

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

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| In the Matter of |) | |
| Petition for Declaratory Ruling |) | |
| That, Pursuant to the Carve-Out |) | |
| Provisions of 47 U.S.C. § 251(g), |) | |
| Interstate Originating Access Switched |) | WC Docket No. 09-8 |
| Access Charges, Non-Reciprocal |) | |
| Compensation Charges, Apply to ISP- |) | |
| Bound Calls That Are Terminated via |) | |
| VNXX-type Foreign Exchange |) | |
| Arrangements |) | |
| |) | |

COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

In its petition, Blue Casa urges the Commission to apply 47 U.S.C. §251(g), which preserves certain regulations that pre-dated the 1996 Telecommunications Act, to traffic patterns that could not have existed at that time—traffic patterns created by virtue of the 1996 Act.¹ Blue Casa seeks to avoid paying reciprocal compensation and instead collect much-higher access charges for calls to other competitive local exchange carriers serving Internet Service Providers (ISPs) through what has come to be known as “virtual NXX” network configurations. Yet Blue Casa’s request is precluded both by Commission and judicial precedent, including the FCC’s reconfirmation just last November that ISP-bound calls are subject to reciprocal compensation under 47 U.S.C. §251(b)(5) *instead of* Section 251(g). Level 3 urges the Commission to deny this petition.

¹ *In re Declaratory Ruling That, Pursuant to the Carve-Out Provisions at 47 U.S.C. §251(g), Interstate Originating Switched Access Charges, Not Reciprocal Compensation Charges, Apply to ISP-Bound Calls That are Terminated via VNXX-type Foreign Exchange Arrangements*, WC Docket No. 09-8, DA 09-467 (“Blue Casa Petition”).

I. Introduction

Blue Casa's Petition seeks a declaratory ruling with respect to traffic that terminates via what it calls "'virtual NXX' ('VNXX') -type foreign exchange arrangements," but Blue Casa fails to define this critical term. However, since Blue Casa is a competitive local exchange carrier, Level 3 believes the calls at issue are those where a Blue Casa customer dials a local number to reach a dial-up ISP served by a competing local exchange carrier. In that scenario, the end user making the call purchases local exchange services from Blue Casa. The dial-up ISP purchases local exchange services, including the capability to receive inbound traffic from the PSTN and the telephone number at which calls are to be received, from another local exchange carrier. In addition, the Blue Casa end user purchases Internet access services from the dial-up ISP. In this scenario, the telephone number provided by the terminating local exchange carrier to the ISP is associated with a rate center in the same local calling area as the telephone number assigned by Blue Casa to its customer. When the end user makes the call, his computer dials the number assigned by the terminating local exchange carrier to the ISP. For purposes of these comments, Level 3 believes that Blue Casa intends to cover these "locally dialed" calls between the customers of two competing local exchange carriers and these comments focus on that specific calling pattern.² Blue Casa, however, states that unless the ISP receives the call in the same local calling area as Blue Casa's customer, then the call is a "virtual NXX" call and that instead of paying reciprocal compensation to the terminating carrier someone owes access charges to Blue Casa.

² Blue Casa's Petition also refers to 800 dialed calls to ISPs and traditional toll long distance calls to ISPs. These are red-herrings as there does not appear to be significant dispute as to how to rate those calls. Level 3's comments will focus solely on locally dialed calls to ISPs.

Blue Casa's argument is without merit. The Commission's decision in the 2008 *Mandamus Order*³ leaves no doubt that ISP-bound calls fall under the reciprocal compensation provisions of the Act. Blue Casa's position requires suspending the regulatory reality of the Telecom Act and importing irrelevant rules from an era during which neither Blue Casa nor the carrier serving the ISP would have been able to operate as a competitive provider.

