DT 00-223
DT 00-054

Investigation as to Whether Certain Calls are Local

Order Addressing Motions for Rehearing

O R D E R N O. 24,218

October 17, 2003

I. INTRODUCTION

The primary issue raised in this docket was whether calls using Virtual NXX (VNXX) numbers are local or toll. Virtual telephone numbers are numbers that are assigned to an exchange for the purposes of billing and intercarrier compensation, when the customer using the assigned number is not physically located in the geographic area served by the exchange. This practice has become known as VNXX.

We found that some versions of VNXX are local, some are toll, and some are neither. Internet-bound VNXX calls, which will utilize specific statewide Information Access NXXs (IANXXs), are neither local nor toll. VNXX calls that are qualified as CLEC Foreign Exchange (FX) because of the sufficiently local nature of the carrier's service (local nexus) are either local or toll based on a comparison of the NXXs of the calling and called parties. We determined that the only versions of VNXX calling permitted in New Hampshire are IANXX and CLEC FX. Accordingly, we ordered that all VNXX numbers assigned to CLECs that are neither IANXX numbers nor used for CLEC FX will be reassigned for both rating and routing purposes to the CLEC Point of Interconnection (POI).

This *Order* considers all the motions for rehearing, reconsideration and clarification filed regarding our VNXX Order. We clarify and affirm our findings, set out a new reporting

requirement for CLECs who have or wish to have numbering resources, and grant limited rehearing regarding the implementation of IANXX.

II. PROCEDURAL HISTORY

On October 28, 2002, the New Hampshire Public Utilities Commission (Commission) issued Order No. 24,080 (*VNXX Order*), which contained our ruling on the common issues raised in three separate dockets: DT 99-081/085 (*Internet Traffic Treated as Local Traffic Subject to Reciprocal Compensation*); DT 00-001 (*Implementation of Number Conservation Methods*); and DT 00-054 (*Local Calling Areas between Independent Telephone Companies and Competitive Local Exchange Carriers*). Pursuant to the provisions of RSA 541:3, timely motions for rehearing, reconsideration and clarification of portions of Order No. 24,080 were filed by the following parties: Global NAPs (GNAPs) and KMC Telecom V (KMC), filing jointly; Granite State Telephone, Inc., Merrimack County Telephone, Wilton Telephone Company, Inc., Hollis Telephone Company, Inc., Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc., and Dixville Telephone Company, collectively, the joint filing of the Independent Telephone Companies (Joint ITCs); Level 3 Communications (Level 3); RNK, Inc. d/b/a RNK Telecom (RNK); Verizon New Hampshire (Verizon); and WorldCom, Inc.

(WorldCom). Subsequently, and as allowed by N.H. Code Admin. Rules Puc 203.4(h), AT&T Broadband Phone of New Hampshire (subsequently Comcast Phone of New Hampshire (Comcast)), GNAPs and Verizon filed motions opposing portions of other parties' motions for rehearing, reconsideration and clarification.

Responding to motions filed for rehearing, reconsideration and clarification of the *VNXX Order*, on January 24, 2003, the Commission issued Order No. 24,116 (*Clarifying Order*). The *Clarifying Order* stayed the effectiveness of the *VNXX Order*, clarified portions of the *VNXX Order*, and directed the Commission Staff (Staff) and the parties to meet for technical discussions of various issues raised by the *VNXX Order*. The *Clarifying Order* directed Staff to file a report with the Commission two weeks after the technical discussions, identifying what and how issues had been resolved, if any, and what issues remain unresolved.

In the *Clarifying Order*, the Commission specifically refrained from making any findings on the merits of the various motions for reconsideration and rehearing. The Commission stated that it would determine the scope of any rehearing that it finds necessary subsequent to the required technical discussions and Staff report. The required technical sessions were duly held and, on March 5, 2003, Staff filed its report (*March 5 Report*).

On February 24, 2003, the Joint ITCs filed a *Further Motion for Rehearing* with respect to the Commission's *Clarifying Order*. The Joint ITCs raise three issues with regard to paragraph 5 of the *Clarifying Order*, asserting that paragraph 5 is unjust and unreasonable.

The *March 5 Report* was based upon post-technical-session submissions made by parties who attended the technical session: AT&T Communications of New England (AT&T); Comcast; Conversent Communications (Conversent); GNAPs; the Joint ITCs; KMC; Level 3; RNK; Sprint Communications Company LP (Sprint); Verizon; and WorldCom. Some parties filed post-technical session reports even though they had not filed a motion for rehearing.

III. BACKGROUND

This docket concerned issues surrounding the use of virtual telephone numbers, as described above. Competitive local exchange carriers (CLECs) have used VNXX to create virtual local calling areas for their customers that do not necessarily coincide with the local calling areas defined by the ILECs. GNAPs explained that this practice resulted from the CLECs' development of a business plan based on different local calling areas than those offered by incumbent carriers, while Verizon, the Joint ITCs, and the FCC have speculated that CLECs did so primarily to arbitrage intercarrier compensation. Intercarrier

compensation, i.e., access charges and reciprocal compensation, varies depending on the toll or local designation of calls. Historically, calls were designated as either local or toll. Generally speaking, if a call was designated as local, the originating carrier owed reciprocal compensation to the terminating carrier while, if a call was designated as toll, the originating carrier was owed originating access charges from the toll carrier, who might also be the terminating carrier.

Intercarrier compensation involves both how much compensation is paid and to whom it is paid. In this proceeding we have determined that some calls are neither local nor toll. By determining the circumstances under which VNXX traffic is local, toll or otherwise, this docket determines who will receive what intercarrier compensation.

In our examination of the facts on record in this docket, we determined that telephone numbers were being used in a non-traditional manner by some CLECs. While some phone numbers, i.e., NXX plus four digits, were assigned and used for indisputably local service, that is, by customers physically located in the geographic area associated with the NXX, others were being used differently: (i) to provide numbers to ISPs , allowing the ISP to offer effectively statewide toll-free calling to their customers; (ii) to provide a CLEC service similar in effect to the foreign exchange (FX) service offered by incumbent

local exchange carriers (ILECs); (iii) to provide numbers in bulk to companies like eFax for individualized email fax service; and, (iv) other uses that were not detailed in this docket. In the *VNXX Order*, we determined that we will only permit VNXX in certain circumstances. We concluded that two particular versions of VNXX are reasonable and in the public interest. We determined that a statewide service for information access is in the public interest, and therefore approved a version of VNXX we called Information Access NXX service (IANXX), to be used for dial-up calls to ISPs for access to the Internet. We also determined that once a CLEC is provisioning indisputably local service in an exchange, pursuant to our definition, we would allow that CLEC to offer a version of VNXX we defined as "FX-like service for non-ISP bound traffic provided by a CLEC that is providing local dial tone via its own facilities" (*VNXX Order* at p. 56). In this Order on Reconsideration we identify this second version of permissible VNXX more succinctly as CLEC FX.

In the course of carving out these two exceptions, and prohibiting all other VNXX uses, we laid the groundwork for how the exceptions would be implemented, while acknowledging that technical discussions must ensue on the details of implementation.

IV. LEGAL STANDARD FOR MOTIONS FOR REHEARING

RSA 541:3 provides that the Commission may grant a rehearing motion when in the Commission's opinion "good reason for the rehearing is stated in the motion." RSA 541:4 provides that a motion for rehearing must set forth grounds by which the decision is either unlawful or unreasonable. Motions for rehearing direct attention to matters "overlooked or mistakenly conceived" in the original decision and require an examination of the record already before the fact finder. *Dumais v. State Personnel Comm'n*, 118 NH 309, 312 (1975). Therefore, the Commission undertakes a careful analysis of every argument raised by any party to determine if such good reason exists, based on the record developed. *Wilton Telephone Company*, 86 NH PUC 625 (2001).

Pursuant to recent case law, the Commission has found good reason for rehearing when rulings were made without sufficient opportunity for an affected party to comment. *Verizon New Hampshire Tariff Filing Introducing Charges for Busy Line Verification*, 86 NH PUC 266 (2001). Sufficient good reason was also found when the order was unclear as to the specific circumstances in which Rate Reduction Bond charges would apply. *Public Service Company of New Hampshire Petition of 5 Way Realty Trust*, Order No. 24,127 (March 14, 2003). Good reason is also

shown when a party explains that new evidence exists that was unavailable at the original hearing. *Consumers New Hampshire Water Co., Inc.*, 80 NH PUC 666 (1995), cited in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23, 976 (May 24, 2002).

On the other hand, the Commission has recently denied requests for rehearing where a petitioner failed to support its allegations with any factual assertions different than those raised at the original hearing. *LOV Water Company*, 85 NH PUC 523 (2000). The Commission also found insufficient reason to grant a rehearing in *Public Service Company of New Hampshire Petition of Wausau Papers*, Order No. 24,179 (May 29, 2003), in light of the opportunity for Wausau's concerns to be addressed in another docket. Rehearing was denied in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, Order No. 23, 976 (May 24, 2002), because the Commission's intent was made clear and the arguments raised on rehearing had been fully considered during the hearings.

V. ANALYSIS OF ISSUES RAISED BY MOTIONS FOR REHEARING

In the post-technical-session submissions, parties identified issues they considered unresolved by the *Clarifying Order*. Some of these issues had not been raised in the parties' underlying motions for rehearing, reconsideration or

clarification, and those additional issues were also reported in the *March 5 Report*. However, consistent with relevant law, this order addresses only those issues originally contained in a party's motion and the three issues raised in the Joint ITCs' *Further Motion for Rehearing*. In this *Order*, we will place our analysis within five subject-matter sections. They are: A. CLEC FX; B. IANXX; C. Reassignment of VNXXs to the POI; D. Third Party Transport; and E. Traffic Exchange Agreements (TEAs).

A. CLEC FX

CLEC FX is defined in the *VNNX Order* at page 56:

> ... a CLEC may offer FX-like service for non-ISP bound traffic only when it is providing service to at least one customer physically located in the exchange from which the FX service is requested. For this purpose, the CLEC must be providing local dial tone via its own facilities, over an EEL [Enhanced Extended Loop] arrangement or by using UNE [Unbundled Network Element] loops.

Accordingly, a CLEC may provide CLEC FX only when the CLEC is: (1) providing service to at least one customer who is physically located in the exchange from which the FX-like service is requested; and, (2) providing local dial tone via its own facilities, over an EEL arrangement or by using UNE loops. The intent is to permit CLEC FX to be considered the provisioning of local service with respect to the exchange in which the NXX is assigned (just as ILEC FX service is placed within a local tariff) only when it is provided in conjunction with facilities-

based competitive local exchange service. In other words, CLEC FX is permitted when the CLEC has created a sufficient local nexus.

1. The One-Customer Requirement (Local Nexus Test)

(a) Many of the parties had objections to the so-called "one-customer" rule. KMC/GNAPs, the Joint ITCs, RNK, Verizon and WorldCom each requested clarification or reconsideration of this issue. KMC/GNAPs stated that VNXX should be available without limitations. The Joint ITCs objected that the presence of one physically located, yet unrelated, customer is not a rational basis for rating CLEC FX calls. RNK and WorldCom requested clear criteria for demonstrating readiness. Level 3 claimed that the one customer requirement is a barrier to the provision of FX services. The Joint ITCs and Verizon claimed that the one-customer rule is not sufficient since the requirement would simply be an entry fee and since we did not specify that the customer could not, for instance, be an employee of the CLEC.

The Joint ITCs claim that the *VNXX Order's* failure to identify specific criteria for determining whether a carrier serves one customer physically located in the exchange is unjust and unreasonable. The Joint ITCs describe several scenarios by which a carrier may appear to provide service, but not actually do so. Thus, the Joint ITCs request that we clarify standards

for determining whether a carrier serves one customer physically located within the rate center.

