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STATE OF MICHIGAN

MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Commission's own motion,)
to commence a proceeding for the purpose of)
resolving issues surrounding virtual NXX.)
_____) Case No. U-14683

**VNXX WORKGROUP PRELIMINARY REPORT
AND RECOMMENDATIONS**

MAY 9, 2006

DRAFT

Table of Contents

Introduction.....	1
History of Proceedings.....	1
Description of VNXX and Current Compensation.....	5
Other VNXX Types of Service.....	8
Positions of Parties.....	9
❖ <i>AT&T, Verizon and Talk America</i>	9
❖ <i>MECA</i>	11
❖ <i>TAM</i>	14
❖ <i>ISPs</i>	14
❖ <i>Telnet, Pac-West, and Level 3, CLEC group</i>	18
❖ <i>MERIT</i>	22
Conclusions and Recommendations.....	22

DRAFT

Introduction

On November 21, 2005, Governor Jennifer M. Granholm signed into law 2005 P.A. 235 which amended 1991 P.A. 179, commonly called The Michigan Telecommunications Act (MTA). In addition to other changes, Public Act 235 added Sec. 304(9), which provides:

A call made to a local calling area adjacent to the caller's local calling area shall be considered a local call and shall be billed as a local call. Effective December 31, 2007, a call made to a called party who is not located within the geographic area of the caller's local calling area or an adjacent local calling area as defined by the commission's order in case numbers U-12515 and U-12528 dated February 5, 2001, is not a local call if the tariff of the provider originating the call does not classify the call as a local call. The commission shall convene a workgroup of interested parties for the purpose of resolving issues surrounding virtual NXX. Virtual NXX is the assignment of a telephone number to customers who are not physically located in the exchange to which the NXX is assigned. The workgroup shall consider the utilization of virtual NXX services to transport interexchange traffic and the associated inter-carrier compensation. Prior to July 1, 2006, the commission shall submit a report to the governor and the house and senate standing committees with oversight of telecommunication issues on the progress of workgroup discussions. The report shall include a commission policy statement relating to the provision of virtual NXX services, and recommendations for legislation, if any.

This document provides the Michigan Public Service Commission (MPSC) with a report of the progress made by the workgroup created by the Commission in reply to Section 304(9) of the Michigan Telecommunications Act (MTA).

History of Proceedings

The Michigan Public Service Commission issued an Order in Case No. U-14683 on November 22, 2005. The Order assigned Orjiakor Isiogu, Director of the MPSC Telecommunications Division, to convene a collaborative process to address virtual NXX issues.

DRAFT

By December 13, 2005, Mr. Isiogu shall have determined the membership of the workgroup of interested persons and shall have established a schedule for the members of the workgroup to present a preliminary report and recommendations to the Commission in time for the Commission to prepare a final report and recommendations to be submitted to the Governor and legislative leaders prior to July 1, 2006. (p 2)

The workgroup included the following parties:

- Michigan Exchange Carriers Association (MECA); representing Rural Incumbent Local Exchange Carriers (RLECs)
- Talk America, Inc. (Talk); Competitive Local Exchange Carrier (CLEC)
- Climax Telephone Company; RLEC/CLEC
- Michigan Association for Competitive Telecommunications (MiACT)
- MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services; CLEC/ILEC
- TDS Metrocom LLC; CLEC
- AT&T Michigan f/k/a SBC Michigan (AT&T); ILEC
- Verizon North/Verizon North Systems (Verizon); ILEC
- NeuStar; Clearinghouse for national telecommunications numbering
- Michigan State Attorney General
- ACD Telecom, Inc. (ACD); CLEC/Internet Service Provider (ISP)
- TelNet Worldwide, Inc. (TelNet); CLEC/ISP
- Pac-West Telecomm, Inc. (Pas-West); CLEC/ISP
- Level 3 Communications, LLC (Level 3); CLEC, ISP
- Michigan Consumer Federation (MCF)/American Association of Retired People (AARP)/Consumer Groups
- Comcast Phone of Michigan, LLC; CLEC and Cable Provider
- Telephone Association of Michigan (TAM); representing ILECS
- Mid-mich.Net, M33Access, Iserv; ISPs
- CenturyTel, Inc.; RLEC
- MPSC staff
- MERIT Network, Inc. (MERIT), non-profit educational networking organization
- Sage Telecom, Inc., CLEC

The charge of the workgroup was to bring together various stakeholders in the telecommunications industry to investigate and discuss VNXX issues. The workgroup would discuss member interpretations of existing laws and rulings which might lead to consensus between the parties on federal and state rules regarding current and future

DRAFT

treatment of VNXX traffic, and to accumulate the information needed for a workgroup report to the Commission and recommendations for legislative changes, if any.

As indicated above, the workgroup was inclusive of a wide cross section of industry, consumer groups and other interested persons, representing a broad range of viewpoints and concerns, *i.e.*, large and small ILECs, CLECs, ISPs, TAM, MECA, consumer groups, and representatives of the MPSC Staff. An email list was established for the group to use to distribute any materials developed for the consideration of the group members.

