ORDER NO. 03-329

ENTERED MAY 27 2003

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1058

In the Matter of the Investigation into the Use of Virtual NPA/NXX Calling Patterns.) ORDER

DISPOSITION: COMMISSION AUTHORITY PREEMPTED

On November 20, 2002, pursuant to an agreement at the November 6, 2002 Workshop, the Commission staff (Staff) filed a proposed schedule and a Proposed Issues List.

On December 4, 2002, Time Warner Telecom of Oregon LLC, WorldCom, Inc., on behalf of its regulated subsidiaries operating in Oregon, Level 3 Communications, LLC, AT&T of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Oregon, XO Oregon, Inc., PriorityOne Telecommunications, Inc., and Pac-West Telecomm, Inc., filed Joint Comments on Staff's Proposed Issues List. Comments on Staff's Proposed Issues List were also filed on December 5, 2002, by United Telephone Company of the Northwest dba Sprint (Sprint). Staff submitted its Response to Issues List Comments (Response) on December 13, 2002.

The Issues List adopted by Ruling of December 18, 2002, included the following:

> 5. (a) What is the extent of the FCC's preemption of state commission authority over traffic bound for internet service providers (ISPs)? (b) How does this FCC preemption, to the extent it exists, relate to the offering of VNXX service?

Pursuant to a further Ruling on March 31, 2003, on April 4, 2003, Qwest Corporation (Qwest), Verizon Northwest Inc. (Verizon), Sprint Corporation, on behalf of Sprint Communications Company L.P., Sprint Spectrum L.P. and United Telephone Company of the Northwest d/b/a Sprint (Sprint), CenturyTel of Oregon, Inc., and CenturyTel of Eastern Oregon, Inc. (CenturyTel), the Oregon Telecommunications Association (OTA), AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Oregon (AT&T), Pac-West, Telecomm, Inc., (Pac-West) and Level 3 Communications, LLC, PriorityOne Telecommunications, Inc., XO Oregon, Inc., Time Warner Telecom of Oregon LLC and AT&T (Joint CLECs) each filed briefs on Issue 5.

Background. "NXX" is a designation used throughout the telephone industry to indicate the second three digits in a party's telephone number following the area code.[1] NXX codes are assigned to particular central offices within the state. The NXX codes are associated with specific geographic areas, typically an exchange or "rate center." An exchange is a geographic area defined for the purpose of providing local exchange service.[2] A rate center is a geographic point within an exchange, or group of contiguous exchanges. (The rate center's geographic coordinates are used to measure distance for rating long distance toll calls). Competitive local exchange carriers wishing to provide local service in multiple exchanges from a single central office need to have a separate NXX code for each rate center. Customers with the same NXX have their calls rated the same way. Calls from a customer with a particular NXX to another customer with that same NXX would thus have a geographic distance of zero, so no long distance charges would apply.[3]

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in sequence, including entire NXXs. A "Virtual NXX" (VNNX) occurs when a CLEC assigns a "local" rate center code to a customer physically located in a "foreign" rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer's phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer's physical location in Portland, is a distance of some fifty miles. Thus, under a CLEC's VNNX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC's Portland customer. When those same customers call the ILEC's Portland customers, served out of the same central office as the CLEC's Portland customer, they are charged time and distance-sensitive intraLATA toll charges.

This type of service was not unknown to the telephone industry prior to the arrival of CLECs. For many years, incumbent carriers offered foreign exchange (FX) services, which, for an additional monthly fee, also provided business customers served out of one central office with numbers from an NXX assigned to another central office, usually so that their customers could call them without incurring intraLATA toll charges. By Order No. 83-869, issued almost twenty years ago, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers.

[1] The area code itself is sometimes referred to within the telephone industry as the "NPA" (number plan area). Thus, the generic telephone industry reference for a party's telephone number is often "NPA-NXX-xxxx."
[2] *See* ORS 759.004(2)(c).
[3] *See, e.g., Rate Center Consolidation Investigation,* UM-953, Order 00-478, August 29, 2000.

However, before the Commission considers the evidence on the magnitude of this issue and what resolution should be made to further the public interest, the scope of the Commission's authority to decide the outcome must be established.

Issue 5 is concerned with how the *ISP Remand Order*[4] impacts the Commission's investigation on VNXX services. That order in essence provided that ISP-bound local traffic would not be included in calculations for reciprocal compensation and "bill-and-keep" arrangements would apply to such traffic. The Federal Communications Commission's (FCC's) intentions, as deduced from the language of the *ISP Remand Order,* are argued by the parties in their briefs.

