

October 19, 2011

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

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

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Dear Ms. Dortch:

I am writing on behalf of Cox Communications, Inc. (“Cox”) to respond to arguments made in this proceeding by Neutral Tandem, Inc. concerning the appropriate treatment of transit under the Communications Act and the Commission’s Rules.<sup>1</sup> This letter addresses two issues raised by Neutral Tandem – the applicability of the interconnection obligation under Section 251(c)(2) of the Communications Act to transit provided by incumbent local exchange carriers (“LECs”) and the extent of competition in the provision of transit.

First, Neutral Tandem claims that transit is not a form of interconnection because transit, in large part, includes a transport component. This is incorrect. As Cox described in more detail in its comments in this proceeding, Section 251(c)(2) must apply to transit

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<sup>1</sup> Although Neutral Tandem has been making similar arguments throughout this proceeding, this letter responds in particular to the presentation submitted to the Commission on October 3, 2011. See Letter from Russell Blau, Counsel to Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90 *et al.* (filed Oct. 4, 2011) (the “*Neutral Tandem October 4 Ex Parte Notice*”).

to give Section 251(a)'s indirect interconnection provisions any meaning.<sup>2</sup> Moreover, there are other forms of interconnection that include a transport component.

Importantly, the Commission, lower federal courts and the Supreme Court all have concluded that it is appropriate to treat entrance facilities as subject to Section 251(c)(2). In fact, while Neutral Tandem argues that treating transit as a form of interconnection would be inconsistent with the Supreme Court's decision in *Talk America v. Michigan Bell*, that decision actually supports the conclusion that interconnection can include components that otherwise would be treated as unbundled elements, so long as those components are used for interconnection.<sup>3</sup> Since transit is used for interconnection, and not as an unbundled element, *Talk America* supports the conclusion that it is subject to Section 251(c)(2).

Neutral Tandem also cites a U.S. District Court decision from Puerto Rico as supporting its views.<sup>4</sup> That decision, however, relies principally on the Commission staff's decision in the 2002 *Virginia Arbitration Order*, interpreting that decision as concluding that transit is not a form of interconnection.<sup>5</sup> However, the staff did not reach that conclusion. Instead, the staff affirmatively declined to determine whether transit is required under Section 251(c)(2), stating that, "[i]n the absence of" existing precedent on the issue, "we decline, on delegated authority, to determine for the first time that Verizon has a section 251(c)(2) duty to provide transit service at TELRIC rates."<sup>6</sup> Given that error, and the Commission's own statement in the notice of proposed rulemaking for this proceeding that it had not decided whether transit is subject to 251(c)(2), the Puerto Rico district court decision is of no value. Indeed, the Puerto Rico decision is entitled to no weight at all when compared to the two district court decisions that have concluded that transit is a form of Section 251(c)(2) interconnection, both of which are based on analysis of the underlying statutory provisions that govern interconnection rights or against the many state commission decisions that have reached the same conclusion.<sup>7</sup>

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<sup>2</sup> See, e.g., Comments of Cox Communications, Inc., WC Docket 10-90, *et al.*, filed Aug. 24, 2011, at 14-15 ("Cox August 24 Comments").

<sup>3</sup> *Talk America, Inc. v. Michigan Bell Co.*, slip op. at 11-12 (noting that transport used in connection with entrance facilities does not disqualify use of such facilities as interconnection).

<sup>4</sup> *WorldNet Telecomms., Inc. v. Telecommunications Reg. Bd. of Puerto Rico*, 707 F.Supp. 2d 163 (D.P.R. 2009).

<sup>5</sup> *Id.* at 198.

<sup>6</sup> Petition of Worldcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration, *Memorandum Opinion and Order*, 17 FCC Rcd 27039, 27100 (Wireline Comp. Bur. 2002).