Mr. Isiogu also established a website on the Telecommunications Division webpage to provide easy access to materials produced by the group and to specific Federal Communications Commission (FCC) or state orders the group was addressing. Those materials are on the Commission website for future reference, and are incorporated herein.¹

The initial meeting was an organizational meeting held on December 5, 2005. Shortly following the December 5th meeting, the membership of the workgroup of interested persons was determined by Mr. Isiogu, as directed by the Commission's November 22, 2005, Order. To begin, all parties were asked to provide a description of VNXX and to identify the issues associated with VNXX the Commission should address in its report to the Governor and Legislature. Eleven of the workgroup members submitted preliminary statements by December 7, 2005. At meetings held in December, 2005, the group members discussed and developed a common list of issues of concern to direct future meetings. A complete listing of the issues the workgroup developed is attached to this report as Attachment A.

¹ <http://www.michigan.gov/mpsc/0,1607,7-159-16372-131795--,00.html>

DRAFT

Once the issues list was developed, the workgroup held weekly meetings from December 20, 2005 through February 7, 2006, and met subsequently on February 21, 2006, April 4, 2006, April 18, 2006 and May 31, 2006, to discuss these issues.

Throughout that time various participants made presentations and/or submitted information to assist in the workgroup's collaboration. That information is on the website grouped according to meeting date for which it was provided.

Among other items discussed was the current handling of traffic and intercarrier compensation model, including how to correctly identify and define a caller and a called party, what calls are VNXX calls, the various ways VNXX calls are carried on networks today, and how various carriers compensate each other for the costs of transporting VNXX calls when such calls are exchanged between two carriers' networks. Discussions between members of the workgroup revealed differing opinions regarding how state and federal decisions have impacted state's responsibility for determining intercarrier compensation in the present model. At the January 24, 2006, workgroup meeting, industry representatives working on intercarrier compensation reform at the federal level made presentations. Those persons were Philip Bowie from AT&T, Andy Margeson from the Oregon Public Utility Commission acting in his capacity as a representative from the National Association of Regulatory Utility Commissioners (NARUC) intercarrier compensation task force, and Mary Albert from Comptel.

The workgroup also reviewed and discussed issues surrounding VNXX post December 31, 2007, when certain changes are scheduled to occur per Section 304(9) of the MTA. Those included, among other things, the impact on VNXX if local calls become toll calls on December 31, 2007, who will notify calling parties that previous

DRAFT

local calls have become toll calls, how the change will affect network structure design, intercarrier compensation, and states' regulatory authority for intercarrier compensation, given FCC upcoming rulings.

At the February 21, 2006 workgroup session, a schedule was established for participants to submit draft proposed reports, including conclusions and recommendations of participants. Proposals were due March 31, 2006² and responses April 14, 2006³.

The following are descriptions of VNXX, the current compensation regimes, and positions taken by the parties in the workgroup on these and related issues. The report closes with the conclusions and recommendations of the workgroup members.

Description of VNXX and Current Compensation

As defined in Section 304(9), "Virtual NXX is the assignment of a telephone number to customers who are not physically located in the exchange to which the NXX is assigned."⁴

Telephone numbers consist of 10 digits (NPA-NXX-XXXX). The first three digits identify the NPA (Numbering Plan Area), otherwise known as the area code. The second set of digits is the NXX. The NXX generally corresponds to a specific rate center or exchange to which the number or group of numbers is assigned. The last 4 digits, the XXXX, are assigned to a specific line. In a typical Michigan VNXX arrangement for

² Proposed written reports were submitted by: 1) AT&T Michigan, Verizon, and Talk America; 2) TelNet, Pac-West, and Level 3; 3) ISPs (Mid-mich.net, M33 Access, and Iserv Company) and MiACT; and 4) MECA .

³ 1) AT&T Michigan, Verizon, and Talk America; 2) TelNet, Pac-West, and Level 3; 3) ISPs (Mid-mich.net, M33 Access, and Iserv Company) and MiACT; 4) MECA; 5) TAM; and 6) MERIT submitted replies to proposed reports.

⁴ Michigan Telecommunications Act, MCL 484.2102 *et seq.*

DRAFT

example, a telephone number with a 482 NXX, which is associated with a Lansing rate center, is actually assigned to a user in Jackson. Jackson is outside of the Lansing local calling area. Even though it would appear to be a local call to the Lansing area retail customer who is dialing the number, the call actually terminates in Jackson and must travel over interexchange facilities to reach the called party.

Issues arise in the compensation mechanism for transporting and terminating these calls. The parties to the workgroup generally agree that the vast majority of VNXX calls with which there are compensation issues are terminated to a dial-up ISP.

Most commonly, a customer of an RLEC dials an ISP's number associated with the exchange where the customer is located so the caller avoids toll charges. This occurs because the NXX the customer is calling is assigned to their rate center, but the ISP server is physically located outside of the local calling area.

The Commission has issued a number of decisions on VNXX traffic that have been debated by the workgroup participants. The parties have not come to a general consensus on the meaning of these orders and whether the call is considered a local call and is subject to intercarrier compensation or a toll call subject to access charges. *See*, http://www.dleg.state.mi.us/mpsc/comm/vnxx/12_13_2005/telnet12_13_05.pdf for a list of orders for example.

