

**ICC Docket No. 12-0550
AT&T Illinois Exhibit 4.1
J. Scott McPhee Rebuttal Testimony**

Schedule JSM-5

**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 Compen- sation 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 NEUTRAL TANDEM, INC.,
D/B/A INTELIGENT, REGARDING SECTIONS XVII.L-R OF THE
FURTHER NOTICE OF PROPOSED RULEMAKING**

Neutral Tandem, Inc., d/b/a Inteligent ("Neutral Tandem"),¹ respectfully submits these reply comments regarding Sections XVII.L-R of the *FNPRM* in the above-referenced dockets.²

¹ Neutral Tandem is the leading competitive (*i.e.*, non-ILEC) provider of tandem services in the United States. Neutral Tandem provides competitive tandem services in 189 of the 192 LATAs in the continental United States, and in Puerto Rico. The only LATAs in which Neutral Tandem does not provide service are LATAs 921, 980, and 981. LATA 921 is comprised entirely of Fishers Island, New York, an island off of the coast of Long Island. LATAs 980 and 981 are comprised of parts of the Navajo Nation. Neutral Tandem recently adopted "Inteligent" as a d/b/a, but continues to refer to itself as "Neutral Tandem" in these comments, as it has done throughout this proceeding.

² *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal- State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund, WC*

As discussed in more detail below, the Commission should find that the transit service market represents “the hallmark of a competitive market” and therefore, setting ILEC tandem transit service rates at TELRIC levels would stifle competition and inhibit network investment. Recent events in Connecticut demonstrate that the real objective of carriers that seek regulated rates is to force ILECs to offer below-market rates as a benchmark, so that these carriers can then force competitive local transit providers such as Neutral Tandem to match those below-market rates. In addition, if the Commission decides to prescribe the rates for other terminating and originating access charges, it should not set or cap the rates for intermediate tandem transit service because it has no authority to do so nor is there a need to regulate such rates because the marketplace for this service is competitive. Finally, if the Commission mandates IP interconnection, indirect interconnection should be a permissible option as it is an efficient way to accomplish such a mandate.

I. THE COMMISSION SHOULD FIND THAT THE TRANSIT SERVICE MARKET IS COMPETITIVE

As Neutral Tandem previously and fully demonstrated in this proceeding, local tandem transit service is widely available and the market for this service is competitive.³ In fact, the marketplace for this service represents “the hallmark of a competitive market.”⁴ Neutral Tandem provides service in 189 of the 192 LATAs in the contiguous United States.⁵ The only such LATAs in which Neutral Tandem does not provide service are one comprised entirely of an island in New York with 250 residents, and two comprising some (but not all) of the Navajo

Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 17 FCC Rcd 17663 (2011) (“*FNPRM*”).

³ Reply Comments of Neutral Tandem, at 5 & Ex. B, Saboo Decl. (filed May 23, 2011).

⁴ *FNPRM*, ¶ 1313.

⁵ Reply Comments of Neutral Tandem, at 4 & Ex. A, Laurain Decl. (filed May 23, 2011).

Nation.⁶ Other non-ILECs that provide competitive local tandem transit services include Level 3, HyperCube, Peerless Network, IntelPeer, and others,⁷ and Neutral Tandem “faces considerable competitive pressures to provide local transit service” because of them.⁸

Various commenters agree unequivocally that the market for tandem transit service is competitive and should remain unregulated. For instance, AT&T maintains the market for switched transit services is “highly competitive.”⁹ Google states that “[t]he FCC should... continue to promote a market-oriented approach to transit services.”¹⁰ The United States Telephone Association professes that transit should remain unregulated because “[t]here is substantial evidence, both publicly available and in this proceeding, that competition for transit services exists in most urban and suburban territories and is growing. Accordingly, buyers of transit services typically have real and growing third-party alternatives for the provision of transit services, along with the options of self-provisioning and direct interconnection.”¹¹ Alaska Communications Systems Group, Inc. avers that “[t]he vast majority of such traffic is covered by contracts negotiated between carriers on market-based terms. There is no need for FCC or state regulatory intervention in transit arrangements in Alaska at this time.”¹²

Lower prices, better service and innovative solutions for local tandem transit services are the direct result of the competitive tandem transit service marketplace. In comments filed in this docket, Neutral Tandem explained fully how competition has done just that.¹³ Moreover, as the

⁶ *See id.* at 4 & Exhibit A, Laurain Decl. ¶¶ 3-5.

