

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

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)	Docket No. 09-8
Access Charges, Non-Reciprocal)	
Compensation Charges, Apply to ISP-)	
Bound Calls That Are Terminated via)	
VNXX-type Foreign Exchange)	
<u>Arrangements</u>)	

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications LLC submits these Reply Comments concerning the Petition for Declaratory Ruling of Blue Casa Communications Inc.

The initial comments leave the Commission with two stark choices. The first, expressed by competitive local exchange carriers and supported by Level 3, follows the Telecommunications Act of 1996 (“1996 Act”) and the D.C. Circuit’s decision in *WorldCom, Inc. v. Federal Communications Commission*, 288 F.3d 429 (D.C. Cir. 2002), and complies with Commission’s classification of locally dialed ISP bound traffic as falling under the reciprocal compensation provisions of Section 251(b)(5) of the Communications Act of 1934, as amended by the 1996 Act.¹

The alternative, offered by Blue Casa, Qwest, and their supporters, invites the Commission to extend federal and/or state access-charge rules to traffic that did not exist prior to the 1996 Act, but which these carriers deem to be “analogous” to various types of

¹ *In re High-Cost Universal Service Support*, FCC 08-262, 2008 FCC LEXIS 7792 (rel. Nov. 5, 2008) (“2008 Mandamus Order”).

pre-1996 Act traffic for which access charges were and are paid. Whatever the strength of those analogies, Congress foreclosed that path: the plain language of Section 251(g) temporarily preserves only rules that existed on the day *prior* to the enactment of the 1996 Act. For all other traffic, Congress established Section 251(b)(5) to govern traffic exchange between a LEC and any other telecommunications carrier.

I. ISP-BOUND TRAFFIC EXCHANGED BY LECS IS SUBJECT TO RECIPROCAL COMPENSATION BECAUSE IT IS TRAFFIC THAT DID NOT EXIST BEFORE THE 1996 TELECOMMUNICATIONS ACT.

As explained in Level 3’s initial comments, locally dialed ISP-bound VNXX traffic is governed by the two payment regimes for the exchange of telecommunications traffic established by the plain language of 47 U.S.C. § 251. The first regime — created by Section 251(b)(5) — establishes a default rule applicable to the “transport and termination of telecommunications” traffic. Under this rule, local exchange carriers must pay reciprocal compensation to carriers that transport or terminate telecommunications traffic on their behalf. The second regime — created by Section 251(g) — creates a narrow, temporary exception to Section 251(b)(5) for specific traffic that was already being exchanged between telecommunications carriers. The exception provides for the “[c]ontinued enforcement” of access charges as to certain types of traffic that was being exchanged prior to the Telecommunications Act of 1996 — specifically, traffic exchanged between a LEC and an “interexchange carrier[]” or “information service provider[].”²

The ISP-bound VNXX traffic cited by Blue Casa falls under Section 251(b)(5) because it is “telecommunications” traffic. Moreover, that traffic is not carved out by

² 47 U.S.C. § 251(g).

Section 251(g) because it is not a type of traffic that existed prior to the 1996 Telecommunications Act. Prior to the 1996 Act, LECs had no obligation to exchange ISP-bound traffic with other LECs; thus, there were no access charge rules governing this traffic, and there are no pre-Act rules to be “preserved” under Section 251(g).

II. THE INCUMBENTS’ ANALOGY TO FOREIGN EXCHANGE IS FLAWED BECAUSE 251(G) CANNOT BE EXTENDED BY ANALOGY.

Despite the unambiguous state of the law, Blue Casa and incumbent carriers like Qwest, the ILEC national trade associations, Frontier, and the Washington Independent Telephone Association draw tortured analogies between traffic patterns and rules that existed prior to the 1996 Act and the new traffic patterns and rules that sprang from the introduction of local exchange competition through the 1996 Act. Qwest, for example, offers a detailed discussion of how incumbent local exchange carriers — who faced no competition in their local markets — provided foreign exchange service to their customers prior to 1996, and how access charge rules applied when two neighboring, but non-competing ILECs collaborated to deliver foreign exchange traffic to an interconnected interexchange carrier. In those instances, the incumbent local exchange carrier worked with an interexchange carrier or another incumbent exchange carrier to provide a customer a physical presence in another calling area.³

These arguments miss the point. Section 251(g) does not apply to traffic that is “like” pre-Act traffic to which access charges apply. On the contrary, Section 251(g) applies only to types of traffic that were *already being exchanged* prior to the passage of the 1996 Telecommunications Act. Thus, the provision allowed carriers to collect access

³ While the incumbents focus on interexchange carriers, they are silent on those instances in which the incumbent provisioned the foreign exchange service between separate calling areas within its operating territory.

charges for specific traffic that was already being exchanged under the Act. It did not, however, authorize the Commission to expand the access charge regime to other traffic that was not already being exchanged.