At the February 7, 2006 workgroup meeting, the parties agreed upon a diagram of a typical ISP VNXX call (Attachment B) to utilize for discussing the charges associated with each segment of the call from origination at the retail consumer end to termination at the ISP server. Under the current compensation regime, it is usually the technical responsibility of the RLEC to transport the traffic to the AT&T or Verizon tandem

DRAFT

switch.⁵ The RLEC is also typically financially responsible for the transiting fees charged by AT&T and Verizon. The RLEC may also be charged for reciprocal compensation by the CLEC to whom the call is handed off to before the CLEC terminates the call to its end user, the ISP. Although the FCC's ISP Remand Order generally provides that current compensation for ISP-bound traffic is \$.0007 per minute of use (MOU),⁶ the workgroup discussions have revealed that rates actually charged vary from this amount depending on specific arrangements between providers.

Telnet, *et al*, and the ISPs assert that depending on the amount of traffic, federal rules permit a CLEC to have a single point of interconnection (POI) per LATA,⁷ which eliminates the need for a CLEC to physically locate in each individual exchange. Michigan has 5 LATAs: Detroit, Grand Rapids, Lansing, Saginaw and the Upper Peninsula. Typically, a CLEC will interconnect at or near an AT&T or Verizon tandem switching facility, where traffic is routed through as a concentration and/or distribution point. As a result of a CLEC's location and interconnection to the tandem, an RLEC is usually required to deliver VNXX traffic outside its original service territory via the tandem.

⁵ A tandem switch is an intermediate switch or connection between an originating telephone call location and the final destination of the call. The tandem point passes the call along. Newton's Telecom Dictionary, Harry Newton, 21st Ed., 2005, p 821.

⁶ Order on Remand and Report and Order, FCC 01-131, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, FCC 01-131 (released April 27, 2001), p 6.

⁷ Local Access and Transport Area, geographic areas set out in the US originally as part of the AT&T divestiture most commonly associated with geographic area codes at that time.

DRAFT

Other VNXX Types of Service

There was general agreement by the workgroup that the focus of Section 304(9) was on dial-up ISP-bound traffic from RLEC exchanges to ISP servers located outside RLEC local calling areas. The ISPs⁸ and CLEC group did express concern that, as currently written, Section 304(9) will encompass all services that utilize VNXX or a VNXX type of scenario. Such services might include Foreign Exchange or “FX” service, Voice Over Internet Protocol (VOIP) and wireless services, because as defined in Section 304(9), “. . . a call made to a called party who is not located within the geographic area of the caller’s local calling area or an adjacent local calling area . . . is not a local call if the tariff of the provider originating the call does not classify the call as a local call.”

In Section 304(9), the legislature called upon the commission to “convene a workgroup of interested parties **for the purpose of resolving issues surrounding virtual NXX.**” (Emphasis added). The other types of services, such as traditional FX, have established compensation mechanisms in place. Those mechanisms are not at issue between the parties. Also, some of these other services are unregulated services. If they were to be encompassed under the Section 304(9) umbrella, they would most likely be challenged as outside the Commission’s jurisdiction. As the parties have agreed in their recommendation at the conclusion of this report, if any changes are required to Section 304(9), after action is taken by the FCC in the intercarrier compensation docket and the parties need to revisit the definition of VNXX in section 304(9), it can be done after the FCC acts.

⁸ ISPs March 31, 2006 proposal, pp 9-17, contains several diagrams and discussion of various types of VNXX arrangements and their current application as a result of implementation of Section 304(9) language after December 31, 2007.

DRAFT

Positions of Parties

The following section provides brief summaries of the parties' positions as written in comments submitted to the workgroup March 31 and April 14, 2006.

❖ *AT&T, Verizon and Talk America*

In its proposed report dated March 31, 2006, AT&T, Verizon and Talk America (AT&T *et al*) state that, "Virtual NXX arrangements have given rise to issues associated with appropriate intercarrier compensation and network architecture." (AT&T, Verizon, and TalkAmerica Proposed Report, March 31, 2006, pp 11-12.) As a result of unclear policy at the federal level, intercarrier compensation arrangements with regard to VNXX traffic vary from state to state. Some various state scenarios identified by AT&T, *et al* include:

- Classification of VNXX traffic as non-local and subject to access charges to be paid by the terminating carrier to the originating carrier.
- A bill and keep arrangement in which no intercarrier compensation payments are made among the carriers who transport and terminate the call. Responsibility for payment is then typically shifted to end users.
- VNXX traffic is classified as local and is subject to reciprocal compensation charges by the originating carrier to the terminating carrier. This is the compensation scheme that VNXX traffic in Michigan currently falls under.
- Determination that VNXX is local traffic subject to reciprocal compensation charges to be paid by the originating carrier to the terminating carrier with a transport charge to be paid by the terminating carrier to the originating carrier for transport of traffic beyond the originating local exchange. (*Id*, p 10)

AT&T, *et al*, also states that in addition to the state commissions' responses, some ILECs and CLECs have resolved compensation issues through negotiation of agreements. These agreements typically entitle a CLEC to compensation for transporting ISP-bound

