

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. (“Qwest”) hereby files these comments on a petition for declaratory ruling (“Petition”) filed by Blue Casa Communications, Inc. (“Blue Casa”).¹

The Blue Casa Petition requests that the Federal Communications Commission (“FCC” or “Commission”) clarify that switched access charges apply when traffic is delivered to interexchange carriers (“IXCs”) for further delivery to a remote location, notwithstanding that the IXC assigned a local number to the remote customer. The Petition focuses on “Virtual NXX,” or “VNXX,” in which a competitive local exchange carrier (“CLEC”) teams with an IXC (generally the CLEC and the IXC share a common identity) to provide the equivalent of interstate foreign exchange (“FX”) service to customers. As is the case with more traditional FX service, the customer is located in one exchange, but is assigned a telephone number in a different exchange. However, unlike other carriers who provide FX-service, in the case of VNXX the CLEC/IXC often claims that the long distance call to the remote customer is a local call and, instead of making the proper payment of switched access tariffed rates, the CLEC/IXC

¹ Blue Casa Communications, Inc. Petition for Declaratory Ruling, WC Docket No. 09-8, filed Dec. 18, 2008. Public Notice, DA 09-467, rel. Feb. 25, 2009.

assesses terminating reciprocal compensation charges on the originating incumbent local exchange carrier (“ILEC”).

This claim is based on two different but related theories:

- CLECs/IXCs contend that the assignment of a local number results in an interexchange call being classified as a local call.
- CLECs/IXCs contend that, whether the call is local or not is irrelevant because most of the VNXX traffic is ultimately terminated in an information service provider or Internet Service Provider (“ISP”)² computer. They claim that all traffic that is ultimately delivered to an ISP computer is subject to reciprocal compensation no matter where the computer is located.

As Blue Casa points out in its Petition, longstanding FCC rules require that IXCs pay switched access charges for use of local switching facilities for the origination and termination of interstate interexchange traffic. This is true whether the remote customer has been assigned a local telephone number inconsistent with its actual location, whether the remote customer is a computer, a private branch exchange (“PBX”) or a pizza delivery service, or whether the IXC doubles as a CLEC and exchanges local traffic with an ILEC in addition to providing exchange access services. These access rules have been in place since divestiture, have been specifically preserved by Section 251(g) of the Act, and will remain in place until they have been “explicitly superseded” by the Commission. For reasons that differ slightly in nuance from those presented

² The initials ISP have been used to denominate both information service providers and Internet service providers. For purposes of this proceeding, there is no difference between the two.

by Blue Casa, Qwest agrees with the basic principles set forth in the Blue Casa Petition and requests that the Commission issue an appropriate declaratory ruling as specified herein.³

I. INTRODUCTION AND SUMMARY.

This ruling is especially necessary at this time because some providers of long distance telecommunications services,⁴ namely the providers of the interexchange component of VNXX service, are claiming, in the context of appeals, arbitrations and other proceedings,⁵ that the Commission's recent *ISP Mandamus Order*⁶ removes interexchange common carrier traffic from the access charge regime preserved in Section 251(g) whenever the content of the carried traffic

³ See Section II, *infra*, for a description of the precise declaratory ruling that Qwest recommends that the Commission issue.

⁴ We use the phrases "common carrier service" and "telecommunications service" interchangeably in these comments.

⁵ See, e.g., *Qwest Corporation v. Arizona Corporation Commission*, No. CV-06-2130-PHX-SRB, Order March 6, 2008, *appeal pending sub nom. Qwest Corporation v. Level 3 Communications, LLC, Arizona Corporation Commission, et al*; and *Pac-West Telecomm, Inc.*, 9th Circuit, Case No. 08-15887, docketed Apr. 16, 2008 ("*Qwest v. ACC*") (VNXX traffic not subject to reciprocal compensation); *Qwest Corporation v. Washington State Utilities and Transportation Commission*, 484 F. Supp. 2d 1160 (W.D. Wash. 2007) ("*Qwest v. WSUTC*") (same); *Verizon California, Inc. v. Peevey*, 462 F.3d 1142, 1157-58 (9th Cir. 2006) (State could require reciprocal compensation but traffic not subject to Section 251(b)(5)). As Blue Casa points out, much of the current controversy is centered around simple refusals by carriers exchanging traffic to pay each others' bills, a situation which obviously cannot continue indefinitely.

⁶ *In the Matter of 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 Inter-carrier Compensation Regime; Inter-carrier 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, rel. Nov. 5, 2008 ("*ISP Mandamus Order*"), *pet. for rev. pending sub nom. National Association of Regulatory Utility Commissioners v. FCC*, D.C. Cir. 09-1046, filed Jan. 30, 2009. The *ISP Mandamus Order* is a direct follow-on to the *ISP Remand Order*. See note 8, *infra*.

is used in the provision of an information or enhanced service.⁷ Specifically, it is contended that, because of certain language in the *ISP Mandamus Order* (and the earlier *ISP Remand Order*⁸), any traffic that originates from or terminates to an ISP computer (or modem or router) is thereby “ISP-bound” traffic and is subject to the ISP reciprocal compensation rules that govern local interconnection. Under this theory, a common carrier that seeks interconnection with the local exchange switching facilities of a LEC (or combination of LECs) for origination or termination of the interstate interexchange common carrier transmission of traffic to or from an ISP computer may do so without paying the tariffed interstate access charges of the LEC. This position is now particularly acute because the argument is further made that, when exchange access is provided to the IXC by two LECs (through jointly provided switched access), the normal carrier tariff relationship is broken and the intermediate LEC is entitled to treat the traffic as subject to

⁷ An enhanced service entails the use of computer processing to modify the content or other aspects of subscriber information which is provided over a common carrier facility. 47 C.F.R. § 64.702(a). An information service is an enhanced service, but also includes the same services offered over telecommunications, whether or not a common carrier service is involved. See *Fiber Technologies, L.L.C. v. North Pittsburgh Telephone Company*, 22 FCC Rcd 3392, 3401 ¶ 25 (2007). The Blue Casa Petition and Qwest’s comments deal with services offered over the facilities of facilities-based common carriers -- hence, all of the services discussed in these comments are both enhanced services and information services. Because the quotations that we recite herein use both terms, and because the meaning is identical insofar as this proceeding is concerned, we use the terms interchangeably herein.

⁸ This proceeding (and some related ones) have already generated numerous FCC decisions and at least three judicial decisions. The initial order and analysis was found in *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (“*ISP Reciprocal Compensation Order*”). This decision was vacated on appeal. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). On remand, the Commission took a different approach. *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”). This too was reversed (but not vacated) on appeal. *Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Upon inaction, the Court ultimately issued a writ of mandamus compelling action. *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008). This Court decision resulted in the most recent *ISP Mandamus Order*.

“reciprocal compensation” under Section 251(b)(5) of the Act, rather than as access traffic subject to tariff. In other words, IXCs/CLECs are claiming that, rather than the IXC paying an ILEC’s tariffed access charges for use of the ILEC’s local switching facilities to originate interexchange traffic, the ILEC should instead pay its co-access provider under the reciprocal compensation provisions of the Act and the Commission’s rules.

In examining the access charge rules as they apply to VNXX, it is important to differentiate between the long distance rules that are implicated in a VNXX scenario as normally configured, and the “ISP reciprocal compensation” issues addressed by the Commission in the proceeding leading up to the *ISP Mandamus Order*. VNXX service, whether traffic is delivered to an ISP computer or a pizza delivery service, does not involve “ISP-bound traffic” as that term is contemplated in the *ISP Mandamus Order*.

