

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

**Joint Comments of
Telnet Worldwide, Inc., Pac-West Telecomm, Inc., Level 3 Communications, LLC,
Mid-mich.Net, IServ, ACD.Net, M33 Access and MiACT**

On May 16, 2006, the MPSC Staff circulated a “Draft VNXX Workgroup Preliminary Report and Recommendations.” The following entities are filing joint comments in response to the Draft Preliminary Report (Report): Iserv, Midmich.Net, M33 Access and ACD.Net (Internet Service Providers or ISPs); the Michigan Alliance for Competitive Telecommunications (MiACT); and Pac-West, Telnet and Level 3 (CLEC Group). The Joint parties commend the Staff for attempting to pull together a document that describes countless hours of discussions. However, the Joint Parties disagree with certain findings in the Report, as well as the conclusions and recommendations in the Report, particularly the conclusion that there is a consensus among the parties on how to proceed with future legislation.

**The Conclusions and Recommendations of the Report
Do Not Accurately Reflect the Positions of the Participants**

The most critical point of these Joint Comments is that the Report does not reflect the recommendations of many of the participants of the Work Group. The Report states that the participants “agree that Michigan should not, at this time take any action to amend the MTA.” (Report, p. 23). In fact, both the CLEC Group and the ISPs recommended that the current language in Section 304(9) of amended 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 Inter-carrier Compensation Regime, CC Docket No. 01-92, regarding inter-carrier 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 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 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.***

Although the Staff recognized the need to await the FCC action before urging the Commission to finalize its recommendations to the Legislature and therefore correctly deemed the Report “preliminary”, the Report fails to recognize the serious consequences that will occur if legislation is not enacted immediately to make clear that the 12/31/07 reclassification date for VNXX will, in all likelihood, be superseded by FCC action and should postponed until the details of the FCC actions are known.

In addition to the consequences detailed in the below sections of these comments, the absence of immediate legislation will make it very difficult, if not impossible, for CLECs and ISPs to adequately plan for a transition to the new intercarrier compensation regime in a time remaining before 12/31/07. If the FCC ‘s final action occurs, as expected, later this year, there is no reason to avoid amending Section 304(9) now to eliminate the 12/31/07 date for reclassification and require a reexamination of the VNXX issue by the Commission upon the issuance of the FCC order. No parties are prejudiced by such a course, and the certainty that is created will inure to the benefit of numerous parties in the work group and rural dial-up customers and educational institutions as well.

If the Commission declines to revise the Staff recommendations to urge the Legislature to immediately amend the MTA, the ISPs recommend that the Commission at the very least, require in the Report that there be further review of the issue and another report to the Legislature no later than October 15, 2006¹. This will allow for the NARUC Task Force to announce the details of its recommendations to the FCC and for the Commission to review those recommendations in order to be in a better position to assess the prospects for FCC pre-emption of the VNXX issue and recommend the appropriate changes to the MTA.

The Report Should Be Revised In Certain Other Respects:

- 1) MECA and TAM represent the same group of rural ILECs. The Report should not give the impression that those two organizations have separate interests.
- 2) The description of VNXX traffic on page 6 should be revised. The Report gives an example of a customer in Jackson that has been assigned a Lansing NXX phone number. The Report indicates that “the call actually terminates in Jackson and must travel over interexchange facilities to reach the called party.” The later statement is inaccurate. The call does not travel over interexchange facilities from Lansing to Jackson to terminate. The Lansing to Jackson leg of the call would be carried by the CLEC over local interconnection trunks owned or leased by the CLEC . The Report should make this correction.
- 3) On page 6, the Report indicate that the parties have not come to a general consensus on the meaning of past MPSC Orders “and whether the call is considered a local call and is subject

¹The CLEC Group does not join in this alternative recommendation. The CLEC Group believes that the instant Report must recommend a change to the statutory language.s