Verizon argues that there must be affirmative steps taken to establish the criteria that must be demonstrated to show that a CLEC is providing *bona fide* local service to any requesting customer within the rate center. Verizon states,

> The Commission, at a minimum, must insist that CLECs comply fully with Chapter 1300 of the Commission's Rules, particularly the requirement of §1306.02 that CLECs make basic service available throughout their franchise territory. The Commission should also require the CLEC to establish that it holds itself out to the public, through general advertisements and mailings, as offering local service in the exchange to all similarly situated applicants. (Verizon Petition at pp 23-24.)

We recognize the concerns raised by the Joint ITCs and Verizon as valid. We intend that the "one customer" rule shall not be used as a back door entry to the impermissible arbitrage enabled by unlimited VNXX. A CLEC's ability to provide CLEC FX will be maintained only by the existence of a sufficient presence in the local exchange market, as discussed below. This establishment of a local presence shall be referred to as the CLEC FX local nexus test, as "one customer" is too narrow to capture our intent.

Given the likelihood that CLECs will only make collocation investments when they plan to provide service to indisputably local customers, if a CLEC has collocated with an ILEC, this will constitute proof positive that the CLEC is

serving at least one customer who is physically located in the exchange. CLECs may serve physically located customers by other means, i.e., by the CLEC's own facilities, EELs, or other leased facilities. To prevent sham service offerings, we clarify that a CLEC may not provide CLEC FX service in multiple exchanges when that CLEC is offering service to one and only one customer in many exchanges across the state. Neither provision of local service using only EELs in each of its exchanges nor service to a CLEC's employees or agents will satisfy the local nexus test. While it is not possible to specify in advance every example of what would constitute an illegitimate application of the local nexus standard that does not reflect a genuine local presence, we confirm that we will not permit the local nexus standard to be transformed into a mere entry fee.

We note that any CLEC having only one "entry ticket" customer in an exchange assumes the risk that the one customer could leave and thus cause the CLEC to lose its authority to provide CLEC FX. CLECs would be unlikely to assume that risk and thus that type of behavior would be inhibited.

Since our intent in developing the local nexus test is to encourage the commitment to local markets by CLECs, concerns about the narrow scope of the one-customer approach are reasonable. We clarify that the ultimate test, in those exchanges where the CLEC has or wants numbering resources, is the

extent to which a CLEC is holding itself out to the public as a provider of local service as defined in 1306.02, and is ready and able to provide such service. Such a requirement responds to Verizon's concerns that the CLEC must make basic service available. The rules do not require advertising and mailings, nor that a CLEC serve every type of customer in an area. When considering questions as to any particular CLEC FX offering, we will look for a demonstration of the CLEC's intent to invest in the community and to establish a truly local presence. A customer audit may be required of a CLEC whose service is suspected not to have the requisite local nexus.

To put this issue in perspective, whether or not a CLEC is serving at least one customer physically located in the exchange will be an issue only when a CLEC wishes to provide CLEC FX. The implementation of IANXX, and the number of exchanges where CLECs are already providing indisputably local service via collocation, will eliminate or satisfy the local nexus test for most CLEC VNXX demand. We anticipate, too, that CLECs will initially limit their CLEC FX offerings to the exchanges in which they have already established a presence. For these reasons, we anticipate a modest amount of alternative local nexus provisioning.

In order to implement CLEC FX, we shall require CLECs to make a report of their use of numbering resources. No later

than March 1, 2004, all CLECs that have thousands blocks or NXXs of numbers assigned for their use or that are in the process of applying for numbers in New Hampshire shall file a letter stating that they are complying with this order. In an attachment, CLECs shall provide supporting information describing their operations on an exchange by exchange basis to show how they meet the local nexus test. CLECs shall specify if the information is to be held confidential.

In response to the submissions, we will notify CLECs if their submission is acceptable, and will post the list of CLEC filings to our web site. If not enough information is provided, we will advise the CLEC and request further information. If the submission is still unacceptable, we will inform the CLEC and the NANPA that the relevant NXX is to be reassigned to the rate center where the CLEC's POI is located.

Future requests for local numbers in areas other than the rate center where the POI is located will have to meet the local nexus test, as defined herein. Accordingly, requests for local numbers will require a statement of compliance with supporting information.

The annual report form used by CLECs shall include a statement attesting to continued compliance on an exchange by exchange basis.

In our *VNXX Order* we directed Staff to develop the process for determining if a carrier is qualified to provide CLEC FX service. We have now clarified the standards for determining if CLEC FX service is permissible. Thus, the reconsideration process has provided the guidance we had directed Staff to develop, and the directive to Staff is no longer necessary.

(b) The Joint ITCs requested that we reconsider the "one-customer" rule because it is arbitrary, lacks factual justification, and is inconsistent with the number conservation requirements of RSA 374:59. (Joint ITCs Motion, ¶¶ 9, 10 & 15.) In similar fashion, Verizon argues that we did not indicate why Staff's position is reasonable on this issue and should prevail. (Verizon Petition at p. 17.)

The Commission relied on Staff's expert opinion that a CLEC serving at least one physically located customer demonstrates the provisioning of local exchange service as that term is commonly used in the industry. Staff's testimony on this issue stated that,

> ... the fact that some portion of the numbers within the NXX are terminated in the same local calling area from which they originate removes the virtual attribute of that NXX ... because some customers are drawing dial tone from the CLEC switch and are located in the rate center. Where the CLEC decides to terminate the call once the ILEC hands it off affects the transport costs of the CLEC, not the ILEC. (*Staff Testimony*, p. 6.)

Staff's position emphasized the establishment of a local presence in order to provide FX service, recognizing the investment of the CLEC in facilities at the distant exchange. Thus, the Commission's rationale for the requirement was not arbitrary and did not lack factual justification. See also our further discussion of determination of local and toll in Section A.4., below.

(c) The Joint ITCs requested that the Commission clarify support for the statement on page 56 of the *VNXX Order* that "[T]his [one-customer] requirement ensures that the use of VNXX will not grow disproportionately, in the manner predicted by Verizon, and that the requirement itself does not rise to the level of a barrier to entry." The Joint ITCs claim that the statement is not supported by substantial evidence in the record. (Joint ITC's Motion, ¶ 17.) Verizon requested clarification of the same statement. Verizon had argued against Staff's proposed plan to permit CLEC FX, based on its perception that widespread abuse of the privilege by non-internet users would occur and result in a substantial reduction of ILEC toll and access revenues. (Verizon Petition at p. 24.)

Our finding was not intended as a finding of adjudicative fact. We are persuaded that effective implementation of the local nexus test, along with the

implementation of IANXX, is likely to have the effect of preventing abuses of VNXX.

(d) Level 3 requested reconsideration of the one-customer requirement because the requirement is discriminatory and imposes a barrier to the provision of Foreign Exchange service in competition with the ILECs. Level 3 further states that the one customer requirement for providing CLEC FX is discriminatory because ILECs already have customers physically present in all local exchanges they serve. (Level 3 Motion at p. 6.)

Equal treatment, in this case, requires the CLECs to meet the same standards as the ILECs. This means that both types of carriers must have some local facilities to serve customers within the exchange. It is not unreasonable to require both CLECs and ILECs to maintain a local presence in order to be permitted to offer FX services, even if they provide them in different fashions.

(e) RNK sought guidance on the criteria that would be used to determine a CLEC's readiness to serve customers physically located in a particular exchange. Among other things, RNK queried whether having facilities in rate center end offices will meet the readiness requirement, because at that point, the ILEC/ITC would be handing off the traffic to the CLEC at a facility-based local point. (RNK Motion at § 9.)

We believe our further discussion of the standard, above, has clarified that collocation facilities will satisfy the local nexus test. We clarify that the readiness requirement referenced is a refinement of the obligation of a carrier to meet North American Numbering Plan Administrator (NANPA) and State Pooling Guidelines for assignment of telephone numbers in a rate center. Our authority to determine such requirements is delegated to us by the FCC in DA99-2634, *New Hampshire Public Utility Commission's Petition for Additional Delegated Authority to Implement Numbering Optimization Measures in the 603 Area Code*, issued November 30, 1999 (*New Hampshire Delegation Order*).

Requiring carriers to provide evidence of their intent to serve the local market is not an unreasonable barrier to entry into the local market. By determining that, in some instances, a single customer will be adequate to prove intent to serve locally, we have ensured that such a requirement is not an insurmountable barrier to entry in the local market.

(f) WorldCom requested that we reconsider or clarify our decision requiring that CLECs certify their eligibility to provide FX-like service, but provided no rationale for its request. As stated above, we decline to reconsider, but have clarified our decision.

2. Comparison of CLEC FX and ILEC FX

(a) The Joint ITCs contend that we should reconsider

our finding that CLEC FX service is like ILEC foreign exchange (ILEC FX) service. (Joint ITC Motion at ¶13.) The Joint ITCs state that ILEC FX service transports dial tone from a foreign exchange to a customer via dedicated facilities. By dedicated facilities, the Joint ITCs mean that the dial tone for ILEC FX service comes from a switch in the foreign exchange and the NXX used for ILEC FX is assigned to that foreign exchange. In contrast, according to the Joint ITCs, CLEC FX transports dial tone from a foreign exchange to a customer via number assignment rather than dedicated facilities, meaning that the dial tone for CLEC FX comes from the CLEC's single switch in the LATA and the NXX used for CLEC FX is not assigned to the exchange where the switch is located.

We find that ILEC FX and CLEC FX are equivalent services even though they are provided in a different manner. To find otherwise would be contrary to the logic of the Telecommunications Act of 1996 (TAct), which does not require CLECs to replicate the existing network completely. For instance, the TAct does not require CLECs to have a switch in every exchange and CLECs typically have only one switch in each LATA in order to provide service equivalent to ILEC local service. Thus, local service provided by CLECs draws dial tone from the CLEC's only switch, which is usually not located in the same exchange as the customer. ILECs, on the other hand,

typically do have a switch in every exchange and draw dial tone for local service from a switch located in the same exchange as the customer. Similarly, for FX service ILECs draw dial tone from a switch located in the relevant foreign exchange, while CLECs do not.

We find that the different methods of provisioning both local and FX services are necessary and reasonable and are consistent with the goal of the TAct to bring about competition without requiring absolute replication of the network. CLECs that provide service through collocation, which is specifically set out in the TAct, draw dial tone from a remote switch. If we were to follow the logic of the Joint ITCs, we also would have to treat CLEC local service differently than ILEC local service, in violation of the TAct. The difference in provisioning CLEC FX does not render the service fundamentally different from ILEC FX. We are unable to change the regulatory scheme devised by Congress in the TAct and interpreted by the FCC. Therefore, we find that it is in the public interest to allow CLECs to provision FX service in this manner, as long as the CLEC has the requisite local nexus outlined in Section A.1., above. Our decision to allow CLEC FX in controlled and limited circumstances furthers the goals of the TAct to foster competition and innovative uses of technology.

3. Number Portability for CLEC FX Numbers

(a) The Joint ITCs and Verizon further objected that the *VNXX Order* fails to consider the technical ramifications of number porting on the provision of CLEC FX. The Joint ITCs claim that the *VNXX Order* is unjust and unreasonable because it fails to address the technical problems of porting those numbers that have been legitimately used for CLEC FX to other carriers that are not supposed to be providing CLEC FX. As a result, the Joint ITCs assert, CLEC FX could be provided by carriers who do not have the requisite local nexus. (Joint ITCs Motion at ¶ 16.)

On reconsideration, we conclude that telephone numbers will not be portable from providers of CLEC FX to carriers who do not have a local nexus in the exchange to which the number is assigned. To do otherwise would be an end run around the intent of the *VNXX Order*.

(b) Verizon raised further issues regarding number porting and pooling which we address below.

