



David Erickson, President
4300 E. Pacific Coast Highway
Long Beach, CA 90084

August 12, 2019

VIA ECFS

Notice of Ex Parte

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage,
WC Docket No. 18-155**

Dear Secretary Dortch:

On Thursday, August 8, 2019, the undersigned, Josh Lowenthal and Kathryn Glaser of HD Tandem, along with Megan Delany of Delany Advisory Group met separately with Arielle Roth, Wireline Legal Advisor to Commissioner O’Rielly, Al Lewis, Lisa Hone, Lynne Engledow, Erik Raven-Hansen and Alison Baker of the Wireline Competition Bureau, Shane Taylor of the Office of Economics and Analysis, Nirali Patel, Wireline Advisor to Chairmain Pai, and Joseph Calascione, Legal Advisor to Commission Carr in the above referenced proceeding.

On Friday, August 9, 2019, the undersigned, Josh Lowenthal and Kathryn Glaser of HD Tandem, along with Megan Delany of Delany Advisory Group met with Travis Litman, Chief of Staff and Senior Legal Advisor, Wireline and Public Safety to Commissioner Rosenworcel, again regarding the above referenced proceeding.

HD Tandem hereby submits this ex parte presentation regarding the Federal Communications Commission’s ongoing efforts to reduce access arbitrage in the outdated intercarrier compensation regime.¹ Specifically, HD Tandem urges the Federal Communications Commission (“FCC” or “the Commission”) to ensure that any new regulatory policies involving the nation’s intercarrier compensation regime are rooted firmly in the fundamental principle of intercarrier reciprocity to allow current telecommunications services and consumer offerings to continue to thrive, and to cultivate new ones yet to come. HD Tandem believes that an intercarrier compensation regime based on the guiding principle of reciprocity would transition

¹*Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd. 5466 (2018)

the existing geographically-based intercarrier compensation system to a flexible, non-geographic, and deregulatory cost paradigm to ensure consumers continue to benefit from lowering costs and new efficiencies and services, while also meeting the Commission's desired end state goals of bill-and-keep.²

Specifically, HD Tandem wishes to state for the record its concerns that the adoption of "Prong 1," as currently proposed in the NPRM would most likely spell the demise of the current intermediate commercial marketplace.³ To explain, HD Tandem wishes to further describe in this ex parte its business model, the successes the company has achieved in creating and growing an intermediate commercial marketplace, as well as the hurdles it faces to continue to evolve and grow. HD Tandem believes that Prong 1, as proposed, could threaten not only its continued growth, but also its very existence as a competitive alternative in the free marketplace.

I. Access Arbitrage: Beware of Solutions in Search of Problems

HD Tandem commends the Commission's thoughtful and deliberate attempts to finish what the Commission had started back in 2010.⁴ Despite some companies' efforts to use the regulatory process to force the Commission's hand,⁵ this Commission instead chose to refresh the record and carefully examine the best, if any, regulatory steps to take to advance a modern bill-and-keep framework that accounts for "marketplace developments" since the adoption of the Transformation Order.⁶ The FCC specifically sought comment to refresh the record regarding intercarrier compensation "issues in light of developments that have occurred since the 2011 ICC Transformation FNPRM, including the transition of certain terminating traffic to bill-and-keep, and implementation of the adopted mandate to move all traffic to bill-and-keep."⁷ The goal of this exercise was to inform the FCC's ongoing review and analysis, "and thus the extent of bill-and-keep reforms."⁸

Subsequently, the Commission issued the Access Arbitrage NPRM to determine whether any further reforms were necessary. Generally speaking, arbitrage is typically defined as "the practice of taking advantage of a price difference between two or more markets." More specifically, regulatory arbitrage can occur in a variety of contexts when government regulations create artificial classifications or distinctions between or among similar entities subject to

² *Id.*

³ *Id.*

⁴ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109; GN Docket No. 09-51; CC Docket Nos. 01-92 and 96-45; WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17,663 (2011) ("Transformation Order").

⁵ See, e.g., *In the Matter of Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Rules For Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 16-363 ("AT&T Forbearance Petition") (September 20, 2016).

⁶ *Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, WC Docket No. 10-90; CC Docket No. 01-92, Public Notice, DA 17-863 (Sept. 8, 2017) ("Record Refresh PN").

