

**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

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

**OPENING COMMENTS OF
THE WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION**

March 12, 2009

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INTRODUCTION AND SUMMARY

The Washington Independent Telecommunications Association (“WITA”) welcomes the opportunity to comment on the Petition for Declaratory Ruling filed by Blue Casa Communications, Inc. (“Blue Casa Petition”). In the Blue Casa Petition, Blue Casa seeks a declaratory ruling that originating interstate switched access charges apply to calls bound for Internet service providers or ISPs that are delivered via virtual NXX arrangements (“VNXX”).

WITA is a trade association that represents incumbent local exchange carriers that are defined as rural telephone companies under the Communications Act of 1934, as amended.¹ A list of WITA’s members is set out in Attachment A. WITA’s members serve the more rural and high-cost areas in the State of Washington.

WITA is in general support of the result sought in the Blue Casa Petition, with one modification to the outcome. WITA’s position is that interexchange traffic that is carried under a virtual NXX (“VNXX”) arrangement should be subject to intrastate access charges if the calling party and the called party (the ISP) are within the same state. Only if the Commission clearly extends its ruling that ISP traffic is interstate in nature to the application of VNXX traffic should interstate access charges apply. In no case should reciprocal compensation charges apply to such traffic. VNXX arrangements are no more than access bypass mechanisms.

BACKGROUND

Some competitive local exchange carriers (“CLECs”) have established working relationships with ISPs which allow the ISPs to consolidate their physical presence in a single location within the state or LATA. The CLEC then provides the ISP with a virtual presence in other calling areas in the state or LATA by assigning to the customer an NPA/NXX number

¹ The definition of rural telephone company is in 47 U.S.C. § 153(37).

resource that appears to be local, but is actually an interexchange call from the calling party to the location of the ISP. This has been called a VNXX arrangement. The VNXX arrangements are used primarily, if not exclusively, for dial-up ISP service.

In many instances, WITA's members that serve relatively less densely populated areas than those served by other ILECs such as Qwest or Verizon have, over time, been subject to orders or other direction of the Washington Utilities and Transportation Commission ("WUTC") establishing extended area service ("EAS") routes between the calling areas served by the WITA member and the larger calling areas served by Verizon or Qwest. With the arrival of VNXX arrangements, a calling party served by a WITA member believes that the ISP he or she desires to reach is physically located in the larger ILEC calling area, based upon the assigned numbering resource, and believes he or she can reach the ISP through an EAS call. In actual practice, the ISP is located several exchanges away in what would normally be a toll call for the WITA member's customer to reach the ISP at its physical location.

As a result of this VNXX arrangement, the originating access charges of the WITA member are bypassed. Instead, because the call is rated and routed as a legitimate EAS call as though the ISP being served by the CLEC is in the neighboring exchange to which the WITA member has an EAS route, the carrier serving the ISP avoids the payment of access charges.

DISCUSSION

1. Blue Casa Correctly Asserts that Originating Access Charges Should Apply to a VNXX Call; However, Intrastate Access Charges Rather than Interstate Access Charges Should Apply if the Call Originates and Terminates Within One State.

In the Blue Casa Petition, Blue Casa argues that originating interstate switched access charges should apply to VNXX traffic.² It is WITA's position that originating access charges should apply to VNXX calls. However, until such time as the Commission unequivocally rules that dial-up calls to ISP providers located within the same state but in separate exchanges from the calling party are interstate in nature, intrastate access charges should apply. As will be discussed below, to date, the Commission's rulings on ISP traffic have addressed only the calling to ISPs located in the same exchange as the calling party.

Under a VNXX arrangement, normally the calling party is located within the same state as the called party (the ISP). To illustrate, the calling party is in State Exchange A. The called party looks as though it is in State Exchange B and Exchanges A and B have EAS between them. The reality is that the called party is physically located in State Exchange C some distance from both State Exchanges A and B which is normally a toll call to which intrastate access charges would apply. Under this situation, the intrastate access charges should apply to the origination of a call to a VNXX customer (the called party) that appears local, but is, in fact, physically located in a distant location outside the local calling area.

2. Blue Casa is Correct that the Commission's Recent Order in the *Second ISP Remand Order* Does Not Bar the Application of Originating Access Charges to VNXX Traffic.

In response to the remand from the DC Circuit in the *WorldCom* decision,³ the Commission recently issued an order that determined that ISP-bound traffic, while interexchange

² Blue Casa Petition at p. 1 and 4.

