

**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 VERIZON<sup>1</sup>**

The Commission should exercise its discretion and decline to rule on Blue Casa Communications, Inc.'s ("Blue Casa") petition for declaratory ruling. Blue Casa does not identify any "controversy" such a ruling could "terminat[e]" or any "uncertainty" for the Commission to "remov[e]." 47 C.F.R. § 1.2. In fact, two weeks before filing its petition, Blue Casa voluntarily settled a dispute with a competitive local exchange carrier ("CLEC") in California about Virtual NXX traffic delivered to Internet service providers ("ISPs"). In addition, the industry has addressed this issue through interconnection agreements — both negotiated and arbitrated — and the federal courts have resolved disputes that have arisen about those agreements.

Rather than addressing intercarrier compensation issues regarding Internet and IP-based traffic piecemeal, the Commission should ensure that the regulatory structure keeps with the marketplace and the services of the future: broadband and IP-based services. As the industry moves away from circuit-switched telephony and towards an infrastructure based on broadband, wireless, and IP, the Commission should make sure that the regulatory structure provides

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<sup>1</sup> The Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

certainty for consumers, providers, and investors in these new technologies. The Commission can address Virtual NXX traffic delivered to ISPs in the course of an intercarrier compensation decision for all forms of IP-based traffic. To the extent the Commission were to address individual intercarrier compensation issues through declaratory rulings, there are far more pressing issues than Virtual NXX traffic delivered to dial-up ISPs that warrant the Commission's attention — in particular, ending traffic pumping.

However, if the Commission were to address the issue of dial-up ISP-bound traffic delivered over Virtual NXX arrangements in a declaratory ruling, it should not disturb the contractual arrangements that carriers have entered into over the past seven years. Preserving those arrangements, subject to their change-of-law provisions, is consistent with the 1996 Act's strong preference for negotiated agreements, as well as with the Commission's past rulings on ISP-bound traffic. Moreover, carriers have reasonably relied on the terms of their contracts, as well as the decisions of federal courts. To avoid unsettling those expectations, the Commission should explicitly hold that any declaratory ruling it issues operates prospectively only.

## DISCUSSION

### **I. THE COMMISSION SHOULD DECLINE TO RULE ON BLUE CASA'S PETITION, WHICH IDENTIFIES NO CONTROVERSY OR CONFUSION WARRANTING ISSUANCE OF A DECLARATORY RULING**

Blue Casa seeks a declaratory ruling that it is entitled to collect interstate access charges when one of its customers accesses the Internet — through an ISP such as America Online or EarthLink — by dialing what appears to be a local telephone number, but the traffic is routed to modem banks that are actually located in a distant local calling area, and perhaps in another state.<sup>2</sup> This traffic is referred to as “Virtual NXX” or “VNXX” traffic because the NXX Code of

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<sup>2</sup> See Opinion and Order, *Level 3 Communications, LLC v. Marianna & Scenery Hill Tel. Co.*, Case 20028114, 2003 WL 1563643, at \*1 (Pa. Pub. Util. Comm'n Jan. 7, 2003) (describing Level 3's assignment of

the telephone number assigned to the ISP is associated with a local calling area where the ISP has no physical presence, but only the “virtual” presence the assigned telephone number provides. As the First Circuit has explained, an ISP thus “can be given VNXX numbers that are different than those that would normally be assigned to [it] based on [its] physical location,” which “allows a party to call what appears to be a ‘local’ number, although behind the scenes that call is actually routed to a different local calling area.” *Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 64 (1st Cir. 2006).