⁷ *Record Refresh PN* at 1.

⁸ *Id.* at 2.

regulatory purview.⁹ HD Tandem supports the Commission’s efforts to eliminate access arbitrage and to update the outdated intercarrier compensation regime to catch up and keep pace with ongoing technological evolution and innovation. Unfortunately, in this proceeding, despite the FCC’s best intentions and efforts to take into account the entire competitive marketplace that exists today, and despite the reality of ongoing commercial rate drops, it seems that other self-interested parties continue to manipulate the regulatory process to formally regulate their side – and only that side at this time – of the intercarrier compensation exchange to a regulated rate of zero, rather than simply stepping up to the competitive plate and playing ball in the free marketplace.

Thus, if Prong 1 were to be adopted, without any changes to level the regulatory playing field for all carriers in the call path, then the FCC will have just created a new landscape for arbitrage – and more specifically positioned certain carriers to exercise regulatory arbitrage immediately out of the gate. The only inevitable result of such a one-sided order would be the creation of a new arbitrage platform that is solely available to the very largest and most established and dominant companies in the communications landscape – the originators. By stacking the regulatory deck in favor of just these carriers, the FCC will eliminate the possibility of any truly commercial negotiations for the exchange of traffic. In such a lopsided regulatory environment, and in HD Tandem’s own experience, the carrier at this negotiation table, with such regulatory preferential status, can, and will, leverage its advantage to simply deny access to its network.

As a result, HD Tandem believes that, if the Commission is determined to address narrow issues of access arbitrage before resolving outstanding and open network edge issues and questions,¹⁰ or without considering both sides of the call path – the originating side AND the terminating side then the Commission would actually be in effect determining broad issues that remain outstanding – primarily the de facto creation of a network edge where some minutes of traffic receive preferential regulatory treatment over others, despite the fact that both minutes are just that – the exact same amount of time, i.e. sixty seconds.¹¹ If such a newly classified regulatory anomaly governs any updated intercarrier compensation regime, then, not only will the regulatory rug be pulled out from many existing carriers, but also reciprocal intercarrier

⁹ Arbitrage. Retrieved from <https://en.wikipedia.org/wiki/arbitrage>. (August 7, 2019). *See Also*, Partnoy, Frank. “The Law of Two Prices: Regulatory Arbitrage, Revisited.” *Georgetown Law*, Apr. 2019, <https://www.law.georgetown.edu/georgetown-law-journal/in-print/volume-107-issue-4-april-2019/the-law-of-two-prices-regulatory-arbitrage-revisited/>.

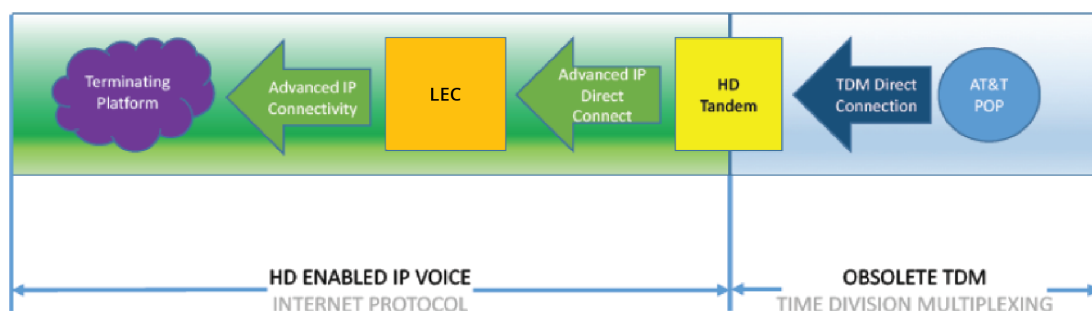
¹⁰ Memorandum Opinion and Order, *Level 3 Communications, LLC v. AT&T Inc.*, 33 FCC Rcd 2388, ¶ 17 (2018) (“*Level 3 Order*”).

