

EXHIBIT A

11-2332

(& 11-2714)

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
d/b/a AT&T CONNECTICUT,
Plaintiff-Appellant-Cross-Appellee,

v.

CABLEVISION LIGHTPATH-CONNECTICUT, INC., COX CONNECTICUT TELCOM, LLC, AND
COMCAST PHONE OF CONNECTICUT, INC.,
Intervenor-Defendants-Appellees-Cross-Appellants,

METROPCS NEW YORK, LLC, SPRINT COMMUNICATIONS, L.P., SPRINT SPECTRUM, L.P.,
NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC., AND YOUGHIOGHENY
COMMUNICATIONS-NORTHEAST, LLC,
Intervenor-Defendants-Appellees, and

ANTHONY J. PALERMINO, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC
UTILITY CONTROL; KEVIN M. DELGOBBO, COMMISSIONER, CONNECTICUT DEPARTMENT
OF PUBLIC UTILITY CONTROL; AND JOHN W. BETOSKI, III, COMMISSIONER,
CONNECTICUT DEPARTMENT OF PUBLIC UTILITY CONTROL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
CASE NO. 3:09-CV-1787(WWE)
HON. WARREN W. EGINTON

**BRIEF OF *AMICUS CURIAE* NEUTRAL TANDEM – NEW YORK, LLC IN SUPPORT
OF PLAINTIFF-APPELLANT-CROSS-APPELLEE SUPPORTING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Neutral Tandem – New York LLC hereby states that it is a wholly-owned subsidiary of Neutral Tandem, Inc., which is a publicly-held company.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY
OF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, Neutral Tandem - New York, LLC (“Neutral Tandem”) states that it is a telecommunications carrier providing “tandem transit” services in Connecticut, in competition with Plaintiff-Appellant-Cross-Appellee The Southern New England Telephone Company d/b/a AT&T Connecticut (“AT&T”) and other carriers.¹ AT&T is appealing the district court’s final judgment entered on May 11, 2011. The district court’s judgment affirmed, in pertinent part, an October 7, 2009 Decision (“Decision”) issued by Defendants-Appellees, the Commissioners of the Connecticut Department of Public Utility Control (the “DPUC” or the “Department”).²

The DPUC’s Decision ordered AT&T, in pertinent part, to reduce its charges for tandem transit service to a regulated rate based on the “Total Element Long-Run Incremental Cost” (or “TELRIC”) methodology. The district court affirmed this part of the DPUC’s Decision.

¹ Pursuant to Federal Rule of Appellate Procedure 29(c) and Local Rule 29.1(b), Neutral Tandem states that: (1) no party’s counsel authored this brief in whole or in part; (2) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no other person or entity, other than Neutral Tandem, contributed money that was intended to fund preparing or submitting this brief.

² As of July 1, 2011, the DPUC was renamed the Public Utility Regulatory Authority and aligned under the new state Department of Energy and Environmental Protection. For simplicity and consistency, Neutral Tandem will continue to refer to the agency as the DPUC for this brief.

Neutral Tandem's customers in Connecticut include many of the carriers that also purchase tandem transit services from AT&T. Because Neutral Tandem is a direct competitor of AT&T, the DPUC's Decision requiring AT&T to reduce its pricing for tandem transit service has had a direct impact on the prices Neutral Tandem charges for its services in Connecticut. Specifically, Neutral Tandem has been forced to lower its rates to match those imposed on AT&T by the DPUC's Decision. Neutral Tandem therefore has a substantial interest in the DPUC's regulation of AT&T's tandem transit rates in Connecticut.

As required by Federal Rule of Appellate Procedure 29(b), Neutral Tandem has filed a motion seeking leave to participate in this appeal as *amicus curiae* contemporaneously with the submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Neutral Tandem agrees with AT&T that the DPUC's Decision is both pre-empted by, and inconsistent with, the Telecommunications Act of 1996 ("1996 Act"). In particular, Neutral Tandem agrees that: (1) the Federal Communications Commission ("FCC") has, despite repeated requests, refused to find that tandem transit service is a form of "interconnection" under Section 251(c)(2) of the 1996 Act; (2) the FCC is currently considering (again) whether to regulate tandem transit service; and (3) at most, tandem transit service could be viewed as a service used to facilitate "indirect" interconnection, which is a form of interconnection governed by Section 251(a) of the 1996 Act. Neutral Tandem submits this *amicus curiae* brief to emphasize two points.

