

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling That,)	
Pursuant to the Carve-Out Provisions of)	WC Docket No. 09-8
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)	

REPLY COMMENTS OF AT&T INC.

Blue Casa Communications, Inc. (Blue Casa) seeks a declaratory ruling that, pursuant to section 251(g) of the Telecommunications Act of 1996 (1996 Act), originating interstate switched access charges, not reciprocal compensation charges, apply to calls to Internet Service Providers (ISPs) delivered through virtual NXX foreign exchange (virtual FX or VNXX) arrangements. Its petition is the most recent in a steady stream of filings made with the Commission over the past several years seeking a declaratory ruling or a clarification concerning discrete aspects of the Commission's intercarrier compensation rules. Absent comprehensive reform, the Commission should expect that stream to continue, as carriers are forced to seek regulatory band-aids as each new intercarrier compensation problem or dispute arises.¹ While AT&T agrees with Verizon that the Commission should focus its resources on finally enacting comprehensive intercarrier compensation reform, rather than continuing to address these issues

¹ See, e.g., Letter from Robert W. Quinn, Jr., AT&T, to Chairman Kevin Martin, FCC, CC Docket Nos. 01-92, 96-45, 99-68, WC Docket Nos. 05-337, 07-135 (filed July 17, 2008) (explaining that if the FCC fails to implement comprehensive intercarrier compensation reform, it will be forced to address issues such as the appropriate intercarrier compensation for VoIP traffic, traffic pumping, asymmetrical compensation for IP-PSTN traffic, IP-in-the-middle, interconnection point manipulation, and phantom traffic).

on a piecemeal basis,² if the Commission is unable or unwilling to do so, it should affirm that all jurisdictionally interstate FX traffic, including all ISP-bound virtual FX traffic, remains subject to interstate access charges – not reciprocal compensation – consistent with section 251(g).

AT&T disagrees with Verizon when it argues that the Commission should “decline to grant” Blue Casa’s petition because there is no controversy or uncertainty.³ To the contrary, as noted by the “Associations,”⁴ Embarq, Qwest, and others, state commissions and courts have reached different conclusions when confronted with this matter.⁵ While Commission precedent clearly establishes that originating access charges apply to all interstate FX traffic (which includes the traffic at issue here), disputes continue to arise. Indeed, AT&T itself currently is embroiled in a proceeding before the Wisconsin Public Service Commission on this very issue, *i.e.*, what is the appropriate compensation regime applicable to ISP-bound virtual FX traffic.⁶ Commission affirmation that such traffic is subject to interstate originating access charges, not reciprocal compensation payments, would “terminat[e] a controversy”⁷ and would put a halt to expensive and unnecessary litigation that has been occurring throughout the states and courts.

² Verizon Comments at 5.

³ *Id.* at 3 (citing 47 C.F.R. § 1.2).

⁴ NECA, NTCA, ITTA, OPASTCO, USTelecom, and WTA filed joint comments and referred to themselves as the “Associations.”

⁵ *See, e.g.*, Associations Comments at nn. 12, 13, 14; Embarq Comments at n.13; Qwest Comments at n.13.

⁶ *See Application for Approval of the Interconnection Agreement Between Southwestern Bell Telephone Company d/b/a AT&T Kansas (AT&T Kansas) and CoreTel Kansas, Inc.*, Docket No. 5-TI-1875, AT&T Wisconsin’s Supplemental Brief on VFX Issue, filed with the Public Service Commission of Wisconsin on March 11, 2009.

⁷ 47 C.F.R. § 1.2.

