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August 24, 2011

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

In re: Pennsylvania Public Utility Commission v. Verizon Pennsylvania, Inc.,
Docket No. R-2011-2234464

Pennsylvania Telephone Association v. Verizon Pennsylvania Inc.,
Docket No. C-2011-2237456

Pennsylvania Public Utility Commission v. Verizon North, LLC,
Docket No. R-2011-2234462

Pennsylvania Telephone Association v. Verizon North, LLC,
Docket No. C-2011-2237496

Dear Secretary Chiavetta:

Enclosed for filing please find the Brief of the Pennsylvania Telephone Association in the above-referenced consolidated proceeding. Copies are being served in accordance with the attached Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By:


Norman J. Kennard

Encl.

cc: Dennis J. Buckley, Presiding Administrative Law Judge

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission	:	R-2011-2234464
Pennsylvania Telephone Association	:	C-2011-2237456
	:	
v.	:	
	:	
Verizon Pennsylvania Inc.	:	
	:	
	:	
Pennsylvania Public Utility Commission	:	R-2011-2234462
Pennsylvania Telephone Association	:	C-2011-2237496
	:	
v.	:	
	:	
Verizon North LLC	:	

**BRIEF OF
THE PENNSYLVANIA TELEPHONE ASSOCIATION**

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Date: August 24, 2011

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I. PROCEDURAL BACKGROUND

On April 5, 2011, Verizon Pennsylvania Inc. (“Verizon PA”) filed Tariff Telephone - PA PUC No. 19, Section 1, and Verizon North LLC (“Verizon North”) (collectively “Verizon”) filed Tariff Telephone - PA PUC No. 10, Section 10. On April 23, 2011, the Pennsylvania Telephone Association, on behalf of its member rural local exchange carriers (“PTA Companies” or “RLECs”) operating in Pennsylvania,¹ filed Formal Complaints against each. The PTA Companies are rural local exchange companies in Pennsylvania which serve exceedingly rural areas of Pennsylvania and are the carriers of last resort for both broadband and voice services in these difficult and expensive to serve territories.² Verizon PA and Verizon North filed Answers to the Complaints on May 5, 2011. By separate Orders dated May 19, 2011, the tariffs were suspended.

Thereafter, a Prehearing Conference was held at which case management matters were addressed, including scheduling. On June 27, 2011, Verizon filed an Amended Answer and New Matter, which was replied to by the PTA on July 18, 2011. Verizon responded to the PTA’s Preliminary Objections regarding its New Matter on July 28, 2011.

Factual development in the case consists of testimony and exhibits. On July 11, 2011, Verizon filed the testimony of Peter J. D’Amico as its Statement No. 1.0. On August 1, 2011,

¹ For purposes of this proceeding, the PTA Companies are: Armstrong Telephone Company - North, Armstrong Telephone Company - Pennsylvania, Bentleyville Telephone Company, Citizens Telephone Company of Kecksburg, Frontier Communications Commonwealth Telephone Company, LLC (d/b/a Frontier Commonwealth), Frontier Communications of Breezewood, LLC, Frontier Communications of Canton, LLC, Frontier Communications – Lakewood, LLC, Frontier Communications – Oswayo River, LLC, Frontier Communications of PA, LLC, Hickory Telephone Company, Ironton Telephone Company, Lackawaxen Telecommunications Services, Laurel Highland Telephone Company, Mahanoy & Mahantango Telephone Company, Marianna & Scenery Hill Telephone Company, The North-Eastern Pennsylvania Telephone Company, North Penn Telephone Company, Consolidated Communications of Pennsylvania Company (f/k/a North Pittsburgh Telephone Company), Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Sugar Valley Telephone Company, Venus Telephone Corporation, and Yukon-Waltz Telephone Company.

² PTA St. 1 at 7 (“The small companies serve far fewer lines per square mile than Verizon at generally a higher cost per customer.”).

the PTA filed the Prepared Rebuttal Testimony of Gary M. Zingaretti, marked as PTA Statement No. 1. Thereafter, on August 8, 2011, Verizon submitted the Surrebuttal Testimony of Peter J. D'Amico as Verizon Statement No. 1-1. Hearings were held on August 12, 2011. This Brief is timely filed pursuant to the schedule established by Your Honor for this proceeding.