In a VNXX scenario, a CLEC assigns a local number to a customer with its point of presence (“POP”) located in a remote exchange. This customer may be an ISP, a pizza delivery service, or any other customer desiring to establish a local presence in a remote area without actually establishing a premise there. The remote customer is connected to the local exchange via common carrier facilities, generally owned and operated by the CLEC.⁹ Calls are made to the number assigned to the remote customer by customers of another LEC (customarily, but not always, an ILEC). The calls are routed to the CLEC, which then functions as an IXC (or hands the call off to an IXC) and transports the call across exchange (and often state) boundaries to the remote ISP POP.¹⁰ Even though the call to the remote ISP (which is classified as an end-user

⁹ In economic terms these calling parties are generally considered to be customers of the ISP under these circumstances. However, they are also the end-user customers of the ILEC insofar as they purchase local exchange service from the ILEC.

¹⁰ There are occasions when, because a CLEC is entitled to a single POP within a LATA, the ILEC will deliver a call across exchange boundaries to a CLEC’s single POP, and the CLEC will

premise for FCC access charge analysis purposes) is a long distance call under the Commission's rules, IXCs/CLECs claim that this traffic not only is exempt from the payment of interstate switched access charges (charges owed by the IXC), but instead generates liability on the part of the originating ILEC for the payment of "reciprocal compensation" under Section 251(b)(5) of the Act (charges allegedly owed to the CLEC). These CLECs/IXCs argue that the service is not a long distance service because the numbers assigned to the remote ISP POPs are local numbers and that, in any event, the traffic is "ISP-bound traffic" and is subject to the Commission's rules relating to reciprocal compensation for ISP traffic.

As is pointed out by Blue Casa, these arguments are clearly wrong and significantly misstate the FCC's rules regarding access by common carriers using local exchange switching facilities to provide long distance services to information service providers. In fact, interconnection of VNXX services to a local exchange is factually indistinguishable from interstate FX service, a service that clearly is subject to interstate switched access tariffs at what is called the "open end."¹¹

The current confusion caused by the claim by CLECs that long distance traffic to or from a computer is subject to the FCC's reciprocal compensation rules has left the issue in the hands of courts reviewing interconnection arbitrations.¹² Thus far courts that have addressed VNXX

then deliver the call to a customer within the CLEC's local calling area (rather than returning it to the originating local calling area). In such circumstances, the long distance carrier is still the CLEC and not the ILEC. The fact that the traffic is delivered by the ILEC to a single POP does not change the status of the CLEC as the IXC.

¹¹ See Section VI, *infra*.

¹² The FCC has stated that it has not decided the VNXX reciprocal compensation issue. See *In the Matter of Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region InterLATA Services in Maryland, Washington, D.C., and West Virginia*, Memorandum Opinion and Order, 18 FCC Red

have reached mixed results, generally agreeing that long distance calls were not subject to reciprocal compensation (or at least that the reciprocal compensation provisions of Section 251(b)(5) of the Act did not apply to such calls), while deferring to state commissions the question of whether a VNXX call was in fact a long distance call.¹³ ISP arguments that the FCC had, in the *ISP Remand Order*, actually determined that VNXX calls were subject to reciprocal compensation at the ISP designated rate of \$.0007/minute of use (claiming that all calls to anywhere in the world were “ISP bound calls” if the ultimate end-user premise was an ISP POP) have generally been rejected.¹⁴ However, some of these decisions are now on appeal or in the midst of remand proceedings, and, as Blue Casa observes, many IXCs are simply refusing to make the proper payments for tariffed services. What is more, IXCs/CLECs that offer VNXX services are now claiming that, because of the *ISP Mandamus Order*, “[a]ll ISP-bound traffic, including VNXX traffic, is compensable,”¹⁵ as reciprocal compensation, which they claim includes long distance traffic delivered to a remote computer or modem.

Qwest submits that, as pointed out by Blue Casa, such a conclusion is clearly wrong and dangerous, and that current law requires that interexchange carriage of information services is currently governed by the Commission’s interstate access rules and the tariffs filed to implement

5212, 5300-01 ¶ 151 (2003). As is noted by Blue Casa and herein, this statement is not entirely accurate.

¹³ See *Qwest v. ACC* at 14-20 (VNXX traffic not subject to reciprocal compensation); *Qwest v. WSUTC*, 484 F. Supp. 2d at 1172-4 (same); *Verizon California Inc. v. Peevey*, 462 F.3d at 1157-58 (State could require reciprocal compensation but traffic not subject to Section 251(b)(5)); *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73-74 (1st Cir. 2006).

¹⁴ See note 8 and associated text, *supra*.

¹⁵ *ISP Remand and ICC Reform*, presentation of John R. Harrington and Bill Hunt, CLE International, attached hereto as Exhibit A. See also Level 3 Communications LLC’s Motion for Leave to File Supplemental Authority and Memorandum in Support in Case No. 05-00484-UT, *In the Matter of Level 3 Communications Petition for Arbitration*, New Mexico Public Regulation Commission, undated. This filing is attached hereto as Exhibit B.

them, not the reciprocal compensation rules. This includes payment of switched access charges for use of local exchange facilities for the origination or termination of long distance traffic where the remote customer has been assigned a local number. Until the Commission disposes of these issues decisively, however, they will continue to haunt interconnection arbitrations and other regulatory and judicial proceedings throughout the country.

A critical part of clearing up the confusion that currently surrounds much VNXX analysis is a proper understanding of what is known as the ESP exemption from switched access charges. The ILECs/CLECs supporting reciprocal compensation for interexchange carriage of VNXX traffic base much of their argument on multiple misinterpretations of that access charge rule. The ESP exemption provides that, for access charge purposes, an ISP POP is to be treated as an end-user premises in obtaining access to a local network for interstate traffic. The same analysis of exchange access necessarily carries over to the reciprocal compensation realm as well. This means that, if an ISP receives local traffic and delivers that traffic to another location (*e.g.*, if the ISP provides Internet access service or operates an X.25 packet network), the traffic is local or interexchange based on the location of the ISP POP.

This principle also applies in the case of multiple LECs -- when a CLEC receives traffic from an ILEC and uses its carrier facilities (or those of another carrier) to deliver the traffic to a remote exchange or remote local calling area, the CLEC/IXC is providing an interexchange telecommunications service whether the end user at the remote location is a computer, a PBX or a pizza delivery service.¹⁶ This means that carrier's carrier charges are due to the ILEC from the

¹⁶ As noted above, in those cases where the ILEC has delivered traffic to a CLEC single POP, the same rule applies -- if the CLEC itself then hands off the traffic to a collocated ISP POP, the CLEC is then performing the IXC function because the CLEC has created the interexchange circuit. An ILEC does not become an IXC because it provides a single POP to a CLEC. Otherwise a CLEC would have no right to demand delivery of traffic to a single POP.

IXC (which can also be the CLEC). The *ISP Mandamus Order*, by reaffirming the end-user status of an ISP POP, also reaffirms that interexchange traffic to or from an ISP POP is measured, for access and other purposes, based on the physical location of the ISP POP (which is treated as an end user). The *ISP Mandamus Order* does nothing to change this long-standing rule. In point of fact, by reaffirming that an ISP POP is to be treated as an end-user premises for access charge purposes, the Commission has reaffirmed the continuing validity of this rule.

In any event, the rule governing interexchange carriage of ISP traffic was not at issue in the proceeding leading up to the *ISP Mandamus Order*, and the Act specifies that a pre-1996 access charge rule can only be eliminated if it is “explicitly superseded” by the Commission. The notion that the rule may have been changed *sub silentio* without notice or analysis in a proceeding that was not examining that rule has no basis in the Act or administrative procedure.¹⁷ Interpretation of the *ISP Mandamus Order* as modifying (*sub silentio*) the long-standing policies and practices regarding exchange access by facilities-based carriers receiving information service traffic from a LEC or combination of LECs would violate both the Communications Act and the Administrative Procedure Act.¹⁸

Because interpretation of the Commission’s rules and policies is a matter that is best entrusted to the Commission itself, rather than to state regulators,¹⁹ arbitrators and federal courts,

¹⁷ 47 U.S.C. § 251(g). The Commission is free to modify its rules, but only if it does so deliberately after appropriate notice, comment and analysis. See *Greater Boston Television v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

¹⁸ 5 U.S.C. § 553.

