

The Vast Majority of State Commissions That Have Addressed Whether VNXX Traffic Is Local Have Firmly Concluded That It Is Not Local and Not Subject to Reciprocal Compensation.

1 The vast majority of state commissions analyzing this issue have concluded that VNXX traffic is not subject to reciprocal compensation. A summary of those decisions is set forth herein.¹

2 The New Hampshire Public Utilities Commission recently drew a clear distinction between “local ISP-bound traffic” and ISP-bound traffic that is not local for reciprocal compensation purposes.² The New Hampshire tariff defined “local traffic” as “a call that is originated and terminated within a local exchange area.” The commission ruled that reciprocal compensation could not be imposed on this traffic:

Under the interconnection agreement, reciprocal compensation applies only to local traffic, which is defined in the tariff as calls originating and terminating within a specified geographic area, established for purposes of defining the zone within which in-state toll charges will not apply. *This leads ineluctably to a determination here that the parties did not intend reciprocal compensation to apply to calls that were terminated to an ISP physically located outside the originating callers local service area.*³

3 The Nebraska Public Service Commission issued an order in a Qwest/AT&T arbitration that, like the recent Washington decision between the same parties, adopted the Qwest proposal

¹ In addition to the cases discussed below, see also: Opinion, *All Providers of Local and Interexchange Telecommunications Services in the State of Alabama Declaratory Ruling Concerning the Usage of Local Interconnection Services for the Provision of Virtual NXX Service*. Docket No. 28906, Alabama Public Service Commission (2004 Ala. PUC Lexis 144) holding that ISP VNXX calls are exclusively under the jurisdiction of the FCC, but that other VNXX and FX calls should be compensated on a bill and keep basis; and *Arbitrator’s Order 10, In the matter of arbitration between Level 3 Communications, LLC and SBC Communications, Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996 for Rates, Terms and Conditions of Interconnection*, Docket No. 04-L3CT-1046-ARB, Kansas Corporation Commission (2005 Kan. PUC Lexis 166) adopting SBC’s proposed language which reflected traffic classifications the parties should use to define traffic for intercarrier compensation purposes. The Commission stated that SBC’s proposed language appropriately classified traffic and issued an order that VNXX ISP-bound traffic is not subject to reciprocal compensation.

² Order, *Re New England Fiber Communications, LLC*, Nos. DT 99-081 & DT 99-085, 2003 N.H. PUC LEXIS 128 (NH PUC Nov. 12, 2003).

³ *Id.* at *32-33.

that “local exchange traffic” be defined as “traffic that is originated and terminated in the same local calling area as determined for Qwest by the Commission.” The commission rejected AT&T-proposed language that would have excepted VNXX traffic from this definition.⁴ The AT&T approach, the commission stated, would have “far reaching implications and unintended consequences by reclassifying a large number of interexchange calls as local calls in violation of state statutes and Commission rules.”⁵ Further, AT&T’s definition “could result in abuses in the process of assigning NPA-NXX codes,” including assigning “NPA-NXX codes to customers irrespective of their physical location and collect[ing] reciprocal compensation from Qwest.”⁶

- 4 Two decisions by the Vermont Public Service Board ruled that VNXX calls are not local calls. In the first case, the board concluded that VNXX is a means to use NXX number assignments to convert toll calls into local calls: “Physically, the call is indistinguishable from other calls that the Board has classified as toll.”⁷ The Board concluded that it was the Board, not the CLEC, that determines the distinction between interexchange and local traffic: “In this Order, we make clear that the determination of whether traffic is local or toll is based upon the physical termination points, not the rate center assigned to the VNXX number.”⁸ In the second decision, the Vermont Board concluded that “VNXX calls do not actually physically terminate within the local calling area”; thus, even though “they may be rated as local calls due to the assignment of an NXX code to a switch, the physical characteristics of

⁴ Arbitrator’s Recommended Decision, *In the Matter of the Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with AT&T of the Midwest and TCG Omaha*, Docket No. C-3095 (Neb PSC May 4, 2004).

⁵ *Id.* at 18.

⁶ *Id.* at 19.

⁷ Order, *Petition of Global NAPs, Inc., for Arbitration Pursuant to § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New England Inc., d/b/a Verizon Vermont*, Docket No. 6742, 2002 Vt. PUC LEXIS 272 (Vt. PSB Dec. 26, 2002) (pinpoint citation not available).

⁸ *Id.* (emphasis added).

the calls suggest they are *not local * * **.”⁹ Therefore, “Reciprocal Compensation does not apply to VNXX traffic that physically terminates outside the local calling area.”¹⁰

5 The Massachusetts Department of Telecommunication and Energy found that “VNXX calls will be rated as local or toll based on the *geographic end points* of the call”¹¹ and that the Verizon tariff in Massachusetts “defines local calling areas in terms of municipalities and geographic areas, not in terms on NXXs.”¹²

6 The Pennsylvania Public Utility Commission concluded that “calls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation.” Opinion and Order, *Petition of Global NAPs South, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000 (Pa PUC Apr. 21, 2003) at 45 (available at <http://puc.paonline.com/PcDocs/392849.doc>).

7 In Ohio, a CLEC argued that it should be allowed to assign to its customers “NXX codes that are ‘homed’ in a central office switch outside of the local calling area in which the customers resides * * *.” *Re Global NAPs, Inc.*, No. 02-879-TP-ARB, 2002 OhioPUC Lexis 644, *22-*23 (Ohio PUC July 22, 2002) The CLEC also argued that “the classification of a call is determined by comparing the rate centers associated with the called and calling party’s NPA/NXXs, not the physical location of the customers.” *Id.* at *23. The Ohio Public Utilities Commission rejected that argument, concluding that “[a]ny end-user call originating and

⁹ Order, *Re Adelpia Business Solutions, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *76 (Vt PSB July 16, 2003) (emphasis added).

