

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of

Petition of Blue Casa Communications, Inc.  
for Declaratory Ruling Concerning Intercarrier  
Compensation for ISP-Bound VNXX Traffic

WC Docket No. 09-8

**REPLY COMMENTS OF VERIZON<sup>1</sup>**

The Commission should exercise its discretion and decline to issue a declaratory ruling on the question of intercarrier compensation for Virtual NXX traffic delivered to dial-up Internet service providers (“ISPs”). As Verizon demonstrated, Blue Casa Communications, Inc. (“Blue Casa”) does not identify any “controversy” a declaratory ruling could “terminat[e]” or any “uncertainty” for the Commission to “remov[e].” 47 C.F.R. § 1.2. Equally important, the Commission’s resources should not be used for a narrow, limited issue, particularly when it is being dealt with through carriers’ agreements.

Instead, the Commission should focus on the broader issue of intercarrier compensation and IP-based services generally. The best use of Commission resources is to ensure that the regulatory structure keeps pace with the broadband and IP-based services of the future, for which consumers, providers, and investors are looking for regulatory certainty. In contrast, and despite the absence of a Commission decision on intercarrier compensation for ISP-bound Virtual NXX traffic, the industry is addressing that issue through interconnection agreements — both negotiated and arbitrated — and the federal courts have resolved those disputes that have arisen about carriers’ agreements.

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

The Commission should keep those contracts in mind in the event it were to issue a declaratory ruling on Blue Casa's petition. The 1996 Act and Commission policy, particularly in the context of ISP-bound traffic, strongly support holding carriers to the terms of their contracts, subject to any change-of-law provisions in those agreements. In addition, because carriers have reasonably relied on their contracts, as well as federal court decisions addressing disputes about those contracts, the Commission should hold that any declaratory ruling will operate prospectively only, to avoid unsettling carriers' expectations.

None of the commenters — whether for or against the ruling Blue Casa seeks — takes issue with any of these points. However, some claim that the Commission has already ruled against Blue Casa, so that a declaratory ruling denying its petition would not be a “new application[] of existing law.” *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotation marks omitted). But, as the Commission told the First Circuit, “the Commission did not directly address VNXX calls in either of its ISP orders” — that is, in the *ISP Declaratory Ruling*<sup>2</sup> or the *ISP Remand Order*<sup>3</sup> — and, as of March 2006, “ha[d] not addressed VNXX calls more generally.” *FCC Amicus Br.*<sup>4</sup> at 13. Matters have not changed since the Commission filed its *amicus* brief.

Nonetheless, some commenters continue to claim that the Commission, in the *ISP Remand Order*, established new intercarrier compensation rules for *all* ISP-bound traffic, including ISP-bound Virtual NXX traffic. *See* Core Comments at 2-3; Global NAPs Comments

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<sup>2</sup> Declaratory Ruling and Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999) (“*ISP Declaratory Ruling*”) (subsequent history omitted).

<sup>3</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”) (subsequent history omitted).

<sup>4</sup> Brief for *Amicus Curiae* Federal Communications Commission, *Global NAPs, Inc. v. Verizon New England Inc.*, No. 05-2657 (1st Cir. Mar. 13, 2006) (“*FCC Amicus Br.*”).

at 3-8. Global NAPs made the same argument to the First Circuit, which expressly rejected that claim, in part in reliance on the Commission's *amicus* brief, quoted above, filed at that court's request. *See Global NAPs, Inc. v. Verizon New England Inc.*, 444 F.3d 59, 71-75 (1st Cir. 2006). Numerous other federal courts have relied on the Commission's representations to the First Circuit to reject claims that the Commission, in the *ISP Remand Order*, determined that its ISP payment rules apply to ISP-bound Virtual NXX traffic.<sup>5</sup>

In addition, when some competitive local exchange carriers ("CLECs") with ISP customers opposed Verizon's § 271 applications on the ground that Verizon was not paying them for Virtual NXX traffic delivered to their ISP customers, the Commission responded that "no clear Commission precedent or rules declar[e] . . . a duty" to pay CLECs for such traffic. *MD/DC/WV 271 Order*<sup>6</sup> ¶ 151. The Commission went on to note that "parties to an interconnection agreement have been and remain free to negotiate compensation arrangements for virtual [NXX] traffic." *Id.* ¶ 151 n.603. As Verizon has shown, that is exactly what carriers have done over the past seven years.

The Commission and its staff have also addressed both negotiated and arbitrated contracts dealing with ISP-bound Virtual NXX traffic following the *ISP Remand Order*, in each case making clear that its decision was limited to the specific contract before it. Thus, in a complaint case, the Commission addressed "the parties' obligations under the[ir] current Agreement" to pay for Virtual NXX traffic, but did "not address the legal and policy question"

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<sup>5</sup> *See, e.g., Global NAPs, Inc. v. Verizon New England Inc.*, 454 F.3d 91, 99, 101 (2d Cir. 2006); *AT&T Communications v. Pac-West Telecomm Inc.*, No. 06-7271, 2008 WL 3539669, at \*8 & n.8 (C.D. Cal. Aug. 12, 2008); *Qwest Corp. v. Washington State Utils. & Transp. Comm'n*, 484 F. Supp. 2d 1160, 1173-75 (W.D. Wash. 2007); *Verizon North Inc. v. TelNet Worldwide, Inc.*, 440 F. Supp. 2d 700, 713-14 (W.D. Mich. 2006).