DRAFT

VNXX traffic in exchange for a commitment from the CLEC to connect further into the ILEC's network, reducing the ILEC's cost of transporting traffic. (*Id.*, p 11) AT&T, *et al.*, takes the position that current Commission orders remain in full effect, that Sec. 304(9) does not require the Commission to modify any of its orders and that disputes involving interconnection arbitrations will be decided by the Commission when those issues are presented. Participation and the positions taken by the workgroup do not bind a carrier in other proceedings before the Commission. (*Id.*, p 12) AT&T, *et al.*, also suggests that successful negotiation of intercarrier compensation arrangements with regard to VNXX traffic between carriers allows the companies to avoid a win-lose outcome and allows the parties to achieve an outcome that reflects a balanced solution to a longstanding problem. (*Id.*, p 13)

AT&T, *et al.*, contends that there is likelihood that the FCC will act soon and release a nationwide intercarrier compensation policy which will be phased in and become at least partially effective before December 31, 2007. AT&T, *et al.*, recommends that the legislature enact no revisions to Sec. 304(9). This assumption is based on the likelihood that the FCC will issue orders in the near future that will address intercarrier compensation issues, including VNXX and other services discussed in the workgroup. (*Id.*, p 13) Finally, AT&T, *et al.*, recommends that the Commission should provide the legislature continued updates on VNXX on a regular basis (possibly every six months) with regard to action by the FCC in its progress on intercarrier compensation reform proceedings as well VNXX actions or decision made by the Commission in proceedings before it. (*Id.*, p 13)

DRAFT

❖ *MECA*

MECA asserts that VNXX calls do not normally generate reciprocal compensation. VNXX calls primarily produce one-way traffic flow that terminates outside an RLEC's local calling area, usually to an ISP, which requires use of interexchange facilities to reach the called party. Due to the more lengthy duration of the calls associated with dial-up internet usage, RLEC interoffice trunks to the AT&T or Verizon tandem switch become overburdened, which in turn forces the RLEC to add more trunks. Those additional trunks today are added at the expense of the ILEC, while the CLEC or CLEC's ISP customer contribute nothing to the recovery of those costs. (MECA "VNXX Workgroup Proposed Comments," March 31, 2006, pp 1-2.) MECA asserts that the VNXX compensation issue became an even greater problem when the RLECS implemented expanded local calling plans that gave their customers the ability to call VNXX codes in the expanded areas that were previously toll calls. (*Id.*, p 3)

In its comments, MECA also addresses both Commission and FCC decisions regarding VNXX. It states the Commission first addressed compensation for VNXX calls in *Bierman v CenturyTel of Michigan, Inc*, Case No. U-11821, issued April 12, 1999.⁹ In the *Bierman* case, the Commission resolved the issue of whether calls are considered local or non-local based on the language in the CenturyTel tariff. The Case only addressed the rates to be paid by the end user; intercarrier compensation was not addressed. The Commission has only addressed reciprocal compensation for VNXX

⁹ *In the matter of the complaint of Glenda Bierman against CenturyTel Communications of Michigan, Inc, d/b/a CenturyTel*, Michigan Public Service Commission Case No. U-11821, April 12, 1999.

DRAFT

calls in a few arbitration proceedings reached prior to the amendment of the MTA in 2005.

MECA argues that although VNXX allows a customer to access the ISP of their choice and avoid toll charges, it creates a financial strain for the RLECs. The RLECs also assert that they are not being properly compensated in their local rates for these calls because local rates cannot include the transport of interexchange traffic. When the RLEC customer generates the call the RLEC receives no compensation from a terminating CLEC for originating and transporting, and the RLEC is billed by the interexchange carrier to transport the call. Meanwhile, the CLEC still seeks reciprocal compensation. (*Id.*, p 3)

MECA contends that when Sec. 304(9) takes effect on December 31, 2007, it will allow the LECs to include language in their tariffs that will determine if VNXX calls are treated as local or toll calls, thus still complying with the *Bierman* decision. Section 301(a) of the amended 2005 MTA requires all local exchange carriers to offer Primary Basic Local Exchange Service (PBLES) to their residential customers. The PBLES offering is the only rate regulated service and is intended for voice communications only. This allows LECs to exclude data calls from the PBLES package and offer optional calling plans to customers for data calls to the ISP of their customer's choice. (*Id.*, pp 5-6)

MECA further discusses the position of the FCC in the debate over intercarrier compensation and asserts the FCC has not fully addressed compensation involving VNXX traffic. The FCC's ISP Remand Order introduced a compensation scheme for ISP-bound calls that originate and terminate in the same local calling area and took

DRAFT

exclusive jurisdiction over compensation for ISP-bound calls. However, the FCC has not yet determined that VNXX ISP-bound calls are subject to the ISP Remand Order.

MECA also claims compensation for the termination of ISP calls that originate and terminate in the same local calling area is not based on Section 251(b)(5) of the Federal Telecommunications Act of 1996 (FTA)¹⁰ as other parties have asserted. Section 251(b)(5) imposes upon all local exchange carriers the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications. According to MECA, the ISP Remand Order of April 27, 2001 created an interim compensation regime for ISP-bound traffic. The order was later appealed and the DC Circuit Court of Appeals remanded the issue back to the FCC, but it did not vacate the order and the rules remain in effect. (*Id*, p 6-7).