The rapid growth of dial-up Internet traffic has had far-reaching effects on calling patterns in the public switched telephone network, manifest in particular by the increase in call holding times and utilization of the public network. Today's decision by the Commission on this issue will, of necessity, have a profound impact on this docket and upon the docket's impact upon the parties.

Positions of the Parties. Qwest, Verizon, CenturyTel and OTA each argue that the *ISP Remand Order* does not preempt the Commission's Authority over ISP traffic using VNXX arrangements.

In its comments prefatory to its legal arguments, Qwest contends that VNXX is against public policy if used to avoid toll charges because it undermines the rate structure, that all VNXX traffic should receive equal treatment because the interoffice transport is identical, that VNXX services should be subject to the existing local/toll rate structure and that the Commission should not differentiate between ISP and voice traffic for purposes of end-user charges.[5] As to the interpretation of the scope of the preemption, Qwest cites the D.C. Circuit's recent review of the *ISP Remand Order*, in which it stated

> In the order before us the Federal Communications Commission held that under section 251(g) of the Act it was authorized to "carve out" from section 251(b)(5) calls made to Internet service providers ('ISPs') located within the caller's local calling area." (*ISP Remand Order* at 429-430.

Qwest thus contends that the Court clearly intended to address "only ISP-bound traffic located *within a caller's local calling area*…Nowhere in any decision has the FCC determined that toll charges are not applicable where the ISP is outside the end-

[4] Order on Remand and Report and Order, *in the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic,* CC Dkt. Nos. 96098 and 99-68 ¶¶ 52, 57, 65; FCC 01-131, 2001 (released April 27, 2001), *remanded, WorldCom, Inc., v. FCC,* 288 F.3d 429 (D.C. Cir. 2002) (*ISP Remand Order*).
[5] Qwest Brief, pp. 4-8.

user's local calling area."[6] As further evidence of FCC intent, Qwest cites the FCC's orders relating to the establishment of the Universal Service Fund in which it assumed that rural health care providers would be able to obtain ISP access with a local call only if the ISP was physically located in the same rate center as the end-user.[7] Qwest concludes by noting that other states have reached similar conclusions.[8] Since Qwest asserts with respect to Issue 5(a) that there is no preemption, it contends that Issue 5(b), which inquires about the application of the preemption to VNXX services, is inapplicable.

Verizon takes a similar position, asserting that the *ISP Remand Order* expressly preserves preexisting access regimes.[9] The Order "established a bill-and-keep compensation scheme for "locally-rated" ISP-bound calls, or calls that originate and are delivered to an ISP modem or server *in the same local calling area"* and, intending to preserve this result for locally rated calls, preempted state commissions from addressing the issue. Any argument that paragraph 82 of the *ISP Remand Order* intended to deprive state commissions of all jurisdiction over compensation for ISP-bound traffic is erroneous, when examined in the Order's full context. Finally, Verizon cites extensively from the *Global NAPS* decision and discusses its reasoning.[10]

CenturyTel acknowledges that the *ISP Remand Order* has elements of preemption, but that to conclude every aspect of ISP-related traffic has been removed from state jurisdiction is to overstate the case: only inbound traffic to an ISP located in the same local calling area as the customer placing the call has been removed from state jurisdiction.[11] CenturyTel contends that the FCC identified and sought to solve the problems that arose where two LECs competing within the same local calling area jointly provided dial-up access to an ISP located within that local calling area and were required by the Act to provide reciprocal compensation for the termination of traffic. The "bill-and-keep" methodology sought to remove the regulatory arbitrage that occurred in an environment where traffic essentially flowed one way. The FCC, however, made no change to the treatment of ISP-bound traffic where the ISP is not located in the same local calling area and other paragraphs of the Order are consistent with that view.[12]

