

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	
Connect America Fund	WC Docket No. 10-90
A National Broadband Plan for Our Future	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	WC Docket No. 07-135
High-Cost Universal Service Support	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Lifeline and Link-Up	WC Docket No. 03-109

REPLY COMMENTS OF RCN TELECOM SERVICES, LLC

James C. Falvey, Esq.
Brett Heather Freedson, Esq.
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 659-6600
jfalvey@eckertseamans.com
bfreedson@eckertseamans.com

Counsel for RCN Telecom Services, LLC

March 30, 2012

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REPLY COMMENTS OF RCN TELECOM SERVICES, LLC

RCN Telecom Services, LLC (“RCN”) respectfully submits these Reply Comments in response to the arguments of those parties that commented on the issue of the manner in which tandem transit rates should be regulated in the context of the broader transition established by the Commission’s Report and Order and Further Notice of Proposed Rulemaking, released on November 18, 2011. *In re Connect America Fund et al.*, WC Docket No. 10-90 et al. (rel. Nov. 18, 2011) (“*Report and Order*” and “*FNPRM*,” respectively).

I. SUMMARY OF RCN REPLY COMMENTS

A number of carriers agreed with RCN that the Commission's findings in the *Report and Order* concerning the de minimis costs of the tandem switching function strongly support a transition to bill and keep for transit rates on the same glide path as tandem switching offered in the Section 251(b)(5) context. A wide variety of carriers also agreed with RCN that the Commission must regulate ILEC tandem transit rates which are critical to the ongoing development of competitive markets. While carriers supporting the urgent need for transit regulation under Section 251(c)(2) can point to two federal court decisions and approximately twenty states that support their position, carriers opposed to regulating transit rates can point to no compelling legal analysis.

The Commission has been considering a finding that tandem transit rates are subject to Section 251(c)(2) since at least 2001. The record in this proceeding clearly reflects that there is insufficient competition to discipline tandem transit rates where they are not yet regulated, and that rates are significantly lower in the approximately twenty states that currently regulate tandem transit rates. The Commission should now take the necessary step to establish that tandem transit rates are uniformly subject to Section 251(c)(2) cost-based rates nationwide. The Commission should then establish that, to the extent that ILEC tandem switching functions move below cost-based rates in the Section 251(b)(5) reciprocal compensation context, ILECs must also migrate towards a zero rate for tandem transit.¹

¹ As explained in RCN's initial FNPRM Comments, RCN does not support the migration of the reciprocal compensation tandem interconnection rate below cost-based rates to bill and keep. Comments of RCN Telecom Services, LLC, at 2 (filed Feb. 24, 2012) ("RCN Comments"). Again, RCN files these Reply Comments without waiving its rights to challenge the Commission's bill and keep result but with a recognition that the legality of the Commission's decision is now an issue for the Tenth Circuit.

II. CARRIERS FROM ALL INDUSTRY SEGMENTS AGREE THAT TRANSIT RATES MUST BE SET BY THE COMMISSION AT BILL AND KEEP OR COST-BASED RATES

A. A Broad Cross Section of Carriers Support Regulated Tandem Transit Rates

If there was any surprising aspect of the FNPRM comments filed on the issue of the tandem transit rate, it is the broad spectrum of carriers that support either bill and keep or cost-based rates for tandem transit functions. Carriers across all segments of the industry, including ILECs, CLECs, interexchange carriers, cable companies, and wireless carriers, all reached the same conclusion that cost-based or lower tandem transit rates are critical to keep transit rates at reasonable levels. Carriers across all major sectors of the telecommunications industry, including RCN, Bandwidth.com, CBeyond, Earthlink, Integra, tw telecom, Comcast, Sprint, T-Mobile, MetroPCS, CenturyLink,² and CTIA,³ all recognize the legal requirement for cost-based or lower rates for the tandem transit function.⁴

A number of carriers also recognized that only by moving beyond cost-based rates to bill and keep will the Commission ensure that the tandem rates charged by both ILECs and CLECs are treated in a nondiscriminatory manner. As RCN noted in its Comments in this proceeding, there is a heavy overlap between the functions used for tandem transit (tandem switching and transport) and reciprocal compensation (tandem switching, transport, and end office switching).