⁷ Reply Comments of Neutral Tandem In Response to August 3, 2011 Notice of Further Inquiry, at 4 (filed Sep. 6, 2011).

⁸ Reply Comments of Neutral Tandem, at Ex. B, Saboo Decl. ¶ 8 (filed May 23, 2011).

⁹ AT&T Comments at 60 (filed Feb. 24, 2012).

¹⁰ Comments of Google at 4 (filed Feb. 24, 2012).

¹¹ Comments of the United States Telephone Association at 5 (filed Feb. 24, 2012).

¹² Comments of Alaska Communications Systems Group, Inc. at 5 (filed Feb. 24, 2012).

¹³ Comments of Neutral Tandem at 3-5 (filed Apr. 18, 2011).

United States Telephone Association pointed out, following the introduction of Neutral Tandem's tandem interconnection services, it "began to face competition from other non-ILEC carriers, including Level 3, Hypercube and Peerless Network," and over the past several years, "this competition has intensified causing [Neutral Tandem] to lose some traffic as well as significantly reduce certain rates we charge our customers in various markets, including with respect to our major customers."¹⁴

Despite this record evidence, various carriers persist in arguing, without factual support, that the market for local transit service is "not effectively competitive" and that ILECs have "market power" in the local transit market.¹⁵ As Neutral Tandem has previously shown, these claims have no merit.¹⁶ In addition, apart from raising arguments that Neutral Tandem debunked previously, Charter now states that Neutral Tandem's claim to have connections to "more than 100 of the largest national and regional telecommunications carriers" actually reveals that the company has connections to only eight (8%) percent of all incumbent LECs operating in the nation.¹⁷ Stated differently, Charter characterizes Neutral Tandem as unable to provide transit services to 92% of the ILECs in the United States. Charter's claims are both wrong and mislead-

¹⁴ Comments of the United States Telephone Association, at 5 (quoting Neutral Tandem Inc., Form 10Q, filed November 9, 2011 for the period ending September 30, 2011, p. 14 (available at: <http://files.shareholder.com/downloads/TNDM/1707536840x0xS1193125-11-304064/1292653/filing.pdf>).

¹⁵ Comments of Cbeyond, EarthLink, Integra Telecom, and tw telecom, at 3, & 12 (filed Feb. 24, 2012); Comments of Charter Communications, Inc., at 16-17 (filed Feb. 24, 2012); Comments of Sprint Nextel Corporation, at 68 (filed Feb. 24, 2012); FNPRM Comments of GVNW Consulting, Inc. ICC Issues, at 12 (filed Feb. 24, 2012); Comments of Windstream Communications, Inc. on Sections XVII-R, at 9 & 12 (filed Feb. 24, 2012); Comments of Comcast Corporation at 7 (filed Feb. 24, 2012); Comments of Leap Wireless International, Inc. and Cricket Communications, Inc., at 7 (filed Feb. 24, 2012) (arguing that transit services are not competitive in all markets).

¹⁶ See Reply Comments of Neutral Tandem, at 4-5 & Exhibit B (Saboo Decl.) at 2-13 (filed May 23, 2011); Reply Comments of Neutral Tandem in Response to August 3, 2011 Notice of Further Inquiry, at 4-5 & Saboo Decl. at 2-4 (filed Sept. 6, 2011); Letter from Russell M. Blau, Counsel for Neutral Tandem, to Marlene H Dortch, Secretary, FCC (filed Oct. 24, 2011).

¹⁷ Comments of Charter Communications, Inc., at 18 (filed Feb. 24, 2012).

ing. As explained above, Neutral Tandem provides service in nearly all of the LATAs in the United States. And in providing transit service in a given LATA, Neutral Tandem connects to every ILEC in the LATA either through direct connection or through indirect interconnection arrangements with other ILECs in the LATA.

More fundamentally, Charter's argument is misleading. As Charter and others point out, competitive carriers nearly always establish their own direct connections with at least the main ILEC in a given LATA. Thus, by definition Charter and other competitive carriers do not need intermediate transit service from Neutral Tandem or other competitive providers to exchange traffic with ILECs, because they exchange that traffic via direct interconnection. Therefore, Charter's argument that the market for transit services is not competitive is disingenuous. Even ignoring the existence of other competitive transit providers, there is no "market in the country where Charter provides service that Neutral Tandem does not."¹⁸

In short, the market for local tandem transit service is competitive and as a result, is ensuring just and reasonable rates, terms and conditions for the service. Accordingly, the Commission should not regulate this service.

