

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

In the Matter of

Petition of Blue Casa Communications, Inc.
for Declaratory Ruling Concerning Intercarrier
Compensation for ISP-Bound VNXX Traffic

WC Docket No. 09-8

Comments of ALEC, Inc.

ALEC, Inc. submits these comments in opposition to the petition filed by Blue Casa Communications, Inc. (“Blue Casa”) asking the Commission to issue a declaratory ruling that originating interstate switched access charges apply to calls bound for Internet Service Providers (“ISPs”) that are delivered via Virtual NXX (“VNXX”) arrangements.¹ The Commission should deny Blue Casa’s Petition.

It appears from public records that Blue Casa is a California CLEC that recently lost a case before a California Public Utilities Commission (“CPUC”) Administrative Law Judge regarding intercarrier compensation for VNXX ISP-bound traffic. The traffic in question was being delivered from Blue Casa to another CLEC (Pac West). Blue Casa has no interconnection agreement with Pac West. However, Pac West has a CPUC tariff for local and/or intraLATA toll traffic delivered from another LEC. Blue Casa’s customers evidently dial Internet Service Providers who receive their connectivity to the public switched telephone network from Pac West. Pac West sent Blue Casa bills, which went unpaid. Pac West eventually brought a

¹ 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 (filed Dec. 19, 2008) (Blue Casa VNXX Petition).

proceeding to enforce its tariff at the CPUC, which granted Pac West's complaint and directed Blue Casa to pay. Blue Casa and Pac West then settled their respective appeals of the ALJ's ruling.

So, it appears that Blue Casa's petition here is, in effect, an effort to turn the tables on Pac West – at least going forward – by obtaining a ruling from this Commission that, not only is the originating carrier not required to pay the terminating carrier for VNXX ISP-bound traffic but, to the contrary, the terminating carrier is supposed to pay the originating carrier for the privilege of receiving it.

The proper legal analysis of this question should now be deemed settled following the Commission's *Second ISP Remand Order*.² The current state of the law as follows:

- All traffic between LECs is subject to reciprocal compensation under Section 251(b)(5), unless that traffic is carved out by Section 251(g); and
- The Section 251(g) carve-out applies *only* to traffic that is (a) carried between LECs and information service providers or interexchange carriers (IXCs); (b) carried via types of interconnection arrangements that existed when the Telecommunications Act of 1996 was passed; *and* (c) was subject to an established, preexisting compensation regime existing prior to the 1996 Act.

² *High-Cost Universal Service Support; 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*, Order On Remand And Report And Order And Further Notice Of Proposed Rulemaking, WC Docket No. 05-337; CC Docket No. 96-45; WC Docket No. 03-109; WC Docket No. 06-122; CC Docket No. 99-200; CC Docket No. 96-98; CC Docket No. 01-92; CC Docket No. 99-68; WC Docket No. 04-36 (released November 5, 2008) (“*Second ISP Remand Order*”) at ¶¶ 6-29.

In short, the reach of Section 251(b)(5) is very broad, while the scope of the Section 251(g) carve-out is very narrow. Under this framework, all intraLATA LEC-to-LEC traffic – VNXX or otherwise – is not covered by the carve-out because it is not carried by an interexchange or information service provider, and because such interconnection arrangements did not exist prior to the 1996 Act. It follows that all such traffic is subject to Section 251(b)(5).³

This conclusion clearly applies to VNXX-type traffic. VNXX arrangements did not exist before the 1996 Act took effect. As a result, Section 251(g) cannot apply to “preserve” some prior compensation regime for VNXX traffic. No such traffic, and no such prior compensation regime, existed to be preserved.

Blue Casa recognizes this problem with its argument. To avoid it, Blue Casa claims (a) that originating access charges apply to interstate Foreign Exchange (“FX”) service (which is true) and (b) that LEC-to-LEC VNXX arrangements should be treated the same as FX (which is not true).

Traditional Interstate FX. In a traditional interstate FX arrangement, the FX customer buys an interstate point-to-point circuit from his premises (the “closed” end) to the distant central office switch from which he wishes to receive service (the “open” end). When a third party makes a call to the FX number, that call is routed to the distant (open end) switch in the normal way. However, such a call does not terminate to a local loop attached to that switch. Instead, such a call is routed to the interstate point-to-point circuit attached to that switch, for onward delivery to the customer’s distant premises. In practical terms, the customer is buying basic local

³ See *id.* at ¶¶ 6-22; *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

service out of a particular switch that is typically far away, but then purchasing a long interstate “loop” running from that switch back to the customer’s distant premises.