Concomitantly with the litigation of Verizon's tariffs, the parties have continued to engage in mediation for the purpose of establishing a voluntarily agreed-to interconnection agreement in lieu of the tandem transit tariff at issue in the litigation.

II. SUMMARY OF ARGUMENT

Under the architecture of the Pennsylvania public switched network ("PSTN"), many of the PTA Companies' end office switches are connected to ("subtend" in industry parlance) Verizon's tandems. Verizon is the dominant tandem provider in Pennsylvania. When Verizon enters into an interconnection agreement with another carrier, Verizon and that carrier also contemplate that tandem switching and transit services will be provided for traffic destined for delivery to the sub-tending carriers.³

The PTA Companies and Verizon have an over one hundred year ongoing history of cooperating to complete calls.⁴ The PTA Companies and Verizon have a number of contractual agreements in place, which have been voluntarily entered into and are not tariffed.⁵ These include extended area service ("EAS") agreements, the Telecommunications Service and Facilities Agreement ("TS&FA"), which deals with toll services, third-party services and other

³ PTA St. 1 at 7.

⁴ NT at 54-55.

⁵ NT at 55.

interconnection issues, as well as the ILEC's toll traffic originating responsibility plan ("ITORP").⁶ As Mr. Zingaretti, witness for the PTA, described:

At the time of AT&T divestiture, Verizon, then Bell Atlantic, and the PTA Companies executed a series of agreements, including the Telephone Services and Facilities Agreement ("TSFA") specifying how their networks would be interconnected and compensation. The TSFA was a voluntary process between Bell and the RLECs, upon the introduction of toll competition attendant the AT&T/Bell Modified Final Judgment, to replace the preexisting toll revenue settlement process between Bell and the ILECs. It has been modified several times since it was originally entered into, including as to the delivery of local traffic originated by third parties. At no time, of which I am aware, did Verizon state that it wished to open an industry dialogue regarding third party local traffic delivered by the RLEC to the Verizon tandem.⁷

Facilities used and services provided as between Verizon and the RLECs have never been tariffed. This is the first time that Verizon has sought to tariff facilities and service arrangements between the RLECs and Verizon.

In the pre-competition era, the trunking arrangements between the RLECs and Verizon were implemented at the border between the two carriers (the "meet point") for the exchange of toll and local calls. With the advent of competitive carriers, traditional EAS calls now can involve local calls from the RLEC to a customer of a competitive local exchange company ("CLEC") or a commercial mobile radio service ("CMRS" provider).

Verizon and the CLECs and CMRS providers have entered into interconnection agreements for the use of the Verizon tandem switch to complete their indirect interconnection with the RLECs. These negotiations were conducted without participation by the RLECs.⁸ Through these arrangements, the CLECs and CMRS providers have become the new calling or

⁶ NT at 55-56.

⁷ PTA St. 1 at 7.

⁸ The RLECs are not parties to these arrangements. Further, the RLECs have no right to demand an interconnection agreement with a CLEC.

called party on these local routes. The RLECs were not adversely affected by these agreements until the filing of Verizon's transit tariff.

Up to this point, Verizon has charged the CLECs and CMRS providers for their indirect interconnection on the basis of their call origination and has not sought to charge the RLECs for the CLECs' and CMRS providers' choice of interconnection. This is fair because, as *incumbent* local exchange carriers, the RLECs obligation is to exchange local traffic at a technically feasible point "within *the carrier's network*"⁹ (in this case, the RLEC's network). It is illogical, inequitable and unlawful to require the RLECs to pay for and subsidize the CLECs and CMRS providers' use of Verizon's network to establish an indirect interconnection with the RLECs, by forcing the RLECs to then pay for facilities *not on their network* to reach the CLECs and CMRS providers.

The Commission should resolve this dispute with a two-part order. First, the Commission should reject Verizon's tariffs as unjust, unfair, and unreasonable because the rates, terms, and conditions for local transit services should be addressed in negotiated intercarrier agreements, rather than unilaterally dictated tariffs. Second, the Commission should also require Verizon and the RLECs to negotiate an intercarrier agreement, a commercial agreement in this case, that addresses the rates, terms, and conditions by which Verizon terminates local transit traffic on the RLECs' networks.