II. THE COMMISSION SHOULD REJECT ARGUMENTS THAT LOCAL TANDEM TRANSIT SERVICE IS A FORM OF INTERCONNECTION THAT ILECS MUST PROVIDE UNDER SECTION 251(C)(2)

Contrary to certain commenters,¹⁹ as the record demonstrates, local tandem transit service is not a form of interconnection under Section 251(c)(2) of the Telecommunications Act of 1996

¹⁸ See Reply Comments of Neutral Tandem, at Ex. B, Saboo Decl. ¶ 30 (filed May 23, 2011).

¹⁹ Comments of the National Cable & Telecommunications Association at 3-5 (filed Feb. 24, 2012); Comments of RCN Telecom Services, LLC at 5-7 (filed Feb. 24, 2012); Comments of Sprint Nextel Corporation at 59-62 (filed Feb. 24, 2012); Comments of Charter Communications, Inc. at 20-22 (filed Feb. 24, 2012); Comments of Leap Wireless International, Inc. and Cricket Communications, Inc. at 6-8 (filed Feb. 24, 2012).

(the “Act”).²⁰ Rather, local tandem transit service is the delivery of telecommunications traffic and the Commission’s rules make clear that “interconnection” under Section 251(c)(2) is not the delivery of telecommunications traffic.²¹ If anything, local tandem transit service could be viewed as a service used to facilitate “indirect” interconnection, which is a form of interconnection under Section 251(a) of the 1996 Act.²² Accordingly, the Commission should not set local tandem transit service rates at TELRIC-based levels.²³

A. Prescribing TELRIC-Based Rates for ILEC Local Tandem Transit Service Would Stifle Competition and Inhibit Network Investment in Contravention of the Act

Any Commission action setting ILEC local tandem transit rates at TELRIC levels would defy the competitive goals of the Act. Indeed, as Neutral Tandem explained previously, adoption of the TELRIC price regulation for ILEC local tandem transit service would stifle competition and inhibit the development of next-generation tandem network.²⁴ TELRIC-based pricing is intended to apply only to “bottleneck” parts of the ILECs’ networks where no substitutes are available from competing carriers.²⁵ Local tandem transit does not fall in that category.

²⁰ See Comments of Neutral Tandem at 6-7 (filed Apr. 18, 2011); See Reply Comments of Neutral Tandem, at 3, 7-12 (filed May 23, 2011); Letter from John R Harrington, Neutral Tandem, to Marlene H. Dortch, Secretary FCC, CC Docket No. 01-92; WC Docket Nos. 05-337, 07-135, 10-90 and GN Docket No. 09-51 at Exhibit A pp. 10-15 & Exhibit B at 27-29 (filed Sep. 30, 2011) (attaching detailed briefs filed with the United States Court of Appeals for the Second Circuit explaining why transit service is not a form of interconnection under Section 251(c)(2) of the Telecommunications Act of 1996).

²¹ *Id.*

²² Letter from John R Harrington, Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, at Exhibit A pp. 4, 14 & Exhibit B at pp. 29-33 (filed Sep. 30, 2011). See also FNPRM Comments of GVNW Consulting, Inc. at 4 & 12 (filed Feb. 24, 2012).

²³ See Comments of Neutral Tandem at 2-3 (filed Apr. 18, 2011); Reply Comments of Neutral Tandem, at 9 (filed May 23, 2011).

²⁴ See Comments of Neutral Tandem at 6-8 (filed Apr. 18, 2011).

²⁵ See, e.g., *Illinois Bell Tel. Co. v. Box*, 548 F.3d 607, 611-12 (7th Cir. 2008).

Moreover, refraining from applying TELRIC pricing when a market is competitive furthers Congress's goal of encouraging the development of facilities-based competition. Indeed, a core "goal of limiting the requirement of unbundled access at cost to [the] network services that requesting carriers need rather than just want is to wean those carriers from reliance on unbundled network elements, so that fully competitive landline networks will be built[.]"²⁶ As courts have recognized, requiring ILECs to provide network services to competitors at "cost-based" rates can "retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition in the long run."²⁷ Moreover, "as long as requesting carriers rely on network services supplied by incumbent local exchange carriers, competition is hampered because the services continue to be monopolies and to require regulation."²⁸

This is not the case with local tandem transit service because it is a competitive success story under the Act. Using private investment dollars, Neutral Tandem and other carriers have built route-diverse transport networks, using next-generation technology, that now carry billions of minutes of telecommunications traffic every month. Neutral Tandem alone carried more than 108 billion minutes of traffic on its network in 2010. With respect to local tandem transit service, the Commission can best achieve its goals of encouraging investment in next generation telecommunications networks and promoting "market-driven" intercarrier compensation policies by letting the competitive market further develop and thrive, and by avoiding inappropriate and stifling price regulation.²⁹

²⁶ *Id.* at 610 (internal quotation marks omitted).

