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Attorney for the Commission Staff

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

<b>IN THE MATTER OF THE PETITION OF</b>	)	<b>CASE NO. GNR-T-02-16</b>
<b>POTLATCH TELEPHONE COMPANY,</b>	)	
<b>CENTURYTEL OF IDAH, CENTURYTEL OF</b>	)	
<b>THE GEM STATE, AND THE IDAHO</b>	)	<b>COMMENTS OF THE</b>
<b>TELEPHONE ASSOCIATION FOR A</b>	)	<b>COMMISSION STAFF</b>
<b>DECLARATORY ORDER PROHIBITING THE</b>	)	
<b>USE OF "VIRTUAL" NXX CALLING.</b>	)	
_____	)	

**COMES NOW** the Staff of the Idaho Public Utilities Commission, by and through its attorney of record, Donald L. Howell, II, Deputy Attorney General, and submits the following comments in response to the Notice of Petition for Declaratory Order, Notice of Modified Procedure, Notice of Intervention Deadline and Order No. 29125 issued on October 4, 2002.

**THE APPLICATION**

On August 27, 2002, several small incumbent local exchange companies (LECs) filed a petition seeking a declaratory order. In particular, the Petitioners urged the Commission to declare that the practice of "virtual" calling by means of a virtual prefixes (NXX) or other virtual-like services is not in the public interest and should be prohibited in Idaho. Virtual NXX calling converts what would otherwise be a long distance (toll) or message telecommunications service (MTS) call to a toll-free local call by the assignment of a local telephone prefix, which makes it

appear that the call is a local call. The Petition for Declaratory Order was filed jointly by Potlatch Telephone, CenturyTel of Idaho, CenturyTel of the Gem State and the Idaho Telephone Association (ITA).<sup>1</sup>

## DISCUSSION

1. Background. As an initial matter, this Commission regulates intrastate telecommunications. Traditionally, the jurisdictional distinction (between interstate and intrastate or interLATA and intraLATA) has been premised on determining the points of origination and termination of the telephone call. For example, a telephone call that originates in Idaho and terminates within Idaho has traditionally been construed as an intrastate telephone call. Even if the call is routed for transport services through facilities that are located out of state, if the call originates and terminates in Idaho the call has been construed to be an intrastate call. Order No. 21433.

From a historical perspective, each wireline local exchange has been assigned rating coordinates. When a call is made from one local exchange to another local exchange, the central office switching equipment determines whether the call was local or toll based upon a comparison of the rating coordinates. In 1996, the Commission authorized Qwest's predecessor (U S WEST) to create three large regional local calling areas. Order No. 26672 issued November 1, 1996. In subsequent Orders, the Commission expanded these three local calling regions to include adjacent non-Qwest local exchanges.

With the advent of wireless communication and competitive LECs, these entities serve "local" areas that do not necessarily conform to the typical exchanges or calling area boundaries of the incumbent LECs (ILEC). For example, the FCC has authorized commercial mobile radio service (CMRS) carriers to use the major trading area (MTA) as their "local service area for CMRS traffic. *Local Competition Order* at ¶ 1036.<sup>2</sup> For purposes of illustration, the southern

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<sup>1</sup> The ITA has 14 members including Albion Telephone, Cambridge Telephone, Midvale Telephone, Direct Communications Rockland, Silver Star Telephone, Rural Telephone, and Inland Telephone. These listed companies receive financial support from the Idaho USF. Petition at 4.

<sup>2</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom., Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 8<sup>th</sup> (Cir 1997) *aff'd in part and remanded, AT&T Corp. v. Iowa Utilities Bd*, 525 U.S. 366, 119 S.Ct. 721 (1999) (hereinafter the *Local Competition Order*).

Idaho MTA includes all the Qwest and non-Qwest exchanges located in the Boise LATA.<sup>3</sup> Consequently, the local service areas for wireless carriers and competitive LECs may be larger than the local calling areas of the ILEC and may include routes that, from an ILEC's perspective, may be a toll route.

2. Virtual NXX. As described in the Petition for Declaratory Ruling, Virtual NXX occurs when telephone numbers or an entire prefix (NXX) are assigned to a carrier such as a competitive local exchange carrier (CLEC) in a certain rate center but calls to those numbers are delivered by the incumbent carrier (ILEC) to the CLEC in another rate center outside of the originating local calling area. Therefore, such calls are *rated* as local calls, but by the nature of the end points are *routed* as toll calls. The questions surrounding inter-carrier compensation in Virtual NXX situations are currently being considered by the Federal Communications Commission (FCC).<sup>4</sup> However, in the Local Competition Order, the FCC stated that state commissions have the authority to determine what geographic areas should be considered "local areas" for the purposes of reciprocal compensation obligations under Section 251(b)(5) of the Act.<sup>5</sup>