³ *WorldCom v. FCC*, 288 F.3d 429 (DC Cir. 2002).

in that the traffic is ultimately bound to the Internet for delivery, is traffic which is subject to the reciprocal compensation provisions of Section 251(b)(5).⁴ The Blue Casa Petition correctly points out that the determination of the Commission in the *Second ISP Remand Order* cannot apply to the type of traffic that exists with VNXX arrangements.⁵

What is at the heart of the decision in the *Second ISP Remand Order* and the issues addressed in the *WorldCom* case are calls made to the ISP which is “located within the caller’s local calling area.”⁶ The basic premise for the Commission’s rulings to date has been that the rulings are predicated upon addressing the arrangements where two local exchange carriers are operating within the same local calling area, one serving the calling party and the second serving the ISP the calling party is accessing. This premise is the key to interpreting the *WorldCom* decision. The Commission acknowledged that this was the case when it filed its Amicus Brief with the First Circuit when that Circuit was addressing VNXX issues. The Commission stated, “The administrative history that led to the *ISP Remand Order* indicates that in addressing compensation, the Commission was focused on calls between dial-up users and ISPs in a single local calling area.”⁷ This statement is equally applicable to the *Second ISP Remand Order*. This interpretation of what was being addressed by the Commission is applied consistently by several circuits, including the First Circuit,⁸ the Second Circuit⁹ and the Ninth Circuit.¹⁰

⁴ In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, et al., WC Docket No. 05-337, et al., Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. November 5, 2008) (“*Second ISP Remand Order*”).

⁵ Blue Casa Petition at p. 2-3.

⁶ 288 F.3d at 430.

⁷ Brief of Amicus Curiae FCC in Global NAPS, Inc. v. Verizon New England, Inc., et al. at p. 12, 206 WL 2415737 at 12.

⁸ Global NAPS, Inc. v. Verizon New England, Inc., 444 F.3d 59 (1st Cir. 2006).

⁹ Global NAPS, Inc. v. Verizon New England, Inc., et al., 454 F.3d 91 (2nd Cir. 2006).

¹⁰ Verizon California v. Peevey, 462 F.3d 1142 (9th Cir. 2006); Qwest Corporation v. Washington State Utilities and Transportation Commission, 484 F. Supp. 2d 1160 (W.D. Wash. 2007).

The First Circuit held that “[t]he FCC did not expressly preempt state regulation of intercarrier compensation for non-local ISP-bound calls.”¹¹ This language affirms the distinction between local traffic on one hand and interexchange or access traffic on the other hand. The Second Circuit reached a similar conclusion, ruling that “[t]he ultimate conclusion of the [FCC] was that ISP-bound traffic within a single calling area is not subject to reciprocal compensation.”¹² The Ninth Circuit has also agreed with this analysis. In the Peevey case, the Ninth Circuit reasoned that the Commission’s *ISP Remand Order* applied to traffic for termination of local ISP-bound traffic and did “not affect the collection of charges by ILECs for the originating interexchange ISP-bound traffic.”¹³ Similar logic was applied by the District of Columbia Circuit interpreting in its prior ruling on the *ISP Remand Order* when the Court stated that the Commission “found that calls made to ISPs located within the caller’s local calling area fall within those enumerated categories – specifically, that they involve ‘information access.’” (Emphasis added.)¹⁴

The decisions in all of these federal cases can reasonably be read as meaning that intrastate access charges apply to interexchange (i.e., between local calling areas) VNXX calling, even for ISP-bound calls, consistent with the state definition of what constitutes a local calling area. That is, traffic that goes outside of the local calling area to access an ISP through VNXX service is subject to intrastate access charges.

¹¹ Global NAPS, Inc. v. Verizon New England, Inc., 444 F.3d 59, 62 (1st Cir. 2006).

¹² Global NAPS, Inc. v. Verizon New England, Inc., 454 F.3d 91, 99 (2nd Cir. 2006).

¹³ Verizon California v. Peevey, 462 F.3d 1142, 1159 (9th Cir. 2006).

¹⁴ In re Core Communications, 455 F.3d 267, 271 (D.C. Cir. 2006).

3. VNXX Service is More Closely Analogized to 800 Service than the FX Service Described in the Blue Casa Petition.

In its Petition, Blue Casa argues that VNXX service is analogous to FX or foreign exchange service. While the FX to VNXX analogy is helpful in some respects, WITA believes that VNXX service is more closely related to 800 service.