4. Local and Toll Designation of CLEC FX Calls

(a) By determining that CLEC FX was an acceptable form of VNXX, we intend that CLEC FX calls will be considered local or toll based on a comparison of the originating and terminating NPA-NXXs. KMC/GNAPs, RNK, Verizon, and the Joint ITCs objected to our determination that CLEC FX calls will now be considered

local or toll based on a comparison of the originating and terminating NPA-NXX. KMC/GNAPs and Verizon requested that we reconsider the definition of "local" and "toll" indicated at page 56 of the *VNXX Order* which states that, "non-ISP-bound traffic shall continue to be defined as local or toll by the physical location of end-users." KMC/GNAPs believe that such a statement is inconsistent with the current and historical method for defining local and toll based on the rating points of the end users. (KMC/GNAPs Motion at p. 6.) Verizon, on the other hand, claims that the proposed "FX-like" exception (CLEC FX) ignores the physical locations of calling and called parties and therefore the *VNXX Order* is internally inconsistent. (Verizon Motion at p 16.) RNK, too, objects to our decision that non-ISP-bound calls can be defined as local or toll by the physical location of end-users and also requested reconsideration of the definition of toll traffic cited in the *VNXX Order*. (RNK Motion at § 3.)

We disagree that our statement is inconsistent with the historical method for defining local and toll calls but acknowledge that the statement left room for misinterpretation. We therefore clarify the statement on p. 56 of the *VNXX Order* to read: "As for non-ISP-bound traffic, with the exception of CLEC FX and ILEC FX traffic, it shall continue to be defined as local or toll by the physical location of end-users. Calls to a CLEC

FX or ILEC FX number shall be determined to be local or toll by comparing the originating and terminating NXX without regard to the physical location of the end users."

In the *VNXX Order*, we declared that non-ISP-bound traffic would continue to use the historic definitions of local and toll (with the CLEC FX exception) for compensation purposes. GNAPs and RNK presented evidence during the hearings that calls should be denominated as local or toll, for both routing and rating, by the NXX prefixes alone, supporting the argument that VNXX should be preserved. These arguments were fully considered during the hearings, and the parties have presented no new evidence here for our consideration. We have determined that unlimited VNXX is not allowed. Therefore, we have resolved the issue raised at hearing by GNAPs and RNK. Accordingly, this claim does not represent good reason for granting rehearing.

(b) Verizon objects to CLECs being permitted to provide CLEC FX in contravention of the definition of local and toll based on end-user location. As stated above, CLEC FX is an exception to the finding that non-ISP-bound traffic shall be defined as local or toll by the physical location of end users, because a local nexus is present that justifies such treatment.

(c) KMC/GNAPs argue that the Commission's rule requiring a carrier to serve at least one physically located customer in an exchange in order to provide CLEC FX traffic is

unreasonable because it relies on traditional, pre-TAct definitions of local and long distance calls. KMC/GNAPs argue that the Commission should not ban, restrict or encumber any non-ISP VNXX traffic. (KMC/GNAPs Motion at §2.) According to these carriers, the Commission should find that traditional, geographic-based "local areas" are irrelevant to the analysis of VNXX calling. Instead, they claim, the relevant distinction is telephone exchange service vs. telephone toll service, as defined in 47 U.S.C. §153 (47-48).

According to KMC/GNAPs, telephone exchange service means telecommunications service for which the end user is not charged a separate toll charge and that is "within an exchange area". They go on to say that such service also includes any "comparable service". KMC/GNAPs posit that VNXX constitutes telephone exchange service because, while it may not be within an exchange area, it is "clearly comparable and therefore meets the relevant definition." (KMC/GNAPs Motion at p. 7.) This rationale is not compelling.

We disagree with KMC/GNAPs' reading of the Code. The subsections read:

> (47) The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service

> provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. (47 U.S.C. 153 (47))
>
> (48) The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service. (47 U.S.C. 153 (48))

KMC/GNAPs have incorrectly placed the definition of telephone toll service within the definition of telephone exchange service, reasoning that, because VNXX service does not meet the definition of telephone toll service it must therefore come within the definition of telephone exchange service. In fact, telephone toll service and telephone exchange service do not define the entire universe of telephone services. To meet the definition of telephone exchange service, VNXX must fall under either Subsection (47)(A) or (47)(B). It does not. The only VNXX service we will recognize as service within a telephone exchange is CLEC FX, which we find comparable to ILEC FX, because of the local presence in the exchange where the service is provided.

(d) Verizon argues that CLEC FX creates a loophole through which CLECs may obtain unlimited volumes of ILEC interexchange traffic without incurring access charges. Verizon states that there is no plain discussion in our *VNXX Order* of the justification for allowing a CLEC, in Verizon's view, to mis-

report interexchange traffic as if it were local just because the CLEC serves at least one local service customer in the same exchange.

We disagree with Verizon. We conclude CLEC FX is correctly identified because the CLEC has a sufficient local nexus to qualify for local treatment. We agree with the position advanced by GNAPs (in its support of VNXX) that CLEC FX service imposes no additional transport costs on originating carriers, since Verizon's responsibility for terminating traffic to a CLEC remains the same: delivery of the traffic to the CLEC POI. Furthermore, we have eliminated the unconditional use of VNXX, which we find creates misreported interexchange traffic.

(e) Finally, Verizon argues that we established CLEC FX based on a faulty conclusion that Verizon is incapable of distinguishing CLEC FX calls. Verizon cited and attached to its petition the testimony of Terry Haynes which it submitted in the then pending Docket No. DT 02-107, *Global NAPs Petition for Arbitration to Establish an Interconnection Agreement with Verizon*, requesting that the testimony be considered, in pertinent part. We have examined the testimony of Terry Haynes in Appendix A (*Haynes Testimony*), and find that our conclusion was correct. Mr. Haynes states:

> Verizon's billing system, for purposes of billing reciprocal compensation, was designed to compare the NPA-NXX codes of the calling party and the called party

to determine whether a call is in fact local. That is a reasonable method, because the volume of CLEC originated traffic sent to a FX number on Verizon's network – for which that method would not yield a correct answer from the point of view of intercarrier compensation billing – is very small. Based on a traffic study Verizon performed in Florida, such traffic makes up less than one-half of one percent of the CLEC originated traffic delivered to Verizon for termination to its customers.

But Verizon has learned since the advent of local competition that the assumption that a customer's assigned NPA-NXX code most likely corresponds to the customer's physical location is often not a valid assumption in the case of traffic delivered to CLECs. To the contrary, the volume of locally rated interexchange traffic being delivered to some CLECs makes up a significant percentage of the traffic delivered to those CLECs. In fact, in neighboring Vermont, nearly all of the traffic that Verizon delivers to GNAPs is Virtual FX traffic.

To properly bill such calls based on their geographical end points, Verizon has recently taken steps to develop methods to measure the volume of CLEC traffic terminated to Verizon FX numbers. Verizon conducted a study to identify those calls that were originated by CLEC customers and terminated to Verizon FX numbers. The study simply matched call records for calls from facility-based CLECs to a list of telephone numbers that Verizon assigned to FX service lines. This study provided Verizon with a means of estimating the access revenue to which CLECs would be entitled for CLEC-originated calls terminated to Verizon FX numbers. At the same time, Verizon considered what approach would be required to properly account for traffic originated by Verizon customers that terminated on CLEC virtual FX numbers. Two options were identified. One option would be for the CLEC to conduct a study, similar to the one performed by Verizon, to quantify the number of Verizon customer originated minutes that were delivered to the CLEC virtual FX numbers. The other option would be for the CLEC to notify Verizon of the numbers it has assigned as virtual FX numbers. In this scenario, Verizon would modify its traffic data collection system to capture all traffic delivered to

> the NPA-NXXs associated with the virtual FX numbers. A data query could then be run to identify what portion of the traffic delivered to the NPA-NXXs was actually virtual FX traffic. A billing adjustment would then be entered into each Party's billing system to properly account for the Verizon traffic delivered to the CLEC virtual FX numbers. Verizon is prepared to work with GNAPs to implement one of these options so that traffic can be properly billed. (*Haynes Testimony*, pp. 36-37.)

There is no evidence in this record that current ILEC billing technology is able to distinguish the physical termination point of a call. Verizon claims in its petition that it has such capability. However, upon close examination it appears Verizon is offering to institute either a system of CLEC reporting of individual CLEC FX numbers, or a proxy ratio for determining the percentage of calls to such numbers. The former is unacceptably burdensome. As to the latter, we observe that a CLEC's inventory of assigned numbers changes frequently enough so that a reporting of the proxy ratio would be undependable. After examining this information, we decline to reconsider our finding that CLEC FX is allowed.

B. IANXX

Our *VNXX Order* created a new service, called IANXX. On page 54, we wrote:

> We direct Staff to work with NANPA and the LECs to arrange for specified NXX blocks having statewide EAS, such service to be known as information access NXX (IANXX) service, that will be used only for information access traffic. All ISPs will be able to purchase IANXX service from any carrier. Carriers shall provide IANXX service only for information access traffic.

Many parties challenged the technical feasibility of IANXX, from a variety of perspectives. Some parties requested clarification of numbering and pooling considerations implicated by IANNX. In addition, parties asserted: the *VNXX Order* did not provide for intercarrier compensation for IANXX calls (Joint ITCs and Verizon); there was inadequate due process for creation of this service (RNK and Verizon); and VNXX arrangements should be grandfathered (KMC/GNAPs). Some parties raised specific legal barriers to our order, which we address below. We also address arguments regarding network configuration, interconnection and 500-number service.

1. Technical Feasibility of IANXX

(a) Level 3 argues that the Commission errs as a matter of law because the record does not support a conclusion that the IANXX plan is feasible and in the public interest. To rectify the legal error, according to Level 3, the Commission must either eliminate the IANXX numbering requirements or consider testimony regarding the costs and other technical considerations regarding IANXX. (Level 3 Motion at 12-13.) In like manner, RNK asks that we reconsider the *VNXX Order* in light of an asserted lack of due process, stating that there should still be evidentiary hearings and commentary regarding the

implementation of a statewide IANXX before a final decision is rendered. (RNK Motion at § 1.)

To facilitate resolution of the technical feasibility matters raised, the *Clarifying Order* required Staff and the parties to meet in technical sessions to discuss all the concerns raised in the parties' motions. It was thought that a productive series of technical sessions, in which IANXX technical questions could be raised, would result in agreement by the parties on an implementation plan for IANXX. To further assuage technical concerns, based on our experience working with NANPA regarding the assignment of NXXs since 1999, we ordered a six month transition period for the IANXX conversion and for developing the CLEC FX certification process.

The technical sessions did not produce an implementation plan to resolve the issues. In order to develop a full record, therefore, we will conduct a limited rehearing on the technical issues of implementing IANXX, i.e., technical feasibility, implementation timeframes and cost to implement. The remainder of our Order, dealing with CLEC FX and the re-assignment of CLEC VNXX codes to the CLEC POI shall be implemented according to the timetable we set out herein, thereby effectively eliminating the abuse of VNXX in New Hampshire.

(b) KMC/GNAPs requested clarification of our statement that CLECs serving ISPs today using multiple telephone numbers in

multiple NXX codes will be able to continue to serve those ISPs without changing the physical configuration of the ISPs' services, more specifically, KMC/GNAPs want carriers to be able to keep existing NXX blocks currently used for "local routing number" purposes. KMC/GNAPs aver that without such action a smooth transition would be impossible as CLECs might have to deploy duplicate networks.