¹⁹ The Commission has delegated to state regulators the responsibility of designating local calling areas and ensuring that local number assignments are not abused. See *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, et al.*, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27182 ¶ 303 (Chief, Wireline Competition Bureau 2002); *Global NAPS, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 98 (2d Cir. 2006). See *Qwest*

it is important that the Commission act expeditiously to explain the fundamentals of its common carrier rules when a facilities-based carrier carries an information service.

II. REQUESTED DECLARATORY RULING.

As is described below, it is vital that the Commission confirm that its tariff/access rules, not its reciprocal compensation rules, apply to long distance VNXX traffic, and will continue to do so until and unless the Commission explicitly acts to change them. The relief requested by Blue Casa goes along way towards achieving this objective. We suggest that the Commission consider an elaboration on the basic relief requested by Blue Casa. Accordingly, we request that the Commission fashion a declaratory ruling to the following effect that the Commission's regulatory structure regarding access charges, enhanced/information service providers, and jointly provided switched access provide as follows:

- When an IXC uses LEC local exchange switching facilities to originate or terminate an interstate interexchange call, that carrier must compensate the LEC for the provision of switched access services.
- This is true whether the access has been purchased to connect an interexchange call to any end user -- including an ISP computer or modem, a pizza delivery service, or a PBX.
- This is true whether the access services have been provided by a single LEC or jointly by two or more LECs.
- This is true whether the remote end user has been assigned a telephone number consistent with its own geographic location or has been assigned a telephone number consistent with a location in a foreign exchange.

Corporation v. Washington State Utilities and Transportation Commission, 484 F. Supp. 2d at 1170 (State cannot set local exchange boundaries in derogation of FCC policy on local versus interexchange calls). Qwest does not request that this delegation be reversed in this proceeding.

- This regulatory structure has been in place since the inception of access charges and predates the Telecommunications Act of 1996. It remains in place today because it has not been “explicitly superseded” by the Commission as required for elimination under Section 251(g) of the Act.
- In addition, the phrase “ISP bound traffic” used in the *ISP Mandamus Order* and the *ISP Remand Order* refers to traffic where the ISP POP and the other party to a call are located within the same local calling area.

III. THE ISP RECIPROCAL COMPENSATION PROCEEDINGS HAVE NOT CHANGED THE FCC’S RULES AND POLICIES REGARDING INTEREXCHANGE CARRIAGE OF INFORMATION SERVICES BY A FACILITIES-BASED COMMON CARRIER.

The FCC’s rules regarding the application of access charges to carriers using local exchange switching facilities to originate or terminate interexchange calls where one of the parties to the call is an ISP are not affected at all by the FCC’s ongoing ISP Reciprocal Compensation proceedings. Nevertheless, the CLECs supporting VNXX reciprocal compensation base most of their argument on some ambiguous language that exists in the Commission’s various orders dealing with what is called “ISP reciprocal compensation.” In the context of the actual FCC proceedings and access rules, this language is not susceptible to the meanings assigned to it by the VNXX supporters, and it is accordingly important not to lose sight of the meaning, purpose and history of these rules.

After the statutory reciprocal compensation provisions were enacted in 1996, some CLECs recognized that, because ISP POPs were treated as “end users” for access charge purposes, they could also be treated as end users for reciprocal compensation purposes. If such were the case, the fact that much ISP traffic was “one way” in nature created an irresistible arbitrage opportunity. Taking advantage of this opportunity, a number of CLECs entered into

the business of providing service almost exclusively to ISPs who had located their POPs within the local calling areas of the competing ILEC (entitling them to “end user” status under the ESP exemption). Huge volumes of traffic destined to these ISP POPs generated massive “reciprocal compensation” bills for traffic that was not reciprocal at all, causing massive diseconomies²⁰ and leaving the Commission to face the issue of how, once it classified an ISP POP as an end-user premise for access charge purposes, it could avoid the implication that the same POP should be treated as an end user for reciprocal compensation purposes.

The CLEC and ISP industry claimed that there was no difference for either access charge or reciprocal compensation purposes between a call to an ISP POP and any other end user -- the typical argument being that there was no difference between an ISP POP and a call to a pizza delivery service.²¹ For obvious reasons, there was no suggestion that interexchange traffic delivered to a remote ISP POP or to a remote pizza delivery service were under scrutiny in the ISP proceeding -- the sole question was whether a local ISP POP should be treated as any other local POP. Interexchange carrier traffic was not at issue at all.

The Commission initially acted to exclude ISP traffic from the scope of its reciprocal compensation rules based on the finding that most ISP traffic did not really “terminate” at the ISP POP (but was delivered in other protocols to remote locations) and was jurisdictionally interstate.²² Thus the FCC determined that an ISP POP was more akin to an IXC POP because of the lack of termination at that location. The basis for this finding was the conclusion that the calls were jurisdictionally interstate (based on the FCC’s traditional analysis of its own

²⁰ See *ISP Remand Order*, 16 FCC Rcd at 9153 ¶ 2, 9154-55 ¶ 5, 9181-85 ¶¶ 68-71; *ISP Mandamus Order* ¶ 24.

²¹ *Bell Atlantic*, 206 F.3d at 7.

²² *ISP Reciprocal Compensation Order*, 14 FCC Rcd at 3698-99 ¶ 13.

jurisdiction over interstate communications).²³ The Court of Appeals for the District of Columbia Circuit vacated this decision, finding that the jurisdictional analysis (which was not disputed) was not readily applicable to the question of whether the reciprocal compensation provisions of the Act applied, at least not without additional analysis and explanation.²⁴ In other words, the distinction between a local ISP POP and a local pizza delivery service was not sufficiently explained, notwithstanding the fact that the traffic was jurisdictionally interstate.

On remand, the FCC, still dealing with the same factual premises, reached the same conclusion (that ISP traffic was not subject to the reciprocal compensation rules), but now based the decision on the finding that an ILEC's provision of access directly to an ISP POP constituted "information access." As such the FCC's rules regarding ISP interconnection were held to be subject to Section 251(g) of the Act, which keeps intact pre-Act access regulations until the Commission chooses to modify them.²⁵ Finding that this type of information access had been regulated by the FCC prior to the 1996 Act, the FCC held that Section 251(g) of the Act allowed it to craft access rules for intercarrier compensation for ISP traffic.²⁶ The FCC then established independent compensation rules regarding ISP traffic. In the *ISP Remand Order*, the FCC reversed its prior analysis that the provisions of Section 251(b)(5) regarding reciprocal compensation applied only to "local" traffic. Thus, the issue of whether traffic actually terminated at an ISP POP became moot, and the end-user status of an ISP POP could be comfortably maintained.

²³ *Id.* at 3697-98 ¶ 12.

²⁴ *Bell Atlantic*, 206 F.3d at 8.

²⁵ *ISP Remand Order*, 16 FCC Rcd at 9170-75 ¶¶ 42-47.

²⁶ "Section 251(g) expressly preserves the Commission's rules and policies governing 'access . . . to information service providers' . . ." *Id.* at 9169-70 ¶ 39.