This physical arrangement is – at least as far as the LEC serving the “open” end is concerned – identical to Feature Group A access, which was the predominant form of access used by competing interexchange carriers in the early- to mid-1980s when the rule regarding access charges for FX services was established. During that time the major local exchange carriers – the Regional Bell Operating Companies, or “RBOCs” – were banned from providing interLATA service, so the physical arrangement of an interstate FX service was directly analogous to the physical arrangement applicable to a “normal” interstate long distance call: a local exchange carrier provided the facilities and connections on each end of the call, with an interexchange carrier’s facilities in the middle linking the two LECs.⁴ Although not quite the same as a traditional toll call, an interstate FX line uses the same LEC-IXC-LEC routing pattern that characterizes most such calls.⁵

Modern VNXX Arrangements. Modern VNXX arrangements are completely different from traditional FX arrangements. The paradigmatic VNXX arrangement arises when a CLEC interconnects with an ILEC using a single point of interconnection (POI) in a LATA. This POI is often but not always near the ILEC’s LATA tandem switch. All traffic from the ILEC’s customers to the CLEC’s customers – whether or not VNXX is involved, and originating and

⁴ Consider a call from someone served by the same switch as the “open” end of the FX line to the FX customer. The LEC serving that area would carry the call on the calling party’s loop to the switch, and then on an entrance facility from the switch to the interexchange carrier providing the interstate service. The interexchange carrier then carries the call on its facilities to the LATA where the customer’s actual premises are. At that point, the interexchange carrier delivers the call to an entrance facility provided by the LEC serving that area, which is eventually linked to a channel termination, again provided by the LEC, delivering the call to the FX customer’s premises.

terminating to and from anywhere in the LATA – is handed off over a single interconnection trunk group at that single point. A CLEC typically will have at most one switch serving a LATA, and may have a single switch serving many LATAs.⁶ In this arrangement, then, two LECs interconnect their networks at a single point, which connects to the CLEC’s single switch. The CLEC then delivers calls to its customers in that LATA via loop facilities from its switch to each customer’s location.

The “VNXX” aspect of this arrangement arises, or not, depending on the called party’s assigned telephone number. If the customer’s number has an “NXX” code that corresponds to where the customer’s premises actually are, the call is a traditional intraLATA call. But if the customer’s premises are somewhere else, then the customer is receiving “VNXX” service. Calls to that customer will normally be rated to the end user as either local or toll based on the calling and called party’s NXX codes, not on their physical location. The retail rating of calls from the originating LEC’s end users to a VNXX customer will, therefore, generally be similar to the retail rating of calls to a traditional FX customer.

As a matter of physical call routing, however – that is, the underlying actual interconnection arrangement – a VNXX arrangement is totally different from a traditional FX line. In a traditional FX service, the customer is physically connected to, and in effect “draws dial tone” out of, the distant switch that houses the NXX code of the customer’s assigned FX number. But in a VNXX arrangement, the customer is physically connects directly to the nearest switch of the LEC (normally a CLEC) that provides the customer’s dial tone. In an FX service,

⁵ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) (“*Local Competition Order*”) at ¶ 1034.

⁶ See *id.* at ¶ 1090 (noting that a fiber ring arrangement may perform the same functions as a tandem switch with multiple subtending end offices).

the customer receives a dedicated private line, provided jointly by an originating LEC, an IXC, and a terminating LEC, that carries traffic bound for that customer alone from the distant switch to the customer's premises. But in a VNXX arrangement, calls to the VNXX number are commingled on common transport facilities, provided by the originating LEC and carrying all traffic from the originating local calling area and elsewhere, to the single POI between the originating LEC and the terminating LEC. In contrast to an FX arrangement, in a VNXX service, no IXC is involved at all: where there is an IXC in the middle between two LECs for FX service, in a VNXX arrangement, the two LECs (typically) connect directly to each other.

Traditional interstate FX service, therefore, is a totally different type of service and type of interconnection than modern VNXX service, and Blue Casa's attempt to equate them utterly fails. The two arrangements are not remotely analogous in physical terms. The only parallel is that in retail billing terms, an originating LEC's customers will be able to call both an FX service customer and a VNXX customer as a "local" call based on the number assigned to the called party. Other than that, in essentially every other respect, the two arrangements are totally different.⁷