First, despite the district court's misunderstanding, competitive carriers have not been, and will not be, forced to "create a new infrastructure redundant to what [AT&T] already possesses" unless AT&T is required to provide tandem transit service at regulated, below-market rates. (JA 174.) This is because Neutral Tandem, and other competitive tandem transit carriers, provide competitive carriers with alternative ways to interconnect their networks indirectly, without using AT&T's network. The evidence of record shows that competitive carriers already use Neutral Tandem and other competitive transit providers – rather than using AT&T – for the large majority of their tandem transit service needs. The

DPUC's Decision and the district court's decision thus do not alleviate any "bottleneck" or other impediments to the development of local telephone competition. As a practical matter, they simply force AT&T to offer below-market regulated rates as a benchmark, which in turn forces competitive tandem transit providers to match those below-market, regulated rates.

Second, the district court based its finding that tandem transit service is a form of "interconnection" under Section 251(c)(2) of the 1996 Act on its belief that tandem transit service is merely "the provision of equipment and supplies, not a service in and of itself." (JA 174.) The district court's belief is indisputably wrong. Tandem transit service most certainly does involve a "service" – the delivery of traffic between carriers. Even the DPUC has acknowledged as much. The district court's misunderstanding of what tandem transit service is led directly to its erroneous conclusion that the service is a form of "interconnection." To the extent tandem transit service could be viewed as facilitating any type of interconnection, at most it could be viewed as facilitating indirect interconnection, which is governed by Section 251(a) of the 1996 Act, not Section 251(c).

ARGUMENT

I. THE DISTRICT COURT FAILED TO TAKE INTO ACCOUNT THE COMPETITIVE MARKET FOR TANDEM TRANSIT SERVICE.

The district court's decision purports to be based, primarily, on its interpretation of Section 251(c) of the 1996 Act, as well as the FCC's prior

decisions addressing tandem transit service. Yet the district court's rationale clearly was driven, in substantial part, by its belief that requiring AT&T to provide tandem transit service at below-market, TELRIC-based rates was somehow necessary to remove an impediment to entry for competitive carriers. Specifically, the district court found that requiring AT&T to provide tandem transit service "minimizes the costs to the new [competitive carrier] by not forcing it to create a duplicate and redundant infrastructure to the preexisting one established by the monopolist incumbent." (JA 174.) The district court expressed concern that: "By [AT&T's] reading of the statute . . . [competitive carriers] would be forced to create a new infrastructure redundant to what [AT&T] already possesses." (*Id.*) The district court concluded that "[i]ndirect interconnection is therefore necessary to ensure that new [competitive carriers] to a market can connect at minimal cost so as to promote competition within the market." (*Id.* at 175.)

The district court's concern is not supported by the record, or by the goal of promoting local competition. The record below showed that AT&T provides less than ***REDACTED*** of tandem transit services to competitive carriers, and that those same carriers deliver more than ***REDACTED*** of their tandem transit traffic through alternative providers such as Neutral Tandem. In other words, the competing telecommunications carriers participating in the docket

before the DPUC rely on tandem transit providers other than AT&T for more than ***REDACTED*** of their tandem transit needs in Connecticut.