- to intercarrier compensation or a toll call subject to access charges. The MPSC Orders speaks for themselves and it should not be constrained by disagreements between the participants regarding the scope of some the MPSC decisions. The Commission should include in the Report a summary of its past Commission decision and a summary of the Court of Appeals decision in the Bierman case. Secondly, it is inaccurate for the Report to suggest that any past Commission precedent could be interpreted as requiring VNXX calls to be subject to access charges. No participant has made that assertion in the Work Group.
- 4) On page 7, the reference to the \$.0007 rate should be put in context. There should be a statement that this rate is charged by the terminating LEC to compensate that LEC for switching and delivering ISP-bound traffic to the end users. There should also be a statement that, in comparison, the Rural LECs charge in the range of \$.02¢ to \$.05¢ for switching and delivering traffic.
 - 5) The Report on page 7 should not focus on the fact that various providers have sent invoices with varying rates for ISP traffic. Rather, the Report should focus on the amounts actually paid for termination of ISP traffic. No one in the Work Group admitted to paying more than \$.0007 for ISP traffic.
 - 6) On page 7, the states that the Federal rule regarding a CLEC's right to maintain only on Point of Interconnection in a LATA "depend[s] on the amount of traffic." This condition is not in the Federal rule and should be removed from the Report.
 - 7) There should be a statement in the Report that the issues surrounding VNXX posed particular concern to the Rural ILECS, who serve in relatively small geographic areas and who do not have the ubiquitous networks like AT&T and Verizon.
 - 8) There should be a statement in the Report that rules and regulations regarding VNXX traffic can be employed by Rural ILECs in the same manner as they are employed by CLECs.
 - 9) On page 8, it is not accurate to suggest that the other types of VNXX services have established compensation mechanisms in place. For example, it cannot be said that there is an established compensation method for VOIP traffic.
 - 10) The Report does not address the effect on services other than traditional VNXX. The Report notes that the workgroup was convened "**for purposes of resolving issues surrounding virtual NXX**" (emphasis supplied by Staff), but fails to recognize that the definition of virtual NXX in the MTA encompasses many more services than those associated with traditional VNXX. The fact that a service may be unregulated and "outside the Commission's jurisdiction," does not alter the fact that the Legislature can, in defining an issue, affect more services than may have been intended. The Report should indicate that the statutory language is broad and encompasses more than the type of VNXX architecture typically used by CLECs to provide service to ISPs. The Report should delete the sentence on page 8 that the compensation mechanisms of other VNXX architectures "are not at issue between the parties."

- 11) One of the critical issues that the Report should be addressed is the disruption and havoc that would be created and visited upon various parties if VNXX is no longer classified as a local service after 12/31/07. As noted by the Report, numerous Commission decisions have classified VNXX calls as local and parties have relied on those Commission decisions in their business plans. Communications systems have been built in Michigan in reliance upon the numerous MPSC decisions that VNXX calls are local calls. The Report should specifically advise the Legislature and Governor of that fact.
- 12) On page 18, the Report states: “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.” That description of the CLEC Group’s position is not accurate. ISP-bound VNXX calls are subject to the compensation mechanism found in the ISP Remand Order. The DC Circuit Court has definitively concluded that ISP-bound traffic is not Section 251(g) traffic.
- 13) If the Federal Communications Commission (FCC) implements a unified intercarrier compensation scheme, along the lines of the ICF or NARUC Task Force proposals, the ability of the State of Michigan to change the existing classification of VNXX calls will be abrogated. The harm to numerous parties, and the rural residents and educational institutions of Michigan, will be enormous if State reclassification occurs and the FCC soon thereafter pre-empts the State’s efforts. ISPs may be forced to abandon service to rural areas that depend on dial-up internet service, educational opportunities will be affected and CLECs may be required to make operational adjustments that, by waiting a few months, may become unnecessary. The Report should specifically advise of the impending Federal pronouncements and recommend that Michigan not take action to disrupt and rework state networks prior to the time the FCC acts.
- 14) The Report indicates that “there was spirited and open discussion of the many and varied issues of concern to the parties” (Report, p. 22) and “considerable progress” was made in researching, analyzing and debating the issues (Report, p. 24). In fact, Attachment A to the report is a list of issues identified by the Workgroup. Although there are references to some of these issues in the Staff’s discussion of the positions of the parties, the Report does not resolve many of them, including: (1) is there evidence of benefit or harm from VNXX service; (2) how does VNXX effect network investment; and (3) how, by whom, and when, will end users be notified which calls will become toll calls effective 12/31/07. Also, there is the important issue of even being able to track VNXX calls. More importantly, the fact that the Work Group has not been able to resolve key issues is evidence that the industry is not prepared for a reclassification of VNXX traffic. Accordingly, a need for an immediate legislative solution, which the report declines to recommend, exists.

SUMMARY

The Joint Parties urge the Staff to revise its preliminary report to address, or at the very least recognize, the issues detailed in these comments and to revise the Conclusions and Recommendations to urge the Commission to immediately seek the legislative changes outlined in the CLEC comments of March 31, 2006. In the alternative, the ISPs urge the Staff to recommend that the Commission include in the preliminary report a further review and report no later than October 15, 2006.²

Respectfully Submitted,

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²The CLEC Group does not join in this alternative recommendation. The CLEC Group believes that the instant Report must recommend a change to the statutory language.