This was the central holding of the D.C. Circuit's decision in *WorldCom v. FCC*. In that case, the court explained that Section 251(g) preserved the Commission's access charge rules with respect to traffic delivered by local exchange carriers to interexchange carriers and information service providers. Thus, it could not be read to encompass traffic exchanged by competing local exchange carriers that was destined for an information service provider, traffic that had not existed prior to the 1996 Act. The court reasoned that to permit such new types of traffic to be swept within the ambit of Section 251(g) by analogizing it to pre-1996 Act traffic would allow the FCC to "override virtually any provision of the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations."⁴ But, the court continued, the statute could not be read so broadly: "Because that section is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act, we find the Commission's reliance on § 251(g) precluded."⁵ The D.C. Circuit thus precluded what Blue Casa, Qwest and similarly situated carriers are trying to do in this proceeding — extend by analogy the pre-1996 Act access charge rules to new types of traffic.

What Qwest ignores is that the traffic discussed by Blue Casa did not exist prior to the 1996 Act. Here, the traffic is exchanged by two LECs competing in the same area, both of whom are providing local services, including the ability to receive telephone calls

⁴ *WorldCom, Inc. v. FCC*, 288 F. 3d 429, 433 (D.C. Cir. 2002) ("*WorldCom*").

⁵ *Id.* at 430.

at a particular telephone number and the assignment of the telephone number itself. As the D.C. Circuit noted in *WorldCom*, there was “no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic” exchanged by two competing LECs.⁶ Qwest thus asks the Commission to do again what the Court in *WorldCom* rejected — to extend the pre-1996 rules to post-1996-Act traffic exchanges.

Unable to overcome the plain language of Sections 251(g) and 251(b)(5), Qwest turns to regulatory alchemy and attempts to convert its competitor into a “CLEC/IXC.”⁷ That term is not defined in the Act or the Commission’s rules. However, Qwest’s intent is clear. By morphing its competitor into an “interexchange carrier,” Qwest wants the Commission to believe that these locally dialed calls are not exchanged between two local exchange carriers competing in the same service territory but instead represent a call between a pre-Act incumbent and an interexchange carrier. Qwest goes further and misleads the Commission by stating that the Commission’s access rules apply “whether the IXC doubles as a CLEC and exchanges local traffic with an ILEC.”⁸ Qwest makes this statement without citing to a rule for when an “IXC doubles as a CLEC” and fully knowing that traffic exchanged between a CLEC and an ILEC is not “saved” by the restrictions imposed on access charges by section 251(g). Qwest and the other incumbents bet their case on morphing a competitive local exchange carrier into an interexchange carrier, hoping that the Commission enacts, in error, the restrictions imposed on access charges by Section 251(g).

⁶ *WorldCom*, 288 F.3d at 433.

⁷ In the Matter of Petition of Blue Casa Communications Inc. for Declaratory Ruling Concerning Intercarrier Compensation for ISP-Bound VNXX Traffic, WC Docket No. 09-8 (filed December 18, 2008); Comments of Qwest Communications International Inc., WC Docket No. 09-8 (filed March 12, 2009) at 1 (“Qwest Comments”).

⁸ Qwest Comments at 2.

The ILECs make clear that what this is really about is the money. Beset by declining access minutes generally, the ILECs now seek to expand the pool of access traffic from which they can derive implicit subsidies. But Section 254(e) bars the Commission from heading down that road. As the Fifth Circuit made clear in *COMSAT v. FCC*, “the FCC cannot maintain any implicit subsidies whether on a permissive or mandatory basis,”⁹ (internal quotation marks omitted). That is what granting Blue Casa’s request for a declaratory ruling would do — extend pre-1996 access charge rules to post-1996 Act traffic that Congress left outside of Section 251(g)’s transitional provisions.

