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

In the Matter of	)	
	)	
Petition of Blue Casa Communications, Inc. for	)	WC Docket No. 09-8
Declaratory Ruling Concerning Intercarrier	)	
Compensation for ISP-Bound VNXX Traffic.	)	

COMMENT ON PETITION FOR DECLARATORY RULING

Global NAPs, Inc. ("Global") respectfully comments on the Petition for Declaratory Ruling of Blue Casa Communications, Inc. ("Blue Casa"). In essence, the issue is simple. Blue Casa "petitions the Commission for a declaratory ruling that, pursuant to the carve-out provisions of 4 U.S.C. § 251 (g), originating interstate switched access charges, not reciprocal compensation charges, apply to calls bound for Internet service providers ("ISPs") that are delivered via "virtual NXX" ("VNXX"') -type foreign exchange arrangements." Blue Casa's Petition for Declaratory Ruling ("Petition) at 1. Fortunately, the resolution is also simple as the Commission has already considered and resolved this issue against the petition.

INTRODUCTION AND BACKGROUND

Blue Casa's contention is that it provides local exchange service and carries over its local exchange network dial-up calls that its end users make to ISPs. In doing so it hands the calls off to other carriers for routing and termination to the ISPs. Such calls would appear to be local calls because the central office or NXX code of the dialed number is associated with the calling end user's local calling area though many are

actually terminated to ISPs located in exchanges outside of the originating local calling area. For the purposes of this petition, Global will herein refer to such calls as "VNXX calls." In such cases, Blue Casa seeks to be paid interstate originating switched access charges for VNXX calls, rather than pay reciprocal compensation as capped by the Commission for termination of the call.

In essence, Blue Casa wants to be paid twice, once by its subscriber for origination of the call and then by a Competitive Local Exchange Carrier ("CLEC") for terminating the call on behalf of Blue Casa, notwithstanding the fact that Blue Casa incurs no additional costs in handing the call off to a CLEC that employs VNXX. Fortunately, as explained below, the Commission has resolved this in two orders, *In re Implementation of the Local Comp. Provs. In the Telecom. Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9164-66 (2001)("*ISP Remand Order"*) and *In re High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-92 and 99-68, 2008 FCC LEXIS 7792, ¶¶7-8 (November 5, 2008) ("*2008 Order*").

ARGUMENT.

This Commission has explained the purpose of the *Telecommunications Act of 1996* ("*1996 Act")* as follows:

> The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by Congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts

> over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition. … The *Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well*.[1]

To facilitate true local competition, the *1996 Act's* mandate to remove statutory, regulatory, economic and operational impediments must be aggressively pursued. On April 27, 2001, the FCC adopted the *ISP Remand Order* that established a new regulatory regime that controls all of the inter-carrier compensation issues raised in this petition.

1. Under the *ISP Remand Order*, inter-carrier compensation for all "telecommunications" traffic except "exchange access" traffic and "information access" traffic is controlled by the reciprocal compensation rules.

On August 29, 1996, the FCC established its original rules implementing the *1996 Act* in the *Local Competition Order*.[2] The FCC established rules controlling inter-carrier compensation for *local* traffic, codified as Rules 701-717. Rule 701(a) stated: "The provisions of this subpart apply to reciprocal compensation for transport and termination of *local* telecommunications traffic between LECs and other telecommunications carriers." Consequently, the reciprocal compensation rules only applied to *local* telecommunications traffic. The term "*local telecommunications traffic"* was not defined in the *1996 Act*. The FCC defined the term in Rule 701(b)(1): "For purposes of this subpart, *local telecommunications traffic* means: (1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider *that originate and*

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) ("*Local Competition Order*") (emphasis added).

[2] 61 FR 45619 (Aug. 29, 1996).

terminates within a local service area established by the state commission." This definition expressly limited application of the reciprocal compensation rules to a geographic area, the "local service area."

However, on April 27, 2001, the FCC issued its *ISP Remand Order*.[3] In the *ISP Remand Order* the FCC expressly rejected the past focus on "local" traffic. It stated:

> [W]e modify our analysis and conclusion in the *Local Competition Order*. There we held that "transport and termination of *local traffic* for purposes of reciprocal compensation are governed by sections 251(b)(5) and 251(d)(2)." We now hold the telecommunications subject to those provisions are all such telecommunications not excluded by section 251(g). In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase "local traffic" created unnecessary ambiguities, and we correct that mistake here.[4]

The Order explained that section 251(b)(5) imposes a duty on all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications.[5] Thus, local exchange carriers are required to establish reciprocal compensation for transport and termination of "**all 'telecommunications' they exchange with another telecommunications carrier, without exception**."[6] However, the FCC concluded that a reasonable reading of the statute is that Congress intended to exclude the traffic listed in § 251(g) from the reciprocal compensation requirements of § 251(b) (5): "[t]hus, the statute does not mandate reciprocal compensation for 'exchange access, information access, and exchange service for such access' provided to IXCs and information service providers."[7]

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[3] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 F.C.C.R. 9151, 9152-53 (2001).
[4] *Id.* ¶ 46.