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[6] *Id.*, p. 10. Emphasis in text.
[7] *Id.*, pp. 10-11. Citations omitted.
[8] *Id.,* pp. 11-12, citing *Petition of Global NAPS, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996 or Arbitration to Establish an Interconnection Agreement with Verizon New England, Inc. d/b/a Bell-Atlantic Massachusetts f/k/a New England Telephone and Telegraph Co d/b/a Bell Atlantic Massachusetts, Docket No. D.T.E. 02-45 (December 12, 2002, Mass. D.T.E.)* (*Global NAPS* decision) and *In re Petition of Adelphia Business Solutions of South Carolina, Inc., for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996,* Docket No. 2000-516-C, Order on Arbitration (January 16, 2001, S. Car. P.S.C.) at 8-9. (Adelphia Decision). *See also* Ohio Public Utilities Commission, *Petition for Arbitration, Global NAPs v. Sprint and Ameritech,* Case Nos. 01-2811 TP-ARB, 01-3096-TP-ARB, Arbitration Award (Issued May 9, 2002). p. 8.
[9] Verizon Brief, pp. 2-3, citing *ISP Remand Order*, ¶39.
[10] *Id.,* pp. 4-7. (emphasis in text).
[11] CenturyTel Brief, p. 2.
[12] *Id.,* pp. 4-7, citing *ISP Remand Order*, ¶¶ 39, 67.

CenturyTel also cites the *Global NAPS* decision in Massachusetts as supportive of its views,[13] as well as the following conclusion from the Vermont Public Service Board

> In addition, nothing in the ISP remand Order suggests that the Board's authority to define local calling areas has been altered. Global points to no language, but instead relies upon a broad assertion of preemption. We see no basis for Global's assertion. Accordingly, we reject Global's argument. This Order applies to ISP-Bound traffic and bars the use of VNXXs for the purpose of completing calls to ISPs.[14]

OTA asserts that VNXX arrangements are more attractive to the CLEC's ISP customers than 800 or other toll-free calling products because the ISPs can "avoid paying compensation to the underlying carriers (usually the ILEC, but potentially other CLECs) whose networks are being used to originate and haul the ISP traffic outside local calling areas."[15] OTA cites the same paragraphs in the Order, much of the same case law from other jurisdictions and uses similar hypothetical situations as CenturyTel and Verizon.[16]

Sprint takes a somewhat different approach from the other incumbent carriers and argues that imposing originating access charges on ISP-bound traffic using VNXX arrangements is inconsistent with the *ISP Remand Order* and is therefore preempted. Sprint asserts that states may only address transport obligations, not intercarrier compensation rates.[17] The solution Sprint proposes is "that the Commission should require ILECs and CLECs to share the TELRIC-based costs to transport virtual NXX traffic between the ILEC central office and the CLEC's POI." Sprint contends that its proposal is not pre-empted by the Order and would not replace the rates set by the FCC. Sprint argues that ILECs must pay CLEC reciprocal compensation, but should not be required to pay for all of the costs of transport.[18]

AT&T quotes paragraph 89 of the *ISP Remand Order* in which the FCC states that "…we will not allow [ILECs] to 'pick and choose' intercarrier compensation regimes depending on the nature of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, only if an incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate." AT&T therefore states that a Commission determination to compensate VNXX ISP traffic

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[13] *Id.,* pp. 9-10
[14] *Id.,*citing *Petition of Global NAPS, Inc., for arbitration with Verizon Vermont,* Docket No. 6742, Order Adopting Arbitrator's Recommendations (Vermont Public Service Board, December 26, 2002).
[15] OTA Brief, p. 2.
[16] *See Id.,* pp. 4-9.
[17] Sprint Brief, p. 6, citing *ISP Remand Order*, ¶¶ 82, 78.
[18] *Id.,* pp. 9-10.

differently than other types of ISP traffic would expressly contradict the FCC's requirement of a uniform pricing mechanism.[19]

Pac-West also asserts that the FCC has expressly preempted state jurisdiction over intercarrier compensation for locally-dialed ISP-bound traffic, including ISP-bound traffic delivered using VNXX arrangements. Therefore, Pac-West asserts that the Commission should confine its investigation to issues relating to non-ISP-bound VNXX traffic and reject the notion that the physical location of ISP modems has any bearing on the extent of federal preemption. Furthermore, ILECs have previously argued that the location of the ISP modem is irrelevant when determining where a call terminates and it is now inconsistent of them to argue that modem location is suddenly critical.[20] Pac-West also cites paragraphs 57 and 82 of the *ISP Remand Order* as dispositive of the preemption of state jurisdiction over ISP-bound traffic.[21] Pac-West further noted a Virginia Arbitration Case in which the FCC's Wireline Competition Bureau decided that the *ISP Remand Order* was applicable to VNXX arrangements pending the FCC's conclusion of its *Intercarrier Compensation NPRM.*[22]