II. Two Systems of Intercarrier Compensation

At the heart of the question of how locally dialed ISP-bound calls should be classified lie two sets of rules governing how interconnected carriers compensate each other for exchanging a call. One set—providing for “access charges”—predated the 1996 Act and governs long-distance toll calls. In the pre-Act calling pattern, there are three carriers involved in a typical long-distance toll call. An originating incumbent local exchange carrier (“LEC”), which serves the party making the call, delivers the call to an interexchange carrier (“IXC”), which in turn carries the call to the terminating LEC, which finally delivers the call to the party being called.⁴ Under the access charge rules, the IXC pays access charges to both the originating LEC and the terminating LEC.⁵ The IXC obtains its payment entirely from the calling party who selected the IXC for long distance services.⁶

³ *In re High-Cost Universal Service Support*, WC Docket No. 05-337, 2008 FCC LEXIS 7792 (rel. Nov. 5, 2008) (hereafter *2008 Mandamus Order*).

⁴ *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Local Competition Order*, First Report and Order, 11 FCC Rcd 15499, 16013, ¶1034 (1996) (hereafter *Local Competition Order*).

⁵ 47 C.F.R. §69.5(b); *In re Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 9613-14, ¶¶6-7.

⁶ *Local Competition Order*, 11 FCC Rcd at 16013, ¶1034.

The second set of rules—providing for “reciprocal compensation”—came into existence with the 1996 Act. A typical call requiring reciprocal compensation involves two carriers, an originating LEC and a terminating LEC, both of which provide network connections and telephone numbers to their respective customers. In contrast to access charges, under the reciprocal compensation rules of the Act, an originating carrier cannot levy an origination charge on the terminating carrier.⁷

This second set of rules, providing for reciprocal compensation, is governed by Section 251(b)(5) of the Act. As the FCC has stated, Section 251(b)(5) applies on its face to all telecommunications exchanged by interconnected carriers.⁸ Yet there is one, temporary limit on its scope. Section 251(g)⁹ of the Act preserved the pre-1996 Act regulatory regime that applied to certain traffic, including access traffic, until the FCC acted to bring such traffic within the scope of Section 251(b)(5).¹⁰ The question presented by Blue Casa’s petition, then, is whether

⁷ 47 C.F.R. §51.703(b).

⁸ *See, e.g., 2008 Mandamus Order*, 2008 FCC LEXIS 7792, ¶15; *ISP Remand Order*, 16 FCC Rcd at 9165-66, ¶31.

⁹ Section 251(g) provides that, after the enactment of the 1996 Act:

each local exchange carrier ... shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment ... under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission.

47 U.S.C. §251(g).

¹⁰ *Id.* ¶16.

Section 251(g) preserved any pre-1996 Act regulatory treatment over ISP-bound VNXX calls. It did not.

III. ISP-bound traffic falls under Section 251(b)(5) of the Act whether “Local” or Not

The Commission’s November 5, 2008 *Mandamus Order* eliminates any confusion over which set of rules applies to the traffic at issue here: originating access charges cannot apply to ISP-bound calls exchanged by competing local exchange carriers delivered via “virtual NXX.”

In this recent order, the Commission found that ISP-bound traffic fell under Section 251(b)(5) of the 1996 Act. It also reaffirmed its finding from the *ISP Remand Order* that “section 251(b)(5) is not limited to local traffic.”¹¹ The Commission wrote: “Because Congress used the term ‘telecommunications,’ the broadest of the statute’s defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic.”¹² The Commission made clear that the *ISP Remand Order* had repudiated the approach it had initially taken in the 1996 *Local Competition Order*.¹³ The Commission said: “To be sure, we acknowledge that, in the *Local Competition Order*, the Commission found that section 251(b)(5) applies only to local traffic. . . . [H]owever, the Commission, in the *ISP Remand Order*, reconsidered that judgment and concluded that it was a mistake to read section 251(b)(5) as limited to local traffic, given that ‘local’ is not a term used in section 251(b)(5).”¹⁴ The Commission further described the *ISP Remand Order* as “revers[ing] course on the scope of section 251(b)(5)” and finding that “the scope of section

¹¹ 2008 *Mandamus Order*, 2008 FCC LEXIS 7792, ¶7.

¹² *Id.* ¶8.

¹³ *Local Competition Order*, 11 FCC Rcd 15499 (1996).

¹⁴ 2008 *Mandamus Order*, 2008 FCC LEXIS 7792, ¶7.