The Commission should “decline to grant the declaratory ruling [Blue Casa] seeks” because it “has not shown any unresolved controversy or uncertainty regarding” the intercarrier compensation rules for Virtual NXX traffic.<sup>3</sup> Although Blue Casa asserts that a declaratory ruling would “resolve actual, on-going controversies with other competitive telecommunications carriers,” Pet. at 1, it does not identify even one ongoing controversy between it and another CLEC. Blue Casa *was* involved in a dispute about Virtual NXX traffic originated by its customers and delivered to ISPs that are customers of Pac-West Telecomm. But Blue Casa and Pac-West voluntarily settled that dispute about two weeks before Blue Casa filed its petition for declaratory ruling.<sup>4</sup> No other disputes involving Blue Casa appear to be pending in California, whether in federal court, state court, or before the California Public Utilities Commission. Therefore, Blue Casa has not shown that a declaratory ruling would serve to “terminat[e] a controversy.” 47 C.F.R. § 1.2.

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telephone numbers associated with local calling areas in Pittsburgh, Pennsylvania, to modem banks located in Baltimore, Maryland).

<sup>3</sup> Memorandum Opinion and Order, *Application of Abundant Life, Inc. for a Construction Permit for a New FM Station at Hattiesburg, Mississippi*, 17 FCC Rcd 4006, ¶ 11 (2002).

<sup>4</sup> See Joint Motion to Dismiss, *Pac-West Telecomm, Inc. v. Blue Casa Communications, Inc.*, C.07-10-017 (Cal. Pub. Utils. Comm’n Dec. 4, 2008) (stating that Pac-West and Blue Casa had “resolved” their dispute “by written settlement agreement”).

In addition, there is no need for the Commission to rule in order to “remov[e] uncertainty” on this issue. *Id.* Although the Commission “has not addressed VNXX calls” or “the implications of using VNXX numbers for intercarrier compensation,”<sup>5</sup> carriers have entered into interconnection agreements — both negotiated and arbitrated — that address their respective compensation obligations for Virtual NXX traffic, including Virtual NXX traffic delivered to ISPs. For example, in states where Verizon is an incumbent, it has entered into negotiated, and publicly filed, interconnection agreements with a number of carriers, including (pre-merger) AT&T and Level 3, that address intercarrier compensation for a wide range of traffic, including Virtual NXX traffic delivered to ISPs. Verizon’s (former MCI) CLEC entities have also entered into negotiated agreements with numerous incumbent local exchange carriers (“ILECs”), including independent ILECs, regarding compensation for Virtual NXX traffic delivered to ISPs, among other types of traffic.

When disputes have arisen, federal courts have held carriers to the terms of their agreements, finding that such “[c]ontract disputes are . . . with in the conventional experience of judges.” *Global NAPs North Carolina, Inc. v. BellSouth Telecomms., Inc.*, No. 5:04-cv-96, slip op. at 3 (E.D.N.C. Sept. 27, 2006). The district court in that case went on to enforce the terms of the contract before it, finding that the carriers to that contract had agreed that the originating carrier would be paid access charges for Virtual NXX traffic delivered to ISPs. *See Global NAPs North Carolina, Inc. v. BellSouth Telecomms., Inc.*, No. 5:04-cv-96 (E.D.N.C. Sept. 28,

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<sup>5</sup> Brief for *Amicus Curiae* Federal Communications Commission at 11, 13, *Global NAPs, Inc. v. Verizon New England Inc.*, No. 05-2657 (1st Cir. Mar. 13, 2006) (“FCC *Amicus* Br.”); *see also* Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc.*, 18 FCC Rcd 23625, ¶ 17 nn.63, 68 (2003) (explaining that neither the Commission nor the Staff had addressed “the legal and policy question of whether incumbent LECs have an affirmative obligation . . . to pay reciprocal compensation for virtual NXX traffic”); Memorandum Opinion and Order, *Application by Verizon Maryland Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, 18 FCC Rcd 5212, ¶ 151 (2003) (finding that there is “no clear Commission precedent or rules declaring [that ILECs have the] duty” to “pay reciprocal compensation for virtual NXX traffic”).