On appeal, the Court again reversed (but did not vacate), finding that the rules in question (which involved joint provision of access to an ISP POP by an ILEC and a CLEC) had not existed prior to the 1996 Act, and, accordingly, could not be found to be preserved under Section 251(g) of the Act.²⁷ The Court continued to deal only with the facts actually addressed by the Commission -- exchange of traffic between two LECs where both an ISP POP and the second party to a communication were located within the same local calling area.²⁸

After substantial delay in acting on the remand from the Court in the second reversal of its ISP reciprocal compensation rules, Core Communications petitioned for a writ of mandamus to the D.C. Circuit Court of Appeals, which writ was granted on July 8, 2008.²⁹ The Court gave the FCC until November 5, 2008 to issue an order in response to its decision remanding the *ISP Remand Order* or face vacation of its long-standing ISP reciprocal compensation rules.³⁰

In the *ISP Mandamus Order*, issued on November 5, the FCC reaffirmed the key conclusions of the *ISP Remand Order*. An ISP POP is to be treated as an end user for reciprocal compensation purposes as well as for access purposes. The traffic is, accordingly, subject to Section 251(b)(5) of the Act, as is any other traffic between local carriers. However, because the traffic is jurisdictionally interstate, the FCC, and not a state regulator, has the authority to establish the proper rate to govern compensation for the traffic.³¹ The reasoning is that, while there is no reason to exclude the ISP traffic involved in the proceeding (namely, traffic between an ISP POP and another party within a single local calling area) from the reciprocal

²⁷ *Worldcom*, 288 F.3d at 433-34.

²⁸ *Id.* at 431.

²⁹ See note 8, *supra*.

³⁰ *In re Core Communications, Inc.*, 531 F.3d at 862.

³¹ *ISP Reciprocal Compensation Order*, 14 FCC Rcd 3695-3703 at ¶¶ 10-20.

compensation provisions of Section 251(b)(5) of the Act, the traffic differed from normal voice traffic in that it was entirely subject to the FCC's interstate jurisdiction. Therefore, the FCC has plenary jurisdiction over pricing of transport and termination of interstate ISP traffic under Section 251(i) of the Act, which preserves the FCC's pre-Act interstate authority over access and interconnection.³² The FCC reaffirmed its finding that Section 251(b)(5) of the Act was not limited to "local" traffic, and reaffirmed that all traffic subject to pre-existing access rules would continue to be governed by those rules until and unless the FCC decided otherwise.³³ Accordingly, the FCC reaffirmed its rules regarding compensation for local ISP traffic exchanged between LECs. It did not modify its interexchange access rules.

Three aspects of this decision are important in the context of the instant Petition. First, the *ISP Mandamus Order* reaffirms that ISP POPs are treated as end-user premises for access charge purposes.³⁴ In other words, the basic structure of the ESP exemption discussed above is retained for ISP calls. Second, by reaffirming that Section 251(g) of the Act continues to preserve those pre-Act access charge rules until they are expressly modified by the Commission, the *ISP Mandamus Order* confirms that the access structure that has governed IXC use of local exchange switching facilities when it obtains access for the origination or termination of information services continues in full force and effect.³⁵

Third, it is simply not possible to claim responsibly that the FCC modified the interexchange tariffing rules for long distance traffic that carries ISP services by expanding the

³² 47 U.S.C. § 251(i).

³³ *ISP Mandamus Order* ¶ 16. Given the statutory command that pre-Act access regulations remain in effect until "explicitly superseded" by the Commission, it would not be lawful for the Commission to take any other stance.

³⁴ *Id.* ¶ 13.

³⁵ *Id.* ¶ 9.

scope of the ISP reciprocal compensation proceeding to include interexchange carriage of ISP traffic within the scope of the “ISP-bound” traffic addressed in the proceeding. It is clear in context that the FCC throughout the ISP Reciprocal Compensation proceeding continued to deal only with the issue of the access charge/reciprocal compensation problem as it relates to calls where the ISP POP and the other party to the call are in the same local calling area (that being the only issue before the Commission in the proceeding). As is discussed below,³⁶ such a dramatic change in the scope of the proceeding and the Commission’s rules would have been unlawful in any event. However, some loose language in the *ISP Remand Order* and the *ISP Mandamus Order*, has provided fodder for those who claim that the FCC reversed the law dealing with interexchange carriage of information services in the ISP Reciprocal Compensation proceeding. This ambiguity was summarized by the Commission’s General Counsel in his amicus brief to the United States Court of Appeals in *Global NAPS, Inc. v. Verizon New England, Inc.*³⁷ In that brief, the General Counsel observed:

In some respects, the *ISP Remand Order* appears to address all calls placed to ISPs. The Commission’s ruling that calls to ISPs are interstate calls because they may terminate at web sites beyond state boundaries necessarily applies to all ISP-bound calls. The Commission’s theory that ISP-bound calls are “information access” calls within the meaning of § 251(g) that are thus exempted from the requirements of § 251(b) likewise applies to all ISP-bound calls. The *ISP Remand Order* is also replete with references to “ISP-bound calls” that do not differentiate between calls placed to ISPs in the same local calling area and those placed to ISPs in non-local areas.³⁸

The General Counsel, however, concluded that, despite this language, there was no indication that the Commission had broadened the scope of the ISP Reciprocal Compensation proceeding beyond calls involving an ISP POP and another caller within the same local calling area, and

³⁶ See Section VII, *infra*.

³⁷ 444 F.3d 59 (1st Cir. 2006). The amicus brief may be found at 2006 WL 2415737 (CA.1).

³⁸ FCC amicus brief, *supra*, internal WL page 6.

represented that “the Commission itself . . . has not expressed an opinion on the matter [of interexchange ISP calls delivered by a carrier].”³⁹

We submit that this “ambiguity” does not exist, cannot exist as a matter of law, and that the *ISP Mandamus Order* did not modify the rules on interexchange carriage of information services. As is discussed in more detail below, the access structure that governs interexchange calls to remote premises (computers, pizza delivery services, PBXs or telephones) can only be modified deliberately and explicitly. This structure cannot be modified by accident. The “local” issue that arose in the ISP Reciprocal Compensation proceeding involved claims that calls to ISPs were inherently interexchange in nature because they did not actually “terminate” at the ISP POP. The Commission never addressed the issue of interexchange carriage of ISP information by a facilities-based carrier. The rules governing this carriage accordingly remain intact. In the following sections we describe what those rules are and why it would be unlawful for the Commission to conclude that it has modified them in the ISP Reciprocal Compensation proceeding (or to modify them now without notice, an opportunity for comment, and full analysis).

IV. ACCESS CHARGES AND THE ESP EXEMPTION -- CARRIAGE OF TRAFFIC TO REMOTE ISP POPS CONSTITUTES THE PROVISION OF INTEREXCHANGE SERVICE SUBJECT TO LEC ACCESS TARIFFS.

The Commission’s access charge regime was implemented upon divestiture of the consolidated AT&T.⁴⁰ In the access charge structure, carriers that use local exchange switching facilities to originate or terminate interstate, interexchange traffic purchase both originating and

³⁹ *Id.*, internal page 7.

⁴⁰ See *Nat’l Ass’n of Regulatory Util. Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

terminating exchange access from ILECs pursuant to tariff (rather than contract).⁴¹ IXCs may purchase local business lines from an exchange carrier only for their own internal administrative purposes -- when they provide long distance service, IXCs must purchase exchange access from LECs pursuant to those carriers' access tariffs.⁴²

When the first access charge rules were originally adopted in the mid-1980s, ESPs⁴³ were required to purchase switched access service when they originated and terminated their interstate services via local exchange switching facilities.⁴⁴ Prior to enactment of the access charge structure, ESPs had purchased local exchange service out of local exchange tariffs (there being no other choice available at the time). Hence, there was significant concern that the "rate shock" would occur if ESPs were immediately required to pay the new switched access charges (which were dramatically higher than they are today), and that this rate shock would be detrimental to what was at the time a fledgling ESP industry. Accordingly, the Commission, on reconsideration, created what has become known as the "ESP exemption" from access charges as

⁴¹ 47 C.F.R. § 69.5(b); *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7466 ¶ 14 (2004). Prior to the adoption of the access charge structure, carrier-to-carrier relations were generally governed by contract rather than by tariff. *See In the Matter of American Telephone and Telegraph Company, Revisions to Tariffs FCC Nos. 265, 266 and 268*, Memorandum Opinion and Order, 92 FCC 2d 896, 903-4 ¶¶ 9-12 (1982).