It is our understanding that KMC/GNAPs are using the term "local routing numbers" to mean the individual telephone numbers currently assigned to their customer ISPs for local Internet access, which is not the same as the Local Routing Number (LRN) assignment made by NANPA in a carrier's initial NPA/NXX assignment for the purposes of call routing. That being the case, it appears that what KMC/GNAPs are requesting is confirmation that during the transition from VNXX to IANXX, current number assignments and new number assignments will both exist, in a permissive dialing fashion, such that the ISP's customers may dial either the old or new number with the same result. We confirm our intent that a specific period of time will allow for such permissive dialing. On a date certain, however, the current number assignments will lapse and permissive dialing will cease. That date will be determined in the order that issues on the rehearing on IANXX implementation.

(c) WorldCom requests that we rehear evidence regarding technical impediments to implementation of the Commission's order. WorldCom claims that consideration of such impediments will necessarily require an analysis of the costs associated with implementation and whether they are prohibitive, and states that among the costs that must be considered are: (i) the costs carriers would incur in development and modifications to their systems and processes to accommodate the new IANXX service; and, (ii) the costs to carriers and ISPs relating to the reconfiguration of the service that carriers provide to ISPs whose existing VNXX will not be grandfathered pursuant to the Commission's order. (WorldCom Motion at p. 4.) During the technical investigation, WorldCom further requested that the Commission vacate its transition deadline of May 1, 2003.

The *Clarifying Order* addressed this latter point by staying the effectiveness of the *VNXX Order* itself. As discussed above, we will provide rehearing on the issues of technical feasibility and costs of implementing IANXX. The transition schedule will be addressed as part of the rehearing on technical issues.

(d) WorldCom further requested clarification of the ILEC implementation plan for transitioning to an IANXX service. (WorldCom Motion at p 7.) Our grant of rehearing to consider technical and cost issues covers this request.

(e) The Joint ITCs request rehearing on technical and cost issues surrounding "workarounds" that may be necessary to provide IANXX service in switches that are not capable of local number portability (LNP). (Joint ITCs Motion at ¶ 8.) We find that the *VNXX Order* contemplated resolution of these issues as part of the implementation process. Hence, this issue can be addressed in the rehearing on the technical issues of implementing IANXX.

2. Number Authority, Pooling and Portability

(a) Level 3 states that the Commission erred as a matter of law by imposing numbering assignment restrictions without the authority to do so. (Level 3 Motion at pp. 7-9.) Level 3 asserts that the Commission's authority over NXXs is limited to the specific authority delegated by the FCC in the *New Hampshire Delegation Order*. Level 3 is incorrect.

While IANXX has potential number resource optimization effects, it does not inhibit or otherwise affect a carrier's ability to obtain numbering resources. By statute we have jurisdiction to regulate the provisioning of intrastate services, including the ability to define local calling areas, and the *New Hampshire Delegation Order* grants us authority to define facilities readiness requirements for carriers. The *VNXX Order* regarding IANXX does not overstep the boundary reserving plenary numbering plan jurisdiction to the FCC.

(b) KMC/GNAPs claim that the imminent exhaust of the 603 area code is a key premise underlying our *VNXX Order* and request reconsideration of IANXX on that basis. (KMC/GNAPs Motion at § 1.) In fact, as we stated in our *Clarifying Order* at p. 4, the IANNX service was not established in order to conserve numbering resources. Thus we need not reconsider a conclusion we did not reach.

(c) The Joint ITCs raise RSA 374:59 as a bar to IANXX, suggesting that the *VNXX Order* violates that statute's mandate to conserve numbering resources. The Joint ITCs claim that IANXX impairs thousands-block pooling, a numbering resource conservation effort, unless IANXXs can be divided into thousands blocks with different calling areas -- which the Joint ITCs say raises issues of technical feasibility.

In the *Clarifying Order*, we stated that pooled thousand-number blocks cannot be divided into different calling areas but must have the same local calling area as the original NXX from which they emanated. Pursuant to the Joint ITC's motion, we must consider whether IANXX could actually impair pooling and, if so, whether such impairment conflicts with RSA 374:59.

The chapter heading above RSA 374:59 is "Telephone Number Conservation and Area Code Implementation Policy Principles." RSA 374:59, II states that:

> the commission should promote and adopt telephone number conservation measures to the maximum extent allowed by federal law;

and RSA 374:59, III directs the Commission to, *inter alia*,

> adopt measures, to the maximum extent allowable by federal law… to provide that all customers of all suppliers have equitable access to all currently available unassigned telephone numbers…[B]locks of telephone numbers that are currently assigned but may be retrievable if thousands number block pooling becomes available should be assigned on an equitable basis to all suppliers.

We are undeniably concerned about and have been active in efforts to conserve numbering resources. See, e.g., *Re Number Conservation Measures* 85 NH PUC 20 (2000); *Re Number Conservation Measures* 85 NH PUC 74 (2000), and *Re Number Conservation Measures* 85 NH PUC 320 (2000). We acknowledged in the *VNXX Order* that IANXX may use up several NXXs. We balanced that result against our expectation that carriers will be able to return NXX codes as a result of IANXX. *VNXX Order* at p. 55. The Joint ITCs provide no information or rationale to support their claim that the *VNXX Order* contravenes the statute. We recognize that the Joint ITCs may disagree with our judgment that IANXX will result in a greater conservation of numbers, on balance. Even so, the judgment is reasonable and lawful, within our discretion, and the policy set by RSA 374:59 is not contravened by our decision to pursue several methods of number resource optimization.

(d) In its post-technical session submission, WorldCom requested that we clarify how an ISP will go about porting its IANXX numbers to another carrier. (WorldCom Motion at p 7.) We here provide that clarification. IANXX numbers will be administered in the same manner as other numbers in the 603 area code. The specified calling area for the IANNX numbers will be "statewide", which is a rating function. Routing for IANXX numbers will be determined, as it is for all numbers, either by the default, i.e., the Common Language Location Information (CLLI) code of the code owner, or by dipping into the local number portability database to retrieve the LRN of the LEC to whom the number has been ported.

3. Intercarrier Compensation for IANXX

(a) The Joint ITCs argue that IANXX is primarily an outbound interexchange service for which they incur uncompensated expenses for originating and transit service. They request reconsideration because the *VNXX Order* is unjust in the absence of an intercarrier compensation mechanism for IANXX service. (Joint ITCs Motion at ¶ 7.) The Joint ITCs suggest that the Commission adopt a compensation scheme similar to that adopted in Maine for calls to Verizon's Enhanced Hub PRI Service.

The order to which the Joint ITCs refer was issued by the Maine Public Utilities Commission (Maine) in Docket No. 2001-650, *Investigation Into the Provision of Hub-PRI Service by*

Verizon in the Service Areas of Verizon and Independent Telephone Companies (*Hub-PRI Order*), on November 13, 2001. The rate structure Maine created resulted directly from a prior decision instructing Verizon to offer statewide flat-rated service to ISPs on a single NXX basis. Maine ruled that the service was an "interexchange service," and directed that the service be provided at a substantial discount from ordinary interexchange rates, based on long-run incremental costs. Maine Docket No. 98-758, *Investigation into the Use of Central Office Codes by Brooks Fiber* (*Brooks Order*). The *Brooks Order* specified that the flat rate would not contribute to common costs.

The *Brooks Order* also instructed ITCs to provide Verizon with the wholesale services necessary for switching and transport to the "meet point" of the Hub-PRI. The conflict addressed in the *Hub-PRI Order* arose because Maine ITCs wanted to charge on a minutes of use (MOU) basis for the transport services they provide Verizon. Applying the same logic it followed in the *Brooks Order*, Maine reasoned that the price structure for a cost that underlies the service should be the same as the price structure for the service itself. Therefore, Maine determined that a flat-rate would be appropriate. Here, the Joint ITCs argue that the Commission should establish a rate structure to compensate ITCs for originating IANXX calls, claiming that IANXX calls are comparable to the interexchange calls described in

Maine even though New Hampshire has not ruled that these calls are interexchange service.

The Joint ITCs claim that we failed to prescribe intercarrier compensation for IANXX calls. This is not the case. We have prescribed intercarrier compensation to the extent of our authority to do so. We defer to the FCC on intercarrier compensation for ISP-bound traffic. We develop a mechanism by which the ITC will pay a portion and the CLEC will pay a portion of those IANXX calls transported via a third party carrier. (See Section D for further discussion of third party transport and intercarrier compensation.) To the extent that the mechanism we prescribe creates a new cost for an ITC, not currently covered by existing revenues, such new costs will be treated as new costs typically are – as a part of the ITC cost of service, recoverable in a separate rate case proceeding.

(b) RNK requests that we reconsider whether toll traffic and access charges to ISPs have been altered by the FCC's Order addressing reciprocal compensation for calls to ISPs. Contrary to the *VNXX Order*, RNK avers, the FCC has not yet ruled on the rating of access charges for customer-intended toll calls to ISPs made by customers who know that such calls are toll calls. Further, by rating as local all ISP calls to a statewide NXX, RNK argues, the Commission is ruling on an issue that has been specifically preempted by the FCC, instead of following the

FCC's plan as the Commission intended. RNK claims that the Commission has misinterpreted the FCC's *ISP Traffic Remand Order* 16 F.C.C.Rcd. 9151 (2001) (*ISP Traffic Remand Order*) that the FCC does not intend to affect "dialed toll calls to ISPs" or to "nullify the payment of intrastate or interstate toll charges for calls to ISPs." In support, RNK states that two facts require the conclusion that toll charges apply to calls to ISPs: (i) the New Jersey state legislature has introduced a bill requiring ISPs to inform end users when toll charges will apply; and, (ii) the FCC allows schools and libraries to apply for refunds of Internet toll expenses. (RNK Motion at § 4.)

We have examined the arguments made by RNK and confirm that we intend for IANXX calls to be treated as neither local nor toll calls, but as information access calls with a statewide calling area. However, when an ISP chooses to continue to use an NXX which is reassigned to the exchange in which the POI is located (described later) calls to that ISP will be identified as local or toll according to the ILEC local calling area. Under those circumstances, reciprocal compensation and access charges will apply as usual to those types of calls. In the case of reciprocal compensation, the FCC's rebuttable presumption that traffic in excess of a 3:1 ratio is Internet-bound traffic would determine whether reciprocal compensation is payable or assigned to a bill-and-keep regime. RNK's arguments do not convince us

that our decisions are incorrect. Therefore we will not grant rehearing on this issue.

(c) Verizon requested clarification that intercarrier compensation on IANXX has not been preempted entirely by the FCC. Like RNK, Verizon argues that the Commission has authority to impose intrastate access charges on ISP-bound traffic, i.e., IANXX traffic. The *ISP Traffic Remand Order* expressly preserved federal and state authority, excepting only with regard to reciprocal compensation, according to Verizon.

We agree with Verizon that the FCC has not preempted states' ability to determine when access charges may apply for intraLATA traffic. Access charges may apply to some ISP-bound traffic (e.g. non-IANXX traffic) pursuant to state tariffs for traffic extending beyond the local calling area. Nonetheless, just as VNXX calls from Verizon customers did not incur access charges, IANXX calls will not incur access charges since they are neither local nor toll.

4. Due Process

(a) Verizon argues for reconsideration of the *VNXX Order* in light of asserted deficiencies in the record, which it claims can be traced in part to the lack of effective notice and opportunity for interested parties to comment on the specific policy choices ultimately adopted by the Commission. (Verizon Motion at p. 3.) Verizon argues that the Commission gave no

notice it was considering in this proceeding adoption of a non-geographic central office code with statewide extended area service.

We disagree. The *Order of Notice* for DT 00-223, issued October 16, 2000, states, "[the parties] may also address the proper rating treatment of an oddball NXX..." (The term "oddball NXX" refers to an NXX rated on a statewide or other basis for a particular purpose; IANXX is a form of oddball NXX.) Further, the notice continues, "[t]his proceeding raises issues whether, *inter alia*, calls originated in one rate center and terminated in a rate center physically located outside the local calling area of the originating rate center through the use of an NXX code assigned for rating purposes to the local calling area of the originating rate center, are considered local in New Hampshire." We found that, in the specific instance of CLEC FX, such calls are considered local in New Hampshire and that IANXX calls are neither local nor toll.

