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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; High Cost Universal Service Support, WC Docket No. 05-337; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Intercarrier Compensation for ISP-Bound Traffic, WC Docket No. 99-68; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, IP-Enabled Services, WC Docket No. 04-36

Dear Ms. Dortch:

Through a series of ex parte filings in these dockets, Neutral Tandem advocates under the rubric of "Critical Pro-Competitive Elements" that the Commission ensure that:

Competitive Tandem Providers with sufficient traffic volumes should have the right to directly connect to a terminating carrier on non-discriminatory terms. (emphasis added).¹

Neutral Tandem's proposal is flawed and violates the Commission's rules as well as its statutory obligations. To appreciate these flaws, it is important to understand what Neutral Tandem is proposing. It asks the Commission to create a rule that would require terminating carriers, which would include non-incumbent LECs, to establish direct, physical interconnection with tandem providers. The Commission rejected this proposed rule long ago. The Commission determined in the *Local Competition Order* that only incumbent LECs have a duty to directly interconnect with a requesting carrier. More importantly, in the same order the Commission concluded that it would **not** impose incumbent LEC obligations on non-incumbents because to do so would expressly

¹ See page 11 of Neutral Tandem presentation at:
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520064836

contravene the explicit direction from Congress set out in 47 U.S.C. 251(h)(2). That provision of the Act sets out the criteria that must be met before the Commission (and only the Commission) can determine to treat a non-incumbent LEC as an incumbent, with all the attendant duties that go with that status, including the duty to directly interconnect with other carriers.

During the comment cycle leading up to the *Local Competition Order*, the Commission heard from incumbent LECs and state commissions on this issue. They argued:

Many incumbent LECs and state commissions contend that it is not inconsistent with the Act for states to impose the requirements in section 251(c) on carriers that do not fall within the 1996 Act's definition of incumbent. These parties note that sections 251(d)(3), 252(e)(3), and 253(b) permit states to impose additional requirements on carriers. State commissions allege that they are in the best position to determine when it is appropriate to impose particular obligations on new entrants. These parties contend that state imposition of reciprocal obligations would be equitable, and would help promote fair negotiation and realistic demands by the new entrants.

Local Competition Order, 11 FCC Rcd 15499, 16108 (¶ 1245).

The Commission rejected these arguments, finding that:

We conclude that allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as "Additional Obligations on Incumbent Local Exchange Carriers," distinct from obligations on all LECs, would be inconsistent with the statute. . . . Section 251(h)(2) sets forth a process by which the FCC may decide to treat LECs as incumbent LECs. Thus, when the conditions set forth in section 251(h)(2) are met, the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents.

Id. at 16109-10 (¶ 1247-48) (emphasis added).

Consistent with these findings, the Commission issued two rules: the first preempts state commissions from undertaking on their own to determine whether to treat a non-incumbent LEC as an incumbent. In the second rule, it established a procedure for

a state commission or an interested party to ask the Commission to treat a particular carrier as an incumbent in accordance with the requirements of Section 251(h)(2). 47 C.F.R. § 51.223.

So, despite the Act and the Commission's direction to the contrary, Neutral Tandem would have the Commission classify all non-incumbent terminating carriers as incumbents for the purposes of direct, non-discriminatory interconnection without applying the appropriate statutory test. Under Commission rule, Neutral Tandem should instead request that the Commission issue an order declaring that a particular LEC be treated as an incumbent LEC, or that a class or category of LECs be treated as incumbent LECs pursuant to section 251(h)(2) of the Act. 47 C.F.R. § 51.223.

If the FCC treats Neutral Tandem's proposal as just such a request, it does not satisfy the test in Section 251(h)(2). The only rationale Neutral Tandem offers to require a non-incumbent terminating carrier LEC to be treated as an incumbent LEC would be if the competitive tandem provider had "sufficient traffic volumes." This hardly begins to satisfy the requirements of section 251(h)(2). Under that section, the Commission may only determine a non-incumbent carrier should be treated as an incumbent LEC if all of the following conditions are met:

- (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);
- (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
- (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

Neutral Tandem's request does not mention whether it seeks a declaration against a specific carrier or a whole class of carriers such as CLECs or wireless carriers. Moreover, Neutral Tandem has made no attempt to demonstrate that any provider meets the three-fold test set forth in Section 251(h)(2) and no doubt would be hard-pressed to do so.

On top of these serious legal defects, the proposal also runs afoul of important public policy considerations.

First, Neutral Tandem does not define "sufficient traffic volumes" for determining when a transit provider could force a terminating carrier to directly interconnect on a "non-discriminatory" basis. If implemented, this proposal will skew the market for transit traffic by effectively creating a duopoly between the incumbent ILEC and Neutral Tandem, assuming it carries "sufficient traffic volume." That duopoly will exist because

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Neutral Tandem would have a new right to direct interconnection based on its higher traffic volumes than a new entrant who is establishing its business and has not contracted to terminate its first minute. New entrants and secondary tandem providers in the market would then be left to scrounge for any remaining market share to meet the “sufficient” traffic volume threshold. The likelihood that such carriers could meet that threshold is small. In short, Neutral Tandem’s proposed rule is nothing more than private legislation that has the exclusive goal of protecting its position in the market.

Second, Neutral Tandem does not propose how to apply its “non-discriminatory” test to “terminating carriers.” Non-incumbent terminating carrier have no obligation in the first instance to directly interconnect with any carrier on a non-discriminatory basis. Rather, as the Act provides under Section 251(a), competitive carriers have the right in voluntary negotiations with other carriers to decide whether to directly interconnect with another carrier. Imposing a non-discrimination requirement on that carrier would undermine that most crucial aspect of a competitive provider’s negotiation right pursuant to Section 251(a) of the Act. Likewise, applying any kind of non-discrimination requirement on a competitive provider in this context could open the door to requiring these providers to assume, for example, the duty to enter into interconnection agreements with other carriers on identical terms and conditions and file such agreements with state commissions.² The FCC has already determined that a competitive provider cannot be treated as an incumbent LEC with all of its attendant obligations, except in the limited circumstances that Neutral Tandem’s proposal fails to meet.

Because Neutral Tandem’s proposal would impermissibly impose incumbent LEC obligations on non-incumbent, terminating carriers, the Commission should reject it.

Respectfully submitted,



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² As a matter of law, Neutral Tandem is wrong to insist that a non-incumbent carrier interconnect with another carrier on a non-discriminatory basis. Congress provided that incumbent LECs must interconnect with any requesting carrier “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory,” but did not impose any form of “nondiscriminatory interconnection” obligation on non-incumbents like Level 3. *Compare* 47 U.S.C. § 251(c)(2)(D) (imposing duty on ILECs) *with* 47 U.S.C. § 251(a) (omitting comparable duty for non-incumbent telecommunications carriers).