



David Erickson, President
4300 E. Pacific Coast Highway
Long Beach, CA 90804

September 3, 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 29, 2019, the undersigned, Josh Lowenthal and Kathryn Glaser of HD Tandem, along with Megan Delany of Delany Advisory Group, LLC, met via conference call with Albert Lewis, Lisa Hone, Erik Raven-Hansen, Gil Strobel, and Alison Baker of the Wireline Competition Bureau, and Shane Taylor, Eric Ralph and Emily Talaga of the Office of Economics and Analysis, in the above referenced proceeding.¹

During the meeting, HD Tandem reiterated the importance of the need for reciprocity as the fundamental principle for any modern intercarrier compensation framework. HD Tandem continues to believe that reciprocal traffic exchanges – specifically, the reciprocal exchange of traffic at mutually agreed upon offset rates - remain the most effective and immediate path to a bill-and-keep end state, as defined in the 2011 Transformation Order.² We lamented that the very carriers complaining about high rates in this Notice of Proposed Rulemaking (“NPRM”) docket are simultaneously refusing to allow offsetting traffic onto their own networks and explained that reciprocal traffic exchanges accompanied by offset rates would effectively make call termination costs zero. HD Tandem suggested, though, that the Federal Communications Commission (“FCC” or “the Commission”) could nevertheless achieve this marketplace solution

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

²*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”).

if any proposed reform, and subsequent relief, were conditioned upon a reciprocal relationship between two carriers. Specifically, any traffic originator seeking to benefit from relief from existing financial responsibilities should in turn agree to reciprocal treatment for any traffic bound to it from such local exchange carrier or a carrier that processes traffic between it and such local exchange carrier, subject to any offset. In this paradigm, the interexchange carrier (“IXC”) or intermediate access provider would also negotiate in good faith a variety of factors, such as an imbalance of traffic, the agreed-upon location of connection, and the reasonable costs of implementation.

HD Tandem also discussed the current definition of access stimulation and how best to revise the current definition to “accurately and effectively target harmful access stimulation practices.”³ We discussed HD Tandem’s personal experiences in the actual marketplace since the adoption of the Transformation Order, candidly describing “what works” and “what doesn’t work,” with the goal of helping the FCC avoid the pitfalls of the past. We also discussed the valuable role that HD Tandem has played in building the necessary infrastructure to support and maintain networks that provide all telecommunications capabilities, including the popular and consumer-oriented voice applications that have become the norm, as opposed to the exception, in today’s modern, connected IP-based world.

HD Tandem then focused its discussion on the Commission’s specific questions raised in the NRPM regarding how best to revise and update the access stimulation definition, including modifying existing “ratios or triggers,” adopting new triggers targeted at tandem and transport services, or eliminating or revising the current revenue sharing agreement requirement in the rules.⁴ HD Tandem explained the many inherent challenges local exchange carriers (“LECs”) face because of both the actual implementation of triggers and any desired evolution of business models so as to avoid tripping any triggers, and subsequent application of any rules, including the NPRM proposed “Prong 1” or “Prong 2.”⁵ By way of example, HD Tandem described the potential situation in which a LEC serving a rural community becomes labeled an access stimulator per any new rule. If such a LEC then desires to evolve their business model or modify their network structure to avoid tripping any access stimulation rule triggers, there should be a clear path, as well as a sufficient transition time, to enable that provider to do so.

HD Tandem therefore explained that any new rule adopted by the Commission must establish both clearly defined parameters around the identification and certification of any triggers and a sufficient transition period that enables affected LECs time to achieve compliance, if so desired. Actual implementation of any of the triggers under a proposed Prong 1 framework, for example, would require significant time to avoid the unintended but likely immediate shift in huge traffic volumes numbering in the billions of minutes, with dire consequences to the millions of consumers and businesses who rely on affected voice applications as part of their daily lives. Specifically, hosting LECs that are perhaps vulnerable to being deemed an “Access Stimulating” LEC may choose to re-home to a new tandem provider. To do so, they would need to recontract, provision, test, and possibly augment network capacity, in addition to terminating their current tandem arrangements. Centralized Equal Access (“CEA”) tandems, such as Aureon, may require

³ *Access Arbitrage NPRM* at ¶ 28.

⁴ *Id.*

⁵ *Id.*

their LEC customers to be exclusive as a condition of partnership. The ramifications for the implications of this potential condition for LECs contracted to Aureon that wish to avoid being an Access Stimulating LEC are very real but unknown. Each of the IXC's and transit carriers will need to update the new tandem information in the local exchange routing guide ("LERG"), which can be an immensely time-consuming process. On the other side, LECs will need to recontract with hosted voice applications, based on any new economics introduced in such a proposed Prong 1. The issue of capacity management will also come into play, as traffic shifts based on the new market economics influenced by the adoption of any new rules. In HD Tandem's opinion, then, the only realistic timeframe for actual implementation of any rule that would necessitate the above business changes would be an eighteen to twenty-four-month time period.