Although we do not believe our decision was outside the scope of our *Order of Notice*, we do address the issue of sufficient evidentiary support in Section B.1., above, by granting a limited rehearing on technical feasibility and costs of implementing IANXX.

5. Grandfathering VNXX

(a) KMC/GNAPs ask that we reconsider the requirement which mandates ISPs give up existing dial-up access numbers. Instead of requiring ISP customers to change telephone numbers, they argue that the carriers and the ISP customers should have the option to retain their current dial-up numbers and forward calls from current numbers to the new information access NXX code(s). (KMC/GNAPs Motion at fn. 1.)

KMC/GNAPs request that we free ISPs from the requirement of changing their telephone numbers in order to utilize IANXX. Allowing ISPs to retain their existing access numbers would defeat our intent to establish IANXX and to prohibit VNXX calling for any purposes other than information access and CLEC FX. In our *VNXX Order*, we weighed the burden of number changes and the benefit of statewide information access calling, based upon the record. We concluded that the benefit of a statewide information access service outweighs the burden of changing a number. Subsequent motions have not persuaded us to conclude otherwise.

GNAPs suggests that VNXX use could be grandfathered easily such that current end users could continue to dial their ISP's existing numbers, with the call then forwarded to an IANXX number and rated accordingly. According to GNAPs, this work-

around process would avert the need for ISP end users to dial a new number to access their ISP.

In order to ease the transition to IANXX, we adopted a permissive dialing period. If that period were extended indefinitely, IANXX would not be seen as ubiquitous for ISP-bound calling, a result that could potentially cause confusion among end users when IANXX is unveiled. In addition, the existing numbers would not be released as a resource for use by customers within the actual NXX, thereby resulting in inefficient numbering resource usage. For these reasons, we decline to reconsider grandfathering existing VNXX numbers.

In further support of its argument for grandfathering VNXX, KMC/GNAPs referred to Verizon's 500-service in footnote 1 of their Motion for Rehearing. Verizon's 500-service involves the use of an NPA, not an NXX, and it is an interstate service over which state commissions have no jurisdiction. Because calls to 500-numbers are not statewide local but are only rated as local for calls from Verizon's customers, Verizon's 500-service does not have the same statewide capability that IANXX service will have. (*Transcript*, Day 2, April 16, 2002, at p. 75.) If Verizon wishes to gain the true statewide capability of IANXX for its ISP customers, it will have the same need as CLECs to switch those customers to new numbers. Accordingly, allowing Verizon to retain 500-service does not provide it with a competitive

advantage. Further, if a CLEC chose not to utilize IANXX and, as argued, the CLEC's customer ISP chose to migrate to Verizon in order to obtain "local" service via Verizon's 500-service, the outcome will be the same as the IANXX outcome: the ISP's end users will have to change to a different number to reach the ISP.

(b) In like fashion, RNK asks that we reconsider forcing ISPs to relinquish their existing dial-up access numbers, stating that we should instead give ISPs a voluntary choice to switch to an IANXX without the threat of rating those calls as toll calls. (RNK Motion at § 2.) RNK argues that the Commission's decision to offer CLECs the option of utilizing IANXX numbers is not a real option, but a Hobson's Choice, in that CLECs must incur the cost for converting to IANXX or else lose ISPs as customers because the ISPs will move to Verizon via ported numbers in order to: (i) keep the same numbers; or, (ii) obtain better prices. RNK concludes that the effect of the IANXX option is a barrier to entry, impermissible under §253 of the TAct, which provides that state requirements neither prohibit nor have the effect of prohibiting a competitor from providing any inter- or intra-state telecommunications service.

In this case, the *VNXX Order* does not prohibit CLECs from providing service to ISPs. To the contrary, the *VNXX Order* enables CLECs to provide services similar to those provided by the ILECs, while provisioning those services in a different

manner. Certainly the denomination of a call as toll or local is not a new concept in telecommunications. The fact that CLECs have been able to provide interexchange service using VNXX without incurring access charges in the past, does not make the removal of that option a discriminatory action on the part of the state. It is, rather, an action to correct and better systemize the provision of these services.

(c) KMC/GNAPs, Level 3, RNK, and WorldCom requested generally that we reconsider grandfathering current uses of VNXX. Based on the evidence presented, we found that VNXX was not in the public interest. We then examined the current uses of VNXX to see if there were particular uses that are in the public interest and should be preserved. We found two such uses: CLEC FX and Information Access. We deliberately set out a method of preserving those two uses, and established that VNXX itself would be disallowed. We see no good reason to reconsider that decision.

6. Legal Impediments to IANXX

(a) Level 3 holds that we must reconsider the *VNXX Order* because there is a less burdensome approach that would achieve the same results. Level 3 further claims that the new regime is unjust and unreasonable, and that the rationale given for the IANXX proposal on pages 53-54 is not supportable. (Level 3 Motion at pp. 3-8.)

Level 3 argues that the effect of the Commission's *VNXX Order* is to impose significant burdens on carriers while changing only one aspect of the traffic and compensation situation. Therefore, Level 3 posits, the Commission's *VNXX Order* should be revised to lessen the burden on carriers while still attaining the Commission's goals.

In Level 3's view, before the *VNXX Order*, traffic and compensation were governed by interconnection agreements and a moratorium agreement. According to Level 3, under the moratorium agreement, the Joint ITCs and CLECs agreed to a bill-and-keep arrangement for VNXX calls originated by ITC customers and terminated to CLEC customers. After the Commission's *VNXX Order*, Level 3 contends, the same situation pertains except that: (i) all ISP-bound VNXX traffic must migrate to IANXX numbers; and, (ii) a new third party transport compensation scheme applies thereafter as described in Section D., below. The result, according to Level 3, is that carriers and consumers incur the costs of migration without obtaining a benefit commensurate with the cost.

The problem with Level 3's argument is that it is based upon the assumption that prior to this docket, carriers' compensation relations were governed by the moratorium agreement, which is simply not the case. In fact, prior to this docket, carriers were in total disagreement as to the proper treatment of

calls to ISPs. The situation placed some customers in the middle of the conflict, and subjected them to toll charges for calls they thought would be rated as local. The moratorium agreement was put in place as an interim solution until the issues could be resolved in this docket. We are unable to provide Level 3 with the relief it seeks. The conflict itself arose from a lack of consensus regarding whether calls delivered to CLECs were local or toll. CLECs expected that ISP traffic using VNXX would be treated as local and eligible for reciprocal compensation prior to the *ISP Traffic Remand Order*. This induced some carriers to arbitrage ISP service to obtain intercarrier compensation based on the old definitions. This conflict continues to be played out at both the federal and state levels.

Following the lead of the FCC, we recognized that ISP traffic did not fit into traditional definitions of local and toll, and instead created a new service in IANXX. According to the *VNXX Order* at pages 53-54, IANXX will serve the public interest by: (i) identifying federal jurisdictional traffic; and, (ii) creating an unconstrained pathway to information access, by which we mean a statewide non-toll pathway.

Under IANXX, the first benefit will occur for ISP traffic since such traffic is clearly identified. While the second benefit could occur without IANXX, since VNXX provided

non-toll access to information access services, it did not work in cases where no interconnection agreement existed.

Ultimately, Level 3 is under the misapprehension that the Commission's choice is between allowing unlimited VNXX or moving to IANXX. This is not the case. Unlimited VNXX is no longer allowed in New Hampshire. If IANXX is not established, CLECs will not have the opportunity to preserve the statewide non-toll calling for ISP services they may currently be providing.

(b) Level 3 further argues that the Commission has erred as a matter of law by imposing a discriminatory numbering scheme under which extremely few, if any, customers of the ITCs or Verizon would have to change any of their numbers, while a significant number of CLEC customers would be required to reconfigure their dial-up arrangements. Even though Level 3 recognizes that the Commission did not intend to bestow favorable treatment on ILECs, Level 3 contends that is exactly what has occurred. (Level 3 Motion at P. 9-12.) Level 3 believes that due to the ubiquitous nature of ILEC legacy networks, the fundamental premise of the *VNXX Order*, i.e., that ISP-bound traffic to ITCs and Verizon is local (VNXX Order at p. 53) while Virtual Foreign Exchange traffic is not, is inconsistent with the *ISP Remand Order*. (Level 3 Motion at P. 9-10.)

We here address Level 3's argument that the *VNXX Order* is discriminatory. Level 3 claims that the IANXX plan will cause ISP customers to leave a CLEC in order to retain their phone numbers. In other words, Level 3 asserts that ISPs will port numbers to the ILEC in order to retain those numbers. We believe this scenario is unlikely. In order to switch to an ILEC that provides ISP service using current ILEC methods, the CLEC's ISP customer would have to make major changes in its call routing, either by moving to a 500-type service or by installing modem pool equipment in the serving area of the ILEC central offices. We find that the disadvantages to these changes are at least as great as that of accepting an IANXX number which, while bringing with it the disadvantage of number changes, offers a transition period of permissive dialing to ease any potential customer confusion and brings the distinct advantage of single statewide number assignments.

(c) Level 3 also argues that the Commission has erred as a matter of law by imposing terms that are unnecessarily vague, and thus subject to differing interpretations. (Level 3 Motion at p. 13-14.) Level 3's argument that the VNXX Order is impermissibly vague was resolved by the *Clarifying Order* in regard to the rating of calls. At p. 6 of the *Clarifying Order*, the three categories of call rating, i.e., IANXX calls, CLEC FX calls and POI-rated calls, are clearly identified.

Level 3 also argues that the *VNXX Order* is impermissibly vague regarding the definition of IANXX. Level 3 argues that "information access" has not been precisely defined. For instance, Level 3 pointed out, information access was defined in the FCC's *ISP Traffic Remand Order*, with reference to the 1984 *AT&T Consent Decree*, as service purchased by an ISP and as the provision of services in connection with traffic to or from an ISP. (Level 3 Motion at p. 13-14.) The D.C. Circuit Court of Appeals, discussing the term "information access" in its 2002 decision found that §251(g) does not provide a basis for the FCC's decision removing ISP traffic from the TAct's reciprocal compensation requirement. *WorldCom v. FCC*, 288 F.3d 429, 351 U.S.App. D.C. 176 (2002). The information access calls at issue in that order and in the FCC's *ISP Traffic Remand Order* were calls made to ISPs located within the caller's local calling area. Finally, the D.C. Circuit Court of Appeals pointedly declined to vacate the FCC order or to make any finding other than that §251(g) does not provide the relevant authority. *Id.* at p. 433.

We understand that Level 3 wants specificity as to its obligations. We therefore clarify that IANXX is to be used solely for dial-up calls made to an ISP to reach the Internet. Calls to ISPs for other purposes, such as calls for customer service, are not to use IANXX. In addition it is noteworthy that

not all ISP-bound Internet access calls are required to use IANXX, e.g., calls to an ISP located in a caller's local calling area. True VNXX is no longer an option, and CLEC FX is not to be used for ISP-bound Internet access calls.

(d) The Joint ITCs request that we reconsider altering local calling areas without considering the factors enumerated in N.H. Code Admin. Rules Puc 410. (Joint ITCs Motion at ¶ 2.) We disagree with the Joint ITC's claim that our *VNXX Order* alters local calling areas in contravention of Puc 410. Puc 410 specifies the process by which an interested party may petition the Commission to modify Extended Area Service (EAS). EAS is defined in Puc 410.01(d) as "the local toll-free calling area beyond the home exchange." Home exchange is defined as the area serviced by the local central office. To the contrary, IANNX creates a new category of service traffic, not a new EAS, and IANNX deals with information access traffic that is not defined as either local or toll.