III. THE LOCAL COMPETITION RULES DO NOT SUPPORT QWEST’S POSITION.

Hoping to further confuse the Commission, Qwest contends that nothing has changed the rules that govern “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.”¹⁰ In making that misleading statement, Qwest does not cite to a specific rule. But that doesn’t matter because Qwest is not focused on the correct rule. The correct rule for the traffic raised by Blue Casa does not come from the access rules covered in Part 69 but instead from the local competition rules established by the Commission that implemented the Act.

As described by Global NAPs, the Commission set out the guidelines for traffic exchanged between LECs under Section 251(b)(5) in Rules 701 to 717.¹¹ Specifically,

⁹ *Comsat Corp. v FCC*, 250 F.3d 931, 939 (5th Cir. 2002).

¹⁰ Qwest Comments at 26.

¹¹ Global Naps Comments on Petition for Declaratory Ruling, WC Docket No 09-8 (filed March 12, 2009) at 3.

the regulatory framework for intercarrier compensation of telecommunications traffic is set out in Rule 703:

Reciprocal compensation obligations of LECs

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

This unambiguous rule defeats the arguments of Blue Casa, Qwest, and their supporters that they are entitled to originating access charges for locally dialed VNXX-type ISP bound calls. Since the FCC and *WorldCom* court have found that locally dialed calls to ISPs do not fall into the restricted class of traffic for which access charges are preserved under Section 251(g) and instead fall under Section 251(b)(5), the correct rule for the FCC to enforce is 703(b). That rule bars any incumbent like Qwest or a competitive provider like Blue Casa (or even Level 3) from recovering originating access for the use of its network on its side of the point of interconnection when traffic is exchanged pursuant to Section 251(b)(5).

Qwest's arguments also fail because they do not accurately represent the types of local exchange carriers involved in the provision of foreign exchange service. Prior to the Act, Qwest would not have been provisioning foreign exchange or jointly provisioned access with a competitive provider. Instead, the only other LEC that would have been involved was the incumbent provider in the service territory where the customer either had its physical presence or sought to expand its reach. In those instances, the access rules were designed to ensure that the two incumbent providers would be appropriately compensated for any lost access revenue because the calls would normally have been

exchanged by a traditional long distance call. Yet these obligations do not apply in an instance where an incumbent local exchange carrier and a competitive local exchange carrier are exchanging locally dialed calls. So contrary to Qwest's protestations, the Commission would not be "changing its rules" by rejecting the Blue Casa petition, rather Qwest reaches this conclusion because it applies wrong rules in the first instance. By rejecting the petition, the FCC would be correctly enforcing its existing rules for the exchange of Section 251(b)(5) traffic between LECs.

IV. BLUE CASA'S REQUESTED RELIEF IS NOT IN THE PUBLIC INTEREST.

Although the ILECs generally treat intercarrier compensation for VNXX as an issue that implicates only the flow of money between carriers, it has a much broader public interest impact. Dial-up Internet access is still the only method of Internet access available to those who cannot afford a broadband connection. (What is especially ironic about this Petition is that Blue Casa provides California Lifeline services to the members of society who must rely on dialup internet access.¹²) Similarly, it is the only method of Internet access for consumers in rural areas that are unserved by broadband. The impact of granting Blue Casa's petition, or making some of the other declarations requested by the ILECs, would be to raise the price of dial-up Internet access services, and to cause ISPs to drop dial-up service in rural areas. It is these areas for which VNXX enables cost-effective service delivery, and it is these areas that will assuredly lose dial-up Internet access service if the FCC embraces rules that would require ISPs to locate in

¹² See: www.BlueCasa.com

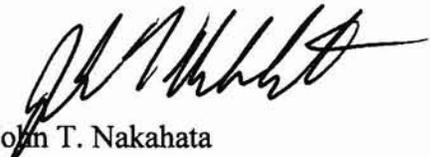
each local calling area in order not to be subject to access charges on inbound calls to the ISP.

VI. CONCLUSION

The law is clear. Locally dialed VNXX-type calls bound for ISPs fall under the reciprocal compensation provisions of the Act and the *2008 Mandamus Order*. Since these calls did not pre-date the implementation of the Act, access charges cannot apply under Section 251(g). Blue Casa, Qwest and other incumbent providers have tried to muddy the record by relying on tortured analogies to inappropriately impose pre-Act rules on post-Act traffic. The Commission should reject the Blue Casa Petition and in doing so should eliminate any doubt that locally dialed, VNXX-type ISP-bound calls are subject to the reciprocal compensation provisions of the Act.

Respectfully submitted,

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