251(b)(5) is limited only by section 251(g).”¹⁵ The November 5 order correctly noted that “[o]n appeal, the D.C. Circuit left intact the Commission’s findings concerning the scope of section 251(b)(5), although it took issue with other aspects of the *ISP Remand Order*.”¹⁶ Finally, the Commission explained that because “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),” “we find that ISP-bound traffic falls within the scope of section 251(b)(5).”¹⁷

IV. Section 251(b)(5) traffic does not qualify for the savings provisions of §251(g)

In its Petition, Blue Casa asks the FCC to ignore its analysis and conclusions in the *2008 Mandamus Order* done at the direction of the D.C. Circuit Court in *WorldCom v. FCC*.¹⁸ Instead, Blue Casa tries to create an issue by drawing factually inaccurate comparisons between the systems of intercarrier compensation that existed before and after the Act. These comparisons are irrelevant since they derive from separate regulatory environments. The Commission need not go down that road since it has already analyzed the Telecommunications Act of 1996, its orders and precedent and concluded this debate, as described above. The courts, likewise, have foreclosed Blue Casa’s position.

The judicial precedent most relevant here is the line of D.C. Circuit cases reviewing the relevant FCC orders and interpreting §§251(b)(5) and 251(g). They preclude Blue Casa’s position that locally dialed ISP-bound traffic is covered by §251(g)’s transitional provisions and not § 251(b)(5). As discussed earlier, and as the FCC reconfirmed in its *2008 Mandamus Order*,

¹⁵ *Id.* ¶9.

¹⁶ *Id.*

¹⁷ *Id.* ¶16.

¹⁸ *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

the *ISP Remand Order* held that §251(b)(5) applies on its face to *all* telecommunications traffic that LECs exchange with any telecommunications carriers.¹⁹ The *ISP Remand Order* further explained, however, that certain traffic is temporarily carved out of §251(b)(5) by §251(g).²⁰ Because all traffic is covered by §251(b)(5) unless removed by §251(g), under the *ISP Remand Order* the two provisions cover the waterfront when it comes to telecommunications traffic. See *2008 Mandamus Order*, 2008 FCC LEXIS 7792, ¶9 (explaining that in the *ISP Remand Order*, “[t]he Commission found that the scope of section 251(b)(5) is limited only by section 251(g), which temporarily grandfathered the pre-1996 Act rules governing” certain traffic); *Pacific Bell v. Pac-West Telecomm*, 325 F.3d 1114, 1122 (9th Cir. 2003) (explaining that in the FCC’s *ISP Remand Order*, “the FCC concluded that §251(b)(5) applied to all telecommunications traffic except for categories specifically enumerated in §251(g)”).

When it reviewed the *ISP Remand Order* in *WorldCom*, however, the D.C. Circuit held that “ISP-bound traffic” *cannot* fit within subsection (g). *Worldcom*, 288 F.3d at 434 (“§251(g) does not provide a basis” for exempting ISP-bound traffic from §251(b)(5)’s reciprocal compensation provisions). That subsection, the court explained, continues the effect of certain pre-1996 Act federal obligations on LECs until the Commission has occasion to “explicitly supersede[]” them by regulations implementing the 1996 Act.²¹ But, as the court explained, there were *no* pre-1996 Act obligations relating to intercarrier compensation for ISP-bound traffic between local exchange carriers like Blue Casa and other competitive telecommunications carriers; in fact, there were no preexisting federal requirements for them to interconnect to

¹⁹ See *ISP Remand Order*, 16 FCC Rcd at 9165-66, ¶31.

²⁰ See *id.* at 9166-67, ¶¶33-34.

²¹ *WorldCom*, 288 F.3d at 432; see also *2008 Mandamus Order*, 2008 FCC LEXIS 7792, ¶9.

transmit such traffic at all. *See WorldCom*, 288 F.3d at 433. The FCC reiterated as much in its *2008 Mandamus Order*: “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.’”²² There were thus no provisions relating to ISP-bound traffic that could be “grandfathered” by §251(g).

