

WILLKIE FARR & GALLAGHER LLP

1875 K Street, N.W.
Washington, DC 20006-1238

Tel: 202 303 1000
Fax: 202 303 2000

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VIA COURIER AND ECFS

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: *Developing a Unified Intercarrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers; Connect America Fund; High-Cost Universal Service Support; A National Broadband Plan for Our Future, CC Dkt. No. 01-92, WC Dkt. Nos. 07-135, 10-90, & 05-337, GN Dkt. No. 09-51*

Dear Ms. Dortch:

Cbeyond, Inc. (“Cbeyond”), Integra Telecom, Inc. (“Integra”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit this letter in response to the reply comments filed by Neutral Tandem in the above-referenced proceedings.¹

¹ See generally Reply Comments of Neutral Tandem, WC Dkt. Nos. 10-90, 07-135, 05-337 & 03-109; CC Dkt. Nos. 01-92 & 96-45; GN Dkt. No. 09-51 (filed May 23, 2011) (“Neutral Tandem Reply Comments”); see also *id.*, Exhibit B, Declaration of Surendra Saboo (“Saboo Declaration”). The Joint Commenters requested that Neutral Tandem disclose to them redacted information in the Saboo Declaration that, in the course of their business dealings with each other, (1) Neutral Tandem has already provided to Cbeyond, Integra, and tw telecom, respectively; or (2) Cbeyond, Integra, and tw telecom, respectively, have already provided to Neutral Tandem. Pursuant to the Joint Commenters’ request, Neutral Tandem gave its prior written consent to disclosure of (1) paragraphs 19, 20, 24 and 26 of the Saboo Declaration to businesspeople within Cbeyond; (2) paragraphs 13 and 16 of the Saboo Declaration to the businesspeople within Integra; and (3) paragraphs 36 through 39 of the Saboo Declaration to the businesspeople within tw telecom. Such disclosure is consistent with the terms of the *Protective Order* in the above-referenced proceedings. See *Developing a Unified Intercarrier Compensation Regime; Establishing Just and Reasonable Rates for Local Exchange Carriers; Connect America Fund; High-Cost Universal Service Support; A National Broadband Plan for Our Future*, CC Dkt. No. 01-92, WC Dkt. Nos. 07-135, 10-90, & 05-337, GN Dkt. No. 09-51, *Protective Order*, DA 10-1749, ¶ 10 (2010) (“*Protective Order*”) (“*Except with the prior written consent of the Submitting*

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Neutral Tandem disputes the Joint Commenters’ arguments that the tandem transit service market is not effectively competitive and that the Commission should therefore require incumbent LECs to provide tandem transit service at cost-based rates.² Neutral Tandem has mischaracterized the tandem transit service market. As the Joint Commenters have explained, incumbent LECs have a monopoly over the provision of tandem transit service for a significant portion of the local traffic exchanged among LECs. As a result, incumbent LECs can and do unilaterally set prices for tandem transit service well above cost and above the level that would be yielded by a competitive market.³ Indeed, legacy Qwest offers competitive LECs tandem transit service at a rate of \$0.0045, which is more than three times Qwest’s average TELRIC rate for tandem transit service,⁴ and in the legacy BellSouth territory, AT&T offers competitive LECs tandem transit service at a rate of \$0.0025, which is almost two-and-a-half times legacy BellSouth’s average TELRIC rate for tandem transit service.⁵ The incumbent LECs’ market power in the provision of tandem transit service is a result of several different factors.

First, unlike incumbent LECs’ networks, competitive tandem transit providers’ networks are not ubiquitous. For example, Neutral Tandem has told investors that “[its] services are principally targeted to address . . . 55% of the total . . . telephone numbers assigned primarily to competitive carriers” in the U.S.⁶ Neutral Tandem also concedes that its network is not interconnected with “some small, rural carriers.”⁷ As a result, as Cbeyond has explained, Cbeyond must still use the incumbent

Party, or as provided under this Protective Order, neither a Stamped Confidential Document nor any Confidential Information may be disclosed further.”) (emphasis added).

² See generally Neutral Tandem Reply Comments.

³ See Reply Comments of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., WC Dkt. Nos. 10-90, 07-135, 05-337 & 03-109; CC Dkt. Nos. 01-92 & 96-45; GN Dkt. No. 09-51, at 17 (filed May 23, 2011) (“Cbeyond et al. Reply Comments”); see also Comments of Cbeyond, Inc., Integra Telecom, Inc., and tw telecom inc., WC Dkt. Nos. 10-90, 07-135, 05-337 & 03-109; CC Dkt. Nos. 01-92 & 96-45; GN Dkt. No. 09-51, at 20 (filed Apr. 18, 2011) (“Cbeyond et al. Comments”).

⁴ See Cbeyond et al. Comments at 20 & Attachment B, Declaration of Douglas K. Denney on behalf of Integra Telecom, Inc., ¶¶ 4-5.

⁵ See Cbeyond et al. Comments at 20 & Attachment A, Declaration of Greg Darnell on behalf of Cbeyond, Inc., ¶¶ 4-5.

⁶ See Neutral Tandem, Inc., Annual Report (Form 10-K), at 2 (filed Mar. 16, 2011); see also *id.* at 46.