In a VNXX service, the customer calling a VNXX number dials a number that appears to be in the local calling area. That call must be routed to the CLEC offering the service, which requires transport out of the local calling area for termination to the CLEC's customer that has subscribed to the CLEC's VNXX service. Thus, Customer A in the originating local calling area calls Customer B who is actually located in a separate calling area without incurring a toll charge. This is very similar to 800 calling. However, in 800 service calling, the carrier pays intrastate access charges. Under a VNXX arrangement, the CLEC avoids payment of the originating intrastate access charges.

In an 800 service, Customer A in the local calling area dials an 800 number. That call is then dipped at the 800 database so that the 800 number is then translated to a regular NPA-NXX-XXXX number, which in a vast majority of cases is associated with a distant calling area in the state. The call is then routed to the carrier who is serving that number and is terminated in a separate local calling area from where it was originated. Like VNXX calling, the calling party does not incur a toll charge and the call is transported out of the originating local calling area to a second local calling area for termination. The difference is that in the case of an 800 service, the carrier transporting the 800 call pays access charges. This is the situation that should exist with VNXX calling.¹⁵

¹⁵ There is another reason that makes 800 service a better analogy to VNXX service than the FX analogy. In most FX arrangements there is both an open end and closed end to the circuit and the FX customer pays for both. There is no closed end to a VNXX service.

4. VNXX Calling is a Form of Access Bypass.

The proponents of the use of VNXX services often argue that use of such service is necessary to advance the policy of promoting access to Internet services (albeit dial-up as opposed to broadband access). On this issue, it is instructive what the Commission had to say about the policy of fostering a market for Internet-related services in light of access bypass. In evaluating a petition by AT&T that access charges should not apply to an IP-based transport service, the Commission weighed, among other things, the Congressional mandate “to foster and preserve the dynamic market for Internet-related services.”¹⁶ In the *AT&T Order*, the Commission pointed out that it had an “equally compelling statutory obligation to preserve and advance universal service, a policy that remains intertwined with the interstate and intrastate access charge regime.”¹⁷ The Commission found that AT&T’s service was subject to access charges and sided with the policy of promoting universal service. As stated in a similar case decided by the WUTC, technology that is claimed to be innovative cannot be used for access bypass just on the basis that it is innovative technology.¹⁸

5. State Commissions Have Opined on the VNXX Issue and the Commission Should Provide a Clear Ruling.

WITA would be remiss if it did not point out to the Commission that the WUTC has recently dealt with this issue. In its case on VNXX matters,¹⁹ the WUTC had before it a complaint filed by Qwest against several CLECs alleging that the CLECs’ attempts to impose reciprocal compensation for VNXX traffic, primarily ISP-bound VNXX traffic, was not

¹⁶ In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket 02-361, Order, FCC 04-97 (rel. April 21, 2004) (“*AT&T Order*”) at ¶ 14.

¹⁷ Ibid.

¹⁸ Washington Independent Telephone Association v. LocalDial, Docket No. UT-031472, Final Order Granting Motions for Summary Determination (Order No. 09) (June 11, 2004).

¹⁹ Qwest Corporation v. Level 3 Communications, LLC, et al., Docket No. UT-063038.

appropriate. The WUTC agreed and ruled that for reciprocal compensation purposes, bill and keep should apply.²⁰ The WUTC went on to rule that bill and keep was reasonable if the CLEC bears the cost of transporting VNXX calls.²¹ This matter is on appeal in the Ninth Circuit.²²

Other states have also been called upon to address this issue. For example, Florida has ruled that intercarrier compensation for calls to virtual NXX numbers should be based upon the end points of the call.²³ Pennsylvania has long held that NXX codes must be assigned where the customers are actually located and that assignments that vary from this standard are subject to civil penalty.²⁴ Connecticut has issued a similar order.²⁵ Maine has long held that VNXX services should not be allowed and took action to reclaim numbering codes because of the use of VNXX services.²⁶ Nevada has also held that such services are subject to access charges.²⁷ Oregon has ruled that VNXX calling is generally prohibited in that state, but created an exception for the use of VNXX for dial-up ISP traffic so long as the CLEC pays the transport

²⁰ Ibid. at ¶ 337. The WUTC treated VNXX as an exception to access charge compensation for interexchange traffic. See ¶ 332 and 333.

