

October 21, 2011

VIA ECFS

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

Re: Connect America Fund, WC Docket No. 10-90; National Broadband Plan, GN Docket No. 09-51; Just and Reasonable Rates for LECs, WC Docket No. 07-135; High Cost Universal Service Support, WC Docket No. 05-337; Unified Intercarrier Compensation, CC Docket No. 01-92; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; and Lifeline and Link-Up, WC Docket No. 03-109

Dear Ms. Dortch,

I am writing on behalf of Charter Communications, Inc. (“Charter”) in response to arguments presented by Neutral Tandem, Inc. (“Neutral Tandem”) concerning the appropriate regulatory treatment of tandem transit services. As a major telephone communications provider with an extensive rural footprint, Charter has a strong interest in and unique perspective regarding the availability of viable competitive alternatives for transit services, particularly in rural areas. This letter will demonstrate that Neutral Tandem’s anecdotal evidence concerning alleged competition for transit services is misleading and unsupported by independent, verifiable data. In addition, this letter demonstrates that because transit is a form of interconnection under Section 251(c)(2) of the Act it is subject to TELRIC pricing standards as a matter of law.

The Record in This Proceeding Lacks Independent, Verifiable Data Concerning the Scope of Competitive Transit Services

In several recent filings, including an October 4, 2011 *ex parte* submission, Neutral Tandem argues that evidence in this proceeding “demonstrates the existence of robust competition” in the transit services market. In support of this claim, Neutral Tandem argues that because it provides service in 189 LATAs,¹ and to “more than 100 of the largest national and

¹ See Letter from Russell Blau, Counsel to Neutral Tandem to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90 et al. at slide 2 (filed Oct. 4, 2011) (hereafter “Neutral Tandem 10/4/11 *ex parte*”).

regional”² telecommunications carriers, competitors cannot claim that they do not have access to competitive transit services.

Although these figures may seem compelling at first glance, they are not sufficient evidence for the Commission to conclude that the market for transit services is “competitive.” The fact is, there is no independent, verifiable data to measure the scope of competition for transit services. Neutral Tandem acknowledged this fact when it stated in its 2010 annual report that the company is “**unable to provide accurate market share information,**” concerning the scope of competition because “no regulatory body or industry association requires carriers to identify amounts of voice traffic to other carrier types.”³ Thus, Neutral Tandem’s anecdotal evidence of the scope of its services must be considered against the company’s own admission that it simply does not have accurate market share information.

Further, Neutral Tandem’s assertions concerning the scope of its coverage is misleading. The company implies that transit services are widely available by identifying the number of LATAs served (189), and the number of carriers with whom it is connected (“more than 100...”).⁴ But a closer look reveals the limitations of this argument. The Commission’s most recent industry statistics reveal that as of January, 2010, more than 3,000 fixed local service providers operated in the U.S.⁵ Of those 3000 providers, approximately 1,300 are incumbent LECs. Thus, Neutral Tandem’s claim to have connections to “more than 100 of the largest national and regional telecommunications carriers”⁶ reveals that the company has connections to approximately eight (8%) percent of all incumbent LECs operating in the nation.⁷ Such limited connectivity cannot be a basis for the Commission to conclude that transit is a competitive service.

Smaller, Rural Markets Still Lack Competitive Transit Services

Neutral Tandem also offers anecdotal evidence (its own employees’ declarations) that the company offers competitive transit services to several commenting parties in this proceeding, and that the existence of these services has helped to reduce transit costs.⁸ This line of argument

² Reply Comments of Neutral Tandem, WC Docket 10-90 et al. at 5 (filed May 23, 2011) (hereafter “*Neutral Tandem Reply Comments*”).

³ See Neutral Tandem, Inc. 2010 Form 10-K Annual Report (for period ending 12/31/10), on file with the S.E.C., available at: <http://www.neutraltandem.com/investorrelations/index.htm> (emphasis added).

⁴ *Neutral Tandem Reply Comments* at 5.

⁵ See FCC Telecommunications Provider Locator, Industry Analysis & Technology Division, Wireline Competition Bureau, Federal Communications Commission at Table 1, page 4 (January 2010) (identifying more than 1,300 incumbent local exchange carriers as filers of FCC Form 499).

⁶ *Neutral Tandem Reply Comments* at 5.

⁷ That figure is further reduced to *only 3%* if you divide the total number of fixed local service providers (3000) by the number of connections (100) that Neutral Tandem alleged in its 10-4-11 *ex parte* submission. By either measure, meaningful competition cannot be said to exist for tandem transit services.