²⁷ *Verizon New England, Inc. v. Maine Pub. Util. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007); *see also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 573, 580 (D.C. Cir. 2004).

²⁸ *Box*, 548 F.3d at 610.

²⁹ *See* Comments of Neutral Tandem at 8 (filed Apr. 18, 2011).

B. Events in Connecticut Demonstrate that Regulation of ILEC Transit Prices Would be Counter-productive

Finally, several commenters support recent decisions from the state commission and federal district court in Connecticut that required the ILEC in the state to set local transit service rates at TELRIC-based levels.³⁰ In fact, certain of these commenting carriers even participated in the Connecticut proceeding and advocated this result;³¹ however, as explained in Neutral Tandem's September 6, 2011 Reply Comments, their desire for rates at these levels had nothing to do with the lack of competitive alternatives to ILEC local transit. Nor did it provide a vehicle for competitive carriers to avoid alleged excessive ILEC pricing (which was not the case since the marketplace for transit service was already competitive).³² Rather, in the aftermath of the Connecticut decision, it became clear that their real objective was to force ILECs to offer below-market rates as a benchmark so that carriers could then force competitive local transit providers such as Neutral Tandem to match those below-market rates. The Commission should not use price regulation to allow these carriers to achieve results that they were unable to negotiate in a free market.

III. IF THE COMMISSION MANDATES IP INTERCONNECTION, INDIRECT INTERCONNECTION SHOULD BE A PERMISSIBLE OPTION

Commenting parties present various views on whether the Commission should mandate IP interconnection.³³ To the extent the Commission does require any carriers to offer IP inter-

³⁰ See, e.g., Comments of Charter Communications, Inc. at 20 (filed Feb. 24, 2012); Comments of Comcast Corporation at 9; Comments of T-Mobile USA, Inc. at 11 (filed Feb. 24, 2012); Comments of MetroPCS Communications, Inc. at 9 (filed Feb. 24, 2012).

³¹ Reply Comments of Neutral Tandem in Response to August 3, 2011 Notice of Further Inquiry at 9 (filed Sep. 6, 2011).

³² *Id.* at 9-10.

³³ See, e.g., Comments of the United States Telecom Association, at 7 (filed Feb. 24, 2012) (stating that IP interconnection should not be regulated); Comments of Sprint Nextel Corporation at 2-7 (filed Feb. 24, 2012) (urging the Commission to establish default IP interconnection rules); Comments of Time Warner Cable, Inc. at 5-18 (filed Feb. 24, 2012) (advocating Commission regulation over IP interconnection); Comments of Windstream Communications, Inc. on Sections XVII.L-R at 14 (filed Feb. 24, 2012) (urging a regulatory framework that allows for the

connection, doing so via indirect interconnection should be permissible under such a mandate. Carriers should be able to choose whether to connect indirectly or directly. As CTIA explained, “the originating carrier should be permitted to rely on third-party transiting services and terminating carriers should be prohibited from refusing traffic from another carrier that has established either direct or indirect interconnection with it.”³⁴

The *FNPRM* recognizes that there are “barriers to IP-to-IP interconnection”³⁵ that must be eliminated and the appropriate steps taken “to enable the efficient transition to IP-to-IP interconnection.”³⁶ Through indirect interconnection, Neutral Tandem’s indirect connections eliminates those barriers and allow carriers to accomplish IP-to-IP interconnection efficiently. The *FNPRM* acknowledges that Neutral Tandem and other intermediate carriers already offer interconnection services that can include converting traffic between IP and TDM protocols.³⁷ Therefore, if the Commission adopts any new IP interconnection mandates, it should allow carriers to meet those mandates by using services of third-party carriers where appropriate. While these carriers could always chose to connect their networks directly on an IP basis, they would have other reasonable options, such as through indirect interconnection, to satisfy any new IP interconnection mandates. And carriers who already prefer IP interconnection would not be disadvantaged by those who preferred indirect interconnection arrangements.