[5] *Id.* ¶ 31.

[6] *Id.*

[7] *Id.* ¶ 34.

Put affirmatively, "section 251(b)(5) applies to telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that is not interstate or intrastate access traffic delivered to an IXC or an information service provider."[8] Consequently, under the *ISP Remand Order*, unless traffic is (a) interstate or intrastate access traffic delivered to an IXC, or (b) information access traffic, it is subject to § 251(b)(5) reciprocal compensation and all of the rules associated with reciprocal compensation traffic. By doing this, the FCC expressly removed the geographic limitation on the reciprocal compensation rules (except for CMRS provider), as application of these rules were no longer related to the boundaries of "local service areas."

On May 3, 2002, the United States Court of Appeals for the District of Columbia Circuit in the *WorldCom ISP Decision*[9] rejected the FCC's conclusion that § 251(g) provided a basis for the actions taken by the FCC in the *ISP Remand Order*, but expressly recognized that other legal bases for the FCC's action may exist and expressly declined to vacate the rules established by the *ISP Remand Order*.[10] Pursuant to the *ISP Remand Order*, the Rules were amended effective May 15, 2001.[11]

Rule 701(a), which sets out the scope of the reciprocal compensation rules, now reads "[t]he provisions of this subpart apply to reciprocal compensation for transport and termination of *telecommunications traffic* between LECs and other telecommunications carriers." Rule 701(b)(1) now states: "[f]or purposes of this subpart, *telecommunications*

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[8] *Id.* ¶ 89 n. 177.

[9] *WorldCom, Inc. v. Federal Communications Comm'n.*, 288 F.3d 429 (D.C. Cir. 2002).

[10] *Id*. at 434.

[11] 66 FR 94 (May 15, 2001).

traffic means: (1) telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider, *except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access.*" (emphasis added). Consequently, under the Rules as they now read, reciprocal compensation traffic, *i.e.*, traffic subject to Rules 701-717, is for all telecommunications traffic except exchange access traffic and information access traffic.

This raises the questions: (a) what is *telecommunications traffic*, (b) what is exchange *access traffic*, and, (c) what is *information access traffic*? Unlike the term "*local telecommunications traffic,*" which was left for state commissions to define by establishing boundaries for "local service areas", the term "*access traffic*" is defined in the *Communications Act* and "*information access traffic"* is defined in the *ISP Remand Order.*

a. "Telecommunications traffic" is the transmission of information, unchanged, between points the user specifies.

In terms of the statutory definitions, the broadest category is "communications," which comes in two categories, wire and radio.[12] This is quite broad, and would include, without limitation television broadcasting, cable TV, satellite transmissions, and information services. Within the broad realm of "communications" is the narrower category of "telecommunications," which means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[13] Within this narrower, but still broad realm of "telecommunications," the statute lays out some particular definitions that

[12] *See* 47 U.S.C. §§ 153(33) (radio communications) and (52) (wire communications).

[13] *See* 47 U.S.C. § 153(43).

do not purport to exhaustively delimit the field such as exchange access[14], interLATA service[15], telephone exchange service[16], and telephone toll service.[17]

b. "Exchange access traffic" is traffic subject to a separate toll charge.

Exchange access is defined by the *Act* as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services."[18] The term "telephone toll service" means "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."[19] According to the *Act*, traffic is *only* exchange access traffic when it is subject to a separate toll charge levied by the originating customer's carrier. Clearly VNXX calls are not exchange access traffic as no separate toll charge was or is imposed on them.

c. "Information access traffic" is traffic routed by a LEC to or from information access providers.

The FCC explained what "information access traffic" entails in the *ISP Remand Order*:

> Under the consent decree, "information access" was purchased by "information service providers" and was defined as "the provision of specialized exchange telecommunications services... in connection with the origination, termination, transmission, switching, forwarding or routing of telecommunications traffic to or from the facilities of the provider of information services." We conclude that this definition of

[14] *See* 47 U.S.C. § 153(16).