Notably, the evidence before the DPUC also showed that competing carriers in Connecticut vary widely in terms of how they choose to obtain tandem transit services in Connecticut. For example, the evidence showed that there are at least three carriers (***REDACTED***) providing tandem transit services in Connecticut. (Supplemental Testimony of Dr. William E. Taylor (*see* II.5 at JA 127) at 4.) And on a carrier-by-carrier basis, the evidence showed the following:

- Comcast routes ***REDACTED***
REDACTED
- Sprint routes ***REDACTED***
REDACTED
- Charter routes ***REDACTED***
REDACTED
REDACTED
- Cox routes ***REDACTED***
REDACTED
REDACTED
- MetroPCS routes ***REDACTED***
REDACTED
REDACTED
- Cablevision
Lightpath routes ***REDACTED***
REDACTED
REDACTED

- Paetec routes ***REDACTED***
REDACTED
- Pocket ***REDACTED***

(*Id.*) In other words, competitive carriers have a wide variety of options available to them to fulfill their tandem transit needs in Connecticut, and they have taken advantage of these sources as appropriate for their individual businesses. For example, some carriers use competitive tandem transit providers for almost all of their traffic. Others split their traffic evenly between AT&T and the competitive providers. Still others, as in the case of ***REDACTED***, elected to use only AT&T's tandem transit services. Thus, the evidence showed that carriers in Connecticut are free to (and do) divide up their business among AT&T, Neutral Tandem, and other competitive tandem transit providers as they see fit.

The district court did not address this evidence, while the DPUC brushed it aside, stating that it was “not persuaded by the [AT&T] and Neutral Tandem argument that there is widespread competition among transiting providers in Connecticut[.]” (JA 76.) The DPUC stated that “the record does not support a finding that there are an adequate number of transit service providers or that they possess a sufficient market share which permits the service to be priced at a market rate.” (*Id.*) The DPUC also discounted the state of tandem transit competition skeptically because it believed that competing providers “are not interconnected with every carrier’s local network as is [AT&T].” (*Id.*)

The DPUC's decision ignores the record. For example, Neutral Tandem showed that it, alone, can deliver traffic to 90% of the end-users' telephone numbers that are served by competitive carriers in Connecticut. (Neutral Tandem's response to Interrogatories SPT-NT 1-1 through SPT-NT 1-50 (*see* V.28 at JA 137) at 8.) In other words, Neutral Tandem also provides carriers with an alternative to AT&T for all but 10% of those carriers' traffic. Other competitive carriers can reach some, or perhaps all, of the remaining 10%. And as shown above, some carriers in Connecticut have chosen to use alternatives to AT&T to deliver virtually all of their tandem transit traffic, further demonstrating the widespread availability of competitive alternatives to AT&T's tandem transit services. The DPUC's cavalier dismissal of the existence of competitive alternatives to AT&T's tandem transit service turned a blind eye to this evidence.³

The district court and DPUC's failure to account for the competitive tandem transit market led directly to the issuance, and affirmance, of a Decision that violates the 1996 Act. The 1996 Act is designed to promote competition in local telecommunications markets. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 489

³ In its Decision, the DPUC conjectured that “[c]learly, Neutral Tandem has its own self-interests rather than the public interest in mind by arguing that transit service should be priced based on market forces rather than pricing [transit service] at TSLRIC-based prices.” (JA 76.) This unsupported *ad hominem* attack on Neutral Tandem has no basis in the record and underscores the DPUC's failure to undertake a reasoned consideration of the record evidence regarding the competition that exists for tandem transit services in Connecticut. Although courts will show some deference to an agency's factual findings, there must be “substantial evidence” in the record to support them. *Dorman v. Harris*, 633 F.2d 1035, 1036 (2d Cir. 1980). There is no substantial evidence in the record for the DPUC's findings.

(2002). Recognizing that competing local carriers would be unable to replicate the complete networks of incumbent carriers such as AT&T, Congress decided to require those incumbents to provide competing carriers with access to certain “bottleneck” parts of the incumbents’ networks at artificially low, “cost-based” rates. *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611-12 (7th Cir. 2008) (Posner, J.). By design, these cost-based rates are well below actual historical cost, and are set “just above the confiscatory level.” *Id.* at 607-09.