² CenturyLink supports setting transit rates at Section 252(d)(2) rates or, in the alternative, a Section 201 “just and reasonable” standard. Comments of CenturyLink, at 16 (filed Feb. 24, 2012). RCN opposes the latter standard in that it would not provide sufficient pricing discipline to transit rates.

³ CTIA technically recommends bill and keep for “tandem switching and transport,” referencing the Commission’s request for comment on those switched access rate elements. Comments of CTIA—The Wireless Association, at 4 (filed Feb. 24, 2012) (citing *FNPRM* at ¶¶ 1308-09). It is hard to imagine, however, that CTIA’s position on “tandem switching and transport” would be any different than its position on transit tandem switching and transport.

⁴ RCN Comments, at 5-7; Bandwidth.com Comments at 15; Comments of CBeyond, Earthlink, Integra Telecom, and tw telecom, at 11-14 (filed Feb. 24, 2012); Comments of Comcast, at 9-10 (filed Feb. 24, 2012); Comments of Sprint Nextel Corporation, at 59-63 (filed Feb. 24, 2012); Comments of T-Mobile USA, Inc., at 11 (filed Feb. 24, 2012); MetroPCS Comments, at 9-10 (filed Feb. 24, 2012); Comments of CenturyLink, at 16 ; Comments of CTIA—The Wireless Association, at 4.

RCN Comments, at 2. Other carriers also recognized this overlap of functions between those functions that the Commission is moving to bill and keep and the tandem transit functions. *See, e.g.,* Comments of Bandwidth.com on Sections VII.L-R, at 15 (filed Feb. 24, 2012) (“Bandwidth.com Comments”). The Commission itself, in issuing its *FNRPM*, more than once recognized that there is no functional difference between the transit functions and certain bill and keep functions: “transit is the functional equivalent of tandem switching and transport” *Report and Order*, at ¶ 1311. *See also id.* at ¶ 1313 (“Given that transit service includes the same functionality as the tandem switching and transport services subject to a default bill and keep methodology, should the Commission adopt any different approach for transit traffic?”).

Bandwidth.com, among other providers, agrees with RCN that because of this functional identity, transit rates should ultimately move to bill and keep when these functions are reduced in the Section 251(b)(5) context: “transit services should closely track the reform measures that are adopted for tandem switching and transport charges.” Bandwidth.com Comments, at 15.

MetroPCS also recognizes that bill and keep is the most appropriate outcome for transit rates. Comments of MetroPCS Communications, Inc., at 9-10 (filed Feb. 24, 2012) (“MetroPCS Comments”). MetroPCS goes on to recommend that, if carriers can make a showing of higher switching costs, they should be permitted to retain cost-based rates. But as discussed further below, the Commission itself has already determined in the *Report and Order* that the cost of tandem switching is negligible. *See Report and Order*, ¶¶ 752-53. As such, if the transition to below cost-based rates for the Section 251(b)(5) “tandem interconnection rate” proceeds as planned, the rates for what the Commission has recognized to be functionally identical tandem transit functions should likewise migrate down to bill and keep in the same time frame.

If the Commission is inclined, as MetroPCS suggests, to build ILEC flexibility into the

transition, the Commission could consider permitting ILECs to opt out of the transition below cost-based rates. Any ILEC that does not want to reduce its tandem transit rates below cost-based rates would be permitted to halt the transition to bill and keep for transit rates, but only if it also opted out of the transition to bill and keep for all Section 251(b)(5) traffic it exchanges with other carriers. Such carriers would be permitted to bill cost-based rates for tandem transit, but only by committing to cost-based rates for reciprocal compensation exchanged with other carriers.