Equally significant, the *WorldCom* court found a second problem with trying to fit ISP-bound traffic into §251(g). By its plain terms, the court explained, §251(g) applies only to “services provided ‘to interexchange carriers and information services providers’; LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP.”²³ Thus, a LEC serving an ISP is entitled to reciprocal compensation from Blue Casa if its end users originate the call to the ISP.²⁴

Both of these holdings preclude Blue Casa’s request to extend §251(g) to VNXX ISP-bound traffic. Like the *ISP Remand Order*, *WorldCom* addressed *all* ISP-bound traffic: it made no distinction between “local” and “non-local” ISP-bound traffic. And *WorldCom*’s holding cannot logically be limited to “local” ISP-bound traffic, even if such a term had any legal significance for purposes of intercarrier compensation either then or now. Again, *WorldCom* held that §251(g) applies only to preserve federal interconnection obligations that predated the 1996 Act. But there was no “federally created obligation for LECs to interconnect to each other

²² *2008 Mandamus Order*, 2008 FCC LEXIS 7792, ¶16 (quoting *Worldcom*, 288 F.3d at 433) (emphasis in original).

²³ *WorldCom*, 288 F.3d at 433-34 (quoting 47 U.S.C. §251(g)).

²⁴ In addition, this traffic could not have fallen under Section 251(g) because it was not “exchange access.” To be exchange access, Blue Casa would have had to been providing the origination for a “telephone toll service.” *See* 47 U.S.C. §153(16). The record does not show that any party received a “separate charge” necessary to create a “telephone toll service[]” as defined in 47 U.S.C. §153(48).

for ISP-bound calls,” 288 F.3d at 433, regardless of whether those calls were VNXX calls or were returned to the local calling area before being routed to the Internet. Indeed, since neither locally dialed VNXX traffic nor CLECs like Blue Casa (or CLECs that serve ISPs) existed prior to the Act, it makes no sense to talk about a pre-1996 federal interconnection obligation for such calls or the compensation mechanism for those calls when dealing with post-Act traffic.

Moreover, the *WorldCom* court’s point that LEC-to-LEC services are not covered by §251(g) controls here—a competitive local exchange carrier is neither an “interexchange carrier” nor an “information service provider.” Accordingly, when locally dialed ISP-bound traffic is exchanged between Blue Casa and another local exchange carrier, Blue Casa cannot assess the terminating carrier the costs of its network on its side of the point of interconnection. *See* 47 C.F.R. §51.703(b).²⁵

V. Congress Did Not Intend For New Types of Traffic to be Covered by Section 251(g)

As explained above, Congress enacted Section 251(g) to preserve, on a temporary basis, the pre-1996 Act regulatory environment of certain traffic until such a time as the FCC could bring that traffic within the scope of the 1996 Act’s provisions governing reciprocal compensation. Congress did so only grudgingly—in general, the Act sought to *eliminate* implicit subsidies, including the access charges Blue Casa seeks to extract from ISP-serving CLECs. But Congress recognized that where such subsidies already existed, the FCC would need some time to adjust the regulatory regime. It would be entirely contrary to Congress’s intent, however, to add *new* forms of traffic—traffic that could not have existed, between entities

²⁵ Blue Casa spends much of its energy arguing that ISP-bound VNXX traffic is like foreign exchange traffic. *WorldCom* and the Commission’s orders, however, make clear that such analogies are simply irrelevant to the question of whether Section 251(g) applies. As we explain, there were no pre-1996 Act regulations governing the traffic Blue Casa’s petition is concerned about, and whatever the regulatory treatment was for traffic that resembles—whether a little or a lot—the traffic at issue here is thus of no moment.

that themselves could not have existed—to the category of traffic governed by the pre-1996 Act rules.

VI. Conclusion

Blue Casa is a competitive local exchange carrier that exchanges locally dialed ISP-bound traffic with competing local exchange carriers. Prior to the Act, locally dialed ISP-bound traffic could not be exchanged between carriers. The Commission, as well as the D.C. Circuit, has been clear that the traffic at issue cannot fall under Section 251(g) because it did not pre-date the Act and that it is properly subject to Section 251(b)(5). Blue Casa rests the foundation of its Petition on illogical comparisons with the pre-Act compensation regime. But that is exactly what the Act, the D.C. Circuit and the Commission have said cannot be done. The FCC should reject this petition.

Respectfully submitted,

/s/

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Date: March 14, 2009

ND: 4831-0049-3315, v. 4