3. Jurisdiction. In their Application, the Petitioners alleged that they "are aware of situations in other states where [CLECs] are requesting to enter into relationships under which a Virtual [NXX] would be established within local exchange areas. . . ." Petition at 5, ¶9. The Petitioners further state that they believe "at least one or more CLECs that provide VNXX or VNXX-like services in other states are now certificated in Idaho." *Id.* at 6. Although not specifically defined in the Petition, it is Staff's belief that Virtual NXX configuration does exist in Idaho. Staff is aware that at least one CLEC has an NXX assigned to the eastern Idaho Qwest calling area, but their point of interconnection with Qwest is in Boise. Consequently, Staff believes that the Petitioners' requested relief is neither of a hypothetical nor abstract character. *Noh v. Cenarrusa*, \_\_\_ Idaho \_\_\_, 53 P.2d 1217 (2002). Returning to the request of the petitioners, they seek an Order prohibiting intrastate telephone calls between locations that are not within the same local calling area being "rated as local rather than toll" calls. Petition at 6. The Commission has authority to address intrastate local calling areas and exchange access

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<sup>3</sup> The Boise LATA includes all LEC exchanges south of the Salmon River.

<sup>4</sup> *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-032 (rel. April 27, 2001).

<sup>5</sup> *Local Competition Order* at ¶ 1035. See also *Virginia Arbitration Order*, 2002 WL 1576912 (July 17, 2002), ¶ 549.

compensation under *Idaho Code* §§ 62-603(7) and 62-609. At the same time the FCC sets local calling areas for CMRS carriers. *Local Competition* Order at ¶ 1036. Both the Applicants' Petition and the Commission's Notice recognize that the Commission has previously determined that the transportation of telecommunication in a manner which avoids the assessment of legitimate toll and access charges was inappropriate and unlawful. Order No. 25885 (the *Upper Valley Case*). In this case, the Commission found that the use of EAS bridging or arbitrage to make what would otherwise be a long-distance call was inappropriate.

Staff continues to support the long established "end-to-end" analysis for determining the nature of calls. (See Order Nos. 25885 and 21433). Specific to this case, Virtual NXX calls originate in the exchange of one local calling area but are delivered to terminate in an exchange of another local calling area and should, therefore, be considered interexchange traffic and subject to the appropriate access compensation rates.

At the root of this issue lies the question of whether or not one carrier can use another carrier's network without a negotiated compensation arrangement. In a Virtual NXX scenario, the ILEC could incur the cost of the network that transports Virtual NXX traffic between local calling areas, lose the access revenue that would otherwise be associated with that traffic, and end up paying reciprocal compensation to the other carrier on that same traffic because it is mischaracterized as local calling. While not attempting to dictate the local calling areas or network architecture of other carriers such as CLECs, wireless providers, or paging services that may use the ILEC's network, Staff does believe that using an ILEC's plant and facilities without some negotiated compensation arrangement for that usage is unjust. This position is supported by the FCC's statement that "traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges."<sup>6</sup>

Carriers that participate in Virtual NXX calling have several legitimate negotiated compensation alternatives to provide service. For example, those carriers can purchase special access services from the ILEC, can negotiate to use extended enhanced loops (EEL), foreign exchange lines (FX), wide area telecommunication service (WATS), or 800 number services. None of these alternatives or other arrangements such as "bill-and-keep" attempt to trick carrier switches and billing systems into providing transport between local calling areas without

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<sup>6</sup> *Id.* ¶ 1035.

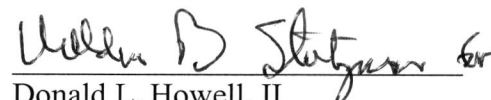
compensation the way Virtual NXX does. For services such as FX that are offered by the ILEC, compensation is either imputed according to § 62-609 or collected from the end use subscriber.

Other concerns Staff considered regard the reporting of minutes to Idaho's Universal Service Fund and Telecommunications Relay Service Fund. Virtual NXX minutes that are inappropriately classed as local minutes may cause carriers to avoid paying the appropriate amount to these funds or at least alter the proportionate funding addressed by the Commission. (See Order Nos. 24525 and 28684). In addition, Staff is concerned that Virtual NXX may unfairly disadvantage those carriers that provide interexchange service and must incur the appropriate costs of access charges.

### RECOMMENDATION

Staff recommends that the Commission rule Virtual NXX traffic is non-local traffic as described by the parties and is instead interexchange traffic. Staff further suggests that carriers resolve this and other intercarrier compensation arrangements as they negotiate interconnection agreements. In most cases, Staff believes that access charges are the appropriate intercarrier compensation mechanism regarding VNXX traffic but recognizes that, due to the varying types of network usage, the carriers may negotiate appropriate arrangements on a case-by-case basis. Staff also recognizes that policy and arrangements may change when the FCC concludes its pending rulemaking investigation on *Unified Intercarrier Compensation*.

Respectfully submitted this 1st day of November 2002.

  
Donald L. Howell, II  
Deputy Attorney General

Technical Staff: Doug Cooley

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 1ST DAY OF NOVEMBER 2002, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. GNR-T-02-16, BY ELECTRONIC FILING A COPY THEREOF, TO THE FOLLOWING:

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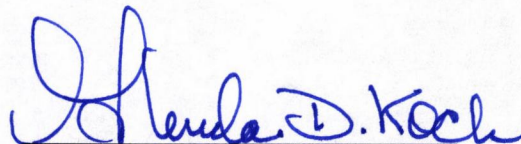
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