MECA also addressed the contention by some other members of the workgroup who suggest that the ILECs should compensate the CLECs using the \$.0007 rate for ISP-bound traffic contained in the ISP Remand Order. MECA explains that if it were to use this rate for ISP-bound traffic it would be required to use it as the rate for all reciprocal compensation. This rate is significantly lower than the MECA members' Commission approved TSLRIC cost study rates for reciprocal compensation.” (*Id*, p 8)

MECA concludes that the MTA as amended in 2005 has resolved all major issues surrounding VNXX and there is no need for future legislation. MECA also notes that intercarrier compensation is receiving attention at the federal level. MECA states,

¹⁰ Federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*

DRAFT

“...expending more time on this issue at the state level would be redundant and could lead in a different direction than the more global discussion taking place on the national level, which would not be productive.” (*Id*, pp 9-10)

❖ *TAM*

TAM submitted a filing to the workgroup on April 14, 2006 indicating it supports the report and comments submitted by MECA on March 31, 2006 and April 14, 2006 respectively.

❖ *ISPs*

The ISPs (Mid-mich.net, M33 Access, and The Iserv Company) and MIACT¹¹ discuss the existing definition of VNXX and contend that a revised definition of VNXX should be applied to address the underlying intercarrier compensation issues indirectly addressed in Sec. 304(9). (ISPs submission, March 31, 2006.) Their suggested definition reads:

Virtual NXX is the assignment of numbers to a Local Exchange Carrier (LEC) that is not directly connected to the telephone Central Office (CO) serving the exchange, where the numbers have been assigned, and therefore relies on the originating carrier of the call to provide transport, beyond the exchange where the call originated in order to complete the call. (*Id*, p 1)

The ISPs also state:

Section 304(9) attempts to redefine what a “local call” is for retail customers based on physical location rather than the standing Michigan model of rating calls based on Area Code and Exchange (NPA-NXX). (*Id*, p 2)

¹¹ The initial proposal was submitted by Mid-mich.net, M33 Access, and The Iserv Company. In an April 3, 2006 email, MIACT indicated it wished to join the submission of the ISPs. In its replies submitted April 14, 2006, the ISPs and MIACT were also joined by ACD.

DRAFT

Currently, in the ISP's view, the Commission has issued nine rulings that have determined that VNXX calls are local calls. *See*, http://www.dleg.state.mi.us/mpsc/comm/vnxx/12_13_2005/telnet12_13_05.pdf for a list of orders for example.

A concern addressed by the ISPs involves the term "called party". They assert that "called party" is not defined in Sec. 304(9) or any other section of the MTA. During the workgroup discussions the called party was "assumed to be the retail customer to whom the call is connected." (*Id*, p 2)

After December 31, 2007, the effective date of changes delineated in Section 304(9), the ISPs contend that NPA-NXX no longer determines what is a local call, instead it will be based on geographic location. Initiatives ongoing at the federal level are moving towards a unified intercarrier compensation regime that does not distinguish between rates for local and toll minutes of use or geographic location. If a local call is not defined by the FCC in its anticipated intercarrier compensation overhaul, unless amended, Section 304(9) will stand as is and this new definition based on geographical location of the called party will lead to call rating issues and confusion for consumers, in the ISP's opinion.

They also contend that Section 304(9) moves in the opposite direction of current proposals in several ways:

- Section 304(9) requires that LECs have a physical presence in each local calling area they wish to provide service to, in order to guarantee calls to their network will still be considered local. The ICF proposal would actually restrict the number of LEC network edges to the number [of] access tandem switches in a LATA. (with the exception of interconnection to RLEC networks, where the terminating LEC would bare all transport costs beyond the RLEC's exchange boundary.)

DRAFT

- Section 304(9) moves away from one of [the] main tenants of the ICF plan that a minute is billed as a minute no matter if the call is within the local calling area, intraLATA, intrastate, or interstate.
- The ICF plan provides an inter-carrier compensation solution that addresses the concerns of RLECs by placing the burden of transport of any traffic outside their exchange boundaries upon the LEC that terminates the traffic.
- Instead of addressing the true inter-carrier compensation nature of Virtual NXX traffic, Section 304(9) redefines the definition of Local Calling for retail consumers in Michigan moving away from the NPA-NXX standard and encompasses services beyond Virtual NXX traffic.
- Unless the final FCC inter-carrier compensation plan addresses Local Call rating, then Section 304(9) will still remain as the standard for local call rating for retail consumers in Michigan. Although the ultimate FCC inter-carrier compensation policy will provide a solution for the underlying compensation issues that 304(9) was designed to resolve. (*Id*, pp 7-8)

The ISPs further contend that currently there is no technological way to determine how to rate a call based on the physical location of the called party and that during the workgroup discussions, “no LEC has proposed a system to provide intercarrier notification of the physical location of a called party so calls could be rated in real-time under 304(9) after 12/31/2007.” (*Id*, p 3) The ISPs go on to explain various scenarios that might occur in calling patterns, and numbering assignments by CLECs to various geographic areas. All of which could add to customer confusion and/or varying toll or local charges.