<sup>6</sup> Memorandum Opinion and Order, *Application by Verizon Maryland Inc., et al., for Authorization To Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, 18 FCC Rcd 5212 (2003) ("*MD/DC/WV 271 Order*").

of what amount federal law requires carriers to pay each other for such traffic absent a contractual arrangement.<sup>7</sup> In arbitrating interconnection agreements under § 252(e)(5), the Commission’s staff “adopted contract language” with respect to Virtual NXX traffic, but similarly “did not . . . address the legal question” of carriers’ intercarrier compensation obligations for such traffic.<sup>8</sup>

Nothing changed with the *Second ISP Remand Order*,<sup>9</sup> as various commenters claim. See ALEC Comments at 2-3, 7-8; Core Comments at 3; Global NAPs Comments at 8-9; Level 3 Comments at 5-6; Sprint Comments at 1-2. As an initial matter, the *Second ISP Remand Order* makes no mention of Virtual NXX traffic, even though some commenters had urged the Commission to address that issue in responding to the D.C. Circuit’s *WorldCom* remand and mandamus order.<sup>10</sup> Furthermore, the Commission explained that it decided to “maintain” — and not to change — the ISP payment rules it adopted in 2001, which as shown above do not apply to ISP-bound Virtual NXX traffic. *Second ISP Remand Order* ¶ 29. The Commission also maintained its view that “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.” *Id.* ¶ 16.

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<sup>7</sup> Memorandum Opinion and Order, *Starpower Communications, LLC v. Verizon South Inc.*, 18 FCC Rcd 23625, ¶ 17 n.68 (2003).

<sup>8</sup> *MD/DC/WV 271 Order* ¶ 151 n.601 (describing staff’s decision in Memorandum Opinion and Order, *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*, 17 FCC Rcd 27039 (Wireline Comp. Bur. 2002). @Communications (at 2 n.6) cites the Commission order in *Starpower* and the staff’s arbitration order, without acknowledging that neither reached the question whether federal law imposes a particular intercarrier compensation regime for ISP-bound Virtual NXX traffic.

<sup>9</sup> Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *High-Cost Universal Service Support*, WC Docket No. 05-337 et al., FCC 08-262 (rel. Nov. 5, 2008) (“*Second ISP Remand Order*”), *petitions for review pending, Core Communications, Inc. v. FCC*, No. 08-1365 et al. (D.C. Cir.).

<sup>10</sup> See, e.g., Letter from John T. Nakahata, Harris, Wiltshire & Grannis LLP, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-68 & WC Docket No. 01-92, at 6-8 (Aug. 18, 2008).

The Commission, however, did not address in the *Second ISP Remand Order* the question whether ISP-bound Virtual NXX traffic is “traffic encompassed by section 251(g).” *Id.* There are issues of first impression the Commission would have to resolve in answering that question. To take one example, dial-up ISPs have long offered their customers toll-free, 1-800 telephone numbers that those customers can use to access the Internet, but those ISPs also impose a surcharge on their customers (10 cents per minute in the case of AOL) because the ISP’s 1-800 provider pays access charges to the originating LEC on such traffic. Many CLECs use Virtual NXX arrangements to create what some have argued is the functional equivalent of a 1-800 arrangement, assigning telephone numbers associated with hundreds of local calling areas in multiple states to an ISP with a single location, so all of the ISPs’ customers in that wide geographic area can access the Internet through that ISP on a toll-free basis. The Commission would have to decide whether the functional equivalence between the 1-800 and Virtual NXX arrangements means that a CLEC offering Virtual NXX service is acting (in part) as an interexchange carrier (bringing the traffic within § 251(g), or whether the different dialing patterns between the two arrangements serve to distinguish them for intercarrier compensation purposes.

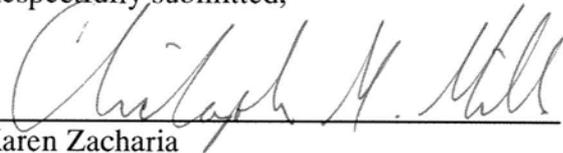
Commenters here offer various answers to this and other questions the Commission would have to resolve in order to rule on Blue Casa’s petition. Whatever the merits of those commenters’ arguments in support of their preferred answer, it is clear that any answer the Commission were to give in a declaratory ruling would be a “new application[] of existing law,” *Verizon Tel. Cos.*, 269 F.3d at 1109, rather than a restatement of a previously issued ruling. Furthermore, because existing contracts adopt a variety of compensation arrangements for ISP-

bound Virtual NXX traffic,<sup>11</sup> any declaratory ruling the Commission issues would necessarily conflict with some of those existing arrangements, thereby “upset[ting] settled expectations . . . on which [those] part[ies] . . . reasonably place[d] reliance.” *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007). Therefore, consistent with the 1996 Act’s preference for negotiated agreements and the Commission’s own prior rulings with respect to ISP-bound traffic, the Commission should expressly hold that any declaratory ruling it adopts will apply prospectively only, and will affect existing agreements only as set forth in the change-of-law provisions in those contracts. *See Verizon Comments at 6-10.*

### CONCLUSION

For the foregoing reasons, and those set forth in Verizon’s comments, the Commission should decline to grant Blue Casa’s petition.

Respectfully submitted,



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<sup>11</sup> *See Verizon Comments at 5; compare, e.g., Global NAPs*, 444 F.3d at 72-75 (upholding Massachusetts arbitrated agreement requiring payment of access charges for Virtual NXX ISP-bound traffic) *with Verizon California Inc. v. Peevey*, 462 F.3d 1142, 1155-59 (9th Cir. 2006) (upholding California arbitrated agreement requiring incumbent local exchange carrier to pay ISP intercarrier compensation for ISP-bound Virtual NXX traffic, but also requiring the CLEC to bear the costs of transporting the traffic to a distant local calling area).