⁸ Neutral Tandem 10/4/11 *ex parte* at slide 3, and Declaration of Neutral Tandem employee Surendra Saboo.

misses the point. Charter does not dispute that there are competitive transit providers operating today, and that the availability of their services may reduce costs *in certain markets*. However, Neutral Tandem's anecdotal evidence ignores the fact that few competitive transit service providers operate in smaller, more rural "Tier 2" and "Tier 3" markets today. In fact, Neutral Tandem's connections to the "largest national and regional carriers" reveals an important fact about the availability of competitive transit services. Such services generally exist in larger markets in the country, but are generally not available in smaller, more rural markets that Charter serves.

As Charter explained in earlier comments, because competitive transit providers do not have ubiquitous network coverage (like the incumbent LECs) in smaller, rural markets Charter is forced to obtain transit services through the incumbent LECs in many of these markets.⁹ Limited availability of competitive transit services in these markets also reveals how Neutral Tandem's claims to have connections in 189 LATAs is misleading. Although the company may have connections in most LATAs, that does not mean it has connections to each of the rural ILECs that may serve one of the hundreds or thousands of rural communities in any particular LATA. Because LATAs are generally large geographic areas, and in some states one LATA covers the entire state (e.g., Mississippi, New Mexico, and Wyoming), simply having a connection within that LATA does not demonstrate that the company offers competitive transit services in smaller rural markets throughout the LATA.

Accordingly, the lack of independent, verifiable data in the record today counsels against a Commission finding that the market for transit services is competitive. Because the scope of coverage may vary from market to market, any future findings on this issue should be made on a market-by-market basis. In prior competition analysis, the Commission has previously defined markets in a more granular fashion (e.g., by wire center or MSA). The Commission should employ a similar approach should it determine that transit is competitive in some areas of the country. Until that time, however, the Commission should reject any conclusory findings that transit is competitive on a national basis.

Transit is Subject to Section 251(c)(2) and Therefore Must be Priced at TELRIC

Neutral Tandem also argues that recent events in Connecticut illustrate that competitors seek TELRIC pricing for ILEC-provided transit services in order to negotiate lower rates from Neutral Tandem.¹⁰ Neutral Tandem, again, misses the point.

The lesson from the proceedings in Connecticut is that several federal courts have found that transit is a form of interconnection under Section 251(c)(2),¹¹ and therefore subject to

⁹ Reply Comments of Charter Communications, Inc., WC Docket 10-90 at pp. 11-12 (filed May 23, 2011).

¹⁰ Reply Comments of Neutral Tandem in Response to August 3, 2011 Notice of Further Inquiry at pp. 9-10 (filed Sept. 6, 2011).

¹¹ See *Southern New England Tel. Co. d/b/a AT&T Connecticut v. Anthony J. Perlermino, et. al.*, No. 3:09-cv-1787, 2011 U.S. Dist. LEXIS 48773 at * 8 (Dist. Ct. May 6, 2011) ("interconnection under section 251(c) includes the

TELRIC pricing, *as a matter of law*. These conclusions of law from federal courts in Connecticut and Nebraska affirm similar findings by a number of state commissions.¹²

More significantly, the federal court rulings interpreting federal law now clearly establish that transit is a form of interconnection under Section 251(c)(2) as a matter of law.¹³ The FCC's own prior findings establish that services and facilities subject to Section 251(c)(2) must be priced at TELRIC.¹⁴ This legal analysis does not turn on whether a service is deemed competitive, or not. Therefore, even if the Commission believes that some portion of the market for transit services is competitive, that does not mean that ILEC transit service providers are excused from the duties of Section 251(c)(2), including the obligation to price such services at TELRIC.

For these reasons, and the reasons described in Charter's comments in this proceeding, the Commission should affirm that transit is a form of interconnection under Section 251(c)(2), subject to TELRIC pricing. Charter respectfully requests that the Commission consider these points in its decision in the above-referenced matter.

Respectfully submitted,



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duties to provide transit service.”), and *Qwest v. Cox Nebraska Telecom, LLC*, 2008 U.S. Dist. LEXIS 102032 (Dist. Neb. 2008) (“ ... the unambiguous language of Section 251 demonstrates that an ILEC must provide transit under Section 251(c)(2).”).

¹² See Comments of Charter Communications, Inc., WC Docket 10-90 at 11, n. 26 (filed Apr. 18, 2011) (citing twelve separate state commission decisions finding that transit is an obligation under section 251).

¹³ See *supra*, note 11 (citing Connecticut and Nebraska federal court rulings finding that transit is mandated by section 251).

¹⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15884 at ¶ 672 (1996).