⁴² 47 C.F.R. § 69.2(m). In the case of CLECs, access may be provided via contract between the CLEC and the IXC. *See In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order, 16 FCC Rcd 9923, 9939-40 ¶ 42 and n.97 (2001).

⁴³ As noted above, ESPs and ISPs are identical classes of service provider, with the exception that ESPs, by definition, must provide their service over common carrier transmission facilities, a requirement that does not adhere to ISPs. We use the terms interchangeably in these comments.

⁴⁴ Section 69.2(a) of the Commission's rules originally provided that common carriers and ESPs who used local exchange switching facilities for interstate service were required to pay carrier's carrier charges. *See In the Matter of MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 344 (1983) ("*WATS Third Report and Order*") (subsequent history omitted).

a temporary provision in order to mitigate the perceived rate shock impact.⁴⁵ This “exemption,” which remains in place today (and is applicable, as noted, equally to ESPs and ISPs), provides that ISP POPs would be treated as end-user premises, and could thereby purchase interstate access service as end users out of local exchange tariffs to the same extent as could other end users.⁴⁶ In order to ensure that all appropriate interstate costs were recovered through access charges, the Commission assessed a \$25 per month “surcharge” on special access lines capable of “leaking” interstate traffic into the local exchange.⁴⁷

Because, under the ESP exemption, ESPs/ISPs are classified as end users,⁴⁸ when they purchase local access under the ESP exemption, they must purchase such local access pursuant to a LEC’s local tariffs on precisely the same tariff terms as are available to other end users.⁴⁹ In the context of the Commission’s access charge rules, the necessary conclusion is simple -- the ISP POP is an end-user premises and the provision of interexchange service by a facilities-based

⁴⁵ *In the Matter of MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 713-15 ¶¶ 81-82 (1983) (“*WATS MO&O*”).

⁴⁶ *Id.* at 711-14 ¶¶ 78-81. In order to permit for lost carrier revenues caused by the end user treatment of ESPs and leaky PBXs, the FCC assessed a \$ 25/line on ILEC special access services that had the capacity to “leak” into the local exchange. *Id.* at 719-20 ¶ 88. See 47 C.F.R. § 69.115.

⁴⁷ *WATS MO&O*, 97 FCC 2d at 719-20 ¶ 88.

⁴⁸ *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, 2633 ¶ 20, n.53 (1988); *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305, 4306 ¶ 6 (1987).

⁴⁹ “ISPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users. ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries.” *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982, 16132 ¶ 342 (1997). “[O]ur present rules do not distinguish between ESPs and end users.” *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Notice of Proposed Rulemaking, 4 FCC Rcd 3983, 3989 ¶ 42, n.92 (1989).

carrier to an ESP/ISP POP is itself the provision of a telecommunications service.⁵⁰ Thus, the interexchange carriage of an information service by a carrier is the provision of interexchange telecommunications service. The Commission stated this principle clearly in *Northwestern Bell Telephone Company Petition for Declaratory Ruling*:

[E]nhanced service providers are treated as end users for purposes of our access charge rules. End users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers. Thus, to the extent that Dial Info is suggesting that some kind of access charge credit for 800 or 976 service should be available, Dial Info has misinterpreted our rules; it cannot be credited for an exemption from access charges on that traffic.⁵¹

The law remains unchanged to this day -- when a facilities-based common carrier provides interexchange service to an ESP/ISP, including to its own enhanced or information service, it must offer transmission service on a common carrier basis to others on non-discriminatory

⁵⁰ “The Wireline Competition Bureau has recently clarified that wholesale telecommunications carriers that provide services to other service providers, including cable operators providing voice over Internet Protocol (VoIP) services, are indeed ‘telecommunications carriers’ for the purposes of section 251 of the Act, and are thus entitled to interconnect with incumbent LECs.” *In the Matter of Implementation of Section 224 of the Act*, Notice of Proposed Rulemaking, 22 FCC Rcd 20195, 20200-01 ¶ 14 (2007). “[I]nterstate interexchange carriers are required to purchase federal access, when they provide interstate transmission for ESPs that lack their own interstate networks. . .” *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3089 ¶ 44 (1990). See also *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15990 ¶ 995 (1996) (“*Local Competition Order*”), subsequent history omitted.

⁵¹ *In the Matter of Northwestern Bell Telephone Company Petition for a Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988 ¶ 21 (1987); vacated on other grounds with legal principles reaffirmed, *Northwestern Bell Tel. Co. v. FCC*, D.C. Cir. No. 87-1745, filed Mar. 1, 1989, *In the Matters of Northwestern Bell Telephone Company Petition for Declaratory Ruling and WATS Related and Other Amendments of Part 69 of the Commission’s Rules*, 7 FCC Rcd 5644 (1992).

terms.⁵² An ILEC must also charge the tariffed access rate to the IXC delivering the information service.

The identity for access charge purposes of ISP POPs and other entities treated by the FCC as end users is highlighted by the so-called “pizza delivery service” analogy. When the issue of ISP reciprocal compensation first arose, CLECs and ISPs claimed that their local POPs (within the local calling area of the calling party) should be treated exactly like pizza delivery services for access charge purposes. That is, both were entitled to purchase local service out of ILEC local exchange tariffs. The D.C. Circuit Court of Appeals agreed, holding:

In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as ‘pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies,’ which use a variety of communication services to provide goods or services to their customers.⁵³

It is not contested that, when an IXC carries an interstate call to or from a remote location to a pizza delivery firm, it must pay tariffed access charges if it uses a LEC’s local switching facilities. The same is, of course, true in the case of carriage by an IXC of ISP traffic. Absolutely nothing the Commission has said has changed this fundamental premise.⁵⁴

These same rules have long applied when more than one LEC is involved in providing exchange access to an IXC for the purpose of delivering or receiving ISP/ESP traffic. The Commission’s rules have provided a methodology for multiple LEC billing of tariffed access to

⁵² *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd 7418, 7442 ¶ 40 (2001). See also *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14872 ¶ 31 (2005).

⁵³ *Bell Atlantic*, 206 F.3d at 7.

⁵⁴ The Commission’s subsequent efforts to differentiate ISPs and pizza parlors in its *ISP Remand Order* dealt with interstate jurisdiction, not end-user status and its consequences. See *ISP Remand Order*, 16 FCC Rcd at 9176-77 ¶¶ 54-55.

an IXC since immediately after divestiture.⁵⁵ Under the rules, if an IXC receives traffic from an end user that has been processed by more than one LEC (typically, one LEC provides switched transport, including tandem switching and its portion of tandem transport and the second LEC provides local switching and its portion of tandem transport), each LEC bills the IXC separately for the functionality it provides (although joint billing by a single LEC is permissible).