In debating the merits of various triggers, including revenue sharing, inbound versus outbound call ratios, percentages of growth, and billed mileage, HD Tandem next explained that any trigger must pass the muster of a simple 4 question test— who, what, where and when. More specifically, who specifically measures the triggers; what specifically is being measured; where specifically is it being measured; and when, and how often, it is being measured, and re-measured if so as well. Without a specific and clear answer to each of these critical questions of "who, what, where, and when," any access stimulation definition, and subsequent carrier classification, will remain ambiguous, providing carriers that are sending traffic with the ability to leverage this ambiguity as a means to effect self-help remedies, including non-payment.⁶

Thus, HD Tandem explained its belief that any newly adopted rule must specifically define "access stimulation," and the relevant triggers associated with the definition, to avoid marketplace uncertainty, dispute, self-help, and to enable continued technological growth and innovation, in both traditional and non-traditional telecommunications economies. By way of example, HD Tandem discussed the real-world application of these questions, as applied to a variety of potential existing and revised triggers:

Revenue Sharing Trigger - Who, What, Where, When.

Who decides and who determines if a LEC has a revenue sharing arrangement? What constitutes the act of revenue sharing, a payment or offsetting with any item of value? Where are things being measured-at the LEC edge? When is the period being measured – and on a monthly or quarterly basis? When can a LEC be re-measured to change its classification?

HD Tandem explained that, especially in light of the disputes over the very definition of "revenue sharing," which may include all items of value and not cash alone, this trigger can only be certified when self-declared and self-policed by the LEC (the only body that

⁶ See, e.g., *PEERLESS NETWORK, INC., et al., Plaintiffs-Counterclaim Defendants, v. MCI COMMUNICATIONS SERVICES, INC., VERIZON SERVICES CORP., and VERIZON SELECT SERVICES, INC., Defendants-Counterclaim Plaintiffs*; United States District Court, N.D. Illinois, Eastern Division; March 16, 2018. ("Verizon-Peerless Case")

measures all traffic and corresponding payments). Any other means would open the door for dispute.⁷

Inbound to Outbound Ratio Triggers - Who, What, Where, When.

Who measures the traffic? What are they measuring? Where is it being measured? When does traffic measuring take place – at the time of the order?

HD Tandem explained that any traffic should be measured in total inbound versus total outbound, neither separated by ingressing carrier nor by regulated versus commercial paths, and measured on a quarterly basis. All LECs in this case should file a quarterly report with the FCC. Again, the ratio trigger can only be certified when self-declared and self-policed by the LEC. In lieu of a self-declaration process, the FCC should create an expedited process for certification to remove ambiguity and to enable LECs to comply.

100% Growth Trigger - Who, What, Where, When.

Who measures growth? What is the growth - growth from single originators or total growth or regulated vs. commercial traffic? Or growth of inbound traffic? When are we measuring – is the measurement going backward?

HD Tandem explained that similar to any ratio triggers, any growth trigger must be measured by total inbound versus total outbound, especially given the dramatic swings in wholesale traffic movement. Furthermore, the only party that would know exactly how much total traffic has been received is the LEC itself, and therefore any “100% growth” trigger should only be certified when self-declared and self-policed by the LEC. In addition, this trigger could negatively impact or potentially stunt the growth of any new technological applications, making them unintended casualties of this trigger.

Mileage Trigger - Who, What, Where, When.

Who measures mileage - the tariff filer or the LEC being measured? What is being measured –the mileage filed in tariff or costs charged to sender? Where is mileage being measured - in the tariff primarily but also in billing to senders? When is mileage measured - when the tariff gets filed? How often do we re-measure? Anytime the tariff gets re-filed?

HD Tandem explained that, unlike the other triggers discussed above, any mileage trigger would not need to be self-declared and self-policed. Instead, a mileage trigger would be easily identifiable by the sending carrier in both tariff and corresponding traffic invoices. Given the ease of accessing this information, HD Tandem explained that any mileage trigger would keep carrier dispute over access stimulation status out of the courts. In contrast, the potential complications accompanying the other triggers discussed above would make the implementation of any of the proposed rules, including the proposed

⁷ See, e.g., Comments of T-Mobile USA, Inc., WC Docket No.18-155, (July 20, 2018), at 4 describing how “Peerless and O1 have repeatedly accused T-Mobile of entering into a revenue sharing arrangement with Inteliquent for the purpose of engaging in arbitrage.”

Prong 1, a legal nightmare.⁸

HD Tandem further stated that, despite any rule changes, voice application traffic will continue to exist and evolve by identifying hosting LECs that enable unencumbered growth and an economic even playing field. That is, incumbent LECs will be the only hosts of applications if the reverse economics of “Prong 1” are implemented across all of their competitors.

In summary, HD Tandem suggested that any new intercarrier compensation policies that are based on any market triggers should be clear, bright-line answers with little to no room for ambiguity and should also provide a clear path forward for affected providers to determine their own going-forward strategy, or change strategies without repercussion. Any new intercarrier compensation regulatory policies should be designed to provide targeted LECs with a compliant mechanism to avoid being classified as an Access Stimulating LEC. Specifically, LECs must have appropriate time periods in which to make necessary adjustments to comply, affecting the homing agreements, re-filing of tariffs, application hosting, contracts, and capacity constraints.

Respectfully Submitted,

/s/ David Erickson

David Erickson

President

Cc: Alison Baker
Albert Lewis
Lisa Hone
Eric Ralph
Erik Raven-Hansen
Emily Talaga
Shane Taylor

⁸ See, e.g., *Verizon-Peerless Case*, a real-life litigation example of an ongoing case between Peerless Networks and Verizon that has been pending for more than 10 years with no remedy in site.