The Commission should find that Verizon's tariffs are unfair, unjust, and unreasonable.¹⁰ It imposes a one-sided, untenable, unreasonable "solution" to issues associated with traffic exchanged between the RLECs and local carriers other than Verizon. In so doing, the tariffs

⁹ 47 U.S.C. § 251(c)(2) ("Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point *within the carrier's network*....") (emphasis added).

¹⁰ 66 Pa. C.S. §§ 1301 and 1304.

dictate the rates, terms, and conditions by which the RLECS exchange traffic with other parties (RLECs and CLECs) and proposes to change existing networks that have adequately evolved over 100 years. It has undermined the negotiation provisions of the Telecommunications Act.¹¹ It has eliminated any incentive on the part of Verizon or third-party CLECs to negotiate appropriate intercarrier agreements with the RLECs and exposes the RLECS to unilateral terms developed by Verizon that do not adequately address the RLECs' rights and interests.

Verizon's tariff not only increases costs to the RLECs in the form of transit fees, but also requires the RLEC's to incur the costs of time, material and labor to modify a functioning network. Some of these additional costs include:

- Establishing additional network monitoring trunks

These additional trunks will be required to monitor any Verizon mandated duplicate and redundant trunking

- Establishing less efficient multiple trunk groups

Establishing multiple trunk groups for the same or similar traffic is inefficient especially when required to build to every tandem in a LATA (only one is used today). Reference Tariff section 3.5.1

- Facility Costs beyond exchange boundaries

Verizon's tariff also would require RLECs to build facilities where they do not exist today in order to connect to each tandem in the LATA.

- Accounting and billing/payment changes

All of section 3.4 of the tariff proposes changes to exist payment process which may cost RLECs more than the transit charge themselves. Verizon's tariff

¹¹ See generally 47 U.S.C. 251-252.

mandates payment dates, deposits, late fees and interest rates. All of which change the historical relationships between RLECs and Verizon where there have been no recorded events causing harm to Verizon.

III. ARGUMENT

A. Tandem Transit Service Should Be Provided Based On Negotiated Terms, Not In a Tariff

1. Federal Law Requires That Verizon, the RLECs, and the CLECs Negotiate Intercarrier Agreements for the Delivery of Local Exchange Traffic

“[T]he over-arching purpose of the Telecommunications Act is to ... promote competition in local telephone markets.”¹² To that end, “the [Telecommunications] Act sets forth detailed requirements for the development of an interconnection agreement between an incumbent and a provider seeking to enter the market.”¹³ As such, the Telecommunications Act requires local exchange carriers who desire to interconnect with other local exchange carriers to negotiate or, where necessary, to arbitrate, agreements for the exchange of that local traffic.¹⁴ State action “is preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal.”¹⁵ The Sixth Circuit specifically admonished state commissions that tariffs may not substitute for the federally-mandated process of negotiating and arbitrating an interconnection agreement for inter-carrier facilities and services required to be provided by the Telecommunications Act.

¹² *Quick Communications, Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. Mich. 2008) (citing *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs.*, 323 F.3d 348, 351-52 (6th Cir. 2003)).

¹³ *GTE Northwest v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997).

¹⁴ See generally 47 U.S.C. § 251-252.

¹⁵ *Verizon North v. Strand*, 309 F.3d 935, 940 (6th Cir.2002) (“*Verizon North P*”).