²¹ Ibid. at ¶ 337.

²² Level 3 Communications, LLC and Broadwing Communications, LLC v. Washington Utilities and Transportation Commission, et al., Case No. 3:08-cv-5563.

²³ In re: Investigation Into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecommunications Act of 1996, Order on Reciprocal Compensation, Docket No. 000075-TP, Order No. PSE-02-1248-FOF-TP (September 10, 2002).

²⁴ Application of MFS Intelenet of Pennsylvania, Inc., Docket No. A-310203F0002, Application of TCG Pittsburgh, Docket No. A-310213F0002, Application of MCI Metro Access Transmission Services, Inc., Docket No. A-310236F0002, Application of Eastern Telelogic Corp., Docket No. A-310258F0002, Opinion and Order (July 18, 1996); affirmed, Petition of Focal Communications Corporation of Pennsylvania For Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell-Atlantic-Pennsylvania, Inc., Docket No. A-310630F0002 (August 17, 2000).

²⁵ DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities, Docket No. 01-01-29, Decision (January 30, 2002).

²⁶ Public Office Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications LLC d/b/a Brooks Fiber, Docket No. 98-758, Order Requiring Reclamation of NXX Codes and Special ISP Rates by ILECs (June 30, 2000).

²⁷ Re: Pac-West Telecomm, Inc., Docket Nos. 98-10015, 99-1007, Order Adopting Revised Arbitration Decision (April 8, 1999).

costs.²⁸ The Oregon Commission ruled that such traffic is subject to a “zero cents” rate, subject to later true-up when this Commission ultimately resolves intercarrier compensation for ISP traffic.²⁹ The Oregon Commission had earlier ruled that in all other cases VNXX service was prohibited.³⁰

Both the Washington and Oregon Commissions dealt with an important issue of transport by ruling that the CLEC providing VNXX service must bear the cost of transport for the calls to the VNXX service recipient. This result avoids the imposition of potentially very high transport costs on rural carriers. The rural ILECs do not have the resources to allow costs for arrangements that benefit the VNXX provider to be forced upon the rural ILEC.

Given the differences in results among the various states, a clear and explicit ruling from the Commission that VNXX services are subject to originating access charges is appropriate and will provide clarity.

CONCLUSION

WITA asks that the Commission accept the Blue Casa Petition and rule that VNXX services are subject to originating access charges. Those originating access charges should be either the intrastate access charges, in most cases, or the interstate access charges, depending upon the location of the calling party and the called party. The Commission should also make it clear that the use of VNXX service may not impose additional transport obligations on rural companies.

²⁸ In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act, ARB 669, Order, Order No. 07-097 (2007) at p. 3-8.

²⁹ Ibid., at p. 8.

³⁰ In the Matter of Qwest Corporation v. Level 3 Communications, LLC Complaint for Enforcement of Interconnection Agreement, IC 12, Order, Order No. 06-037 (2006); In the Matter of Qwest Corporation’s Petition for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Universal Telecommunications, Inc., ARB 671, Order, Order No. 06-190 (2006) at p. 6-7.

Respectfully submitted this 12th day of March, 2009.

By:

A handwritten signature in black ink, appearing to read 'Richard A. Finnigan', written over a horizontal line.

Richard A. Finnigan
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ATTACHMENT A

Washington Independent Telecommunications Association

Asotin Telephone Company d/b/a TDS Telecom
CenturyTel of Cowiche, Inc.
CenturyTel of Inter-Island, Inc.
CenturyTel of Washington, Inc.
Ellensburg Telephone Company d/b/a FairPoint Communications
Embarq
Hat Island Telephone Company
Hood Canal Telephone Co., Inc. d/b/a Hood Canal Communications
Inland Telephone Company
Kalama Telephone Company
Lewis River Telephone Company, Inc. d/b/a TDS Telecom
Mashell Telecom, Inc. d/b/a Rainier Connect
McDaniel Telephone Co. d/b/a TDS Telecom
Pend Oreille Telephone Company
Pioneer Telephone Company
St. John Co-operative Telephone and Telegraph Company
Tenino Telephone Company
The Toledo Telephone Co., Inc.
Western Wahkiakum County Telephone Company d/b/a Wahkiakum West
Whidbey Telephone Company
YCOM Networks, Inc. d/b/a FairPoint Communications