bill-and-keep before the Order, it is bill-and-keep after the Order. Hence, FX ISP-bound traffic is subject to bill-and-keep.</p>	8/28/02	<p>Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for “FX-Type” Traffic Against Southwestern Bell Telephone Company, PUC Docket No. 24015, Revised Arbitration Award</p>	<p>ISP Remand order “informative” as to the issue of local versus access traffic</p>	<p>Results in 1-tier rate structure: bill and keep for all ISP-bound traffic.</p>
Washington	<p>VNXX is interexchange traffic to be exchanged on a bill and keep basis with the originating carrier paying all costs of transport.</p>	7/16/08	<p>Qwest Corporation v. Level 3 Communications, LLC, et al, Docket UT-063038, Order 10</p>	<p>WUTC stated that FCC focused only on ISP-bound traffic that terminates locally, paraphrasing para 10 of the ISP Remand Order – para 26, pp 13-14, Qwest Corporation v. Level 3 Communications, LLC, et al, Docket UT-063038, Order 10</p>	

Wyoming	<p>The Commission finds the <i>ISP Remand Order</i> makes it clear the only traffic considered is ISP traffic that originates and terminates in the same LCA.</p> <p>The Commission finds ISP-bound traffic does not include VNXX-routed ISP-bound traffic, and VNXX traffic is not subject to reciprocal compensation.</p>	April 30, 2007	In re Level 3 Communications, LLC, Docket No. 70043-TK-05-10, Memorandum Opinion, Findings and Order (April 30, 2007).	<p>Quoted language from ISP Declaratory Order as basis for FCC statement in ¶10 of ISP Remand Order. (see paragraph 80)</p> <p>Also cited to Oregon and other decisions in support by pointing out that they had cited ¶10 of ISP Remand Order. (see paragraph 83 and footnote 15)</p>	<p>Results in 2-tier rate structure:</p> <p>(1) .0007 for “local” ISP-bound traffic, and</p> <p>(2) access charges for VNXX traffic (though never explicitly stated)</p>
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Colorado	<p>The calling party and called party must both be physically located in the same local calling area for the call to be a “local” call for reciprocal compensation purposes.</p> <p>The commission also found that calls originating from and terminating to customers in different LCAs are interexchange in nature, and that the FCC did not eliminate the distinction between “local” and “interexchange” traffic.</p>	4/24/07	In The Matter Of Level 3 Communications, LLC’s Petition For Arbitration Pursuant To Section 252(B) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996, And The Applicable State Laws For Rates, Terms, And Conditions Of Interconnection With Qwest Corporation, <i>Initial Commission Decision</i> (adopted February 22, 2007) and <i>Decision No C07-0318</i> (April 24, 2007), Colorado Public Utilities Commission Docket No. 05B-210T
Connecticut	VNXX traffic was subject to federal intercarrier compensation regime, and non-ISP-bound VNXX traffic was not subject to reciprocal compensation, but not subject to access charges, either.	1/30/02	DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Final Decision, Docket No. 01-01-29 (Ct. DPUC Jan. 30, 2002).
Georgia	The Georgia PSC ruled that access	7/23/01	In re Generic Proceeding on Point of Interconnection and Virtual FX Issues,

	charges, and not reciprocal compensation, are due for Virtual FX traffic		Docket No. 13542-U, Final Order
Indiana	VNXX calls terminate outside the local calling area of the party originating the call. Such calls are not local for the purpose of intercarrier compensation and access charges should instead apply.	3/12/08	Petition of MCI Metro Transmission Services dba Verizon Access Transmission Services for Arbitration of Interconnection Agreement with United Telephone Company of Indiana, Inc. Embarq 43373 Int. 01
Kentucky	“Foreign exchange and virtual NXX services should be considered local traffic when the customer is physically located within the same LATA as the calling area with which the telephone number is associated.” The Commission limited virtual NXX traffic so that only traffic originating and terminating within a LATA would qualify for reciprocal compensation.	2/14/01	In re Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Order, Case No. 2000-404
Maine	Ruled that virtual NXX service is interexchange traffic and therefore not eligible for reciprocal compensation. Ordered to provide a “Single Number Service” available only to ISPs.	6/30/00	<i>Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications, LLC d/b/a Brooks Fiber</i> , Order Requiring Reclamation of NXX Codes and Special ISP Rates by ILECs
Minnesota	ISP-bound traffic that is originated by the ILEC end user customer and that is delivered to an ISP customer served by CLEC where the ISP has a sever located within the same local calling area (as approved by the state Commission) as the originating caller, will be compensated.	2/6/08	In the matter of the petition of MCImetro Access Transmission Services dba Verizon Access Transmission Services for Arbitration of an interconnection agreement with Embarq Minnesota pursuant to 47 USC 252(b), P-430, 5321M-07-611