In this regard, it must be remembered that this proceeding has nothing to do with a situation that might arise if ESP/ISP traffic found its way into a local exchange without being brought there by a carrier. If that situation were to arise, the non-carrier would not be entitled to Section 251 interconnection. Instead, once the traffic found its way into the exchange, the ISP would be able to purchase service from local tariffs as an end user, as is the case today. And, if the ILEC local tariffs provided that only calls within a local calling area were eligible for local service treatment, the ISP/ESP would be bound by that rule as well. This case involves Section 251 interconnection and reciprocal compensation. As an ISP is not entitled to either of these, evaluation of the rules that might exist if an ISP were entitled to interconnection rights under Section 251 is not relevant to this proceeding.⁵⁶

⁵⁵ See *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, Memorandum Opinion and Order, 2 FCC Rcd 4518 (1987), *on recon.*, 3 FCC Rcd 13 (1987). Also see, *In the Matter of Access Billing Requirements for Joint Service Provision*, Phase II Order, 65 Rad. Reg. (P&F) 2d 650 (1988).

⁵⁶ See *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (affirming that wholesale carriers can obtain access under Section 251 because they are indeed carriers); *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Fifth Report, 23 FCC Rcd 9615, 9636 ¶ 43 (2008) (affirming principles of *Time Warner*).

V. THE FCC'S RECIPROCAL COMPENSATION RULES DO NOT APPLY TO INTEREXCHANGE TRAFFIC, WHICH IS BILLED BY EACH LEC TO THE INTEREXCHANGE CARRIER.

Compensation for transport and termination of traffic among LECs, generally known as “reciprocal compensation,” became critical with the introduction of local exchange competition and the 1996 Telecommunications Act.⁵⁷ The reciprocal compensation provisions of the Act apply whenever two LECs combine to transport a call from the customer of the originating carrier to the customer of the terminating carrier unless the traffic is subject to rules that predate the 1996 Act.⁵⁸ Reciprocal compensation arrangements are to be negotiated as part of interconnection agreements under Section 252 of the Act.⁵⁹ The pricing parts of the reciprocal compensation statutory provisions do not address “what happens when carriers exchange traffic that originates or terminates on a third carrier’s network.”⁶⁰ Nor do they apply to interexchange traffic -- an IXC cannot demand the right to deliver its interexchange traffic to an ILEC via an interconnection agreement subject to reciprocal compensation.⁶¹

⁵⁷ Reciprocal compensation for transport and termination of traffic among LECs is required by Section 251(b)(5) of the Act. 47 U.S.C. § 251(b)(5). The concept of reciprocal compensation, of course, goes back much further. See *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613-15 ¶¶ 5-10 (2001).

⁵⁸ 47 C.F.R. § 51.705; *Local Competition Order*, 11 FCC Rcd at 16008 ¶ 1027, 16012-16 ¶¶ 1033-40.

⁵⁹ For a discussion of the reciprocal compensation process in practice, see *Verizon California, Inc. v. Peevey*, 462 F.3d at 1146-47.

⁶⁰ See *ISP Mandamus Order*, Appendix A – Chairman’s Draft Proposal ¶ 224; Appendix C – Alternative Proposal ¶ 219. The Commission has cautioned that “[t]his does not mean . . . that section 251(b)(5) must be read as limited to traffic involving only two carriers. Rather, it means that there is a gap in the pricing rules in Section 252(d)(2). . .” *Id.* See also *Worldcom*, 288 F.3d at 433-4 (Section 251(g) does not apply to situations not in existence prior to the 1996 Act).

⁶¹ *Local Competition Order*, 11 FCC Rcd at 16013 ¶ 1034.

Because the rules governing interstate access (including the ESP exemption) predate the 1996 Act, they are not subject to the statutory reciprocal compensation provisions until and unless the FCC takes “explicit” action to make them so. Section 251(g) of the Act provides that pre-existing access rules shall remain in place until they are “explicitly superseded” by regulations prescribed by the Commission.⁶² The rules relating to ISP-bound traffic that the Court in *Worldcom* had found were not covered by Section 251(g) had been developed after the Act to deal with a new phenomenon -- local intercarrier exchange of ISP traffic. The rules relating to the tariffing of interstate access provided to IXCs, including interexchange carriage of enhanced/information service traffic, have been in place for decades. As noted above, these rules were not even under consideration in the proceeding that led to the *ISP Remand Order*, far less “explicitly superseded” in that *Order*. These rules provide that, when a facilities-based carrier uses local exchange switching facilities provided by a LEC to provide its interstate telecommunications services, that carrier must pay the LEC its tariffed access charges regardless of the content of the traffic. The relationship between the two LECs in their interconnection agreement relating to the provisions for reciprocal compensation for transport and termination of traffic, are not relevant to the right of each LEC to bill the IXC for access services -- even if the IXC is also one of the two LECs. This principle applies whether the traffic carried by the IXC is an information service or any other type of service (including long distance traffic to and from a pizza parlor).

⁶² 47 U.S.C. § 251(g).

VI. USE OF LOCAL EXCHANGE SWITCHING FACILITIES TO PROVIDE INTERSTATE VNXX SERVICE AND FOREIGN EXCHANGE SERVICE IS COVERED BY LEC INTERSTATE SWITCHED ACCESS TARIFFS.

Blue Casa points out appropriately that VNXX service is functionally identical to what is called interstate “foreign exchange” or “FX” service. The FCC has, from the inception of the access charge rules at the time of divestiture, had a method of dealing with the access charge treatment of interstate services such as FX. FX service “enables a subscriber in one city or exchange area to place calls to telephones in another city or foreign exchange on a toll free basis, and enables persons in the foreign exchange to place calls to the FX subscriber in the distant city by dialing a local number without paying toll charges. . .”⁶³ FX service is configured by connecting a private line between the FX subscriber and the foreign exchange switching facilities. When an end user in the foreign exchange calls the local number assigned to the FX subscriber, the call traverses the local switch in the foreign exchange (called the “open end”). From that switch the call is connected to a private line that connects to the remote end user on what is called the “closed end.” The above description applies equally to VNXX service, especially when the call is transported to another exchanges by the CLEC or another carrier.

The FCC’s rules have been consistent since the implementation of access charges -- the carrier connecting to the “open end” of an interstate FX service must pay switched access charges.⁶⁴ Indeed, the ability of FX services to obtain interstate exchange access at local rates was one of the factors that drove the FCC to craft the access charge rules in the fashion that was

⁶³ *General Services Administration v. American Telephone and Telegraph Company*, Memorandum Opinion and Order, 6 FCC Rcd 5873, 5874 ¶ 6 (1991).

⁶⁴ See *In the Matter of Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Notice of Proposed Rule Making, 2 FCC Rcd 4305, 4306 ¶ 9, n.27 (1987); *In the Matter of Bell Atlantic Petition for Declaratory Ruling Concerning Application of the Commission’s Access Charge Rules to Private Telecommunications Systems*, 2 FCC Rcd 7458 ¶ 5 (1987); *WATS MO&O*, 97 FCC 2d at 717-18 ¶ 86.

ultimately adopted.⁶⁵ The reason for this approach is self evident: a carrier providing interstate telecommunications services using local switching facilities must pay tariffed interstate switched access rates, and the open end of an interstate FX service constitutes such a use. The use of local exchange switching facilities at the open end of an interstate FX service fits precisely within the scope of the Commission's switched access rules. Indeed, the Commission went so far as to suggest that a different approach to interstate FX access could constitute an unlawful discrimination under Section 202(b) of the Act.⁶⁶ As is the case with the other access charge rules discussed herein, this approach to access and the open end of an FX service applies equally when multiple LECs combine to provide access to a carrier providing an interstate FX service. And these same rules apply when the end-user premises at the end of the private line is an ISP POP -- which is often (but not always) the case with VNXX services.

VII. IT WOULD BE UNLAWFUL AND ARBITRARY FOR THE COMMISSION TO EXPAND THE ISP RECIPROCAL COMPENSATION PROCEEDINGS BEYOND THE SCOPE OF THE INITIAL PROCEEDING WITHOUT NOTICE AND ANALYSIS.