A tariff supplants the procedure the Act requires.¹⁶ Tariffing thus contradicts federal and state determinations that transit services provided by an ILEC be included in agreements.¹⁷ Tariffs which dictate the terms of what the Telecommunications Act requires be reached through negotiation would result in “an interconnection agreement by fiat. Such a result was found to be inconsistent with the elaborate statutory framework of § 252.”¹⁸

The Sixth Circuit, in a subsequent *Verizon North v. Strand* case, has addressed, and rejected, a carrier's attempt to tariff crucial terms and conditions of interconnection arrangements.¹⁹ Specifically, the *Verizon North II* court addressed whether a state public service commission properly approved a CLEC's tariff imposing reciprocal compensation terms on an ILEC without negotiation or arbitration. The Sixth Circuit held that a carrier cannot tariff the rights and obligations reserved by the Telecommunications Act as the subject of intercarrier agreements.²⁰

Specifically, the Court held that to allow the imposition of rights and obligations by tariff “eliminates the virtues of *negotiated* competition ensconced in § 252.”²¹ Furthermore, it would “frustrate[] Congress's intent by eviscerating its chosen mechanism for increasing competition in the local telephony market and by upsetting the intricate balance between competitors and incumbents.”²² In making this determination, the court noted that “[t]he state's role in assisting the process of interconnection agreement formation is clearly bounded by the plain language of

¹⁶ *Id.* (tariffing the provision of network elements “evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act” (citing *Verizon North v. Strand*, 140 F.Supp.2d 805 at 810 (W.D. Mich. 2000))).

¹⁷ *Qwest Corp. v. Cox Nebraska Telecom, LLC*, 2008 WL 5273687 (D. Neb. December 17, 2008) (upholding state commission decision requiring the provision of transit service as a Section 251(c)(2)). A copy of the unreported opinion is attached hereto.

¹⁸ *Verizon North v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004) (“*Verizon North II*”)

¹⁹ *Id.*

²⁰ *Id.* at 584-85.

²¹ *Id.* at 585 (emphasis in original).

²² *Id.*

252 of the Act.”²³ Throughout the *Verizon North* opinion, the Sixth Circuit emphasized the integral role that negotiation and competition play under the Telecommunications Act.

The *Verizon North* series of cases is very similar to the case presented, except that Verizon is now taking an opposing position. Here, Verizon seeks, by its tariffs, to impose the rates, terms, and conditions for local transit services by which third-party carriers and the RLECs would exchange local traffic. Yet, Verizon, and the third-party CLECs are bound by § 251 of the Telecommunications Act to negotiate appropriate agreements with the RLECs addressing these very services.²⁴ ILECs and CLECs have a “duty to negotiate in good faith in accordance with § 252 the particular terms and conditions of [intercarrier] agreements”. As a result, the tariffs effectively sidestep the negotiation and arbitration requirements of the Telecommunications Act. The Verizon tariffs in this case, if allowed to stand, would likewise constructively impose an interconnection agreement for local transit services by “fiat.” In the Sixth Circuit's words, it “eviscerate[s] any incentive to engage in private negotiation, which is the centerpiece of the [Telecommunications] Act.”²⁵

The FCC’s ruling in the *T-Mobile Declaratory Ruling*²⁶ also confirms that Verizon cannot establish rates, terms and conditions for the exchange of local traffic pursuant to a tariff. The FCC held, on a prospective basis, that an ILEC was prohibited from imposing such compensation obligations for non-access traffic pursuant to tariffs and added new subsection 20.11(e) which provides:

²³ *Id.*

²⁴ *Id.*

²⁵ *Quick Comm., Inc. v. Mich. Bell Tel. Co.*, 515 F.3d 581, 585 (6th Cir. 2008) (commenting on the *Verizon North II* opinion).

²⁶ *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et. al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, 20 F.C.C.R. 4855 (2005) (“*T-Mobile Declaratory Ruling*”).

Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

The rationale of the *T-Mobile Declaratory Ruling* applies equally, as well, to wireline carriers such as the RLECs and the CLECs. The FCC concluded that “[P]recedent suggests that the [FCC] intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act.”²⁷

The Eighth Circuit has interpreted the FCC’s changes to 47 CFR § 20.11 as part of a “move [by the FCC] away from tariffs and toward negotiation and arbitration in order to facilitate market competition.”²⁸ Likewise, the Eighth Circuit noted that “no provision of the Communications Act except 203(a) requires tariffing, and no provision gives a carrier a positive right to file a tariff.”²⁹

Because the FCC and Federal Circuits have rejected the rigidity of tariffs in favor of the negotiation and arbitration requirements set forth in 47 U.S.C. §§ 251 and 252 of the Telecommunications Act, this Commission should find that the Verizon tariffs filed in the instant proceeding are inconsistent with and preempted by federal law, and, as such, are unjust, unfair and unreasonable.