On April 24, 2003, Pac-West supplemented its Brief by submission of the opinion of the United States Court of Appeals for the Ninth Circuit in several consolidated cases issued April 4, 2003. (Opinion)[23] Pac-West contends that, while not directly addressing the issue in question, "the Court discusses the limited extent of state commission jurisdiction to regulate ISP-bound traffic, holding that such jurisdiction is confined to the role described in §252 of the Telecommunications Act of 1996, namely, arbitrating, approving, and enforcing interconnection agreements. The Court struck down two opinions of the California Public Utilities Commission in which it had promulgated general 'generic' regulations over ISP-bound traffic."[24]

The Joint CLECs also assert that paragraph 82 of the *ISP Remand Order* clearly provides that the FCC has taken exclusive jurisdiction to resolve all questions relating to intercarrier compensation for ISP-bound traffic and that focusing on the location of modem banks is contrary to the reasoning of the Order. The Joint CLECs further contend that the FCC did not distinguish between "local" and "non-local" ISP-bound traffic, thus mooting the issue of whether the *ISP Remand Order* only applies to "local" ISP-bound traffic.[25] The Joint CLECs cite a recent Washington Utilities and Transportation Commission (WUTC) arbitration ruling concurring in the views expressed by the Joint CLECs

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[19] AT&T Supplemental Brief, pp. 1-2.
[20] Pac-West Brief, pp. 2-3.
[21] *Id.,* pp. 4-6.
[22] *Id.,* pp. 5-7 and cases cited therein.
[23] *Pacific Bell, et al v. Pac-West, et al,* No. 01-17161, D.C. No. CV-99-04480-CW; *Verizon California, Inc., et al v. California Telecommunications Coalition, et al,* No. 01-17166, D.C. No. CV-99-03973-CW; *Pacific Bell, et al v. California Public Utilities Commission, et al,* No. 01-17181, D.C. No. CV-99-04479-CW.
[24] Pac-West Supplement to Brief, pp. 1-2, citing page 4674, *et seq.*
[25] Joint CLEC Brief, pp. 2-3.

> The substance of [the *ISP Remand Order* and the decision of the reviewing court in *WorldCom, Inc., v. FCC*] makes no distinction based on the location of the ISP's modems, and doing so would be inconsistent with rationales previously offered by the FCC for its treatment of ISP-bound traffic.[26]

Like Pac-West, the Joint CLECs further argue that, having claimed for years that ISP-bound traffic does not terminate at modem banks and that, therefore, the location of those modems is irrelevant, and having had the FCC adopt their position, ILECs should not now be permitted to change their position because it will benefit them financially. The Joint CLECs further contend that the Commission was made aware of the VNXX implications of the issue prior to release of the *ISP Remand Order* because various ILECs and CLECs had made *ex parte* presentations about them.[27]

Finally, the Joint CLECs cite the WUTC case discussed *supra* and discuss comparable proceedings in Texas, Florida, Illinois and elsewhere. Massachusetts,' Vermont's and South Carolina's decisions are distinguished by the claim that those jurisdictions failed to clearly distinguish the applicability of their resolution of the VNXX compensation issue to ISP-bound traffic.[28]

Policy Considerations. The instant proceeding is a generic investigation into the availability and offering of VNXX services within the state of Oregon. Issues 5(a) and (b) relate to the extent of Federal preemption of VNXX services as they, in turn, relate to ISP-bound traffic. We recognize that the resolution of this issue will have wide-ranging impacts on both carriers and customers in the State of Oregon. For incumbent local exchange carriers, many of them smaller companies who rely heavily on toll and exchange access revenues to help keep local service costs down, VNNX service made available to CLECs for their ISP customers creates the potential for substantial loss of those revenues. For interexchange carriers, VNNX-provided ISP services have the potential to deprive them of toll revenues, as well. As noted above, a number of other state commissions have grappled with these issues and come to differing conclusions. We believe that the Commission should have an important policy role in making decisions having such profound effects on the provision of telecommunications services in Oregon. Nevertheless, we find that the recent decision by the United States Court of Appeals for the Ninth Circuit has essentially deprived us of that role.

The Ninth Circuit Opinion. As noted above, on April 24, 2003, Pac-West filed a letter requesting leave to supplement the briefing record regarding Issues 5(a) and 5(b), submitting a copy of the April 7, 2003 opinion by the Ninth Circuit

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[26] *Id.,* citing *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc., Pursuant to 47 U.S.C. Section 252,* Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision (Wash. U.T.C. Feb. 27, 2003), at 3-4.
[27] *Id*., pp. 4-6.
[28] *Id.*, pp. 7-12.

in *Pacific Bell v. Pac-West* (Opinion) for our consideration. However, it is not necessary to act on the Pac-West request; we must of necessity and automatically take cognizance of an opinion of the Ninth Circuit on matters relating to Federal law. Pursuant to a Ruling of the Administrative Law Judge, parties were asked to comment on the Ninth Circuit's Opinion. Comments on the Opinion were filed by OTA, Verizon and the Joint CLECs.