⁷ Neutral Tandem Reply Comments at 5. Neutral Tandem’s argument (see Saboo Declaration ¶ 16) that [BEGIN CONFIDENTIAL]

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LEC's local tandem switch in every market in which it operates⁸ and Cbeyond has no choice but to pay the incumbent LEC's tandem transit rate in each of those markets. If Cbeyond were to forgo reliance on incumbent LEC tandem transit service, it would be unable to fulfill its statutory obligation to directly or indirectly interconnect with other telecommunications carriers.⁹

Second, incumbent LECs have utilized a number of strategies to reduce the size of the addressable market for competitive providers of tandem transit service, thereby leaving competitive LECs no choice but to continue to purchase tandem transit service from the incumbent LEC for the traffic affected by these strategies. For example, when a called party in the legacy Qwest territory is served by a competitive LEC via Qwest's QLSP (UNE-P replacement) product, Qwest charges the originating carrier for tandem transit service to deliver the call to the called party.¹⁰ In other words, Qwest has a "transiting monopoly" (much like a "terminating monopoly" for switched access) over this traffic. Thus, when an Integra customer calls the customer of any competitive LEC, including another Integra customer, that is served via QLSP, Integra is forced to use Qwest for transit of that traffic.

AT&T also apparently engages in this kind of conduct. Peerless Network ("Peerless"), a competitive tandem transit provider, recently told the Commission that in many markets in the AT&T incumbent LEC territory, AT&T's long distance affiliates "have consistently refused" to interconnect with Peerless and AT&T's wireless affiliate has refused or delayed interconnection with Peerless.¹¹ Instead, "AT&T will deliver traffic to other carriers from any of its affiliates . . . only through interconnections to AT&T [incumbent] LEC tandems."¹² Again, AT&T has created a transiting monopoly for this traffic. Moreover, as Peerless observes, this transiting monopoly will expand considerably if AT&T is permitted to acquire T-Mobile.¹³ That is, if AT&T acquires T-Mobile, AT&T

 [END CONFIDENTIAL] is therefore irrelevant.

⁸ See Cbeyond et al. Comments at 21.

⁹ See 47 U.S.C. § 251(a).

¹⁰ See Qwest Local Services Platform Agreement, Attachment 2—QLSP Service Description, § 3.7.3 ("For any call originated by an end user served by a Carrier that routes through Qwest's network and which terminates to a QLSP End User, Qwest retains its rights to bill the originating Carrier Transit charges for that call under the originating Carrier's Agreement.").

¹¹ See Petition to Deny of Peerless Network, Inc., WT Dkt. No. 11-65, at 8 (filed May 31, 2011).

¹² *Id.* at 7.

¹³ See *id.* at 7-8.

will have the incentive and the ability to require even more traffic to be routed through its incumbent LEC tandems, thereby reducing the addressable market for competitive tandem transit providers.¹⁴ According to Peerless, AT&T also restricts competition in the tandem transit service market in other ways, including by (1) charging its wireless affiliate lower rates for tandem transit service than it charges non-affiliates;¹⁵ (2) “oppos[ing] efforts to modify the Local Exchange Routing Guide (LERG) to permit an end office carrier to designate more than one homing tandem”;¹⁶ and (3) refusing to recognize Peerless or another alternative tandem transit provider as the sole homing tandem for select competitive LEC and wireless telephone number blocks.¹⁷ These strategies have the effect of giving AT&T the ability to unilaterally set prices far above cost for the significant volume of traffic at issue. Nor is there anything preventing Verizon, which also has wireless and long distance affiliates, from engaging in similar anticompetitive conduct. Moreover, other incumbent LECs can employ some of these exclusionary tactics even if they do not have a wireless or long distance affiliate.

Third, the costs associated with relying on a competitive tandem transit provider further reduce the circumstances in which a LEC can rely on a competitive provider of tandem transit service.¹⁸ For instance, in order to exchange traffic with Neutral Tandem, a LEC must establish trunks between its switch and Neutral Tandem’s tandem switch. Although Neutral Tandem pays for the cost of the trunks,¹⁹ Neutral Tandem will not establish these trunks (which are single or multiple DS3s in capacity) unless there is sufficient traffic to justify the cost. In smaller markets, or markets in which the addressable market for competitive tandem transit service is severely limited, a LEC may not have sufficient traffic to justify the deployment of a DS3 dedicated to the transport of transiting traffic.

¹⁴ *See id.*

¹⁵ *Id.* at 9.

¹⁶ *Id.*

¹⁷ *Id.* at 10.

¹⁸ In addition, in areas in which a LEC seeks to purchase tandem transit service from a competitive tandem transit provider but must still rely on the incumbent LEC for a portion of its tandem transit service needs, it is necessary to disaggregate the local traffic to be carried on each of the two tandem transit providers’ networks. In order to do this, the tandem transit customer must incur the fixed cost of buying facilities to disaggregate the traffic as well as the additional ongoing costs associated with performing this function. While these costs are not particularly significant by themselves, they add further to the barriers to purchasing tandem transit service from a competitive tandem transit provider. As a result of these and other costs of maintaining a redundant transit arrangement with a competitive tandem transit provider, even if that provider charges a lower rate than the incumbent LEC, a LEC that must rely on the incumbent LEC for transit of some of its traffic may be forced to rely on the incumbent for transit of all of its traffic.

¹⁹ *See Saboo Declaration* ¶ 26.

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Where this is the case, as in Integra’s smaller markets, Neutral Tandem is not a viable alternative to the incumbent LEC.

In sum, despite Neutral Tandem’s claims, the market for tandem transit service is not effectively competitive. As the Joint Commenters have explained, the Commission should therefore clarify that incumbent LECs have a duty to provide tandem transit service and require that such service be provided at TELRIC-based rates.²⁰

Please do not hesitate to contact me at (202) 303-1111 if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones
Nirali Patel

*Counsel for Cbeyond, Inc., Integra Telecom, Inc., and
tw telecom inc.*

²⁰ See Cbeyond et al. Reply Comments at 18-19 (explaining that incumbent LECs have a duty to provide tandem transit service under the Act and that the Commission has the statutory authority to require such service to be provided at TELRIC-based rates).