Verizon’s tariffs insert variables where a negotiated agreement would provide stability. If approved, Verizon could file changes to the rates and terms at any point. Any proposed change to the tariff may lead to additional opposition by the RLECs and the parties would be readdressing these issues before the Commission.

²⁷ *Id.* at 4863 ¶ 14.

²⁸ *Iowa Network Services v. Qwest*, 466 F.3d 1091, 1098 (8th Cir. 2006).

²⁹ *Id.* (quoting *MCI WorldCom, Inc. v. F.C.C.*, 209 F.3d 760, 764 (D.C. Cir. 2000)).

2. Verizon's Tariffs Disincentivize Negotiated Intercarrier Agreements

The very presence of Verizon's tariffs effectively eliminates Verizon's incentive to then also negotiate intercarrier agreements for transit traffic. As the Sixth Circuit explained in *Verizon North II*, allowing a telecommunications provider to tariff the rates, terms, and conditions of a crucial network element as an alternative to obtaining interconnection rights is tantamount to "a fist slamming down on the [negotiating] scales."³⁰ Indeed, such action "does not just slightly unbalance the negotiations by forcing the [party upon whom the tariff is imposed] to show its hand. It instead completely forestalls the need for negotiations. Rather than just forcing the [party upon whom the tariff is imposed] to reveal the rates it wants to charge, which clearly disrupts the negotiations, this [action] completely obviates the need for negotiations by allowing [the party] to establish its own rate without any interaction between the [two parties]."³¹ The Telecommunications Act envisions that CLECs, as the new entrants into the local calling area, will request interconnection with ILECs in order to exchange local traffic.³² Verizon's tariffs truncate this process and deprive the RLECs of their rights.

Likewise, Verizon, if its tariffs are in effect, has no incentive to also negotiate an agreement with the RLECs for the delivery of transit traffic. As Mr. Zingaretti noted, while the tariffs themselves refer to the opportunity to enter into a separate agreement:

... one must consider what incentive Verizon will have to negotiate any contractual agreement with the RLECs, if their tariff is allowed to become effective. While it would be a legal matter, it is unclear to me how Verizon can offer a tariff for services and then, while that tariff is still in effect, offer different deals to other parties. Also, as it has everything that it seeks in the tariff, Verizon

³⁰ *Verizon North II*, 367 F.3d at 585; (also citing *Wis. Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (tariffs unfairly alter negotiations by "plac[ing] a thumb on the scales" and requiring only one of the parties to fully participate in the negotiation)).

³¹ *Id.* (emphasis added).

³² 47U.S.C. 251(c)(1) and (2); see also *GTE South v. Morrison*, 957 F.Supp. 800, 802 (E.D. Va. 1997) ("The Act directs the incumbent telephone companies to negotiate purchase and interconnection agreements with the new entrants").

has no incentive to negotiate and the RLECs have no means of forcing Verizon to the negotiating table.³³

Verizon's tariffs disincentivize productive negotiations and undermine the RLECs rights since effectively, Verizon offers the RLECs the option of signing Verizon's proposed transit agreement, or else Verizon claims to hold that carrier to the tariffs. By tariffing transit services, Verizon has nothing to lose.

As Mr. Zingaretti noted: "Transit Service has been included in every interconnection agreement that I have negotiated. Verizon admits that it has nearly 300 interconnection agreements that provide for Tandem Transit Service."³⁴

The RLECs were fully engaged in the process of negotiating an Agreement when the tariffs were filed and continue to actively negotiate an agreement with Verizon. The RLECs continue to believe that a tariff is not the proper mechanism and request that the Commission direct the negotiation of an agreement. A template for such an agreement was attached to Mr. Zingaretti's testimony as Exhibit GMZ-3.

3. **Verizon's Tariffs Improperly Require the RLECs to Pay the Costs of Interconnection Services Provided Outside of Their Respective Networks**

Verizon's decision to tariff local transit services results directly in requiring the RLECs to pay the costs of interconnection services provided outside of their respective networks. In doing so, the tariffs seek to indirectly obtain what no carrier has any right to obtain directly -- RLEC payment for traffic exchange costs incurred outside of the RLEC network as a result of the networking decisions of Verizon and other third-party carriers.