The ISPs also discuss the FCC’s role in intercarrier compensation and explain that, “Once implemented the FCC policy will, from indications in orders they have previously issued, preempt any state law, or policy addressing the same issues” and further state that, “any changes Michigan makes to telecommunications policy should parallel published proposals that have been created as a basis for these policies.” (*Id*, p 5)

DRAFT

Currently, the industry led Intercarrier Compensation Forum (ICF) and the NARUC Intercarrier Compensation Task Force are forming proposals that will help guide the FCC in its policies on intercarrier compensation.

The ISPs assert that the ISP Remand Order provides the FCC with the authority under Section 251(i) of the FTA to regulate ISP-bound traffic under Section 201. Pointing to that order the ISPs reference paragraph 82 of the ISP Remand Order, where the FCC stated, “Because we now exercise our authority under Section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.” In paragraph 80 the FCC indicated that the rates it set for ISP-bound traffic are a cap and “have no effect to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis.” (*See*, FN 6) The ISPs contend that the FCC did not determine whether VNXX traffic should be compensated under the ISP-bound traffic policy and left that determination up to the individual states.

Initially in their proposal the ISPs concluded that Section 304(9) should be repealed, but after reviewing the March 31, 2006 proposal of the CLEC group, the ISPs on reply, endorsed the CLEC group’s suggested proposal, joined with MIACT and ACD. The ISPs recommend that the Commission should encourage the legislature to “delay the filing of the Commission’s final policy recommendations on VNXX until six months after the issuance of an FCC decision in CC Docket No. 01-92.” (ISPs Reply, pp 4-5)

In reaching this conclusion the ISPs reasoned that:

It would be foolhardy to allow providers to unilaterally reverse long-standing Commission precedent regarding VNXX services and then, within a matter of months, find out that the FCC has rendered such unilateral action unenforceable. The only reasonable course of action for

DRAFT

the State of Michigan is to wait for the FCC action on the inter-carrier compensation docket, study the implications of the FCC action and propose a new policy for dealing with VNXX in keeping with the dictates of the FCC. (ISPs Reply, p 4)

❖ *Telnet, Pac-West, and Level 3, CLEC group*

It is the position of the CLEC group that the ISP Remand Order (CC Docket Nos. 96-98 and 99-68) has given the FCC “exclusive jurisdiction over all traffic bound for ISPs including VNXX ISP-bound traffic, and in so doing established an intercarrier compensation regime governing all such traffic.” (Proposed VNXX Report submitted by Telnet, Pac-West, and Level 3, March 31, 2006, p 2.) States have “little opportunity to make fundamental changes to these intercarrier relationships.” (*Id*, p 3) The CLEC group contends that in its ISP Remand Order, the FCC clarified that reciprocal compensation applies to all telecommunications traffic unless specifically exempted by other provisions of the Act (FCC 01-131). The excluded services are those carved out by Section 251(g), *i.e.*, “exchange access, information access and exchange service for such access to interexchange carriers and information service providers.” (FCC 01-131) It is the opinion of the CLEC group that in the end, if VNXX traffic is ISP-bound, the calls are 251(g) calls and the appropriate compensation is \$.0007 per MOU while other VNXX traffic, *i.e.*, FX traffic, falls under Section 251(b)(5) of the FTA and is subject to reciprocal compensation.

Concerning the delivery of traffic, the CLEC group argues that the originating carrier is obligated to deliver traffic to a CLEC’s POI. Under FCC rules, a CLEC needs only one POI in any LATA. Once a CLEC receives a call, the CLEC is required to deliver the call to the called party. The CLECs conclude, and cite several federal and state rulings that support the position, that costs to the calling party’s carrier are the same

DRAFT

as the costs to the carrier of a call to a party located in the calling party's local exchange or as a call using VNXX architecture. If traffic overloads an originating company's equipment, then additional trunking should be obtained at the expense of the originating carrier. The originating carrier's customer is the "cost causer".

Michigan has considered VNXX calls as local calls in several cases beginning with Case No. U-11821. Other cases the CLEC group cited include several arbitrations and customer complaint cases. In these cases, Michigan has consistently considered VNXX calls to be local calls. Some were appealed and the Court of Appeals has upheld the Commission's position. A list of the cases cited in the proposed report and reply comments are:

- U-12382 - Interconnection arbitration between Coast to Coast Communications and AT&T.
- U-11821 - *Bierman v CenturyTel* (customer complaint)
- U-12090 - *Coast to Coast v Verizon North Inc and Verizon North Systems* (reciprocal compensation complaint)
- U-12696 - In the matter of the application of Ameritech Michigan to revise its reciprocal compensation rates and rate structure and to exempt foreign exchange service from payment of reciprocal compensation.
- U-12952 - Interconnection connection agreement between TDS Metrocom and Ameritech
- U-13931 - Verizon argued VNXX is exempt from reciprocal compensation.

FCC and other state cases cited and a brief description of the CLEC group's summary point of each case are as follows:

- *WorldCom v FCC* (DC Cir 2002) – Left hybrid compensation scheme in place.