As described above, the FCC has done nothing to change the regulatory regime that governs interstate switched access when provided by two LECs, including access to a facilities-based carrier transmitting an information service. In fact, it would have been legally impossible for the Commission to have modified its rules without actually describing the rule changes and the reasons for the change. But that is what the CLECs supporting reciprocal compensation for interexchange VNXX traffic argue -- that the Commission made a major modification of its access rules without discussing either the fact of or the reason for the change. Especially in the

⁶⁵ *WATS Third Report and Order*, 93 FCC 2d at 258 ¶ 51, 286 ¶ 150, 294-95 ¶¶ 187-88, 297-98 ¶ 200.

⁶⁶ *Id.*, 93 FCC 2d at 257-58 ¶ 51.

context of a statutory command that supersession of a rule governed by Section 251(g) be “explicit,” this argument must be decisively rejected.

Of course, while the FCC has the option, upon a proper record and reasoned analysis, of changing its approach to carriage of interexchange information services by a facilities-based carrier, it cannot modify its rules without notice and comment upon a proper record. As the D.C. Circuit stated almost forty years ago:

[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.⁶⁷

And the FCC certainly cannot modify its rules without actually acknowledging that it is doing so.⁶⁸ This standard administrative principle is made more explicit by the statutory command that a pre-1996 access rule must be “explicitly superseded” by the Commission in order to be changed.⁶⁹ As pointed out above, the Commission’s rules as applied to access (by one or more LECs) to facilities-based IXC are of long-standing vitality, including those circumstances where the carriers transmit enhanced or information services. Accordingly, they still remain in force and effect under Section 251(g) because the Commission has not explicitly modified them.⁷⁰ If

⁶⁷ *Greater Boston*, 444 F.2d at 852 (footnotes omitted). See also *New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101, 1110 (D.C. Cir. 1987), *cert denied sub nom.*, *Southern Bell Tel. and Tel. Co. v. FCC*, 490 U.S. 1039 (1989).

⁶⁸ See *Motor Vehicle Mfg Ass’n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 56-57 (1983).

⁶⁹ 47 U.S.C. § 251(g).

⁷⁰ One of the points of potential confusion revolves around a perceived difference between “exchange access,” which is defined in the Act, “information access,” which is not defined, and local exchange service. These supposed distinctions are not relevant in the context of this proceeding. The key to the Commission’s regulatory structure is Section 69.5(b) of its rules, which assesses carrier’s carrier charges on “all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.” 47 C.F.R. § 69.5(b). While not defined in the Act, Qwest submits that “information access” applies to direct connections between a LEC and an ISP -- such as those covered by the ESP exemption -

the Commission were to desire to change these rules, the full panoply of protections provided by the Communications Act and the Administrative Procedure Act would apply to the proceeding. In any event, accidental or inadvertent changes to important rules cannot take place in the context of the Commission's statutory mandate -- certainly not in the case of pre-1996 access rules.

What is more, no one doubts that a call between a pizza delivery service and an end user in two different local calling areas is treated as an interexchange call under the FCC's rules,⁷¹ and no one doubts that an interstate interexchange call to a pizza parlor is treated as an interexchange call no matter what telephone number is assigned to the pizza delivery service. Thus, treating long distance calls to ISPs (made over common carrier facilities) differently than long distance calls to pizza parlors would create very serious issues of unlawful discrimination under Section 202(b) of the Act.⁷² Under the analysis put forth by CLECs supporting VNXX reciprocal compensation, it would be critical for the Commission to distinguish between the two apparently identical end-user premises -- one the pizza delivery service premise and the other the ISP POP - - in order to explain why Section 202(b) did not prohibit the discrimination. It might be possible that such an analysis could ultimately justify different treatment of the two types of traffic for access charge purposes. Our point is that this potential discrimination has not been recognized, far less reconciled, by the Commission in any form. The Commission's ESP exemption currently requires that ISP POPs and pizza parlor premises be treated as end users for access purposes. Before the Commission could change these rules, it would need to recognize the

- and not to access service provided to a carrier that is itself carrying the traffic of an information provider.

⁷¹ As noted above, the *Bell Atlantic* Court found the pizza parlor analogy to be particularly illuminating.

⁷² 47 U.S.C. § 202(b).

importance of justifying in a lawful way the new discrimination that such a change would necessitate.⁷³

VIII. CONCLUSION.

Fundamentally, while the foregoing analysis is somewhat complex, ultimately the conclusion is simple. When providing VNXX service to a remote ISP POP, a carrier provides interexchange telecommunications service to the remote ISP. The interexchange telecommunications service provider is liable to all originating carriers for switched access service provided under tariff. This is true whether the IXC doubles as one of the LECs providing the access service. Blue Casa's analysis is correct. Reciprocal compensation does not apply. The Commission should issue a declaratory ruling along the lines suggested above.

Respectfully submitted,

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March 12, 2009

⁷³ Obviously the Commission does require one discrimination between traffic delivered to a pizza delivery service and traffic delivered to an ISP POP in that the rates for termination of the two types of traffic are different. The Commission has fully explained the rationale for this differential treatment and its jurisdictional and public policy basis. *See ISP Mandamus Order ¶¶ 6-22.*

EXHIBIT A

“ISP Remand & ICC Reform”

presented by

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ISP Remand & ICC Reform

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Third time's the charm

- Faced with Nov. 5 deadline imposed by the US District Court of Appeals for the District of Columbia, FCC issued new legal justification for ISP Remand
 - FCC changed course, ISP-bound traffic falls under Section 251(b)(5)
 - Reaffirmed that 251(g) does not preserve access charges for calls between LECs
 - FCC found interstate nature of traffic also gave it jurisdiction under Section 201
 - Retained rate of .0007 per mou if ILEC follows mirroring rule
-

What changed

- All ISP-bound traffic, including VNX traffic, is compensable
 - ¶7: "Nevertheless, we find that the better view is that section 251(b)(5) is not limited to local traffic
 - Local presence repudiated:
 - FN 49: Because our conclusion in this order concerning of Section 251(b)(5) is no longer tied to whether this traffic is local or long distance, we need not address arguments made by the parties as to whether ISP-bound traffic constitutes "telephone exchange service" under the Act.
 - Telephone Exchange Service: means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service
-

Impact

- Court or state commission decisions imposing physical presence requirement on the ISP based on the preservation of access charges under 251(g) are no longer valid
 - Access charges cannot be applied on traffic exchanged between LECs
 - Local interconnection rules apply:
 - No relative use fee
 - No physical interconnection requirements
-

Here we go again

- Order sets compensation rules going forward if the ILEC follows the mirroring rule
 - If not, local state recip comp rate should apply
 - Retroactive exposure?
 - 9th Circuit applies law at time of appeal
 - Core complaints
-

ICC & USF reform

- FCC released proposed plan to reform intercarrier compensation and universal service
 - Comments filed Nov. 25
 - Replies filed Dec. 3
 - Commission may vote Dec. 18
 - In many respects, a slapdash proposal that looks like the FCC just picked sections from various plans without considering how all the pieces fit together
-

EXHIBIT B

bound traffic.³ In *WorldCom*, the D.C. Circuit held that section 251(g) of the Federal Telecommunications Act did not provide a legal basis for the FCC's pricing rules established in the *ISP Remand Order*. Although the court rejected the legal rationale for the FCC's compensation rules for ISP-bound traffic, the court did not vacate the rules, observing that "there is plainly a non-trivial likelihood that the [FCC] has authority" to adopt the rules in the *ISP Remand Order*, "perhaps under section 251(b)(5)" of the Act.⁴

2. On November 5, 2008, the FCC issued an order in response to the D.C. Circuit's remand order in *WorldCom* and its writ of mandamus in *Core Communications*.⁵ Declaring the legal basis for the compensation regime established in 2001, the FCC clarified that ISP-bound traffic falls within the scope of section 251(b)(5) of the Act and concluded that the FCC had the authority to establish the unique pricing rules for this "interstate, interexchange traffic" pursuant to section 201 of the Act. The "Order on Remand – ISP-Bound Traffic" portion of the FCC's complete November 5 release (referred to herein as the "*ISP Mandamus Order*") is attached hereto as Appendix A.