Further consideration of the rules at Puc 410 underscores our opinion that they do not apply to this docket. An EAS petition must request a two-way exchange of local traffic, Puc 410.02(b)(1), between two exchanges that have a demonstrated community of interest, Puc 410.03. IANXX does not deal with two-way exchange of traffic and is not local. Pursuant to Puc 410.05(d), an EAS petition may be granted only if the Commission

determines that the proposed EAS changes meet a four-part standard by: (1) being necessary to create an EAS which offers affordable rates; (2) not jeopardizing competition; (3) being consistent with state and federal laws; and, (4) impacting positively on the affordability, accessibility and efficient delivery of services. The standard was created in order to ensure that EAS changes will not unduly impact local rates of local service customers in the relevant exchanges when increasing the two-way local calling area. Again, IANXX does not deal with local service. IANXX adds an additional NXX to an area, something that occurs frequently without triggering a Puc 410 review. The additional NXX will carry traffic that is currently being carried over VNXX.

7. Network and Interconnection Issues

(a) The Joint ITCs contend that the VNXX Order is based on the "flawed factual premise" that the IANXX numbering regime prescribed is necessary to prevent CLECs from being required to replicate the ILEC network. (Joint ITCs Motion at ¶ 1.) We disagree.

As part of the record, the Commission had before it evidence regarding the effect of removing CLECs' ability to offer VNXX service. For instance, in Exhibit 2 at page 27, GNAPs' Witness Selwyn states:

> ...as a policy matter, it is unquestionable that the overriding purpose of the Act is to encourage local exchange competition. That purpose would be frustrated if the ILEC could directly or indirectly force CLECs to incur costs to, in effect, duplicate the ILEC's ubiquitous embedded network. This anti-competitive result, however, is exactly what would occur if CLECs were forced to pick up traffic from the ILECs in multiple locations, or were assessed extra "transport" fees if they failed to do so.

We find credible the premise that CLECs would, in the absence of VNXX or IANXX, have to replicate the entire embedded network in order to provide statewide non-toll access to ISPs. Thus, the LECs have a competitive advantage because exchange service would be required in every local calling area to allow CLEC ISP customers to purchase local exchange service and receive the advantages of the FCC's Enhanced Service Provider (ESP) Exemption[1] from CLECs. Our *VNXX Order* described what CLECs would have to do in order to provide local exchange service in the *same manner* as Verizon in order to have local exchange service which blankets the whole state. Verizon has the legacy advantage of being able to offer ISPs this type of service because it has a switch in every local calling area. There are only two ways for CLECs to compete with that advantage. The first would be to incur the heavy expense of duplicating the Public Switched Telephone Network (PSTN), and the second would be to do what they are currently doing: provide the service via VNXX.

However, on reconsideration, we find that footnote 2 on page 41 of our *VNXX Order*, cited by the Joint ITCs in their Motion for Rehearing, could state this more clearly in the context of IANXX service and we amend it as follows: "Unless a CLEC incurs the expense of duplicating the embedded network, CLECs cannot provide Internet access as a local call outside the local calling area of its POI."

(b) The Joint ITCs further requested that we reconsider reliance on RSA 374:26 to the extent that the *VNXX Order* would require the Joint ITCs to extend their plant to distant points of interconnection for the exchange of local traffic outside of their current service territories. (Joint ITCs Motion at ¶ 3.) On page 54 of our *VNXX Order* we stated, "[t]he [IANXX] process we intend to implement, as described below, is within our authority to direct the manner in which our jurisdictional telephone utilities serve their customers. *See* RSA 374:26." The Joint ITCs assert that RSA 374:26 is inadequate to confer authority on the Commission to require ITCs to extend plant in order to interconnect with CLECs because RSA 374:26 is within the class of statutes under which the Commission can act only in response to a utility petition for approval of an action.

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[1] See *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682 (1983).

The first claim, that the *VNXX Order* requires ITCs to extend their plant, is readily dealt with. Pursuant to §251(a)(1) of the TAct, the Joint ITCs have a requirement to interconnect. That section outlines the duty of all telecommunications carriers to interconnect, *directly or indirectly*, with the facilities and equipment of other telephone carriers. Accordingly, indirect interconnection is achieved by delivering traffic to the CLEC's POI located outside the ITC's border, via third party transport. Such indirect interconnection does not require the ITC to extend its plant.

If, however, the ITC did need to extend its plant to effect such interconnection, our reliance on RSA 374:26 remains valid. The class of statutes to which the Joint ITCs refer were identified by the Supreme Court in *State v. New Hampshire Gas & Electric Co.,* 86 NH 16, 29-30 (1932). They are: (1) orders directly affecting service and rates and; (2) administrative orders indirectly affecting service and rate permanence and stability, such as granting franchise authority or approving stock acquisitions. (*Id.* at 30.) According to the Court, authority to make the first type of order is plenary but authority to make the second type is limited to granting or withholding of approval of the proposed utility "depending solely upon its judicial determination of the factual issue of whether or not the public good will be promoted thereby." (*Id.*)

RSA 374:26 reads in pertinent part:

> Permission. The commission shall grant such permission whenever it shall, after due hearing, find that such engaging in business, construction or exercise of right, privilege or franchise would be for the public good, and not otherwise; and may prescribe such terms and conditions for the exercise of the privilege granted under such permission as it shall consider for the public interest.

While the first clause of RSA 374:26 does indeed pertain to orders in the class for which utility petition is necessary, we find that the second clause of the statute pertains to the Commission's ongoing plenary authority to regulate a utility's exercise of its franchise. Therefore, no petition is necessary.

Further, there is additional statutory authority. RSA 374:7 authorizes the Commission to review and order reasonable and just improvements in service or methods. RSA 365:19 allows the Commission to initiate investigations "as in its judgment the public good may require," the results of which may be used in an order as long as affected parties have an opportunity to be heard. In the instant case, the Commission conducted an investigation of billing complaints by end users regarding the billing of calls as toll calls which the callers presumed to be local in nature. The Commission responded under its plenary authority and the ITCs have had extensive opportunity to comment.

(c) Verizon argues for reconsideration of the *VNXX Order's* claim that an IANXX "will serve the public interest by [purportedly] creating an unconstrained pathway to information access". (Verizon Motion at p 6.) Verizon claims that the Commission misperceives the manner in which the IANXX plan will work, as shown by the statement quoted. Verizon suggests that IANXX will not alleviate network congestion on the PSTN and therefore no "unconstrained pathway" is created. In fact, Verizon claims that the IANXX plan will increase congestion as changing traffic patterns leave some trunks stranded while creating demand for additional trunking elsewhere.

We have considered Verizon's request and will clarify our statement. Verizon misunderstands it by examining it out of context. The statement is part of a paragraph dealing with the use of IANXX to foster a non-discriminatory telecommunications marketplace. IANXX will eliminate the disparity between ILECs and CLECs in the ability to provide information access service on a statewide basis. The conclusion represented in the quoted statement is related to our discussion on p. 45 regarding equal access to the Internet via ISPs. We do not refer to congestion of the PSTN and do not base our conclusion regarding the benefits of IANXX upon consideration of congestion relief. Therefore, Verizon's claim does not represent sufficient reason to reconsider our order.

(d) Verizon also requests reconsideration of the claim that an IANXX is required to afford CLECs "equal access" to Verizon NH's network. (Verizon Motion at p.9.) Verizon argues that the Commission misunderstands the form of "local access" made available to ISPs by ILECs under the ESP Exemption and therefore erroneously found that IANXX is necessary in order to provide CLECs with equal access to the Internet via ISPs. According to Verizon, the ESP Exemption entitles ISPs to subscribe as business end-users but does not entitle ISPs to obtain LATA-wide carrier access service at local rates. The ESP Exemption enables ISPs to subscribe to basic exchange service within the confines of the exchange carrier's local calling area only, Verizon avers, not to obtain access to end-users outside the local calling area. In support of this contention, Verizon cites to a 1987 case in which the FCC identified the geographic calling limitations of the ESP Exemption.

We agree that the ESP Exemption does not entitle ISPs to obtain LATA-wide "access service" at local rates. We therefore decided that end users of those ISPs who elect not to use IANXX would pay toll charges for interexchange access when the originating NXX and terminating NXX (e.g., an NXX reassigned to the POI) are not in the same local calling area.

Our understanding of the ESP Exemption is the same as Verizon's to the extent that we agree, for example, as Verizon

states on p. 10-11 of its Motion, that on the basis of the ESP Exemption an ISP that subscribes to basic business exchange service in Manchester does not obtain local access to Verizon's Concord exchange and Concord end users. However, we find that the context of VNXX must be added to this analysis. Without the use of VNXX, which was not in use at the time the FCC created the ESP Exemption, the ISP obtains no service outside the local calling area. ISPs could physically locate at each exchange but the limit of the local calling area was the limit of their reach.

The entry of CLECs resulted in the use of VNXX to create a virtual statewide calling area for ISPs. While not supporting generalized use of VNXX, we concluded in our *VNXX Order* that dismantling the existing statewide service for information access that CLECs were providing would not be in the public interest. We therefore identified an acceptable form of VNXX to be used in limited circumstances: IANXX. Our decision is not grounded on an equal access argument and therefore the claim does not provide good reason to reconsider it.

(e) Verizon also argues that CLECs already enjoy equal access for providing service to ISPs. Verizon claims that our *VNXX Order* implies that Verizon is presently offering ISPs' end users statewide access to the ISP at basic exchange rates, which Verizon says is not true. According to Verizon, its customers can only access an ISP without incurring a toll charge if the ISP

has subscribed to exchange service in each local calling area or obtained either 800-service or FX service, neither of which is priced as local to the ISP. Therefore, Verizon concludes, IANXX is not necessary to foster equal access.

Verizon appears to have misconstrued the term "equal access," as used in the *VNXX Order,* as having the meaning it has in §251(c)(2)(C) or (c)(3) in the TAct. Those sections require Verizon to offer CLECs interconnection "that is at least equal in quality to that provided...to itself," and "nondiscriminatory access to network elements on an unbundled bases." In fact, the *VNXX Order* is not premised on the concern that Verizon is treating CLECs differently but, rather, addressed the historic monopoly status of Verizon that resulted in Verizon having switching facilities in every local calling area. Verizon's argument, therefore, does not cause us to reconsider our order.

Verizon goes on to state that the ESP Exemption does not preclude Verizon from charging an ISP or its end users for interexchange calling. Verizon claims that our misunderstanding of that fact created a false foundation for the creation of IANXX.

We agree that the ESP Exemption allows ISPs to purchase local exchange service in lieu of access. We agree, too, that toll access can be assessed for Internet-bound interexchange

calls when those calls do not use IANXX and when the ISP's end user and the ISP are not located in the same local calling area.

If there were currently no method of providing statewide toll-free access for Internet-bound calls, our decision to create IANXX would have a very different foundation. Our decision is not premised upon a finding that ISPs are entitled to statewide toll-free access. Our decision recognized that, through the use of VNXX, the CLECs developed a method to provide the equivalent of statewide toll-free access to their ISP customers. We find that the public interest would be served by continuing a service that already exists and that ISPs and their customers have come to rely on. Therefore we have made the decision to create IANXX to retain statewide toll-free access for Internet-bound calling only, for all carriers, on a non-discriminatory basis. It remains for the parties to develop, through the limited rehearing we have granted, an implementation plan to put IANXX in place for NH ISPs and their customers.

(f) RNK moves for reconsideration of the use of "information access" as a name for any scheme, as this specific section of the TAct and terminology was expressly rejected by the appellate court and cannot be used by the FCC in its remand order on the issue of reciprocal compensation for ISP traffic. Therefore, according to RNK, the use of the term and reliance on

the theory behind it will likely confuse parties. (RNK Motion at § 5.)