OTA did not see the Opinion as being applicable. The question before the Ninth Circuit was "whether a state commission could use rulemaking authority under state law to displace the terms of previously approved interconnection agreements…. Here, the issue is to determine whether VNXX calls are interexchange in nature under state law, whether they be calls to ISPs or other types of VNXX calls."[29] OTA then argued that sections 251 and 252 apply only if the traffic is local in nature. OTA's position is that VNXX traffic is interexchange and that the states have authority over intrastate interexchange access compensation for ISP traffic.[30]

Verizon asserts that the Opinion does not disturb the jurisdictional arguments Verizon made in its previous filing, first, because it dealt only with the narrow issue of whether a state commission could use its rulemaking authority to displace preexisting interconnection agreement provisions. Verizon also argues that the Ninth Circuit never had cause to consider the FCC's express declarations in the *ISP Remand Order*, specifically that access services remain subject to state commission jurisdiction when incumbent LECs provide access to connect subscribers with ISPs for Internet-bound traffic.[31]

The Joint CLECs quote the Ninth Circuit acknowledgement that "it is an unsettled question whether ISP traffic is 'local' of purposes of reciprocal compensation provisions in interconnection agreements under §251(b)(5) of the Act. However, the court pointed out that it is clear that under *Bell Atlantic Telephone Co. v. FCC,* 206 F.3d 1, 5 (DC Cir. 2000), the ISP traffic is 'interstate' for jurisdictional purposes."[32]

Conclusion. We reluctantly conclude that, if we were to adopt generic rules for the compensation of carriers for the transport of VNXX-based, ISP-bound traffic, we would run afoul of the Ninth Circuit's decision. The following excerpts from the Opinion form the bases for our conclusion:

> "The FCC has defined ISP traffic as 'interstate' for jurisdictional purposes, thereby placing it under the purview of federal regulators rather than state public utility commissions. Under this scheme the CPUC lacks authority under the Act to promulgate general 'generic' regulations over ISP traffic….."

[29] OTA Request to Respond, p. 2.
[30] *Id.*
[31] Verizon Request, p. 2.
[32] *Id.*, p. 2, citing Opinion at 4675.

> "By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or at the very least, it acted arbitrarily and capriciously in purporting to interpret 'standard' interconnection agreements…"
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> "Although it is an unsettled question under federal law (and the primary controversy animating these appeals) whether ISP traffic is 'local' for purposes of reciprocal compensation provisions in interconnection agreements, under §251(b)(5), the FCC and the D.C. Circuit have made it clear that ISP traffic is 'interstate' for jurisdictional purposes….Indeed, the FCC recently reaffirmed its position that 'ISP-bound traffic is jurisdictionally interstate.' (citation omitted). The 1996 Act …granted the FCC regulatory authority over those intrastate matters governed by the Act…and it granted the state commissions limited defined authority over interstate traffic under §§251 and 252 of the Act" (citations omitted).[33]
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> "Under the Act, it may not even matter whether ISP-bound traffic is interstate or intrastate, because the Act grants the federal government substantial new authority over intrastate matters that are specifically addressed within the provision of the Act."[34]
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> "The Act did not grant state regulatory commissions additional general rule-making authority over interstate traffic….Thus, the CPUC's resort to its general rule-making authority under California law to issue a generic order applicable to all interconnection agreements between telecommunications companies in California is precluded by §252."[35]

Regulation of the terms and conditions in interconnection agreements relating to compensation for ISP-bound traffic has been preempted by the FCC from the Commission. We therefore conclude that the Commission may not establish generic rules with respect to the compensation for, and transport of, ISP-bound traffic.

[33] Opinion, pp. 4674-5.
[34] *Id.,* footnote 10.
[35] *Id.,* pp. 4676-4677.

ORDER

IT IS ORDERED that any rules or policies promulgated in this docket relating to terms and conditions for compensation and transport under interconnection agreements, shall not apply to VNNX-based ISP-bound traffic.

Made, entered, and effective _____.

Roy Hemmingway	**Lee Beyer**
Chairman	Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.