However, courts interpreting the 1996 Act routinely have held that the requirement to provide access at “cost-based” rates applies only to network elements and services that competing carriers cannot obtain from any provider other than from incumbent carriers like AT&T. This limitation furthers Congress’s goal of encouraging competitive carriers to build their own networks, as opposed to relying on incumbents’ networks in perpetuity. As the First Circuit has noted, this limitation is critical to the goals of the 1996 Act, because requiring incumbents to provide network services to competitors at “cost-based” rates can “retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition in the long run.” *Verizon New England, Inc. v. Maine Pub. Utils. Comm’n*, 509 F.3d 1, 9 (1st Cir. 2007); *see also United States Telecom Ass’n v. FCC*, 359 F.3d 554, 573, 580 (D.C. Cir. 2004).

Moreover, “as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered because the services continue to be monopolies and require regulation.” *Box*, 548 F.3d at 610. Thus, as the Seventh Circuit has explained, any effort by a state commission to require cost-based access to network services that are not true “bottleneck” services; i.e., services for which competing carriers have no alternatives other than the incumbents, is inconsistent with the 1996 Act:

Section 251 of the Telecommunications Act of 1996, as we know, requires unbundling only of network elements (services), and this only if the unbundling is necessary to overcome a bottleneck. The Act does not say in so many words that the state commission cannot require the unbundling of non-network elements any more than it says that about unbundling network elements, *but to allow a state commission to require it would defeat the Act’s goals*.

Id. at 611 (emphasis added).

Simply put, it is inconsistent with the 1996 Act for the DPUC to require AT&T to provide competing carriers with access to AT&T’s network services at below-market, regulated rates, when the competitors are able to obtain those services elsewhere, as they clearly are with respect to tandem transit service.

II. THE DISTRICT COURT’S RATIONALE FOR FINDING TANDEM TRANSIT SERVICE TO BE A FORM OF “INTERCONNECTION” IS INDISPUTABLY WRONG.

The district court also based its analysis of whether tandem transit service is a form of “interconnection” on a misunderstanding of what the service entails.

Specifically, the district court stated that: “The Court also relies on the fact that interconnection is the provision of equipment and supplies, not a service in and of itself.” (JA 174, emphasis added.) The district court found that: “Insofar as section 251(c) requires [AT&T] to provide equipment to enable carriers to connect, that duty includes indirect interconnection.” (*Id.* at 175, emphasis added.)

The district court fundamentally misunderstood the nature of tandem transit service. The tandem transit service provided by AT&T (and Neutral Tandem, for that matter) indisputably involves more than just “equipment and supplies,” it involves the service of delivering traffic between originating and terminating carriers. Even the DPUC recognized this fact in its brief before the district court:

Transit traffic service allows carriers to exchange traffic to one another without establishing direct connections with each other. Instead, the traffic is exchanged by sending traffic to the ILEC, in this case AT&T Connecticut, to which the carriers are directly connected, and AT&T Connecticut routes the traffic to the carrier whose customer is to receive the call.

(DPUC’s Br., at 4.) The district court’s apparent belief that tandem transit service can be “interconnection” because it involves nothing more than providing equipment cannot be squared with the DPUC’s acknowledgement that tandem transit service includes the transport of traffic between carriers.

This distinction is critical, because “interconnection” under the 1996 Act “refers only to the physical linking of two networks[.]” First Report and Order, *In re Implementation of the Local Competition Provisions in the Telecommunications*

Act of 1996, 11 F.C.C.R. 15499, 1996 WL 452885, ¶ 176 (Aug. 8, 1996) (subsequent history omitted). The FCC’s regulations make clear that “interconnection” under Section 251(c)(2) “***does not*** include the transport and termination of traffic.” 47 C.F.R. § 51.5 (emphasis added).

Numerous federal courts have held, consistently with the FCC, that “interconnection” under Section 251(c)(2) of the 1996 Act does not include the exchange or delivery of traffic. As the D.C. Circuit put it, “to ‘interconnect’ and to exchange traffic have distinct meanings. . . . [Interconnection] refers only to ‘facilities and equipment,’ not to the provision of any service.” *AT&T Corp. v. FCC*, 317 F.3d 227, 234 (D.C. Cir. 2003); *see also Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm’n*, 530 F.3d 676, 684 (8th Cir. 2008) (“‘interconnection’ means the physical linking of two networks for the mutual exchange of traffic”); *MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, 352 F.3d 872, 879 (4th Cir. 2003) (concluding that interconnection is limited to the physical linking of two networks and does not include the transport and termination of traffic); *Competitive Telecomms. Ass’n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997).