According to its petition, Blue Casa is a local exchange carrier providing residential service in California. Some of its subscribers obtain dial-up service from ISPs located out of Blue Casa's local calling area. While these calls appear to Blue Casa's customers to be local calls because the NPA-NXX of the number dialed is associated with a rate center in the local calling area, the "vast majority" of these calls are interexchange calls transported to ISPs located in distant exchanges outside of Blue Casa's local calling area.⁸ Blue Casa does not deliver these calls directly to the ISPs; rather, it hands this ISP-bound virtual FX traffic off to other carriers for routing and carriage to the ISPs.⁹ Consistent with the Commission's long-standing rules governing the assessment of access charges on FX traffic, Blue Casa has attempted, without success, to collect originating switched access charges from the carriers to which it hands-off ISP-bound virtual FX traffic, while these carriers, in turn, have sought reciprocal compensation from Blue Casa (which Blue Casa has refused to pay) for "terminating" these calls to the ISP.¹⁰ Blue Casa asks the Commission to resolve this dispute by clarifying that, insofar as the Commission's access charge rules applicable to FX traffic pre-date the 1996 Act and have not been explicitly superseded, originating access charges (not reciprocal compensation payments) apply to all virtual FX traffic (including ISP-bound virtual FX traffic) pursuant to section 251(g) of the 1996 Act.¹¹ AT&T agrees with Blue Casa.

There is no dispute that section 251(g) of the 1996 Act preserves any compensation regime the Commission had adopted for access traffic prior to 1996 until the Commission

⁸ Blue Casa Petition at 2.

⁹ *Id.* at 1.

¹⁰ *Id.* at 2.

¹¹ *Id.*

explicitly supersedes those rules.¹² As the Commission recently observed in its *Second ISP Remand Order*, “traffic encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope. Section 251(g) preserved the pre-1996 Act regulatory regime that applies to access traffic, including rules governing ‘receipt of compensation.’”¹³ Likewise, there can be no dispute that, under long-standing Commission rules, access charges apply to jurisdictionally interstate FX service.¹⁴ Specifically, as Blue Casa points out, under the access charge regime adopted in 1984 (more than a decade prior to enactment of sections 251(g) and 251(b)(5) in the 1996 Act), interstate originating access charges apply to all jurisdictionally interstate FX traffic.¹⁵ Thus, there can be no question that, pursuant to the carve-out in section 251(g), the Commission’s access charge rules applicable to FX traffic (including ISP-bound virtual FX traffic) remained intact following passage the 1996 Act, unless and/or until the Commission expressly superseded those rules.¹⁶

¹² 47 U.S.C. § 251(g); *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002) (*WorldCom*); see also Core Communications Comments at 4.

¹³ *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 Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*; CC Docket Nos: 96-45, 99-200, 01-92, 99-68; WC Docket Nos. 05-337, 03-109, 06-122, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 2008 WL 4821547, ¶ 16 (rel. Nov. 5, 2008) (citing 47 U.S.C. § 251(g)) (*Second ISP Remand Order*).

¹⁴ See *MTS and WATS Market Structure*, 97 F.C.C.2d 834, ¶¶ 97-101 (1984) (*MTS and WATS Order*); Embarq Comments at 3; Qwest Comments at 25-26.

¹⁵ Blue Casa Petition at 4 (citing *MTS and WATS Order* at ¶¶ 97-101).

¹⁶ Core Communications’ assertion that virtual FX traffic cannot be carved out under section 251(g) because it does not meet the definition of “exchange access” since there is no “telephone toll service” “for which there is made a separate charge” should be summarily dismissed. Core Communications Comments at 4. See also Global NAPs Comments at 7. In context, it is clear that Congress’s definition of “telephone toll service” was meant to focus on the *type* of service provided, not a specific manner in which telephone companies might charge for that service. At the time Congress enacted these definitions

The only issue, then, is whether the Commission’s orders relating to intercarrier compensation for ISP-bound traffic modified the access charge rules applicable to ISP-bound virtual FX traffic. As shown below, they did not.