	ISP-bound traffic that is originated by an ILEC end user customer, and is delivered to CLEC where the ISP is physically located outside the ILEC caller's local calling area (as approved by the state Commission) as the originating caller (regardless of either NPA-NXX dialed or whether the CLECs end user customer is assigned the NPANXX associated with a rate center with which the Qwest customer is physically located) will be subject to bill and keep.		
Missouri	VNXX not local traffic and compensated at bill and keep	6/27/06	Socket Telecom, LLC v. CenturyTel of Missouri, LLC, TO-2006-0299
Nevada	Ruled that, for purposes of reciprocal compensation, shall adopt the local calling areas defined in Sprint's tariff. Further, may assign VNXX numbers, but intercarrier compensation shall not apply to FX and FX type services.	5/2/02	Petition of Global NAPs, Inc. for Arbitration of an Interconnection Agreement with Central Telephone Company – Nevada d/b/a Sprint of Nevada, pursuant to Section 252 of the Telecommunications Act of 1996, Dkt. 01-10018, Order
New Hampshire	CLEC must meet a local "nexus" test to gain state wide VNXX – service must be provided to at least on customer physically located in the exchange from which the service is requested and that the service must be provided through collocation with an ILEC, using CLECs own facilities, EELS or other leased facilities.	9/16/05	Re Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas – Investigation as to Whether Certain Local Calls are Local, DT 00223, DT00-054
North Carolina	Commission concluded that: "the Parties should be subject to reciprocal compensation obligations to each other for calls to numbers with NPA/NXX codes associated with the same exchange, provided that the	6/11/03	<i>Petition of US LEC of North Carolina, Inc., for Arbitration with Verizon South, Inc.</i> , NCUC Docket No. P-561, SUB 19, Opinion, at *23 (NCUC, June 11, 2003).

	NPA/NXX code of the customer is 'homed' in the same LATA and this arrangement is accomplished through traditional FX service, i.e., the service arrangement uses owned or leased dedicated lines.".		
North Dakota	Ruled that the FCC <i>ISP Remand Order</i> applies to all ISP-bound traffic, rejecting the ILEC argument that the <i>ISP Remand Order</i> was limited to only "local" ISP-bound traffic	3/3/03	Level 3 Communications, LLC Interconnection Arbitration Application, Case No. PU-2065-02-465, Decisions and Recommendations of the Arbitrator Concerning Level 3 Communications, LLC's Interconnection Arbitration Application
Rhode Island	VNXX calls rated as local or toll based upon the geographic physical end points of call.	10/16/02	In Re; Arbitration of the Interconnection Agreement Between Global Naps and Verizon Rhode Island, Order No. 17193
South Carolina	FCC orders and rules make clear that traffic destined for ISP customers outside the LCA is interexchange traffic and is to be treated as such, the commission found that virtual NXX for dial-up calls to ISPs is not ISP-bound traffic but is interexchange traffic subject to access charges. The commission further found that the physical location of the ISP determines the compensation.	1/11/2006	In re MCI Metro Access Transmission Services, LLC, Order, Docket No. 2005-188-c, 2006 WL 2527432
South Dakota	VNXX not subject to intrastate access charges, but subject to interstate access. ISP calls are jurisdictionally interstate, state commission free to require or not require reciprocal compensation; noting in ISP-Remand the FCC's finding that ISP-bound calls are interstate in nature is somehow limited to calls to ISP made within the same local calling area.	3/14/05	Black Hills Fibercom v. Qwest Corporation. CT03-154

Tennessee	Ruled that calls to an NPA/NXX in the local calling area outside the rate center where the NPA/NXX is homed should be treated as intrastate interexchange toll traffic for purposes of intercarrier compensation and are subject to access charges.	6/25/01	Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant To Section 252(B) of The Telecommunications Act of 1996, Docket 99-00948
Vermont	VNXX prohibited by all telecommunications carriers to avoid what otherwise would be toll charges unless originating carries purchases or builds facilities to transport the traffic from the remote exchanges where the traffic is originated to its ISP customer; the originating carrier to only receive compensation from its ISP customer.	9/28/04	In re Acquisition and Use of Central Office Codes by Local Exchange Carriers in Vermont, Docket No. 6209
Wisconsin	<i>ISP Remand Order</i> applies to all ISP-bound traffic, regardless of the terminating point of the call.	2/13/03	Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms, and Conditions, Docket No. 05-MA-130, Order Approving an Interconnection Agreement