[15] *See* 47 U.S.C. § 153(21).

[16] *See* 47 U.S.C. § 153(47).

[17] *See* 47 U.S.C. § 153(48).

[18] 47 USC § 153 (16).

[19] *See* 47 USC § 153 (48).

> "information access" was meant to include *all access traffic that was routed by a LEC "to or from" providers of information services, of which ISPs are a subset*.[20]

Consequently, traffic is reciprocal compensation traffic unless it is toll traffic or is routed to an information service provider.

Any suggestion that this is limited to traffic delivered to an ISP with a physical presence in the caller's exchange area was utterly resolved by this Commission in 2008. On November 5, 2008, the FCC issued a clarifying order on ISP-bound traffic.[21] There, the Commission reaffirmed its finding in the *ISP Remand Order* that "section 251(b)(5) is not limited to local traffic."[22] The Commission wrote: "Because Congress used the term 'telecommunications,' the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic." *Id*. ¶ 8. The Commission reiterated that the *ISP Remand Order* had repudiated the approach it had initially taken in the *Local Competition Order*, saying, "To be sure, we acknowledge that, in the *Local Competition First Report and Order*, the Commission found that section 251(b)(5) applies only to local traffic. . . . [H]owever, the Commission, in the *ISP Remand Order*, reconsidered that judgment and concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that 'local' is not a term used in section 251(b)(5)." *Id.* ¶7. The Commission further described the *ISP Remand Order* as "revers[ing] course on the scope of section 251(b)(5)" and finding that "the scope of section 251(b)(5) is limited only by

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[20] *ISP Remand Order* ¶ 44 (emphasis added). The *Order* goes on to explain, "others have argued that the 'information access' definition engraphs a geographic limitation that renders this service category a subset of telephone exchange service... . We reject that strained interpretation." *Id.* n. 82.

[21] *Order on Remand and Report and Order and Further Notice of Proposed Rule Making*, 2008 FCC LEXIS 7792 (*"2008 Order")*

[22] *Id*. at ¶ 7.

section 251(g)." *2008 Order* ¶ 9. Finally, the Commission explained "we find that ISP-bound traffic falls within the scope of section. 251(b)(5)." *Id.* ¶ 16. Clearly, the *2008 Order* reasserted FCC jurisdiction over all ISP bound calls. Applying that authority, the FCC reaffirmed that the rate cap of $.0007 adopted in the *ISP Remand Order* would continue until "the Commission is able to complete comprehensive intercarrier compensation reform." *Id.* ¶ 29.

2. The reciprocal compensation rules prohibit imposition of origination charges or access charges on reciprocal compensation traffic and require payment of reciprocal compensation for terminating this traffic.

The regulatory framework created by the FCC for inter-carrier compensation of telecommunications traffic is found in Rule 703. Rule 703 states:

Reciprocal compensation obligation of LECs.

> (a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier.
>
> (b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

Subsection (a) requires a LEC to establish reciprocal compensation arrangements for transport and termination of telecommunications traffic while subsection (b) precludes that same LEC from assessing charges for traffic that originates on its network. Absent subsection (b), subsection (a) would be meaningless as a LEC could impose origination charges that could wholly offset reciprocal compensation for termination and transport.

The Commission explained the basis of this regulation in the *Local Competition Order*:

> We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic. Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. *We therefore conclude that section 251(b)(5) prohibits charges* such as those some incumbent LECs currently impose on CMRS providers *for LEC-originated traffic*. As of the effective date of this order, a LEC must cease charging a CMRS provider or other carrier for terminating LEC-originated traffic and *must provide that traffic to the CMRS provider or other carrier without charge*.

Local Competition Order, ¶ 1042 (emphasis added).

Rule 703 resolves the principal issue as it forbids the imposition of origination charges and establishes reciprocal compensation as the exclusive mechanism for inter-carrier compensation for reciprocal compensation traffic. Application of this rule prohibits imposition of origination charges on VNXX traffic exchanged at the single point of interconnection.

CONCLUSION

The *ISP Remand Order* and the *2008 Order* make it clear that ISP bound calls are reciprocal compensation calls subject to the *ISP Remand Order's* cap. They make it clear that there are no geographic limitations on these. The regulations are clear that there can be no origination charges imposed on these calls. It simply doesn't matter what number is assigned to ISP bound calls, originating access charges cannot be imposed. Analysis of the exception contained in Section 251 (g) makes clear that imposition of VXXX charges on CLECs does not fit within that carve out conceptually or historically.

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Respectfully submitted,

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