RNK mistakenly generalizes the D.C. Circuit Court of Appeals decision to create a proscription on the use of the term "information access." The D.C. Circuit Court does discuss the lack of any pre-TAct federal dictates for LECs to interconnect with each other, beyond services provided to interexchange carriers and ISPs as stated in §251(g). As discussed in Section B.6., above, *WorldCom v. FCC* deals with the FCC's use of §251(g) as the authority for excluding ISP calls from the reach of the reciprocal compensation requirement of §251(b)(5). In no part of its order does the D.C. Circuit Court make any statement regarding the continued usefulness of the term "information access" service. We agree with RNK Telecom that future FCC orders likely will not rely on §251(g), but, that in no way affects our usage of the term information access in the IANXX plan. We do not believe that the use of the term, especially in light of our clarification herein, will lead to confusion or future requests for reconsideration.

C. Reassignment of VNXXs to the POI

As described in our *VNNX Order*, unlimited VNXX is not permitted, but two versions of VNXX, now called IANXX and CLEC FX, are permitted as described above. IANXX is ISP-bound Internet access traffic and CLEC FX is traffic carried by

qualified carriers in qualified exchanges. The *VNXX Order* required all other usage of VNXX, such as calls to eFax, non-Internet bound calls to ISPs, as well as other calls, whether described in this order or not, to be rated and routed to the CLEC POI. The *VNXX Order* called this "rerating to the POI." Based upon the parties' responses in motions, the term "rerating to the POI" may have been confusing. This process may more properly be called VNXX reassignment to the POI. We will further clarify the VNXX reassignment process here.

NXX codes are associated with a particular exchange and are administered by a code holder, i.e. a carrier identified as the code holder by the NANPA. If the code holder is a CLEC, to retain code holder status in an exchange, the CLEC must qualify to provide CLEC FX, i.e. have the requisite local nexus. If the CLEC does not have a local nexus in the exchange to which the NXX is assigned, the CLEC must either relinquish that NXX or reassign the NXX to its POI's exchange. As an example, a hypothetical CLEC with its POI in Nashua is the code holder for "999" assigned to the Concord exchange but the CLEC does not have a local nexus in the Concord exchange. Therefore, the CLEC must either relinquish "999" or reassign "999" to the Nashua exchange for both rating and routing.

To summarize parties' responses to the VNXX reassignment process: (a) RNK requested clarification, (b) the

Joint ITCs objected that reassigning NXXs to the CLEC POI is arbitrary, and (c) Verizon argued that we had failed to consider the implications of porting and pooling.

1. Toll Calls to NXXs Reassigned to the POI

RNK requests clarification regarding which carrier is the toll provider for non-IANXX, non-CLEC FX calls. (RNK Motion at § 8.) We believe our *Clarifying Order* addressed this issue, but we reiterate our finding here. In the instance of a specific CLEC exchange, formerly local to an ITC, but now reassigned to the CLEC POI in a rate center that is toll from the ITC to the CLEC, the ITC's end user's Presubscribed IntraLATA Carrier (PIC) is the toll provider for calls originated to the CLEC. The ITC is the originating LEC and the CLEC is the terminating LEC. The PIC collects toll charges from its customers, and pays both originating and terminating access according to the applicable intraLATA exchange access tariffs.

2. Rationale for Reassignment to the POI

The Joint ITCs call for reconsideration of rating former VNXX calls to the CLEC POI, irrespective of the location of the calling and called parties, because it is arbitrary. (Joint ITCs Motion at ¶ 12.) The Joint ITCs claim that rating these calls to the CLEC POI has no relationship to the calling and called parties.

VNXX reassignment to the POI ensures that the call will be rated and compensated according to its delivery point: the CLEC's POI. When the POI is in a toll exchange in reference to the ITC exchange, then the ITC will receive toll access; when the POI is in a local exchange in reference to the ITC exchange, then reciprocal compensation shall apply, subject to the terms of the *FCC's ISP Traffic Remand Order*.

Hence, the compensation plan detailed in the *VNXX Order* is not arbitrary; it is based on a rational relationship between the called and calling parties and the delivering carriers.

3. Number Porting and Pooling for NXXs Reassigned to the POI

(a) Verizon argues that technical issues regarding number porting must be considered before implementing reassignment to the POI. (Verizon Motion at p. 20.) Specifically, the status of the carrier vis-à-vis the provision of CLEC FX will affect number porting. (*Id.* at p. 22.) None of the parties responding to motions for rehearing, reconsideration or clarification addressed the issue raised by Verizon.

We recognize that the process of reassigning NXXs to the CLEC POI may leave some number assignments in an undefined status. Customers may receive service using numbers that have been ported from Verizon to a CLEC, or from one CLEC to another.

Not all CLECs providing services over these ported numbers may have received certification to provide FX service. For the purposes of this discussion, a CLEC who provides CLEC FX in the pertinent exchange shall be referred to as a "qualified CLEC", while a CLEC who does not provide CLEC FX shall be referred to as a "non-qualifying CLEC".

It is possible that certain categories of telephone numbers that have already been ported from one carrier to another ("ported numbers") will be impossible to reassign to the POI. These include:

i) ported numbers belonging to a Verizon exchange now in use by a non-qualifying CLEC;

ii) ported numbers belonging to an exchange assigned to a qualified CLEC now in use by a non-qualifying CLEC; and

iii) ported numbers belonging to an exchange assigned to a non-qualifying CLEC now in use by a qualified CLEC.

In the first two cases, scenarios i. and ii., if the CLEC has either failed or does not desire to obtain the requisite local nexus, that CLEC may no longer provide service to that customer, and PUC rules for discontinuing service, i.e., Puc 1304.03(d), will apply. In scenario iii, the CLEC's existing customer would have to migrate to a new telephone number in order to continue receiving service in that exchange.

(b) Verizon also raises the issue of pooled numbers between qualified and non-qualifying carriers, stating that Reassignment to the POI would be impossible to implement under such circumstances. (Verizon Motion at p. 21.)

Number pooling involves the assignment of thousands-blocks of numbers within an NXX to other carriers, such that multiple carriers may make use of a single NXX. The code holder (the original carrier to whom the NXX was assigned) will have at least one block of numbers. The remaining blocks may be in one of four categories: (i) pooled but unassigned; (ii) assigned to a carrier but unused; (iii) assigned to a carrier and used for VNXX applications; or, (iv) assigned to a carrier and used for indisputably local customers.

Since thousands-blocks cannot be separately assigned to different rate centers, there are scenarios that must be considered, such as:

i) when there are numbers in the NXX that are in use by physically-located customers; and

ii) when blocks are used for VNXX applications by more than one non-qualified CLEC, that have POIs in different exchanges.

These are the types of question we anticipated would have been addressed in implementation technical sessions. Instead, we will grant rehearing on how to treat the NXX in such

cases. We direct Staff and the parties to file proposals on how these issues should be addressed.

D. Third Party Transport

Our *VNXX Order* recognized the need to provide compensation for a carrier facilitating the transfer of traffic between two other carriers. For the purposes of this order, tandem transit and transport provided by a third party carrier to facilitate the indirect interconnection of two other local exchange carriers' networks shall be called Third Party Transport.

1. As Intercarrier Compensation

Level 3 requests that we reconsider the *VNXX Order*'s finding that Third Party Transport shall be paid for ISP-bound traffic, on the grounds that such compensation is intercarrier compensation. Level 3 states that the *ISP Remand Order* preempts a state from determining intercarrier compensation for ISP-bound traffic. (Level 3 Motion at p. 4.)

We do not consider payment for Third Party Transport to be the kind of intercarrier compensation contemplated by the FCC's *ISP Traffic Remand Order*. Our *VNXX Order* does not affect the FCC's interim bill-and-keep mechanism, which it put in place for certain ISP-bound traffic in lieu of reciprocal compensation between the carriers of end users. The FCC defines bill and keep

as a process by which "each interconnecting network recovers from its own end users the cost of both originating traffic that it delivers to the other network and terminating traffic that it receives." (*Unified Intercarrier Compensation NPRM* at fn. 6.) As we stated in our *Clarifying Order* at p. 7, the payment to a third party carrier for Third Party Transport is neither reciprocal compensation nor an access charge. Further, a third party carrier has no end users from which to recover the costs for its role in facilitating indirect interconnection. The *ISP Traffic Remand Order* clearly speaks only to intercarrier compensation between originating and terminating carriers, specifically reciprocal compensation, and to cost recovery for a carrier that is terminating traffic and that has end users from which to recover the costs for terminating that traffic. (*See*, e.g., *Unified Intercarrier Compensation NPRM* at ¶ 80.) Accordingly, as we stated at p. 8 in the *Clarifying Order*, "[o]ur requirement for ITC payment of compensation to Verizon for tandem transit and transport does not conflict with our deference to the FCC's access and reciprocal compensation plans."

2. Border Meet Points per RSA 378:32-36

The Joint ITCs ask us to reconsider what they claim is the *VNXX Order*'s failure to prescribe border meet points and to set intercarrier compensation in accordance with the asserted

requirements of New Hampshire joint service statutes RSA 378:32-36. (Joint ITCs Motion at ¶ 4.)

The statutes referenced by the Joint ITCs were enacted by the New Hampshire legislature in 1985, eleven years prior to the federal enactment of the TAct. RSA 378:32 through 378:36 authorize the Commission to establish joint services by transfer of messages at common points, and to set and apportion rates therefor, in situations where two localities cannot be reached either by the lines of a single utility or by the use of other lines with suitable connections. By granting the Commission such authority, the statute addresses the problem of the physical barriers encountered in New Hampshire that could interfere with universal service within a specific franchise area that needed to be overcome in the 1985 monopoly environment.

Clearly, this is neither the factual nor the regulatory situation encountered today, eighteen years later and after passage of the comprehensive federal TAct enabling and regulating interconnection between carriers for the purpose of creating local competition. The Joint ITCs have confused federally mandated interconnection to foster competition with state-permitted joint service to ensure universal service in a monopoly environment. The situation today is that of incumbent providers interconnecting with competitive providers as mandated by §251(a) of the TAct. RSA 378:32-36 do not apply to the issues in this

docket. RSA 378:32-36 apply to only those narrow circumstances described in 378:32,I, i.e., "between localities which cannot be reached either by the lines of a single utility or by the use of other lines with suitable connections."

The Joint ITCs' underlying demand is for interconnection at a point on the ITC's border. However, the RSA, even if it were to apply to this situation, refers to "the transfer of messages at common points", (RSA 378:32, II(c)) not to border meet points. For traffic less than 5,000 minutes, or in the absence of a TEA, we have determined that the common point for the transfer of messages shall be the facilities of the third-party carrier that provides common connection to each, i.e., Verizon.

3. Miscellaneous

In their *Further Motion*, the Joint ITCs argue that the *Clarification Order* is unjust, unlawful and unreasonable in that it states in ¶ 5 that ITCs are required to interconnect without a point of interconnection. The Joint ITCs aver that they cannot determine the effect of this ruling. (Joint ITCs Further Motion Item 3.)

The VNXX Order provides for the seamless exchange of and compensation for traffic between ITC and CLEC customers even in the absence of a TEA. As we have stated above, the Joint ITCs have a duty to interconnect, directly or indirectly. Indirect

interconnection is facilitated by Verizon, and ITCs may incur a cost through the application of Third Party Transport charges.

4. Section 251(c)(2) Exemption

The Joint ITCs requested that we reconsider application of the single POI requirement, claiming that insofar as the single POI requirement is justified by §251(c)(2) the ITCs are exempt pursuant to §251(f)(1). (Joint ITCs Motion at ¶ 5.) In their *Further Motion*, the Joint ITCs again cite their exemption under §251(f)(1), and argue that the *Clarification Order* is unjust, unlawful and unreasonable in that paragraph 5 of the *VNXX Order* states generally that ITCs have an obligation to interconnect with CLECs, and appears to be referring to interconnection pursuant to §251(c) of the TAct, from which the ITCs are exempt. They assert they have no obligation to exchange traffic pursuant to §251(c) because of the exemption granted by §251(f)(1). (Joint ITCs Further Motion Item 2.)