¹¹ *See Record Refresh PN* specifically inviting comment on “issues raised by the Commission in the 2011 ICC Transformation FNPRM regarding (1) the network edge for traffic that interconnects with the Public Switched Telephone Network,” where this FCC notes that in 2011 the FCC “*recognized in the 2011 ICC Transformation FNPRM, that ‘[a] critical aspect to bill-and-keep is defining the ‘network edge’ for purposes of delivering traffic.*”⁵ The “edge” is the point where bill-and-keep applies, a carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge.”⁶ In the 2011 ICC Transformation FNPRM, the Commission sought comment on the appropriate network edge and related issues. Specifically, it sought comment on defining the network edge as (1) a “competitively neutral” location “where interconnecting carriers have competitive alternatives—other than services or facilities provided by the terminating carrier to transport traffic to the terminating carrier’s network,”⁷ (2) a point in each Local Access and Transport Area (LATA) determined by a terminating carrier for Mutually Efficient Traffic Exchange,⁸ or (3) a terminating carrier’s central office,⁹ among other possibilities.

relationships, which present the cleanest and most streamlined path towards a competitive bill-and-keep end state, will be thwarted.

II. HD Tandem is a Solution that is Working in the Marketplace Today

HD Tandem's business offering has already provided a real world, commercial and competitive solution to the regulated high rates offered by centralized equal access ("CEA") providers and complained of by many industry participants. Specifically, HD Tandem offers an alternative call path to the regulated CEA call path to deliver traffic nationwide, in all fifty states, at commercially negotiated just and reasonable rates.



HD Tandem's network provides advance quality and more efficient services and network capabilities to the legacy, regulated CEA providers.

Currently, HD Tandem has commercial agreements in place with more than 60 carriers.¹² The rates that govern this traffic, billions of minutes a month and tens of billions of minutes annually, are mutually negotiated and agreed upon rates by HD Tandem and the other party. These rates are subject to standard contractual terms, including Most Favored Nations Clauses.¹³ In contrast to other tariffed, or regulated, intercarrier compensation arrangements, such as one that might govern traffic exchanged between INS and AT&T, traffic that traverses HD Tandem's network is not subject to any geographic-related charges, including mileage costs. Furthermore, all of HD's Tandem's commercial contracts have been 100% litigation free, unlike other intercarrier compensation arrangements, including an ongoing multi-year legal dispute between INS and AT&T, during which AT&T has exercised self-help in refusing to pay.¹⁴ In addition, the infrastructure investments HD Tandem has made to build its network in provide those parties that rely on HD Tandem with state-of-the-art, HD-enabled, VoIP connectivity. The

¹²HD Tandem's 14 LEC footprint includes the largest volume LECs in Iowa and South Dakota and accounts for an estimated 1 billion minutes per month. These LECs include: Northern Valley (SD), Goldfield (IA), Breda Glidden (IA), Breda Western Iowa (IA), Louisa Muscatine (IA), Louisa Wapello (IA), I35 (IA), OmniTel (IA), Great Lakes Communications (IA), Premier (IA), Native American Crow Creek (SD), Native American Pine Ridge (SD), Reasnor Greenway (IA), and Killduff Greenway (IA)..

¹³ See, e.g. *AT&T Agreement*. *HD Tandem submission of AT&T/HD Tandem MSA in NPRM, Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd. 5466 (2018), WC Docket 18-155. ("AT&T Agreement") (April 17, 2019)

¹⁴ *In the Matter of Iowa Network Access Division Tariff* F.C.C. No. 1, WC Docket No. 18-60

accompanying network resiliency and redundancy benefits and fraud detection capabilities are the most superior in the industry.

<i>Regulated Route</i> <i>ie: Aureon</i>	<i>Competitive Route</i> <i>ie: HD Tandem</i>
Monopolistic	Free market alternative
Legacy TDM connectivity	State of the art, HD enabled VoIP
Mandatory use policy	Use by way of mutual agreement
Tariffs	Mutually agreed upon contract
Geography-sensitive	Geography-neutral
Mileage-sensitive	Mileage-insensitive
Heavy regulation	Light, sensible regulation
Complaint-prone	Complaint-free
Lawsuit-prone	Lawsuit-free
Self-help, non-pay	No disputes
Inconsistent with FCC direction on intercarrier compensation	Consistent with FCC goals by supporting Reciprocity, mutual exchange of traffic

Even more noteworthy and demonstrative of the benefits of HD' Tandems competitive alternative in the commercial marketplace, is that, in the time during which HD Tandem developed, implemented and began offering this technological alternative to the traditional regulated call path, the free market has responded. Rates have dropped steadily since HD Tandem's market entry. In fact, even the regulated market has responded.¹⁵

¹⁵ See Letter from J. Troup, Counsel for Iowa Network Services, Inc. d/b/a Aureon Network Services, to M. Dortch, Secretary, FCC, WC Docket 18-155. (May 23, 2019) ("Comcast *Ex Parte*").