2007).<sup>6</sup> Other district courts have similarly held parties to the terms of their interconnection agreements with respect to intercarrier compensation for Virtual NXX traffic. *See, e.g., PAETEC Communications, Inc. v. Connecticut Dep't of Pub. Util. Control*, No. 3:03-cv-1783, 2005 WL 701280, at \*4-\*5 (D. Conn. Mar. 28, 2005); *Qwest Corp. v. Universal Telecom, Inc.*, No. 04-cv-6047, 2004 U.S. Dist. LEXIS 28340, at \*25-\*31 (D. Ore. Dec. 15, 2004).

Federal courts have likewise upheld arbitrated interconnection agreements. *See, e.g., Global NAPs*, 444 F.3d at 72-75 (upholding Massachusetts arbitrated agreement requiring payment of access charges for Virtual NXX ISP-bound traffic); *Verizon North Inc. v. TelNet Worldwide, Inc.*, 440 F. Supp. 2d 700, 711-15 (W.D. Mich. 2006) (upholding Michigan arbitrated agreement requiring payment of ISP intercarrier compensation for Virtual NXX ISP-bound traffic); *Global NAPs, Inc. v. Verizon New England Inc.*, 454 F.3d 91, 101-03 (2d Cir. 2006) (upholding Vermont arbitrated agreement requiring ILEC to pay ISP intercarrier compensation for ISP-bound Virtual NXX traffic, but also requiring the CLEC to bear the costs of transporting the traffic to a distant local calling area); *Verizon California Inc. v. Peevey*, 462 F.3d 1142, 1155-59 (9th Cir. 2006) (upholding similar arbitrated agreement in California).

In sum, Blue Casa has satisfied neither of the requirements for a petition for a declaratory ruling. But even assuming Blue Casa could cure that defect in its petition,<sup>7</sup> “[t]he Commission has broad discretion under the Administrative Procedure Act and [its] rules to decide whether a

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<sup>6</sup> Appeals of that decision are pending before the Fourth Circuit, but the substance of the district court’s interpretation of the contract terms is not among the issues on appeal. *See Global NAPs North Carolina, Inc. v. BellSouth Telecomms., Inc.*, Nos. 07-2000 & 08-252 (4th Cir.).

<sup>7</sup> Verizon is aware of two pending cases in federal courts within the Ninth Circuit involving issues of intercarrier compensation for Virtual NXX traffic delivered to ISPs. *See Qwest Corp. v. Level 3 Communications, LLC*, No. 08-15887 (9th Cir.); *Level 3 Communications, LLC v. Washington Utils. & Transp. Comm’n*, No. 3:08-cv-5563 (W.D. Wash.). Both courts, however, have previously addressed this issue. *See Peevey*, 462 F.3d at 1155-59; *Qwest Corp. v. Washington State Utils. & Transp. Comm’n*, 484 F. Supp. 2d 1160, 1172 (W.D. Wash. 2007). In addition, Global NAPs continues to seek to undo the First Circuit’s final decision upholding a Massachusetts arbitrated interconnection agreement with Verizon New England (444 F.3d 59); Global NAPs’ intransigence does not create a need for a declaratory ruling.

declaratory ruling is necessary to ‘terminate a controversy or remove uncertainty.’”<sup>8</sup> The Commission should exercise that discretion and decline to rule on Blue Casa’s petition. Instead, the Commission should complete its pending rulemakings regarding IP-based traffic, to ensure that broadband and IP-based services can develop in a pro-competitive, technology-neutral regulatory framework, while resolving issues that have long been the source of numerous disputes within the industry and has diverted attention and resources from providing these advanced services to consumers. Investors in and providers of these services need this certainty to continue offering the kinds of VoIP and IP-based services consumers want. The Commission can address Virtual NXX traffic delivered to ISPs as part of such a rulemaking establishing intercarrier compensation rules for all forms of Internet and IP-based traffic. Finally, to the extent the Commission were to issue declaratory rulings to address intercarrier compensation issues on a piecemeal basis, there are far more pressing issues than Virtual NXX ISP-bound traffic before the Commission, such as ending traffic pumping.