In its 2001 *ISP Remand Order*, the Commission found that it was authorized pursuant to section 251(g) to carve out from section 251(b)(5) calls made to ISPs located within the caller’s local calling area.¹⁷ The D.C. Circuit disagreed with this FCC finding, concluding that (1) there was no pre-1996 Act obligation relating to intercarrier compensation for ISP-bound traffic to ISPs located in the caller’s local calling area and (2) “section 251(g) speaks only of services provided ‘to interexchange carriers and information service providers’; LECs’ services to other LECs, even if en route to an ISP, are not ‘to’ either an IXC or to an ISP.”¹⁸ While the D.C. Circuit rejected the Commission’s finding concerning the applicability of section 251(g) to traffic delivered to an ISP with a server located in the caller’s local calling area, neither it nor the

in 1934, the distinction between “local” and “non-local” service normally correlated to the imposition of a separate, per-minute charge for toll calls. But nothing in the statutory language or the context supports the notion that the presence or absence of a per-minute charge was, in Congress’s view, the dispositive factor. Moreover, there is no doubt that “section 251(g) preserves the requirements of the AT&T Consent Decree [i.e., the Modified Final Judgment (MFJ)].” *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151, n.64 (2001) (*ISP Remand Order*), remanded but not vacated by *WorldCom*. The MFJ, in turn, required Bell Operating Companies to “provide to all interexchange carriers and information services providers exchange access, information access, and exchange services for such access.” See *United States v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). It defined “exchange access” as “the provision of exchange services for the purpose of originating or terminating inter-exchange telecommunications,” and defined “interexchange telecommunications” as “telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area.” *Id.* at 228-29. In short, the “exchange access” obligations imposed by the MFJ – and hence incorporated into the Act via section 251(g) – apply to all “interexchange” telecommunications, irrespective of the imposition of separate toll charges upon particular interexchange calls.

¹⁷ *ISP Remand Order* at ¶ 44; *WorldCom*, 288 F.3d at 430.

¹⁸ *WorldCom*, 288 F.3d at 433-34.

FCC addressed ISP-bound traffic that is transported and terminated *outside* of the calling party's local calling area (i.e., ISP-bound virtual FX traffic).¹⁹ That is why, for example, 1+ calls that are made to ISPs are indisputably subject to the access charge regime today.

FX traffic "terminated" to an ISP is no different from such 1+ calls. As with ordinary 1+ calls, such traffic has been treated as access traffic subject to access charges since long before enactment of the 1996 Act. Pursuant to that longstanding policy, when a carrier transports FX traffic outside the local calling area in which the traffic originates, that carrier is acting as an interexchange carrier that may be assessed originating access charges by the originating LEC. As with 1+ calls, the fact that the call is delivered to an ISP does not somehow transform the call into something other than interexchange traffic to which access charges apply. Hence, the D.C. Circuit's bases for rejecting the section 251(g) rationale that the Commission sought to apply to "calls made to [ISPs] located within the caller's local calling area"²⁰ do not apply to ISP-bound virtual FX traffic. Rather, unless and until the Commission issues regulations that explicitly supersede its pre-1996 Act access charge rules applicable to FX traffic, such traffic continues to be subject to interstate access charges.

Several commenters claim that, regardless of what the Commission may have stated previously regarding the scope of its earlier ISP-bound reciprocal compensation decisions, the Commission's *Second ISP Remand Order* makes clear that all ISP-bound traffic – including

¹⁹ Even an opponent to Blue Casa's petition acknowledges this fact. Pac-West correctly notes that the Commission did not refer to ISP-bound virtual FX traffic in its ISP-bound decisions and quotes with support one court's statement that "VNXX traffic is not mentioned, *much less addressed*, in the *ISP Remand Order*." Pac-West Comments at 4 (emphasis added).