Going even further in an effort to drive commercial rates from the already lower market rates to bill-and-keep, HD Tandem has formally offered all major dominant originating carriers a rate of zero to exchange traffic, if the originating carrier will provide a reciprocal direct connection to allow for a mutual exchange of traffic, along with an offset rate for the imbalance of traffic. In other words, HD Tandem has offered each of the originating carriers participating in this NPRM a tailored, immediately achievable, and just and reasonable path to a bill-and-keep mutual traffic exchange. And yet, to date, not a single one of these carriers have agreed to mutually exchange traffic to achieve bill-and-keep, despite asking the FCC to intervene to set rates at bill-and-keep.

¹⁶ Therefore, HD Tandem believes that some industry participants have created yet another regulatory solution to an imaginary problem. Rather than indulging such regulatory shenanigans, HD Tandem firmly believes that the Commission should encourage all industry participants – big and small – to keep pace with technology and invest resources in engineers as opposed to attorneys.

III. The Path Forward for Intercarrier Compensation Reform

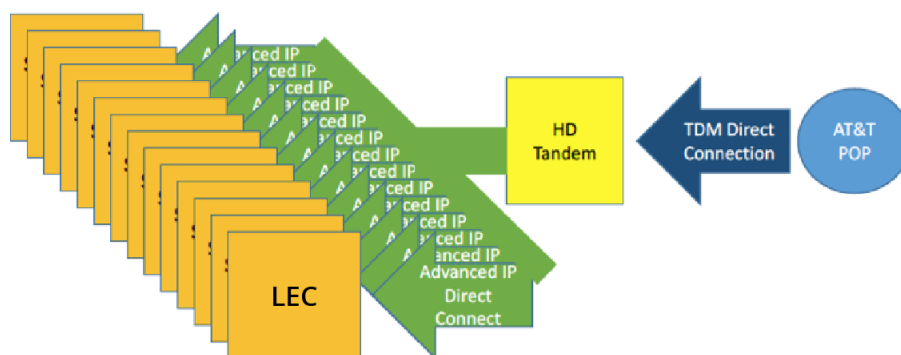
HD Tandem nevertheless believes the Commission is engaged in an honorable exercise and remains a willing participant and hopeful revolutionary industry leader to complete the bill-and-keep evolution and to remain a serious contender in the network space. However, HD Tandem believes that certain arguments contained in the record are inaccurate, and that certain proposals articulated in the NPRM would have unintended detrimental effects on the marketplace.

Specifically, if “Prong 1” is adopted as currently proposed, where the economics are simply reversed for ingressing traffic without any FCC guidance preserving companies’ ability of offsetting termination reciprocity, then smaller local exchange companies (“LECs”) receiving said traffic will simply never be able to achieve the Commission’s stated bill-and-keep end.¹⁷ That is, unless the large originating carriers terminating their application traffic offer reciprocal access to their own networks, then any terminating carrier deemed to be an “access stimulator” under Prong 1 would seemingly be obligated to pay for BOTH ingress and egress traffic. At the same time, the dominant originating carriers would seemingly be excused from having to pay for EITHER ingress or egress traffic (while also receiving compensation for their own ingress traffic). One of many potential unintended consequences of such lopsided economics would be a diminished competitive market, forcing many existing consumer voice applications to host their services with a dominant provider that is unencumbered by any competitive pricing pressures, likely requiring those voice applications to significantly raise consumer rates prices. HD Tandem therefore believes that Prong 1, if adopted as proposed, provides no mechanism for any carrier that is classified as an “access stimulator” to ever remove any access imbalance, thereby denying those carriers a primary path to fair, reciprocal bill-and-keep carrier economics.