**II. IF THE COMMISSION DOES RULE ON BLUE CASA’S PETITION, IT SHOULD ENSURE THAT ANY RULING DOES NOT INTERFERE WITH EXISTING CONTRACTS AND APPLIES ONLY PROSPECTIVELY**

**A. The Commission Should Not Interfere with Existing Contracts Governing Intercarrier Compensation for Virtual NXX Traffic**

As shown above, carriers have entered into numerous interconnection agreements — both negotiated and arbitrated — that set forth their compensation obligations for Virtual NXX traffic, including ISP-bound Virtual NXX traffic. The federal courts have ruled on disputes about those agreements, holding carriers to the terms of their negotiated contracts and upholding arbitrated contracts. Incumbents and competitors alike have operated under these contracts, and have

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<sup>8</sup> Memorandum Opinion and Order, *Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, 18 FCC Rcd 21813, ¶ 15 (2003) (quoting 47 C.F.R. § 1.2).

negotiated voluntary agreements against the backdrop of those court determinations. Those agreements reflect a variety of compromises on the part of both carriers, with each giving up certain rights it may otherwise have insisted upon under § 251.

In issuing any declaratory ruling on Blue Casa's petition, the Commission should ensure that it does not interfere with the terms of existing interconnection agreements. Such a result is consistent with Congress's "clear preference . . . for . . . negotiated agreements" under the 1996 Act. *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001); see *Quick Communications, Inc. v. Michigan Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008) ("Congress's chosen mechanism for increasing competition in the local telecommunications market" was "the private and voluntary mutual negotiation of interconnection agreements."). This Commission has likewise found that "voluntary negotiations for binding interconnection agreements is the very essence of" the local competition provisions of the 1996 Act. *Triennial Review Order*<sup>9</sup> ¶ 701; see also *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("[T]he point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements."). Applying this principle, the Commission has held that a carrier "cannot rely upon the general section 251 duties to circumvent the terms of its agreement."<sup>10</sup> Therefore, a declaratory ruling interpreting § 251(b)(5) and § 251(g) in the context of Virtual NXX traffic delivered to ISPs should not automatically alter obligations under existing contracts except as provided for in the terms of those contracts, such as through change-of-law provisions.

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<sup>9</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

<sup>10</sup> Memorandum Opinion and Order, *CoreComm Communications, Inc. v. SBC Communications Inc.*, 18 FCC Rcd 7568, ¶ 32 (2003), *reconsideration denied*, 19 FCC Rcd 8447 (2004), *vacated on other grounds*, *SBC Communications Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005).

Preserving existing contractual arrangements is also consistent with the Commission's prior rulings on intercarrier compensation for the "calls between dial-up users and ISPs in a single local calling area," which the "Commission was focused on" in its prior orders addressing ISP-bound traffic. FCC *Amicus* Br. at 13. For example, in the *ISP Declaratory Ruling*,<sup>11</sup> the Commission stressed that, notwithstanding its conclusion that § 251(b)(5) does not require payment of reciprocal compensation for such ISP-bound traffic, carriers that had "agreed to include this traffic within their section 251 and 252 interconnection agreements . . . are bound by those agreements."<sup>12</sup> Similarly, in the *ISP Remand Order*,<sup>13</sup> the Commission used its § 201 ratemaking authority to establish new intercarrier payment rules for traffic between dial-up users and ISPs in a single local calling area, but held that those new rules did not invalidate existing contracts. Instead, those rules would apply "as carriers renegotiate expired or expiring interconnection agreements," or pursuant to the "contractual change-of-law provisions" found in those agreements.<sup>14</sup> The Commission should follow that same approach with respect to any declaratory ruling it issues with regard to the category of Virtual NXX ISP-bound traffic.