³³ PTA St. 1 at 17.

³⁴ PTA St. 1 at 16 (citing Verizon St. 1.0 at 5, Lines 18-20).

47 U.S.C. § 251(c)(2)(B) makes clear that RLECs' responsibilities for interconnection cannot extend, in any case, beyond a point on the RLECs' respective incumbent networks. Specifically, 47 U.S.C. § 251(c)(2)(B) provides that it is the duty of an ILEC (a term which includes the RLECS) "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the carrier's network."³⁵ In the FCC's *Local Competition Order* released on August 8, 1996,³⁶ reiterated that interconnection provided by an ILEC under §251(c)(2)(B) must be provided by the ILEC at "any technically feasible point within [its] network."³⁷ Any such requirement that the RLECs pay Verizon for interconnection costs incurred outside of their respective networks would be in direct conflict with the FCC's previous orders and federal law.³⁸

In fact, because the RLECs are not required to bear the costs of exchanging local traffic outside of their networks, it seriously calls into question whether a transit agreement between the RLECS and Verizon is even necessary, even though the RLECs continue to be open to that potential compromise.

Verizon, however, clearly intends to use its tariffs as a means of "placing its thumb on the scales" of negotiations in order to coerce a different resolution than it could otherwise achieve.³⁹ After all, as long as the tariffs remain in place, Verizon suffers practically no consequences from insisting on an agreement that effectively mirrors the terms of its tariffs. In fact, by so doing, Verizon has everything to gain, and nothing to lose, unilateral terms and unilateral rates.

³⁵ 47 U.S.C. § 251(c)(2)(B); see also FCC Rule 47 C.F.R. 51.305.

³⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket Nos. 96-98, 95-185, 11 F.C.C.R. 15499 (1996) ("*Local Competition Order*").

³⁷ *Id.* at 15588 ¶ 173.

³⁸ *Id.*

³⁹ See *Wis. Bell*, 340 F.3d at 944.

When an RLEC sends traffic to a CLEC or CMRS provider that has elected to connect only to Verizon, in lieu of establishing an interconnection point on the RLEC's networks, the CLECs and CMRS providers have effectively elected to designate the Verizon/RLEC service border meet point as their own interconnection point. Accordingly, it is the CLEC or CMRS provider that is utilizing Verizon's transit service arrangement. As Mr. Zingaretti testified:

In my experience working with CLECs, this decision [to connect directly or indirectly] is made by comparing the rates, terms and conditions of indirect connection through Verizon to the direct cost of ordering facilities to the [R]LEC POI.⁴⁰

CLECs and CMRS providers have made the affirmative decisions to utilize Verizon's existing network to produce an indirect interconnection with an RLEC rather than invest in a direct interconnection to the RLECs. If Verizon's network were not in place, these carriers would either have to make the investment to establish a direct point of interconnection or try to find another transiting carrier.

In *Iowa Utilities Board*,⁴¹ the Eighth Circuit held that the FCC had unlawfully adopted and attempted to impose interconnection requirements on incumbent LECs that would have resulted in superior arrangements to that which the incumbent LEC provides to itself. Accordingly, the notion that the RLECs are required to provide a direct interconnection to the CLECs and CMRS providers beyond their networks, a level of interconnection that would be superior to that which the RLECs provide to themselves and other interconnecting carriers such as Verizon, violates 47 U.S.C. § 251(c)(2)(C) and the decision of the Eighth Circuit in *Iowa Utilities Board*.

In summary, Verizon's tariffs ask the RLECs to subsidize the CLECs' and CMRS providers' use of Verizon's network to exchange local traffic with the RLECs -- a unilateral

⁴⁰ PTA St. 1 at 19-20.