¹⁶ See *Level 3 decision*, Memorandum Opinion and Order, *Level 3 Communications, LLC v. AT&T Inc.*, 33 FCC Rcd 2388, ¶ 17 (2018) (“*Level 3 Order*”), where the Commission carefully avoided applying a regulation that “would result in disparate treatment” of similar services and “would create an unlevel playing field, violating the principle of competitive neutrality.”

¹⁷ See *Transformation Order*.

According to the record, AT&T supports Prong 1 because it would effectively prevent the carriers that are in their downstream call path from purposely choosing “inefficient transport routes.”¹⁸ While the former and outdated intercarrier compensation regime may have promoted inefficiencies, the Transformation Order, and the adoption of tariff requirements that eliminate application of high, rural access rates by high-volume service providers to address industry complaints of access stimulation, addressed these issues.¹⁹ Upon adoption of the Transformation Order, and the Further NPRM, HD Tandem proactively developed a commercial alternative to specifically make the call path more efficient and innovate, from origination to termination. Specifically, as the Founder and President of HD Tandem, I personally invested the time and energy to negotiate commercial agreements with fourteen LECs individually. HD Tandem then invested millions of dollars to build network facilities to establish direct connections from each and every one of these remote terminating LEC end offices to one of several HD Tandem central offices – all located in metropolitan markets.²⁰ Armed with these value-added propositions, I then personally negotiated agreements with all of the originating carriers. While the negotiations were time-consuming, lengthy and arduous, after several years, HD Tandem had successfully secured commercial agreements to fourteen LECs to sixty-four carriers.



¹⁹ See *Transformation Order*.

HD Tandem's aggregation model transforms a network of multiple direct connects, each with a monthly recurring fee, into a single direct connect with no monthly recurring fees.

In addition, AT&T describes the current intercarrier compensation problem as driven by existing regulations that allow "terminating LECs and their access stimulation partners . . . to control, via their tariffs and their election of a transport route, how, and where IXCs must route the traffic—and how much IXCs must pay for transport."²¹ Yet, in fact, as evidenced by the HD Tandem and AT&T direct Application Access Agreement that I personally negotiated and executed after six years of dialogue,²² AT&T does in fact have a more efficient, technologically superior and lower rate option in place to use for their traffic today.²³ Yet, despite HD Tandem investing both non-recurring network expenses to direct connect to AT&T in Los Angeles, and recurring monthly expenses to maintain this connection, to date AT&T has not yet sent one minute. As a result, HD Tandem's network investment and capacity is stranded. Instead, AT&T chooses to send its traffic through INS and other inefficient and archaic routes, while focusing energies on routes instead – in the courts and at the FCC.

According to legal filings, during legal disputes, AT&T typically engages in non-payment. . . It is somewhat ironic, then, that AT&T complains about tariffed rates acting as "price umbrellas," when, by virtue of non-payment, their incurred cost is zero. HD Tandem instead has thrived in the marketplace because it offers tremendous value at competitive prices to its customers, all of whom DO pay. AT&T's comments in the record supporting Prong 1 "because it would facilitate more accurate pricing signals" should therefore be read with a skeptical eye seeing as the company affirmatively chooses not to participate in the commercial marketplace.²⁴

Similarly, in supporting Prong 1, Comcast describes the "much lower" termination rates (than \$0.006036) it paid to terminate traffic to consumers located in three major cities – New York, Los Angeles and Chicago. Comcast argues that using a third-party service to connect directly to a remote end office (or one located outside one of these metropolitan cities) would increase their terminating costs substantially. HD Tandem, as a third-party intermediate provider, however, solves this problem through its convenient drop-offs and direct connect aggregation. HD Tandem aggregates direct connection to 14 of the most difficult high volume LECs to connect to in the country and then negotiates a mutually agreed upon interconnection point for the carrier. For example, AT&T connects to HD Tandem in Los Angeles via TDM, whereas Verizon connects in Chicago via VoIP. As a commercial partner of HD Tandem, then, these carriers connect once at a designated edge in major metropolitan areas where their switches are located, saving the very costs they complain of in their NPRM comments.

Other opposition is based on both the sunk and ongoing costs to construct, maintain and operate the necessary direct connects that would be associated with Prong 2, if it were adopted as

²¹ Letter from M. Nodine, Assistant Vice President – Federal Regulatory, AT&T Services, Inc. to M. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (June 12, 2019). AT&T June Ex Parte.