B. There is Extensive Legal Support for Establishing That Transit Rates Are Governed by Section 251(c)(2), and No Adverse Statutory, Court or Commission Precedent

This same broad cross section of carriers universally agree that Section 251(c)(2) requires that tandem transit rates be regulated at cost-based rates, with citation to extensive court and state commission precedent in support. By contrast, the carriers opposing the regulation of tandem transit rates—essentially those ILECs and CLECs that have are taking advantage of higher rates today—have pointed to no court and commission precedent to support the position that Section 251(c)(2) does not require cost-based pricing.

The legal basis for requiring cost-based transit rates is based on a straightforward reading of Sections 251(a) and Section 251(c)(2). 47 U.S.C. §§ 251(a), 251(c)(2). *See* RCN Comments, at 6-7. Section 251(a) requires that each 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). Given that all carriers have this duty to interconnect at least indirectly, and that incumbent LECs have a further duty to interconnect directly “for the transmission and routing of telephone exchange service and exchange access” (47 U.S.C. § 251(c)(2)), courts and state commissions have consistently found that cost-based transit service

is included within the ILEC duties of Section 251(c). Both federal courts that have squarely addressed this issue have found that Section 251 and 252, when read together, require cost-based transit rates. *Qwest v. Cox Nebraska Telecom*, 2008 WL 5273687, *3 (D. Neb. 2008); *Southern New England Telephone v. Pelelmino*, 2011 WL 1750224, *8 (D. Conn. 2011). The *Qwest* court found that transit service “plays a critical role in the availability of indirect interconnections,” and that “the text of Section 251(a) strongly indicates that an ILEC is required to provide transit under the Act.” *Qwest*, 2008 WL at *2. The *Qwest* court ultimately found that “the clear language of Section 251 requires an ILEC to provide transit service pursuant to its interconnection obligations under Section 251(c)(2).”⁵ *Id.* at *4.

In addition, a long line of state commission decisions have reached the same conclusion. *See In re Connect American Fund*, WC Docket 10-90 *et al.*, Comments of Cox Communications, Inc., at 14 & n.32 (filed Aug. 24, 2011) and cases cited therein; *see also SNET* 2011 WL at *6, fn. 2 and cases cited therein. In addition, the Commission itself has often considered and never precluded this reading of the statute.⁶ Given this growing legal consensus, and the Commission’s recent actions on intercarrier compensation reform, the time is right for the Commission to reach a similar finding that cost-based transit rates are required.

Virtually every carrier that joined the growing consensus in support of cost-based compensation relied on a similar legal analysis that Sections 251(a) and 251(c), when read together, require ILECs to provide cost-based compensation. *See, e.g.*, Comments of Sprint

⁵ Once it is established that transit service is included in the interconnection obligations of Section 251(c)(2), the statute requires cost-based pricing pursuant to Section 252(d)(1). 47 U.S.C. §§ 251(c)(2)(D), 252(d)(1).

⁶ For example, in its 2005 Further Notice of Proposed Rulemaking, the Commission inquired: “We seek comment on the Commission’s legal authority to impose transiting obligations. For example, competitive LECs and CMRS carriers point to sections 251(a)(1) and 251(c)(2)(B) of the Act in support of transiting obligations.” *Developing a Unified Intercarrier Compensation Regime*, 20 F.C.C.R. 4685, 4740 (2005).

Nextel Corporation, at 59-63 (filed Feb. 24, 2012) (“Sprint Comments”); Comments of T-Mobile USA, Inc., at 11 (filed Feb. 24, 2012); Comments of Comcast, at 9-10 (filed Feb. 24, 2012); MetroPCS Comments, at 9-10 (filed Feb. 24, 2012). Accordingly, the Commission, in addition to having support from carriers across the telecommunications industry, also has extensive legal support to extend uniform cost-based transit rates across the fifty states.