⁷ Blue Casa presumably would not suggest that the retail rating of calls from its customers to VNXX customers controls the proper intercarrier compensation for such calls, because then the fact that calls to VNXX customers are rated in exactly the same manner as traditional local calls would compel the precise conclusion that Blue Casa is trying to avoid. That said, a sound legal argument can be made that the status of traffic as subject to access charges is properly governed by whether there is a separate toll charge imposed on the call at retail. See 47 U.S.C. § 153(16) (defining "exchange access" as service involved in originating or terminating "telephone toll service") and 47 U.S.C. § 153(48) (defining "telephone toll service" as a service for which there is a separate identified toll charge). On this theory, access charges may not be applied to traffic as to which there is no retail toll charge, so VNXX calls are exempt. Legalities aside, the access charge model is based on the idea that an IXC will charge an end user making a toll call a rate sufficient to compensate the IXC for its own costs plus applicable access charges. When there is no toll charge, there is no economic basis to apply access charges. See *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241 (1983) at ¶¶ 1-8 (summary of access charge plan); *id.* at ¶¶ 11, 37-39 (describing AT&T's "Division of Revenues" process and industry arrangements for sharing toll revenue); *id.* at ¶¶ 37-41 (noting that the FCC's authority to establish access charges arises

As relevant here, this means that while it is possible to argue that payment of access charges with respect to traditional interstate FX arrangements is “preserved” by Section 251(g), there is no remotely credible basis to claim that Section 251(g) “preserves” any sort of intercarrier compensation is preserved with respect to VNXX arrangements, for the simple reason that there were no such arrangements prior to the 1996 Act. Blue Casa has simply not shown that Section 251(g) exempts VNXX arrangements from the default of reciprocal compensation. To the contrary, the only reasonable conclusion is that traffic exchanged between LECs via a VNXX arrangement is subject to Section 251(b)(5).⁸

Blue Casa makes one other claim to retain its right to charge originating access charges on ISP-bound VNXX calls, which is that the FCC’s multiple rulings about intercarrier compensation for ISP-bound calls in particular have all been limited to the situation in which the ISP’s premises are located in the calling party’s local calling area. This argument is flawed in at least two independently fatal ways.

First, whatever may have been true in the past, the *Second ISP Remand Order* does not set out some new regime for intercarrier compensation for ISP-bound calls. To the contrary, it lays out the Commission’s best current understanding of *how Section 251(b)(5) works, and how it interacts with Section 251(g)*. In plain terms, the Commission said that Section 251(b)(5) applies to all traffic to or from a LEC, except to the extent that a specific intercarrier

from its authority under Section 201(a) to require “through routes” involving multiple carriers and to determine how charges for such “through routes” will be split among the carriers).

⁸ Blue Casa’s actual situation is even further different, in that the VNXX ISP-bound traffic its customers originate is not handed off directly to the terminating LEC but is instead transited via yet a third LEC’s tandem switch, to which both Blue Casa and other CLECs are interconnected. This arrangement, then, is even more divorced from what existed prior to the 1996 Act than even a normal VNXX arrangement might be, and thus, if anything, even less affected by the Section 251(g) “carve out” from the normal application of Section 251(b)(5).

compensation regime that existed prior to the 1996 Act covered it and was noted in Section 251(g). Both the Commission and the D.C. Circuit have noted that Section 251(g) applies only to LEC-to-IXC and LEC-to-ISP compensation arrangements.⁹ Here we are dealing with LEC-to-LEC-to-ISP traffic, and/or, in Blue Casa's specific case, LEC-to-LEC-to-LEC-to-ISP traffic. Whether or not the Commission's earlier orders were written with VNXX traffic in mind, the only legally rational conclusion about VNXX traffic, based on what the Commission and the courts have actually said, is that it is not covered by the § 251(g) carve-out and is therefore subject to reciprocal compensation and not access charges.

But the Commission was fully aware that CLECs served ISPs by means of VNXX arrangements even before its decision in the *ISP Remand Order* in April 2001. Although the *ISP Remand Order* did not deal with VNXX in so many words, it expressly considered the fact that CLECs permitted ISPs to centrally collocate their equipment with the CLECs' own switching equipment.¹⁰ As noted above, that is how VNXX service is typically provided to ISPs today. The Commission plainly did not believe that such arrangements should be excluded from the compensation regime being established in the *ISP Remand Order*, or it would have said so. Again, however, whatever the Commission may or may not have specifically said in 2001, it is clear that VNXX traffic is subject to reciprocal compensation, and not access charges, in light of the language of the *Second ISP Remand Order*.

⁹ See *Second ISP Remand Order* at ¶¶ 4, 16 and *WorldCom v. FCC*, 288 F.3d 429, 430, 433-34 (D.C. Cir. 2002).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "CSH", written in a cursive style.

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¹⁰ See *ISP Remand Order* at ¶ 92 & n.189 (discussing ILEC claim that CLECs should receive reduced payment for calls to ISPs because they save money by allowing the ISPs to collocate in the CLEC's central switch locations).