3. The *ISP Mandamus Order* has a direct bearing on important legal issues material to the resolution of the disputed issues in this proceeding. It clarifies that all ISP-bound traffic is subject to the FCC's compensation regime established in its 2001 *ISP Remand Order*. Squarely and unambiguously placing all ISP-bound traffic under section 251(b)(5), the FCC has reaffirmed its prior ruling that ISP-bound traffic is interstate in nature and that the FCC has exercised exclusive authority to regulate such traffic under section 201 of the Act. The *ISP*

³ Intercarrier Compensation for ISP-Bound traffic, CC Docket Nos. 96098, 99-68, *Order on Remand and Report and Order*, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

⁴ *WorldCom*, 288 F.3d at 434.

⁵ Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking* (rel. November 5, 2008) ("*ISP Mandamus Order*").

Mandamus Order contains the following findings and/or conclusions of law directly implicating issues in the instant case:

- “As an initial matter, we conclude that the scope of section 251(b)(5) is broad enough to encompass ISP-bound traffic.”⁶ *ISP Mandamus Order* at ¶ 7
- “[Section 251(b)(5)’s] scope is not limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services (‘telephone exchange service,’ ‘telephone toll service,’ or ‘exchange access’). We find that the traffic we elect to bring within this framework fits squarely within the meaning of ‘telecommunications.’”⁷ *ISP Mandamus Order* at ¶ 8
- “Because our conclusion in this order concerning the scope of section 251(b)(5) is no longer tied to whether this traffic is local or long distance, we need not address arguments made by the parties as to whether ISP-bound traffic constitutes ‘telephone exchange service’ under the Act.” *ISP Mandamus Order* at ¶ 13, f.n. 49
- “Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing ‘receipt of compensation.’ Here, however, the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5) as ‘there had been no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.’ As a result, we find that ISP-bound traffic falls within the scope of section 251(b)(5).” *ISP Mandamus Order* at ¶ 16 (citations omitted)
- “Because we reaffirm our findings concerning the interstate nature of ISP-bound traffic, which have not been vacated by any court, it follows that such traffic falls under the Commission’s section 201 authority preserved by the Act and that we therefore have the authority to issue pricing rules pursuant to that section.” *ISP Mandamus Order* at ¶ 21 (citations omitted)
- “Consequently, in the *ISP Remand Order*, the Commission properly exercised its authority under section 201(b) to issue pricing rules governing the payment of compensation between carriers for ISP-bound traffic.” *ISP Mandamus Order* at ¶ 21 (citations omitted)
- “In sum, we maintain the \$.0007 cap and the mirroring rule pursuant to our section 201 authority. These rules shall remain in place until we adopt more comprehensive intercarrier compensation reform.” *ISP Mandamus Order* at ¶ 29

⁶ The FCC also reaffirmed the conclusion in the *ISP Remand Order* that “it was a mistake to read section 251(b)(5) as limited to local traffic.” *Id.*

⁷ “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.*

4. To summarize, the FCC's *ISP Mandamus Order* establishes as a matter of law that: (i) all ISP-bound traffic is subject to section 251(b)(5); (ii) there is no "local" versus "non-local" distinction under section 251(b)(5); (iii) section 251(g) is not at all applicable to ISP-bound traffic; and (iv) the FCC has exclusive jurisdiction over intercarrier compensation for all ISP-bound traffic. Consequently, any state commission or court decision that has limited ISP-bound traffic compensation or imposed transport obligations that conflict with the above conclusions in the FCC's *ISP Mandamus Order* is contrary to law and without any precedential value.

5. The following is a non-exclusive list of specific findings and conclusions contained in the Recommended Decision that are contrary to the FCC's *ISP Mandamus Order* and are, therefore, incorrect as a matter of law:⁸

- "Accordingly, the Commission concludes the *ISP Remand Order*'s intercarrier compensation regime applies only to calls delivered to an ISP located in the caller's local calling area." Recommended Decision at p. 36
- "It follows then that consistent with the statutory definitions and rules cited by Qwest, in New Mexico the controlling factor in classifying calls as either local or long distance is the geographical location of the calling and called parties." Recommended Decision at p. 42
- "The ISPs are not physically located in the same calling area as the end users placing the dial-up calls. Therefore, in accord with controlling state authority, the VNXX ISP-bound traffic at issue is interexchange traffic." Recommended Decision at p. 43
- "Since VNXX ISP-bound traffic is interexchange traffic, Level 3 is not entitled to terminating compensation for that traffic under the *ISP Remand Order*'s interim compensation regime." Recommended Decision at p. 43

⁸ This list is not intended to be all-inclusive but rather is intended to address the major findings and conclusions. There may be, and likely are, other statements, interpretations, findings and/or conclusions which are contrary to the FCC's *ISP Mandamus Order*, but Level 3's failure to cite to each of them here should not be construed as acceptance by Level 3 as to their accuracy.

- “Since the court did not vacate the *ISP Remand Order*, the FCC’s finding that ISP-bound traffic constitutes, at a minimum, ‘information access’ is still good law.” Recommended Decision at p. 61
- “As ISP-bound traffic has been determined by the FCC and federal courts to be both ‘information access’ and ‘interexchange access traffic’ it is necessarily excluded from the ‘telecommunications traffic’ to which section 51.703(b) pertains. In practical terms, what does this mean? It means that since ISP-bound traffic is not ‘telecommunications traffic,’ Qwest is free to assess charges for ISP-bound traffic originating on its network.” Recommended Decision at p. 62
- “Finally, we note that this result is doubly called for given our finding that the ISP-bound traffic in question is interexchange traffic under New Mexico law, which type of traffic is also excluded by 47 C.F.R. § 51.701(b) from the ‘telecommunications traffic’ to which sections 51.703(b) and 51.709(b) are limited.” Recommended Decision at p. 63
- “To repeat – VNXX traffic is interexchange traffic; it is not ‘telecommunications traffic’ and hence by definition is excluded from the scope of the FCC’s transport and termination pricing rules.” Recommended Decision at p. 64
- “In sum, whether regarded as either newly minted or changed policy, as a matter of prevailing law and sound economic principles ISP-bound traffic should be excluded from the RUF in the parties’ Agreement. We believe the proper approach is to have Level 3 pay for the cost of transport to the POI of dial-up calls placed by end-user customers of ISPs served by Level 3.” Recommended Decision at p. 66

6. The Hearing Examiner submitted his Recommended Decision on April 4, 2008.

Level 3 and Staff filed exceptions to the Recommended Decision on May 5, 2008, and Qwest and Staff filed responses to Level 3’s exceptions on May 27, 2008. No decision has yet been rendered by the Commission, and no hearings are scheduled in this case. Thus, the filing of this supplemental authority will not prejudice either party in this proceeding.

7. Level 3 contacted Commission Staff regarding Level 3’s intent to file supplemental authority and Staff does not object. Level 3 attempted to contact Counsel for Qwest in this matter but had not received any response by the time of the filing of this Motion.

WHEREFORE, for all the reasons stated herein, Level 3 respectfully requests the Commission allow the submission of this supplemental authority in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-8; 2) served via e-mail on Ms. Victoria Goldberg, Federal Communications Commission, Wireline Competition Bureau, Pricing Policy Division at victoria.goldberg@fcc.gov; and 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bepiweb.com.

/s/Richard Grozier

March 12, 2009