¹⁰ *Id.*

¹¹ Order, *Petition of Global NAPS, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Verizon Massachusetts f/k/a New England Telephone & Telegraph Co. d/b/a Bell Atlantic-Massachusetts*, D.T.E. 02-45, 2002 Mass PUC LEXIS 65 at *50 (Mass Dep’t of Tel & Energy Dec. 12, 2002) (emphasis added).

¹² *Id.* at *51.

terminating within the boundary of such a local calling area, regardless of the LEC at the originating and terminating end shall be treated as a local call” and that Verizon’s local calling areas, as revised for EAS purposes, would “determine whether a call is local for the purpose of intercarrier local traffic compensation.” *Id.* at *25.

- 8 In Iowa, the issue arose in the context of a petition to limit certain CLECs from depleting numbering resources. In a case addressing whether the use of 10,000 number blocks of numbers for VNXX, the Iowa Utilities Board concluded that VNXX calls are interexchange in nature. Final Decision and Order, *In Re Sprint Communications Company, L.P., and Level 3 Communications, LLC*, Docket Nos. SPU-02-11, SPU-02-13, 2003, Iowa PUC LEXIS 229, *10-*12 (Iowa Utils. Bd. June 6, 2003).
- 9 In California, the issue was addressed when the commission addressed whether an ILEC could charge a CLEC the costs of carrying VNXX traffic to the POI. The California Public Utilities Commission (the “CPUC”) ruled that it could, noting that the CLEC knows where it terminates traffic to its customers and is thus capable of identifying that traffic which is local and which traffic is interexchange. Decision Approving Arbitrated Agreement Pursuant to Section 252, Subsection (e), of the Telecommunications Act of 1996 (Act), *In the Matter of Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Application 02-03-059, Decision 03-05-031, 2002 Cal CPUC Lexis 1047, *6-*7 (Cal CPUC May 8, 2003). The commission concluded that VNXX “is a valuable service that subscribers are willing to pay a premium for. Such service rates should bear the costs associated with provisioning the service.” *Id.* at *14.
- 10 Another recent PUC decision also supports Qwest’s position. Previously, the PUC had allowed the ILEC to collect a call-origination charge to compensate it for “long haul” VNXX

calls to the [CLEC's] POI * * * that is located outside the given calling area.” *Re Verizon California, Inc.*, Application 02-06-024, Decision 03-12-021, 2002 Cal PUC LEXIS 1047, *8 (CPUC Dec. 4, 2003). On rehearing, the CPUC reaffirmed its conclusion that “VNXX traffic is interexchange traffic, by nature of its termination outside of the originating calling area, that is not subject to the FCC’s reciprocal compensation rules, even though it is rated as a local call to the calling party.” *Id.* The CPUC, however, did not stop there—it also reaffirmed its conclusion that the CLEC must compensate the ILEC “for use of its network to provide VNXX service.” *Id.* at *11. It thus upheld the call-origination charge.

11 Only a small minority of opinions run to the contrary. *In the Matter of Starpower Communications, LLC v. Verizon South Inc.*, 18 FCCR 23,625 (2003), is one of the very few cases that is contrary to the long list of cases holding that VNXX traffic is not subject to reciprocal compensation.¹³ The case is unusual because it involved the FCC sitting in place of the Virginia Corporation Commission, which refuses to decide cases that have been delegated to it under the Act, including cost dockets and arbitrations.

12 In that case, the FCC required the payment of reciprocal compensation on VNXX traffic, focusing on the fact that Verizon rates calls to Starpower’s customers on the basis of the telephone number of the Starpower customer, as opposed to the physical location of the Starpower customer,¹⁴ noting that “the Tariff does not expressly address whether the ‘location’ of a customer station turns on physical presence or number assignment * * *.”¹⁵ However, because there is no such ambiguity in Washington, *Starpower* is easily

¹³ See also, Opinion and Order, *In the matter of the application of Telnet Worldwide, Inc., for arbitration of interconnection rates, terms, and conditions and related arrangements with Verizon North, Inc. and Contel of the South, Inc., d/b/a Verizon North Systems*, Case No. U-13931 (2005 Mich. PSC Lexis 39), refusing to alter longstanding precedent in Michigan that treats VNXX as local. *The Southern New England Telephone Company v. MCI Worldcom Communications, Inc. et al*, United States District Court, D. Connecticut, Case No. 3:02cv274 (SRU)(March 16, 2005)

¹⁴ *Id.* at 23,629, ¶ 9. The FCC agreed that, in the absence of the VNXX arrangement, Verizon’s customers would have incurred toll charges.

¹⁵ *Id.* at 23,632, ¶ 15.

distinguishable from this case. The Qwest Washington tariff directly focuses on calls between customers' premises that are "located within the same local service area."

13 Thus, under the ICA, it is the tariff language that defines local traffic—and local traffic under the tariff is explicitly tied to physical location. The language of the Washington tariff, in conjunction with the recent arbitrator's decision in the AT&T case adopting Qwest's definition of "local exchange service," could not be more different from the situation in *Starpower*.¹⁶ Although the underlying logic of the *Starpower* decision is highly questionable, the proper application of Washington law compels a different result even if one accepted its underlying analysis.

¹⁶ Lest the Commission grant undue deference to *Starpower* because the decision was rendered by the FCC, the Vermont board recently ruled that the *Starpower* decision is not binding upon it, because the FCC was applying Virginia law and "acting in the place of the Virginia State Corporation Commission." *Re Adelpia Business Solutions of Vermont, Inc.*, Docket No. 6566, 2003 Vt PUC LEXIS 181, *61 (Vt PSB July 16, 2003).