By contrast, those carriers that oppose cost-based transit rates can cite to neither a single federal court decision nor to a single state commission decision that has decided that tandem transit is not covered by Section 251(c)(2). *See, e.g.*, Comments of AT&T, at 59-60 (filed Feb. 24, 2012 (“AT&T Comments”). Although AT&T makes arguments based upon statutory interpretation, and based upon interpretation of related cases, none of these cases actually addresses the issue of transit traffic. *See id.* AT&T’s suggestion that interconnection under Section 251(c)(2) relates only to traffic exchanged between the interconnected carriers (*id.* at 60) is inconsistent with, for example, Section 251(a), which only requires competitive carriers to interconnect indirectly.⁷ Likewise, other carriers arguing in support of higher transit rates, such as Neutral Tandem, are limited in their arguments to policy arguments, and can cite to no direct legal support for their position.⁸

⁷ AT&T’s reference to the *Virginia Arbitration Order* also does not amount to a Commission finding on the issue. There the Wireline Competition Bureau merely expressed its reticence to determine an issue that the Commission had not yet reached. Mem. Op. and Order, Petitions of Worldcom, Inc. et al., 17 FCC Rcd 27039, 27101, at ¶ 117 (WCB 2002) (“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.”) Nothing in that Order would preclude the Commission from now making such a finding.

⁸ *See, e.g.*, Comments of Neutral Tandem, Inc., d/b/a Inteliquent Regarding Sections VIII.L-R of the Further Notice of Proposed Rulemaking, at 2-5 (filed Feb. 24, 2012) (“Neutral Tandem Comments”).

III. COMMENTS OPPOSING BILL AND KEEP AND COST-BASED RATES FOR TRANSIT TRAFFIC ARE NOT SUPPORTED BY THE RECORD EVIDENCE

The few carriers supporting higher, fully deregulated rates for transit traffic, such as AT&T and Neutral Tandem, have not made the legal case against Section 251(c)(2) tandem transit rates. But they also have been unable to refute the fact that the tandem transit function is the same function that the Commission has just recently found in its November *Report and Order* to reflect *de minimis* cost. The record evidence also does not support a finding that, in the fifteen years since the Telecom Act was passed into law, a competitive market for tandem transit has evolved, and certainly not one sufficient to discipline transit pricing.

A. Carriers Supporting Higher Transit Rates Ignore the Commission's Findings That the Cost of Providing Tandem Switching Approaches Zero

The few carriers that are opposed to recognizing the reasonable statutory limits the Telecom Act places on transit rates make a common argument based upon their selective reading of the reciprocal compensation provisions of the Commission's *Report and Order*. These carriers ignore the Commission's findings about the negligible cost of tandem switching and focus entirely on the Commission's new concept of end user recovery. In the *Report and Order*, the Commission moved away from the Telecom Act's system of intercarrier compensation and instead indicated that carriers would recover any additional costs of switching from their own end users. *See, e.g., Report and Order*, at ¶ 757. Carriers opposed to setting reasonable limits on transit pricing focus exclusively on this latter finding: "the Commission cannot rationally 'transition' rates for transit and other third-party services 'to bill-and-keep' because, by definition, those third parties have no end users involved in the calls at issue and thus no relevant retail customers from whom they can recover the costs of providing those services." AT&T Comments, at 55. *See also* Neutral Tandem Comments, at 4.

Both carriers ignore one of the critical underpinnings of the Commission's *Report and Order*: based upon the Commission's findings, there are no costs to recover. The Commission's bill and keep transition was based in part on the Commission's findings that the costs of reciprocal compensation—which again includes more functionality than tandem transit services—are *de minimis*. The Commission cited to one study of a next generation network that showed a per minute cost of “\$0.0000001” and found that record evidence “indicates that the incremental cost of termination for circuit-switched networks is likewise extremely small.” *Report and Order*, at ¶ 752. The Commission went on to find that call termination costs are “very nearly zero” and, in addition, are so small that they do not justify the expense of developing new rates:

Our conclusion that the incremental cost of call termination is very nearly zero, coupled with the difficulty of appropriately setting an efficient, positive intercarrier compensation charge, further supports our adoption of bill-and-keep. Exact identification of efficient termination charges would be extremely complex, and considering the costs of metering, billing, and contract enforcement that come with a non-zero termination charge, we find that the benefits obtained from imposing even a very careful estimate of the efficient interconnection charge would be more than offset by the considerable costs of doing so.