<sup>7</sup> See Cox August 24 comments at 14-15, citing *Qwest Corp. v. Cox Nebraska Telcom, LLC*, 2008 WL 5273687 (D. Neb. 2008) at \*6 (When Section 251(a) is read in conjunction with Section 251(c), it is clear that Congress imposed this obligation in Section 251(c) of the Act. Under Section 251(c), an ILEC must allow a CLEC to

Second, Neutral Tandem argues that there is growing competition in the provision of transit that obviates the need to ensure that transit is available as a form of Section 251(c)(2) interconnection. This argument misses the point. Transit is necessary when direct interconnection between two carriers is infeasible, for either economic or technical reasons. Transit works by using a carrier that has interconnection with both the originating carrier and terminating carrier as an intermediary. As even Neutral Tandem acknowledges, the only carrier that interconnects directly with all carriers – and, therefore, the only carrier that can provide transit in all instances – is the incumbent LEC.<sup>8</sup>

While Neutral Tandem claims that it has interconnected with “more than 100 of the largest national and regional telecommunications carriers throughout the country,”<sup>9</sup> there are, in fact, thousands of providers of interconnected local voice services in the United States.<sup>10</sup> Even if the carriers that interconnect with Neutral Tandem account for the vast majority of traffic, the remaining carriers are significant because, as a practical matter, interconnection with all other carriers in a given area is prerequisite to providing competitive local telephone service. Moreover, the carriers that do not interconnect with Neutral Tandem are the ones that are least likely to enter into direct interconnection arrangements with competitive carriers, and therefore the carriers for which transit is most necessary. As a result, Neutral Tandem’s claim that it “is ready, willing and able to provide local transit service to Cox . . . in each and every market that Cox serves” does not address the most important issue, which is that Neutral Tandem is not in a position to provide the transit that Cox and other competitive LECs need because it does not reach every carrier in those markets.<sup>11</sup>

Further, if competition actually were effective, incumbent LECs would be offering transit voluntarily at TELRIC or near-TELRIC rates. However, as Cox’s

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interconnect its facilities and equipment with the ILEC’s network “for the transmission and routing of telephone exchange service and exchange access.”) (citations omitted) and *Southern New England Telephone Company v. Perlermino*, 2011 WL 1750224 (D. Conn 2011) \*6 (citing *Qwest* approvingly). Cox notes that, in an earlier filing, it indicated that neither of the district court cases it cited had been appealed. That is true of the Nebraska decision, but Cox subsequently has learned that the Connecticut case is subject to a pending appeal.

<sup>8</sup> *Neutral Tandem October 4 Ex Parte*, Declaration of Surenda Saboo at 4 (stating that “there undoubtedly are some small carriers to which Neutral Tandem is not currently connected”).

<sup>9</sup> *Id.*, Declaration of Gerard Laurain at 1-2.

<sup>10</sup> In its most recent report on telecommunications providers, the Commission identified 1,307 incumbent LECs, 1,442 competitive access providers and competitive LECs, 413 wireless telephony providers and 291 paging and messaging service providers, or more than 3,000 providers that require interconnection to transmit or receive local traffic. *Telecommunications Provider Locator*, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Jan. 2010 at 5.

<sup>11</sup> *Neutral Tandem October 4 Ex Parte*, Declaration of Surenda Saboo at 12.

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comments established, that is not the case.<sup>12</sup> This demonstrates that the services offered by Neutral Tandem and others are not a sufficient substitute for incumbent LEC transit.

Finally, even the existence of some competition in the provision of transit does not affect the legal analysis that demonstrates that transit is a form of Section 251(c)(2) interconnection. This analysis is purely a question of what Section 251(c)(2) requires. The existence or effectiveness of competition for transit no more affects the legal analysis than the existence of other forms of resale affects the wholesale resale obligation in Section 251(c)(4) or than the opportunity to interconnect in other ways would affect the collocation obligation under Section 251(c)(6).

For all of these reasons, and the reasons described in Cox's comments in this proceeding, the Commission should determine that transit is a form of interconnection under Section 251(c)(2) and that incumbent LECs are required to provide it at TELRIC rates.

In accordance with the requirements of Section 1.1206 of the Commission's Rules, this letter is being filed electronically with the Commission on this date.

Respectfully submitted,

/s/

J.G. Harrington

Counsel to Cox Communications, Inc.

cc: Zachary Katz  
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<sup>12</sup> See Cox August 24 Comments at 14 (describing range of rates proposed by incumbent LEC in different states).