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October 20, 2011

***VIA ELECTRONIC FILING***

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

***Re: CC Docket No. 01-92; WC Docket Nos. 05-337, 07-135, 10-90 and GN Docket No. 09-51***

Dear Ms. Dortch:

On behalf of Neutral Tandem, Inc. ("Neutral Tandem"), I am writing to respond to the October 19, 2011 letter submitted in this proceeding on behalf of Cox Communications, Inc. ("Cox").[1] The record in this proceeding demonstrates that, both as a policy matter and as a legal matter, the Commission should reject the request of Cox and other parties to adopt TELRIC-based pricing regulation for local tandem transit service.

As a policy matter, and as Neutral Tandem has shown previously, neither Cox, nor any of the other parties asking this Commission to impose TELRIC-based price regulation on tandem transit services, has offered any *evidence* that they lack competitive alternatives to ILEC tandem transit services for the overwhelming majority of their traffic.[2] Cox's October 19 letter acknowledges that tandem transit competition exists and that "the carriers connected to Neutral Tandem account for the vast majority of traffic[.]"[3] Cox claims, however, that the existence of competitive alternatives of the "vast majority of traffic" somehow "misses the point" because Neutral Tandem "does not reach every carrier" in some markets.[4]

Notably, Cox has offered no *evidence* of how much traffic it supposedly is unable to deliver other than through ILEC tandem transit services, or what rates Cox actually is forced to pay. By contrast, Neutral Tandem has demonstrated that competitive carriers have access to, and make aggressive use of, *multiple* alternatives to ILEC tandem transit service throughout the country.[5] These include several competing tandem transit providers other than Neutral Tandem, as well as the option to direct connect their networks at any time. Neutral Tandem has provided the Commission with sworn declarations regarding these points, and will not repeat them here.

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[1] *See* 10/19/11 Letter from J.G. Harrington, Counsel for Cox Communications, Inc.
[2] *See, e.g.*, Neutral Tandem's September 6 Comments, at 3, 7.
[3] *See* 10/19/11 Letter from J.G. Harrington, Counsel for Cox Communications, Inc., at 3.
[4] *See id.*
[5] *See, e.g.*, Neutral Tandem's September 6 Comments, at 4-10 & Ex. A; Neutral Tandem's May 23 Comments, at 3-7 & Exs. A & B; Neutral Tandem's April 18 Comments, at 3-8.

As a legal matter, Neutral Tandem has shown that tandem transit service is not a form of "interconnection" under Section 251(c)(2) of the 1996 Act. The Commission has held that "the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks[.]"[6] Thus, the Commission's rules make clear that "interconnection" under Section 251(c)(2) "does not include the transport and termination of traffic."[7]

Consistent with the Commission's rules, multiple federal courts have held that "interconnection" under Section 251(c)(2) of the 1996 Act does not refer to 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."[8] Tandem transit service indisputably involves the provision of a service – the delivery of traffic by an intermediate carrier (the transit provider) between the networks of originating and terminating carriers. Therefore, it is not a form of "interconnection" under Section 251(c)(2) of the 1996 Act.

Cox and other carriers have pointed to the fact that Section 251(c)(2) refers to interconnection being provided "for the transmission and routing of telephone exchange service and exchange access," to support the claim that tandem transit service constitutes "interconnection." 47 U.S.C. § 251(c)(2)(A). But as the Eighth Circuit has recognized, "Congress intended 'for the transmission and routing of telephone exchange service and exchange access' only to describe what the interconnection, the physical link, would be used for. . . . By its own terms, this reference [to interconnection] is to a physical link, between the equipment of the carrier seeking interconnection and the LEC's network."[9] Thus, this argument fails as well.

Cox claims that the Supreme Court's recent decision in *Talk America*, in which the Court found that "entrance facilities" could be used as a form of interconnection, supports its position. The opposite is true. The Supreme Court's ruling made clear that entrance facilities are used for interconnection "when used for the mutual exchange of traffic" between an ILEC and a competing LEC.[10] Tandem transit service, by definition, does not involve the "mutual exchange of traffic" between an ILEC and a competing LEC; rather, it involves the exchange of traffic between originating and terminating competing carriers in which the ILEC is merely an

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[6] *Local Competition Order*, 11 F.C.C.R. 15499, 1996 WL 452885, ¶ 176 (Aug. 8, 1996) (subsequent history omitted).

[7] 47 C.F.R. § 51.5.

[8] *AT&T Corp. v. FCC*, 317 F.3d 227, 234 (D.C. Cir. 2003); *see also Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997); *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).

[9] *Competitive Telecomms Ass'n*, 117 F.3d at 1071-72; *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").

[10] *Talk America v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2263 (2011).

intermediary. Thus, it is not a form of "interconnection" under the Supreme Court's rationale in *Talk America*.[11]

The Commission's *amicus* brief in *Talk America* reinforces this point. The Commission's brief made clear that entrance facilities are ***only*** used for interconnection when they are used to exchange traffic between the ILEC's customers and the competing LEC's customers.[12] By contrast, entrance facilities are ***not*** used for interconnection when they are used for "backhauling," which the Commission described as occurring "whenever a competitive LEC uses an entrance facility for a purpose other than interconnection with an incumbent LEC."[13] Again, because tandem transit service does not involve the mutual exchange of traffic between an ILEC's end-users and a competing LEC's end-users, it is not a form of "interconnection" under Section 251(c)(2) of the 1996 Act.

Respectfully submitted,

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[11] By contrast, a competitive LEC's connection to an ILEC's tandem for the purpose of exchanging traffic with that ILEC's own end users could be thought of as interconnection under the *Talk America* rationale, and would not be affected by the ruling sought by Neutral Tandem in this docket.

[12] *See Talk America v. Michigan Bell Tel. Co.*, Nos. 10-313 & 10-329, *Brief for the United States as Amicus Curiae Supporting Petitioner*, at 5.

[13] *See id.* at 6 & n.4.