²² See AT&T Agreement.

²³ *Id.*

²⁴ See Comments of AT&T at 4 and 8 (footnote 18), July 20, 2018. *Access Arbitrage NPRM*, ¶ 17. See Reply Comments of HD Tandem at 3, August 3, 2018.

is.²⁵ HD Tandem agrees with parties that the establishment of direct connects between two different and separately located geographic entities would require providers to “incur substantial sunk costs,” as HD Tandem itself has already made those investments in its own construction of expensive direct connects to individual LECs located in the remotest areas of the country.

Finally, other supporters of Prong 1 seem to base their opposition to Prong 2 because geographic concerns or distance, or mileage, sensitivities. HD Tandem has explained how its business model effectively takes geography out of the intercarrier compensation equation by aggregating traffic from the remote carriers at three different major metropolitan cities, any of which HD Tandem’s carrier customer can choose as its drop off point, or individual network edge. HD Tandem’s commercial alternative thus eliminates the “distance-sensitive transport charges” complained of by many commenters.²⁶

IV. A True Access Arbitrage Solution

HD Tandem believes that any true access arbitrage solution will: (1) contain no distinction as to types or classes of traffic; (2) be geographically neutral, or based on a non-geographically based approach, to prevent the gaming of traffic in one direction or the other; (2) continue the departure from regulated rates, with commercial negotiations determining terms and conditions for the direct connection of the parties’ traffic, including, if appropriate, offsets in rates; and (3) encourage the most efficient means of interconnection between carriers through state of the art IP technology.

To achieve these goals, however, the Commission’s rules and policies must be guided by the principle of intercarrier reciprocity. Specifically, any carrier that receives a direct connection for their traffic should accept a reciprocal direct connection to traffic seeking to be sent to their networks, including through IP technology. In addition, any carrier seeking bill-and-keep for traffic that it is sending to another carrier’s network, should be willing to accept connection of traffic to their networks at the same reciprocal rate. Finally, offsets in rates, as tailored to individual circumstances, should be allowed to account for traffic imbalances, mileage charges, and other factors, subject to commercial negotiations between the carriers.

Conversely, HD Telecom urges the Commission not to implement a system intended to curtail access stimulation that would allow interexchange carriers to pay a connecting carrier nothing for the connection of the interexchange carrier’s traffic, while refusing any reciprocal obligation to connect the traffic of the other carrier. Put simply, any rules that reverse any intercarrier compensation economics should be reciprocal in nature to foreclose any existing and future arbitrage opportunities.

V. Conclusion

In the commercial marketplace today, HD Tandem has offered, and continues to offer, all originating carriers an immediate rate of zero, if the carrier offers access to their network at a

²⁵ See Letter from B. Choroser, Vice President – Regulatory Affairs, Comcast Corp., to M. Dortch, Secretary, FCC, WC Docket No. 18-155 (July 17, 2019) (“Comcast *Ex Parte*”)

²⁶ Reply Comments of Verizon, WC Docket No. 18-155, at 7 (Aug. 3, 2018). See also Sprint Comments, WC Docket No. 18-155, at 4 (May 16, 2019).

reciprocal rate of zero. Such a reciprocal rate of zero is the most just and reasonable rate available in the telecommunications marketplace, as long as there is a **mutual** exchange of traffic. HD Tandem therefore welcomes the FCC's similar efforts to continue to advance a bill-and-keep end state, if any future regime is a reciprocal regime establishing a level playing field for all carriers – originating and terminating, small and large, established and new. Any one-sided, and short sighted, regime will only serve to shift current access arbitrage, and create new arbitrage opportunities, all while failing achieve the broader and more innovative goals of this Commission.²⁷

Respectfully Submitted,

/s/ David Erickson
David Erickson
President

Cc:

Alison Baker
Joseph Calascione
Lynne Engledow
Lisa Hone
Albert Lewis
Travis Litman
Nirali Patel
Erik Raven-Hansen
Arielle Roth
Shane Taylor

²⁷ See, e.g., Letter from Keith C. Buell, Sprint Corporation, to Marlene H. Dortch, FCC Secretary, WC Docket No. 18-155, at 1-2 (May 16,2019).