²⁰ *WorldCom*, 288 F.3d at 430.

virtual FX traffic – is now subject to section 251(b)(5).²¹ As the commenters well know, in its *Second ISP Remand Order*, the Commission merely undertook to justify its previous conclusions in the *ISP Remand Order* in response to the *WorldCom* remand. Plainly, the Commission did not broaden the scope of this order to sweep in ISP-bound virtual FX traffic. Indeed, in a filing made with the D.C. Circuit prior to that Court’s writ of mandamus,²² the Commission once again made clear that ISP-bound virtual FX traffic is not addressed by either the *ISP Remand Order* or the *WorldCom* decision: “As this Court recognized in *WorldCom*, the *ISP Remand Order* addressed only those calls to ISPs ‘within the caller’s local calling area.’ 288 F.3d at 430. VNXX-related issues, therefore, are not within the scope of the *WorldCom* remand.”²³ It is inconceivable that, less than one year later, the Commission would reverse itself in the *Second ISP Remand Order* by broadening the scope of its findings and convey this reversal without ever mentioning virtual FX in the order. As Qwest notes, the Commission could not expand the scope of its ISP-bound reciprocal compensation rules beyond the scope of its initial proceeding without notice and comment and it most certainly could not modify its rules without actually acknowledging that it is doing so.²⁴

Several commenters that otherwise support Blue Casa’s petition contend that intrastate – not interstate – access charges apply when the calling party and the called party (i.e., the ISP) are

²¹ Sprint Nextel Comments at 2 (asserting that the FCC’s finding that “ISP-bound traffic falls within the scope of section 251(b)(5)” was “unqualified”); Core Communications Comments at 3 (contending that the *Second ISP Remand Order* “has clarified once and for all that *all* ISP-bound traffic is subject to section 251(b)(5)” (emphasis in original)); Level 3 Comments at 5 (arguing that the *Second ISP Remand Order* “eliminates any confusion over which set of rules applies to the traffic at issue here”).

²² *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008).

²³ Opp. of FCC to Petition for a Writ of Mandamus at 26, *In re Core Commc’ns, Inc.*, (D.C. Cir. 2007) (No. 07-1446).

²⁴ Qwest Comments at 26-28.

within the same state.²⁵ AT&T respectfully disagrees with this conclusion. In its *ISP Declaratory Ruling*, the Commission found that Internet-bound communications

do not terminate at the ISP's local server . . . but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our jurisdiction.²⁶

While the D.C. Circuit concluded in its *Bell Atlantic* decision that the Commission did not adequately explain how its interstate jurisdictional finding was relevant to the applicability of section 251(b)(5), neither that decision nor the D.C. Circuit's *WorldCom* remand disturbed this Commission finding.²⁷ Even opponents to Blue Casa's petition acknowledge this fact.²⁸ Consequently, based on settled Commission precedent, ISP-bound virtual FX traffic is jurisdictionally interstate.

²⁵ See, e.g., Embarq Comments at 6, 9-10; Associations Comments at 8.

²⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, ¶ 12 (1999) (*ISP Declaratory Ruling*), vacated and remanded, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*). See also GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, 13 FCC Rcd 22466, ¶¶ 19, 27 (1998) (reaching the same conclusions one year earlier with respect to GTE's ADSL service).

²⁷ See, e.g., *Second ISP Remand Order* at ¶¶ 21, 22 (noting that both the *Bell Atlantic* and *WorldCom* decisions left the FCC's jurisdictional conclusion intact).

²⁸ See, e.g., Sprint Nextel Comments at 1-2 (quoting with support the *Second ISP Remand Order*); Global NAPs Comments at 9 (FCC reasserted jurisdiction over all ISP-bound calls).

For the foregoing reasons, AT&T recommends that the Commission grant Blue Casa's petition for declaratory ruling and affirm that ISP-bound virtual FX traffic is subject to the Commission's access charge regime.

Respectfully Submitted,



Cathy Carpino
Christopher Heimann
Gary Phillips
Paul K. Mancini

AT&T Inc.
1120 20th Street NW
Suite 1000
Washington, D.C. 20036
(202) 457-3046 – phone
(202) 457-3073 – facsimile

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Its Attorneys