

October 21, 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 the October 20, 2011 written ex parte communication from Neutral Tandem in the above-referenced proceedings.<sup>1</sup> The Neutral Tandem October 20 Letter repeats certain claims that Neutral Tandem has made concerning the nature of the market for transit, and elaborates on legal theories concerning the applicability of Section 251(c) to interconnection via transit. Cox already has addressed the status of the transit market and will not address them again here.<sup>2</sup> However, Neutral Tandem continues to misconstrue applicable precedent concerning interconnection obligations under Section 251(c), and this letter responds directly to those claims.

Neutral Tandem argues that existing precedent precludes the treatment of transit as a form of interconnection because transit includes a transport component.<sup>3</sup> This argument misreads the relevant cases. First, the cases that are cited have nothing to do

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<sup>1</sup> Letter of John Harrington, Neutral Tandem, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 *et al.* (Oct. 20, 2011) (the “Neutral Tandem October 20 Letter”).

<sup>2</sup> See Letter of J.G. Harrington, counsel to Cox, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 10-90 *et al.* (filed Oct. 19, 2011), at 3-4 (“Cox October 19 Letter”).

<sup>3</sup> Neutral Tandem October 20 Letter at 2.

with transit – each concerns efforts by interexchange carriers to sweep Section 251(b) “transport and termination” of traffic to end users into the definition of “interconnection” so that they could obtain lower termination rates than would be available under the access charge regime. What the Commission determined in the *Local Competition Order*, and what the courts later affirmed was that interconnection did not include the ultimate connection to the end user.<sup>4</sup> These cases say nothing at all about whether transport used to connect one carrier to another can be part of Section 251(c)(2) interconnection. Rather, and as the U.S. District Court in Nebraska explained, “transit service was not at issue” in those cases<sup>5</sup>

Moreover, if there were any doubt at all that the claim that interconnection cannot include transport is incorrect, it is settled by the Commission’s decision to treat entrance facilities as a form of interconnection and the consistent line of court decisions that have agreed with that conclusion.<sup>6</sup> These decisions make it impossible to conclude that transport cannot be part of an interconnection arrangement.

Neutral Tandem addresses these cases by advancing a new theory that the Supreme Court decided that interconnection is solely for the purpose of “the mutual exchange of traffic” between an ILEC and a competing LEC.”<sup>7</sup> That concept appears nowhere in *Talk America*. Instead, *Talk America* simply decided that entrance facilities, when used for interconnection, are subject to TELRIC rates.<sup>8</sup> In any event, Neutral Tandem’s claim that transit is not used for the “mutual exchange of traffic” does not square with the facts: The *only* reason any carrier uses transit is to exchange traffic with other carriers.<sup>9</sup>

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<sup>4</sup> See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd, 15499, 15588-90 (stating that the Commission was considering the relationship between Section 251(c)(2) interconnection and Section 251(b)(5) transport); *Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1071-72 (8<sup>th</sup> Cir. 1997) (affirming FCC conclusion that Section 251(b)(5) “transport and termination” is not included in Section 251(c)(2) interconnection).

<sup>5</sup> *Qwest Corp. v. Cox Nebraska Telcom, LLC*, 2008 WL 5273687 (D. Neb. 2008) at \*7.

<sup>6</sup> See, e.g., *Talk America, Inc. v. Michigan Bell Co.*, \_\_\_ U.S. \_\_\_, *slip op.* at 11-12 (2011) (accepting Commission conclusion that entrance facilities are subject to TELRIC pricing as a form of interconnection); see also *Pacific Bell Tel. Co. v. California Pub. Util. Comm’n*, 621 F. 3d 836 (2010) (concluding that entrance facilities should be subject to TELRIC rates when used for interconnection), *Illinois Bell Tel. Co. v. Box*, 526 F. 3d 1069 (2008) (same), *Southwestern Bell Tel., L. P. v. Missouri Pub. Serv. Comm’n*, 530 F. 3d 676 (2008) (same).

<sup>7</sup> Neutral Tandem October 20 Letter at 2.

<sup>8</sup> *Talk America*, *slip op.* at 6.

<sup>9</sup> In this regard, Neutral Tandem’s attempt to conflate transit with backhaul is illustrative of the untenable nature of its argument. Backhaul is used to connect elements of the incumbent carrier’s network leased by a competitive carrier with the competitive carrier’s own facilities, that is, to transport a competitive carrier’s own traffic between facilities that are under its control. Backhauling is not interconnection because it does not involve

Finally, every state regulatory commission and every court to consider the underlying statutory interpretation question at issue here has disagreed with Neutral Tandem's position, and in many cases the very argument that Neutral Tandem has made to the Commission, and concluded that transit is a form of interconnection.<sup>10</sup> This authority weighs very heavily against Neutral Tandem's proposed interpretation of the statute and further demonstrates that the correct conclusion is that transit is a form of Section 251(c) interconnection.

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

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cc: Zachary Katz  
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sending traffic to or receiving traffic from another carrier. Transit, by comparison, is used by carriers to transmit traffic to other carriers and receive traffic from those carriers, which is the essence of the interconnection function.

<sup>10</sup> See Comments of Cox Communications, Inc., WC Docket 10-90, *et al.*, filed Aug. 24, 2011, at 14-15 ("Cox August 24 Comments"). As Cox noted in its earlier *ex parte*, the U.S. District Court in Puerto Rico did not consider the underlying statutory issue, but merely assumed incorrectly that the Commission had decided the question. Cox October 19 Letter at 2.