DRAFT

- Illinois Commerce Commission - *Focal Communications v Ameritech Illinois* arbitration. The ICC determined that a VNXX call causes no extra cost for Ameritech Illinois. The company was required to take traffic and deliver it to Focal's POI.
- North Carolina, 4th Circuit Court - *MCIMetro Access v BellSouth*. A company cannot charge an incremental cost for transporting traffic from a customer's local exchange and a POI on another company's network.
- Public Utilities of Texas, 5th Circuit Court - *Southwestern Bell Telephone Co v Public Utilities of Texas*. A company cannot charge an incremental cost for transporting traffic from a customer's local exchange to a POI on another company's network.
- *Southwestern Bell v AT&T*, Virginia Arbitration decision. Traffic is financial and delivery responsibility of an ILEC to the POI of CLEC (pp 11, 13-18)

These cases were submitted in support of the position of the CLEC group. In summary, this group asserts that all VNXX traffic is to be delivered to a CLEC POI, CLECs are only required to have one POI per LATA, VNXX traffic is the financial responsibility of the originating carrier, and the originating carrier's customer is the ultimate cost causer. The ISP Remand Order set the rate for intercarrier compensation. Until the FCC rules differently, this model is the appropriate one for VNXX traffic.

The CLEC group states that a change in the current model in Michigan will cause citizens to have reduced access to the Internet, causing fewer educational opportunities, decreases in jobs and less efficiency in business. According to the CLEC group, this will harm some of Michigan's most vulnerable citizens and areas. Traditional FX service will be harmed also, as will enhanced services and Voice over Internet Protocol calling. The CLEC group proposes:

Michigan should maintain its current framework governing intercarrier compensation and network interconnection architecture for VNXX and FX arrangements and refrain from any further review or consideration of

DRAFT

restructuring those regimes until after the FCC has issued a ruling in its ongoing Unified Intercarrier Compensation Docket (FCC 01-132 and FCC 05-9). (*Id*, p 1)

After the FCC order is issued, the CLEC group further recommends that the workgroup should reconvene and resume discussions in the light of the FCC decision. If it seems that the FCC will not rule in time for providers to make the adjustments in operation necessary to accommodate the change required by the MTA on December 31, 2007, certain changes in the language in Sec.304(9) should be made as follows (suggested new language in bold and italics):

(9) A call made to a local calling area adjacent to the caller's local calling area shall be considered a local call and shall be billed as a local call. ***Within six (6) months of the effective date of an order of a final Federal Communications Commission decision in Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, regarding intercarrier compensation, the commission shall*** ~~Effective December 31, 2007, a call made to a called party who is not located within the geographic area of the callers local calling area or an adjacent local calling area as defined by the commission's order in case numbers U-12515 and U-12528, dated February 5, 2001, is not a local call if the tariff of the provider originating the call does not classify the call as a local call. The commission shall convene a workgroup of interested parties for the purpose of resolving issues surrounding virtual NXX. Virtual NXX is the assignment of a telephone number to customers who are not physically located in the exchange to which the NXX is assigned. The workgroup shall consider the utilization of virtual NXX services to transport interexchange traffic and the associated intercarrier compensation. Prior to July 1, 2006, the commission shall submit a report to the governor and the house and senate standing committees with oversight of telecommunication issues~~ ***on the Federal Communications Commission decision.*** ~~on the progress of workgroup discussions.~~ The report shall include a commission policy statement relating to the provision of virtual NXX services, and recommendations for legislation, if any. ***For purposes of this section, Virtual NXX is the assignment of a telephone number to customers who are not physically located in the exchange to which the NXX is assigned.*** (*Id*, p 27)

DRAFT

❖ *MERIT*

On April 14, 2006 MERIT submitted comments supporting the proposed VNXX report filed by the CLEC group. This organization repeated much of the CLEC group's reasoning with a special emphasis on the negative effects possible regarding educational and residential access to Internet services if the VNXX regime is changed from the current one.

MERIT also stated, as did the CLEC group, that the FCC is best equipped to set reasonable policy for intercarrier compensation issues and provide a consistent nationwide set of rules to accommodate the "needs of telcos and consumers."

(Comments submitted by MERIT on April 14, 2006, p 2.)

Conclusions and Recommendations

Throughout the workgroup sessions, there was spirited and open discussion of the many and varied issues of concern to the parties. A goal throughout, by the participants and Mr. Isiogu leading the workgroup, was to try to find common ground where possible, among the varying interests and disputes. As identified in the previous section of this report, the written positions and proposals reflect some differences, but also consensus to some degree.