Section 251(c)(2), entitled "Additional Obligations of Incumbent Local Exchange Carriers" is a section from which the Joint ITCs, as rural carriers, are currently exempt pursuant to §251(f)(1)(A). Therefore, at this time, the Joint ITCs, although they are local exchange carriers, need not negotiate agreements with competitors for resale, number portability, dialing parity, access to rights of way, reciprocal compensation, unbundled access or collocation, and need not provide for the facilities

and equipment of requesting carriers' interconnection with the LEC's network at any technically feasible point within the carrier's network.

Nonetheless, §251(f)(1)(A) does not exempt the Joint ITCs from the requirement to interconnect contained in §251(a)(1). That section sets out a general duty of all telecommunications carriers to interconnect, directly or indirectly, with the facilities and equipment of other telephone carriers. The Joint ITCs thus have a duty to interconnect.

Such interconnection is achieved, indirectly, by delivering traffic to the CLEC's POI located outside the ITC's border, via Third Party Transport. Direct interconnection may be achieved, and we encourage CLECs and ITCs to achieve it when it is mutually beneficial, through the negotiation of TEAs.

5. Third Party Contract Obligations

The Joint ITCs further requested that we reconsider reliance on Verizon/CLEC interconnection agreements to determine ITC transit and transport obligations. (Joint ITCs' Motion at ¶ 6.) They argue that the *VNXX Order* imposes on them contractual transit traffic obligations pursuant to provisions in contracts to which they are not a party, i.e., the interconnection agreements that exist between Verizon and individual CLECs. Further, the Joint ITCs argue that this docket

was not noticed adequately as a generic docket to determine binding transport and transit charges.

The charges that are the subject of the Joint ITCs' objection here are those for Third Party Transport of traffic that originates on an ITC's network. On p. 4 of the *Clarifying Order,* we corrected language from the *VNXX Order* that appeared to suggest that an ITC would be responsible for transport and transit costs for all traffic between itself and a CLEC (up to 5,000 minutes). We clarified that each ITC would bear only the cost of the transport and tandem transit for its originating traffic sent to a CLEC (up to 5,000 minutes). Our *VNXX Order* encourages the negotiation of TEAs to establish compensation between companies that exchange large amounts of traffic. In addition, for the exchange of traffic when a TEA has not been negotiated, the *VNXX Order* provides a compensation mechanism for the delivery of calls between companies.

We have considered the Joint ITCs' arguments and are not persuaded by them. We find that the interconnection agreements between Verizon and CLECs do not bind the Joint ITCs. The interconnection agreements only bind Verizon to deliver third party calls to CLECs, thus permitting CLECs to receive calls originating from a third party. The Joint ITCs argue that because the interconnection agreements provide this method for the delivery of third-party calls, they are required to use it.

This is not the case. The ITCs are not bound to deliver their end users' calls through Verizon but, if they choose to do so, then Verizon is bound by its interconnection agreements to deliver those calls to the CLEC. §251(a)(1) of the TAct obliges ITCs to interconnect with CLECs either directly or indirectly. Accordingly, the obligation to interconnect is not imposed by the interconnection agreements between Verizon and CLECs; the obligation is imposed by the TAct.

6. Due Process

Next, we consider the Joint ITCs claim that the docket was not correctly noticed as determining the "responsibility and pricing of transport and transit charges." This docket was a combined docket, as spelled out in the *Order of Notice* for DT 00-223 issued October 16, 2000, which stated that issues from DT 99-081 and DT 99-085 (*Reciprocal Compensation*), DT 00-001 (*Number Conservation*), and DT 00-054 (*Local Calling Areas Between Independent Telephone Companies and Competitive Local Exchange Carriers*) would be consolidated. In fact, the documents in this docket have consistently referred to DT 00-223 and DT 00-054. The *Prehearing Conference Order* No. 23,501 in DT 00-054 restated what the *Order of Notice* in DT 00-054 said, that the Commission's investigation would "delve into issues related to the appropriate ... compensation for these calls." Further on in Order No.

23,501, it makes clear that compensation includes transport charges, stating that "BA-NH [now Verizon] also agreed that it would not bill ICOs [ITCs] or CLECs for tandem transit and transport of traffic ..." during the moratorium. The agreement, among several others, was to remain in effect while the parties attempted to negotiate a settlement. This set of agreements later came to be known as the moratorium in this proceeding. Based on this record, DT 00-054 was noticed properly to include consideration of compensation for transport.

As we indicated earlier in this section, it is the TAct, not our *VNXX Order*, that establishes the Joint ITCs' responsibility to interconnect with CLECs. Verizon is not statutorily obliged to absorb the costs for effectuating the CLEC-to-ITC interconnection required by the TAct. The costs for that should reasonably be paid by CLECs and ITCs by mutual agreements, fairly allocating the costs, or by direct interconnection. In the absence of such agreements, we established a default compensation mechanism and encouraged the negotiation of TEAs. The actual rates for Third Party Transport are not set either by an interconnection agreement or by our *VNXX Order*. They will be governed by a tariff to be filed by Verizon with this Commission. In sum, we will deny the Joint ITCs' request for rehearing on this point.

E. Traffic Exchange Agreements

In our *VNXX Order*, we provide for the payment of Third Party Transport for traffic indirectly exchanged between CLECs and ITCs in the absence of Traffic Exchange Agreements (TEAs). As modified in the *Clarifying Order*, our decision regarding transport costs for traffic originated by ITC customers delivered by Verizon to a CLEC recognized that both ITCs and CLECs have incentives not to negotiate TEAs that would determine responsibility for those charges. Therefore, we directed that those transport costs, in the absence of a TEA, would be handled as follows: when the traffic, as measured by Verizon, exchanged between any single CLEC and any single ITC in any direction over Verizon's facilities is less than 5,000 minutes of traffic per month (an amount we consider *de minimis*), the ITC shall bear the cost of Third Party Transport for traffic that originates on its network, terminates on a CLEC network, and is transported between the two by Verizon. When such traffic exceeds 5,000 minutes of traffic per month, the ITC and the CLEC shall each pay one half of the cost of Third Party Transport for all traffic that originates on the ITC network, terminates on the CLEC network, and is transported between the two by Verizon, until the ITC and CLEC reach agreement on a TEA.

Negotiations of such TEAs need not be undertaken in a vacuum, as parties who are unable to reach agreement are

encouraged to seek Commission arbitration in the development of an agreement.

1. 5,000 Minute Threshold Issues

KMC/GNAPs requested that we reconsider applying the requirement that CLECs need to have traffic exchange agreements with each ITC with which the CLEC shares more than 5,000 minutes per month of traffic. (KMC/GNAPs Motion at p. 7.) Their motion for reconsideration requests that the Commission raise the 5,000 minute trigger to 200,000 minutes. In support, KMC/GNAPs posit that a number lower than the monthly amount of traffic that would be generated by a single DS-0 (9000 minutes per month) is too low and that a DS-1 generates 216,000 minutes per month.

RNK argues that a threshold of the capacity of one DS-1 is a more reasonable level. RNK contends that the threshold set in the *VNXX Order*, especially if it includes all types of traffic, would mean that many CLECs and ITCs would need to meet immediately to create traffic exchange agreements.

We agree with RNK that the threshold might be quickly exceeded. Our intent in setting a trigger is to allow the exchange of small amounts of traffic that might be generated by occasional calls between end users of two companies, and to encourage the negotiation of TEAs between CLECs and ILECs in the state. The higher thresholds proposed by KMC/GNAPs and RNK would vitiate the intent of our *VNXX Order* to encourage CLECs and ITCs

to negotiate TEAs as a general rule and in the general course of business.

The compensation mechanism we delineate in our orders, for use after more than 5,000 minutes of use have been generated, is intended to apply in the absence of a TEA. We expect carriers will make decisions about negotiating a TEA when it is mutually beneficial, but have put this mechanism in place to ensure seamless interconnection in the interim. RNK, KMC, GNAPs, or any other carrier may elect not to negotiate a TEA until the traffic exchanged exceeds 200,000 minutes of use (or any other amount they deem appropriate) so long as the carrier is willing to pay half of the Third Party Transport costs for the ITC-originated traffic delivered to it. After reconsidering this matter, we again find that 5,000 minutes is a reasonable trigger for the sharing of Third Party Transport costs until a TEA is negotiated.

2. Small Amounts of Traffic

The Joint ITCs state that the *Clarification Order* is unjust, unlawful and unreasonable in that it finds, without support in the record, that the traffic at issue involves only "small amounts of traffic". (Joint ITCs Further Motion Item 4) The Joint ITCs object to paragraph 5's reference in the *Clarifying Order* to "small amounts of traffic." The Joint ITCs aver that the characterization of the amount of traffic at issue is not supported on the record. We believe that the Joint ITCs

have misconstrued the meaning of paragraph 5, which applied the term "small amounts of traffic" to the amount of traffic that would be exchanged by a CLEC and an ITC before it was beneficial to negotiate a TEA, not to all of the traffic exchanged between ITCs and CLECs. Therefore, this issue does not warrant reconsideration.

VI. PROCEDURAL SCHEDULE FOR IMPLEMENTATION AND REHEARING

The procedural schedule for the remainder of this docket is as follows:

Testimony on IANXX Implementation	December 1, 2003
Proposals for Dealing with Pooled and Ported Numbers When NXXs are Reassigned to the POI	December 1, 2003
Data Requests	December 17, 2003
Data Responses	January 10, 2004
Reply Testimony	February 10, 2004
Data Requests	February 24, 2004
CLEC NXX Use Reporting due	March 1, 2004
Data Responses	March 3, 2004
Settlement Discussions	March 16, 2004
Hearings	March 30-31, April 1 2004
Use of VNXX Other than for CLEC FX and IANXX ends	January 1, 2005

Based upon the foregoing, it is hereby

ORDERED, that the *VNXX Order* is clarified as explained herein; and it is

FURTHER ORDERED, that a rehearing is hereby **GRANTED** on the limited issues of technical feasibility, time frames, and cost for implementing IANXX; and it is

FURTHER ORDERED, that a rehearing is hereby **GRANTED** on the issue of the appropriate treatment of VNXXs that cannot be reassigned to the relevant Point of Interconnection under the pooling circumstances described herein; and it is

FURTHER ORDERED, that, as part of their testimony in the rehearing, the interested parties and Staff shall file proposals for reassignment of NXXs to the POI when the pooling circumstances described herein are encountered; and it is

FURTHER ORDERED, that motions for rehearing of all issues not specifically addressed herein are **DENIED**; and it is

FURTHER ORDERED, that by March 1, 2004, all CLECs shall file a letter stating that they have NXXs or thousands blocks of NXXs assigned for their use, and attach supporting information on an exchange by exchange basis as described herein; and it is

FURTHER ORDERED, that CLEC annual reports to the Commission shall include an attestation of CLEC FX qualification on an exchange by exchange basis; and it is

FURTHER ORDERED, that, at the time IANXX dialing commences, a period of time for permissive dialing shall be established; and it is

FURTHER ORDERED, that a schedule for transitioning to IANXX calling shall be established as part of the rehearing process; and it is

FURTHER ORDERED, that the procedural schedule herein detailed shall apply to all issues for which this order grants rehearing.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of October, 2003.

_____	_____
Thomas B. Getz	Susan S. Geiger
Chairman	Commissioner

Attested by:

_____
Claire D. DiCicco
Assistant Secretary