“right to obtain IP-to-IP interconnection at just and reasonable rates, terms and conditions”); Comments of YMAX at 2 (filed Feb. 24, 2012) (asking that Commission declare that IP-based interconnection is mandatory); Comments of AT&T at 9-46 (filed Feb. 24, 2012) (stating that “[t]he Commission should not regulate interconnection among IP-networks”); Comments of Cbeyond, EarthLink, Integra Telecom, and tw telecom at 20 (filed Feb. 24, 2012) (asking the Commission to simply clarify that incumbent LECs have an enforceable statutory compulsion to provide IP-to-IP interconnection); Comments of CenturyLink at 36-55 (filed Feb. 24, 2012) (stating that the Commission should allow IP-to-IP interconnection to develop organically coincident with the deployment of IP Networks).

³⁴ Comments of CTIA–The Wireless Association at 6 (filed Feb. 24, 2012).

³⁵ *FNPRM*, ¶ 1340.

³⁶ *Id.* ¶ 1380.

³⁷ *FNPRM*, ¶¶ 1362, 1374, 1391.

IV. IF THE COMMISSION DECIDES TO PRESCRIBE RATES FOR OTHER TERMINATING AND ORIGINATING ACCESS CHARGES, IT SHOULD NOT SET OR CAP THE RATES FOR INTERMEDIATE TANDEM TRANSIT SERVICES

Where carriers interconnect indirectly, the Commission cannot rationally transition rates for intermediate tandem transit service (*i.e.*, the service of delivering access traffic between interexchange and local exchange carriers whose networks are not directly connected) to bill-and-keep because, by definition, intermediate tandem transit service providers 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.”³⁸ Indeed, when a carrier sends traffic to the intermediate tandem transit service provider, which transports the traffic over its own network and in turn sends the traffic to the terminating carrier, the transit provider “has no contractual relationship with either the calling party or the called party, and it therefore may not recover from either one the costs that it incurs in providing these third-party services.”³⁹ Rather, the transit provider’s only relevant customer is typically the sending carrier, from whom the transit provider’s costs must be recovered; and the sending carrier is then free to pass through those costs to its own subscribers.⁴⁰ Therefore, the sending carrier has the appropriate incentive *either* to build out its network *or* to outsource the same network functions to a transit service provider, depending on whether it is more economically efficient to build or to buy.⁴¹

The most common form of transit service offered by transit service providers, such as Neutral Tandem, is “tandem transit service” in which the transit provider supplies tandem switching and common transport from its own tandem to a point of interconnection on the terminating carrier’s network (often an end office or equivalent switching facility). While a

³⁸ See also Comments of AT&T at 55 (filed Feb. 24, 2012).

³⁹ *Id.* at 56.

⁴⁰ See also *id.*

⁴¹ *Id.*

number of commenters ask the Commission to set or cap rates for transit service,⁴² the Commission should deny these requests. As the record demonstrates, the Commission has no *legal* authority to regulate the rates for these switched transit services under the 251/252 framework.⁴³ In addition, as previously explained, switched transit services do not qualify as direct “interconnection” within the scope of sections 251(c)(2) and 252(d)(1) and the Commission’s associated TELRIC rules.⁴⁴ Moreover, because the market for these services is highly competitive, there is no legitimate policy justification for regulating switched transit services, whether provided by ILECs or anyone else.⁴⁵ For these reasons, if the Commission chooses to prescribe the rates for other terminating and originating access charges as it is considering in the context of this proceeding, it should not set or cap the rates for intermediate tandem transit service.

Respectfully submitted,

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⁴² See, e.g., Comments of Comcast Corporation at 8; Comments of Sprint Nextel Corporation at 66-67 (filed Feb. 24, 2012); Initial Comments of National Exchange Carrier Association et al. at 17-18 (filed Feb. 24, 2012); Comments of RCN Telecom Services, LLC at 7 (filed Feb. 24, 2012); Comments of Time Warner Cable. at 20 (filed Feb. 24, 2012); Comments of Bandwidth.com, Inc. on Sections XVII.L-R, at 15 (filed Feb. 24, 2012).

⁴³ Comments of AT&T at 59 (filed Feb. 24, 2012).

⁴⁴ *Id* at 60.

⁴⁵ *Id*.