In reaching its decision, the district court relied on a district court case from Nebraska, which found that tandem transit service falls under the definition of “interconnection” in Section 251(c)(2). (JA 172-77 (citing *Qwest Corp. v. Cox*

Nebraska Telcom, LLC, No. 4:08CV3035, 2008 WL 5273687 (D. Neb. Dec. 17, 2008).) The Nebraska court acknowledged that “interconnection does not generally include the transport of traffic.” *Qwest*, 2008 WL 5273687, at *3. The court concluded, however, that an incumbent carrier’s “obligation to provide transit service is an exception to the general rule.” *Id.*

There is nothing in the 1996 Act or the FCC’s rules, however, that supports the finding of such an “exception.” To the contrary, as shown above, the FCC’s rules make very clear – without exception – that “interconnection” under Section 251(c)(2) “**does not** include the transport and termination of traffic.” 47 C.F.R. § 51.5 (emphasis added).

The Nebraska court also relied on Section 251(a) of the 1996 Act. *Qwest*, 2008 WL 5273687 at *2, 4. Section 251(a)(1) provides that “[e]ach telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). To be sure, Section 251(a), unlike Section 251(c)(2), at least **mentions** indirect interconnection. But even if Section 251(a) could be read to impose mandatory transiting obligations of any type on incumbent carriers such as AT&T, the FCC has found that “any duty [an incumbent] may have under section 251(a)(1) of the Act to provide transit service **would not require that service to be priced at TELRIC.**” Memorandum Opinion and Order, *In re Petition of*

Worldcom, Inc. Pursuant to Section 252(E)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corp. Comm'n Regarding Interconnection Disputes with Verizon Virginia, Inc., CC Docket 00-218, 17 F.C.C.R. 27039, 2002 WL 1576912, ¶¶ 115-17 (July 17, 2002) (emphasis added). Thus, even if Section 251(a) supported a requirement that AT&T provide tandem transit service, it would not support a requirement that AT&T provide that service at below-market, TELRIC-based rates.⁴

Finally, the district court's rationale is inconsistent with the Supreme Court's recent decision in *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S.Ct 2254 (June 9, 2011). In that case, the Supreme Court found that incumbents could be required to lease facilities at cost-based rates when those facilities are being used for interconnection; *i.e.*, the mutual exchange of traffic between end-users of competitive carriers and the incumbents' own end-users. *Id.* at 2262-63. However, it was undisputed in that case that, when facilities are not used to deliver traffic to or from the incumbents' end-users and the competitive carriers' end-users, they are not being used for "interconnection." *Id.* at 2258-59 & n.2.

⁴ To be clear, federal district courts are split, as at least one found that the FCC "has held that TELRIC pricing is not required for transit service rates," and that, "as a legal matter," a state commission "was correct in holding that it was not required to apply TELRIC rates" for transit service. *WorldNet Telecomms., Inc. v. Telecommunications Reg. Bd. of Puerto Rico*, 707 F.Supp.2d 163, 198 (D.P.R. 2009).

As discussed above, it is undisputed that tandem transit service does not involve the mutual exchange of traffic between AT&T's end-users and the competitive carriers' end-users. Thus, even under the most expansive reading of the FCC's regulations, the service cannot be "interconnection" under the 1996 Act.

CONCLUSION

For the reasons set forth herein and in the opening brief filed by AT&T, this Court should reverse the district court's decision with respect to the issues addressed herein and in AT&T's opening brief, and remand to the district court with direction to vacate the DPUC's Order.

Dated: September 30, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Richard Levy, attorney of record for proposed *amicus curiae* Neutral Tandem – New York, LLC, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in Fed. R. App. P. 29(d) and 32(a)(7). The total number of words in the foregoing brief is 3,330.

/s/ Richard F. Levy