While participants' ultimate recommendations differ somewhat, there has been a common fundamental proposal among all of the participants. At the April 18, 2006, workgroup session, participants were able to come to a consensus recommendation for this preliminary report to the Commission. Participants differ in their opinions of the extent and effect of current FCC orders and FCC jurisdiction regarding VNXX and

DRAFT

virtual FX traffic in Michigan.¹² Nevertheless, they agree that Michigan should not, at this time take any action to amend the MTA. The better course would be to wait for the FCC to issue a decision in the pending intercarrier compensation Further NOPR proceeding.¹³

The Further NOPR is a notice requesting additional information and comment as a further inquiry to an earlier notice initiated by the FCC in 2001.¹⁴ The FCC noted in the initial notice: “We are particularly interested in identifying a unified approach to intercarrier compensation – one that would apply to interconnection arrangements between all types of traffic passing over the local telephone network.” (§ 2) The FCC also stated: “We seek comment on the use of virtual central office codes (NXXs), and their effect on the reciprocal compensation and transport obligations of interconnected LECs.” (§ 115)

The pending Further NOPR is addressing a broad range of matters. In the opening statement the FCC indicates: “...we begin the process of replacing the myriad existing intercarrier compensation regimes with a unified regime designed for a market characterized by increasing competition and new technologies.” (§ 1)

¹² In fact, as recently at April 17, 2006, the participants submitted information and opposing views on the impact of a First Circuit Court of Appeals ruling issued on April 11, 2006, in an appeal of a decision by the Massachusetts Department of Energy and Telecommunications, dealing with the topic of VNXX calls, *Global NAPS, Inc v Verizon New England, Inc*, ___ F3d ___, slip Op at 11, 2006, WL 924035 (April 11, 2006). Those submissions are available on the Telecommunications Division VNXX website link, identified and incorporated by reference, earlier in this report.

¹³ Further Notice of Proposed Rulemaking, *re Developing a Unified Intercarrier Compensation Regime*, FCC 05-33, CC Docket No. 01-92, (released March 3, 2005).

¹⁴ Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, FCC 01-132 (released April 27, 2001).

DRAFT

The Further NOPR is addressing all aspects of intercarrier compensation, such as specific industry proposals put forth for intercarrier compensation reform, network interconnection issues, cost recovery issues, implementation, and legal issues, including jurisdictional and rate averaging and integration requirements. The FCC proceeding is a comprehensive analysis of the current intercarrier compensation and network architecture schemes. That analysis encompasses the issues being researched and discussed by the VNXX workgroup here in Michigan.

The assumption among the workgroup participants is that the FCC is nearing completion of its review and will act on nationwide network architecture reform and an intercarrier compensation regime in the very near future; most agree a decision is expected by the end of this year. Being cognizant of the broad scope of the FCC intercarrier compensation proceeding, and that an FCC decision is expected relatively soon, the workgroup recommends Michigan should wait for the FCC to issue its decision in the intercarrier compensation proceeding. No legislative changes to the MTA are recommended at this time with respect to Section 304(9). It would be premature, possibly disruptive and an inefficient use of resources for Michigan to move forward with changes in the provisioning and compensation regimes for VNXX service. Awaiting the FCC national based decision avoids potential conflicts, duplication of efforts and provides more certainty for the industry overall.

The workgroup has made considerable progress in researching, analyzing and debating the complex issues surrounding the provisioning and compensation of VNXX services. Even though the recommendation at this time is Michigan should wait for FCC action anticipated later this year, the participants agree that the workgroup should

DRAFT

continue to meet periodically to further study and attempt joint resolution of issues raised. Providers also continue to be free to negotiate individual agreements between providers. Workgroup participants have informally indicated they are indeed attempting to reach negotiated agreements, in addition to attempting resolution of issues in the collaborative workgroup environment.

Following an FCC decision implementing new intercarrier compensation arrangements, the Commission should report back to the legislature on the necessity of any changes to the MTA. Because the workgroup will be meeting periodically, it will be able to present the Commission with an evaluation and recommendations also.

The VNXX workgroup has made considerable progress since its establishment shortly after the enactment of PA 235. A diligent, collaborative and cooperative approach has persisted throughout. The workgroup presents this preliminary report and recommendations to the Commission, and will continue to attempt further joint resolution of any issues requiring more immediate attention.

Attachment A

12/13/05 VNXX workgroup issues list

- 1) What factors determine whether a call is a local or non-local call?
 - a) How should the term “physically located” be defined?
 - b) How should the term “called party” be defined?

- 2) Compensation
 - a – e, not yet discussed. f) added.
 - f) Are there costs incurred by the originating provider, or network providers for VNXX that would not be incurred in handling a non-VNXX local call?

- 3) Should one carrier’s tariffs limit, or expand, the service offerings of another carrier? Is there a role for the MPSC?

- 4) How, by whom, and when, will end users be notified which calls will become toll calls effective 12/31/07?

- 5) Can VNXX calls be tracked?
 - a) notification;
 - b) administrative burdens;
 - c) LNP issues/complications, and
 - d) accounting method for tracking VNXX calls

- 6) Would there be an effect on emerging technologies if VNXX is eliminated? For example such as on:
 - a) VOIP;
 - b) Cellular;
 - c) Ability of a customer to take a phone number with them everywhere, and
 - d) Broadband.

- 7) Is there evidence of benefit or harm from VNXX service?

- 8) How does VNXX effect network investment?

- 9) Is any VNXX traffic subject to preemption by the FCC?

- 10) How widespread is the use of VNXX in Michigan?

- 11) Is any carrier legally or technically foreclosed from offering a service that utilizes NVXX?