**B. A Declaratory Ruling on Blue Casa's Petition Should Apply Only Prospectively**

The Commission should expressly find that any declaratory ruling it issues will apply only prospectively. The Commission has authority to limit the retroactive application of a declaratory ruling involving a "new application[] of existing law" where, as here, "apply[ing] the

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<sup>11</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) ("*ISP Declaratory Ruling*") (subsequent history omitted).

<sup>12</sup> *Id.* ¶ 22.

<sup>13</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*") (subsequent history omitted).

<sup>14</sup> *Id.* ¶ 82.

new rule to past conduct or to prior events would work a manifest injustice.” *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotation marks omitted). There can be no dispute that any ruling by the Commission — whether adopting or rejecting Blue Casa’s position — would involve a new application of existing law. As the Commission explained to the First Circuit, “the Commission did not directly address VNXX calls in either of its ISP orders and has not addressed VNXX calls more generally.” *FCC Amicus Br.* at 13.<sup>15</sup>

Although the issue would be a new one for the Commission, it is not a new issue for the industry. As shown above, carriers have entered into numerous, state-commission-approved interconnection agreements — both negotiated and arbitrated — that set forth their compensation obligations for Virtual NXX traffic. And, as shown above, federal courts have enforced and upheld the terms of those agreements. Carriers have reasonably relied on their approved contracts and those federal court decisions, and have ordered their businesses accordingly. Because those contracts adopt a variety of compensation arrangements for Virtual NXX traffic, any declaratory ruling the Commission issues would necessarily conflict with some of those existing arrangements, subject to their change-of-law provisions, thereby “upset[ting] settled expectations . . . on which [those] part[ies] . . . reasonably place[d] reliance.” *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007).

In these circumstances, and considering the relevant “concerns grounded in notions of equity and fairness,”<sup>16</sup> the Commission can reasonably find that retroactive application of a declaratory ruling on Blue Casa’s petition would cause a manifest injustice. *See AT&T Co. v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006) (recognizing that the “breadth of agency discretion is

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<sup>15</sup> Since March 2006, when the Commission filed the *amicus* brief, it has not issued any order “directly address[ing]” Virtual NXX traffic, either generally or in the specific context of traffic delivered to ISPs.

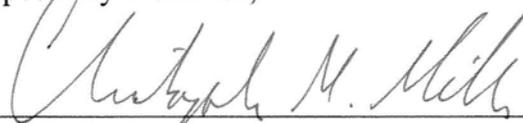
<sup>16</sup> *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (internal quotation marks omitted).

. . . at [its] zenith” in this context) (internal quotation marks omitted). Indeed, this situation is unlike recent cases in which the courts have addressed Commission decisions on retroactivity. For example, in reversing the Commission’s decision to apply prospectively its declaratory ruling that menu-driven prepaid calling cards are telecommunications services, the D.C. Circuit stressed that retroactivity was appropriate where there was a “lack of . . . clarity” about the applicable rule and parties had merely relied on their own “assumption that unclear law would ultimately be resolved in [their] favor.” *Qwest Servs. Corp.*, 509 F.3d at 540. Similarly, the D.C. Circuit upheld the Commission’s retroactive application of a declaratory ruling as to liability for EUCL charges that LECs had imposed on independent payphone providers where “the agency orders on which the LECs claim to have relied not only had never been judicially confirmed, but were under unceasing challenge before progressively higher legal authorities.” *Verizon Tel. Cos.*, 269 F.3d at 1110. In contrast to those cases, carriers here have reasonably relied on the terms of their state-commission-approved interconnection agreements and final decisions of federal courts with regard to their intercarrier compensation obligations for Virtual NXX traffic. Such “reliance . . . establish[es] manifest injustice” because it was “reasonably based on settled law.” *Qwest Servs. Corp.*, 509 F.3d at 540.

### CONCLUSION

For the foregoing reasons, the Commission should decline to grant Blue Casa's petition, as a declaratory ruling is not necessary to terminate a controversy or to remove uncertainty.

Respectfully submitted,



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March 12, 2009