Id. at ¶ 753. *See also* Sprint Comments, at 67 (citing to AT&T's estimate of \$0.00017/mou for switching). Nowhere in the comments does any carrier explain why switching rates that are so *de minimis* that they are not worth calculating in one context should nonetheless continue to be recoverable when billed largely by incumbent LECs for the exact same, and in fact lesser functions, in a parallel context.⁹ If the transition to bill and keep for Section 251(b)(5) rates is permitted to proceed, it would be patently

⁹ Even Sprint falls into the same trap of focusing on end user recovery instead of on the Commission's cost findings. Sprint Comments at 65.

discriminatory not to apply the identical transition to tandem transit switching rates, as well.

B. The Record Evidence Does Not Indicate That Competitive Markets for Transit Switching Have Developed

In addition to no meaningful response to bill and keep for transit traffic, there is also no record evidence that there is sufficient competition for tandem transit switching to discipline pricing. Many carriers have commented on the lack of competitive price discipline. CBeyond, Earthlink, Integra and tw telecom have pointed to the various reasons why incumbent LECS continue to exercise market power for transit services, including the limited reach of alternative transit providers and restraints placed on carriers attempting to offer competitive transit services. Comments of CBeyond, Earthlink, Integra Telecom, and tw telecom, at 12 (filed Feb. 24, 2012) (“Comments of CBeyond *et al.*”). *See also* Comcast Comments, at 8 & n.16 (citing to previous record evidence of the lack of transit competition).

The best evidence of the lack of meaningful competition is in the rates themselves, which are significantly higher in states where carriers are left to their own devices than in states that have established cost-based pricing. The record reflects a wide variety of cases where rates in those states that have not adopted 251(c)(2) regulation are 2 ½ to more than 4 times higher than states that states have adopted rate regulation. *See, e.g.*, Sprint Comments at 68-70; Comments of CBeyond *et al.*, at 13. Given the Commission’s recent emphasis on the decreasing cost of switching, the fact that transit switching rates are rising so high is strong evidence of a lack of competitive price discipline. Moreover, there is no evidence that the existence of regulated rates in approximately twenty states has discouraged transit carriers from expanding their operations,

as record evidence indicates that Neutral Tandem expanded into 42 markets in 2010 alone.¹⁰

This suggests that TELRIC rates established by these state commissions are drawing providers to expand their businesses to collect these rates, which is not surprising given that they have been designed to allow for the recovery of cost plus a reasonable profit.

IV. CONCLUSION

In its *Report and Order*, the Commission has taken on a number of intercarrier compensation and universal service issues that have been left unresolved for over a decade. In light of that Order, the Commission should also now resolve in a uniform nationwide manner the issue of transit traffic compensation. As evidenced by the outpouring of comments in support of regulating transit rates, the Commission should follow the lead of the federal courts and state commissions that have established that transit rates are appropriately regulated under Section 251(c) of the Telecom Act. The Commission should require cost-based rates for ILEC transit functions. In addition, based on the Commission's findings as to the *de minimis* costs associated with such functions in the Section 251(b)(5) context, the Commission should ensure that transit

¹⁰ See AT&T Comments, at 60 (citing *inter alia* Comments of Neutral Tandem, *Connect America Fund et al.*, WC Docket 10-90 *et al.*, at 3 (filed Apr. 18, 2011)).

rates follow the transitional downward migration to bill and keep.

Respectfully Submitted,

/s/ James C. Falvey
James C. Falvey, Esq.
Brett Heather Freedson, Esq.
Eckert Seamans Cherin & Mellott, LLC
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006
(202) 659-6600
jfalvey@eckertseamans.com
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