⁴¹ *Iowa Utilities Board v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000) ("*Iowa Utilities Board*").

decision made by these carriers in lieu of making the investments necessary to establish a direct interconnection. In light of the RLECs' obligation to provide direct or indirect interconnection only on their networks, the conclusion is inescapable that the affirmative election by the CLECs/CMRS providers to utilize the Verizon network in lieu of making the investments necessary to establish a direct interconnection is the sole and direct cause of, and requires the use of, the Verizon transit services at issue in this proceeding.

B. Verizon's Tandem Transit Tariffs Are Improperly Filed and Should Be Rejected

Verizon's rate changes are governed by the terms of their Chapter 30 Plans, as well as the statute itself. This Commission held recently in the Verizon North Price Change Filing that:

Under the Company's Plan, the allowable change (increase or decrease) in rates for noncompetitive services is based on the annual change in the Gross Domestic Product Price Index (GDP-PI). The Plan also contains special provisions for protected services and addresses revenue neutral adjustments to the rates of noncompetitive services. The Plan set forth in Verizon North's Chapter 30 Plan is a complete substitution of the rate base/rate of return regulation. Noncompetitive services are defined as regulated services or business activities that have not been determined or declared to be competitive.⁴²

A Chapter 30 company is permitted to file an *annual* rate adjustment for noncompetitive services and no other changes are permitted for noncompetitive services. The tariffs, which are the subject of this proceeding, are for noncompetitive services and were not filed as part of the annual tariff filing. Unless the tariffs apply to competitive services, such a rate increase is limited to Verizon's annual Chapter 30 rate adjustment.⁴³

Tandem transit services are not "competitive" under Chapter 30. The statutory definition of competitive services provides:

⁴² *Verizon North LLC 2011 Price Change Opportunity Filing*, Docket No. P-2010-2208086 (Order entered January 27, 2011), slip op. at 2.

⁴³ See Verizon PA's Alternative Regulation Plan, Part 1, Price Stability Mechanism; Verizon North's Alternative Regulation Plan, Part 3, Price Stability Plan; 66 Pa. C.S. § 3015.

‘Competitive Service’ A service or business activity determined to be competitive by the commission on or prior to December 31, 2008, and a service or business activity determined or declared to be competitive pursuant to section 3016 (relating to competitive services).⁴⁴

There was no action by the Commission declaring transit services to the RLECs to be competitive prior to December 31, 2008. Nor has there been any action since. In fact, a review of both Verizon and Verizon North’s current Alternative Regulation Plans on file with the Commission make no mention in identifying those services which have been found to be competitive of tandem transit service.

Under § 3016 a carrier may declare a retail “nonprotected” service as competitive.⁴⁵ No such declaration, however, has been filed by Verizon. Nor does Verizon’s claim that tandem transit service is “competitive” make any sense, since competitive services are not required to be tariffed. If transit service were required to be tariffed, it would have been included as part of Verizon’s tariff 500. The very filing of a non-tariff 500 service here demonstrates that Verizon does not view the service as competitive.

The only evidence on this issue that Verizon presented is the averment that “as a factual matter ... there is competition for local transit service.”⁴⁶ However, as Mr. Zingaretti testified, if the mere presence of a competitor in the market place was all that was required to have a service deemed competitive, every telephone service would be declared competitive. Verizon claims that the RLECs have other options for Tandem Transit service, pointing to the presence of Neutral Tandem.⁴⁷ However, Neutral Tandem’s focus is upon CLECs, not incumbents. Even the quote Verizon chose from Neutral Tandem’s website describes its service as “a more

⁴⁴ 66 Pa. C.S. § 3012.

⁴⁵ 66 Pa. C.S. § 3016.

⁴⁶ Verizon St. 1 at 9.

⁴⁷ Verizon St. 1.0 at 6.

efficient and cost-effective means for competitive carriers to route local traffic to one another.”⁴⁸ Neutral Tandem may be providing Tandem Transit service, but its core market is not the ILEC industry. As Mr. Zingaretti described, “a more thorough review of their website indicates that Neutral Tandem transformed how ‘wireless, cable, CLEC, and broadband telephone companies route local transit traffic to one another.’”⁴⁹ Verizon also states that the RLECs have not considered alternative transit options because “they currently use Verizon’s network to transit their local traffic without paying for it.”⁵⁰ As Mr. Zingaretti noted, however, “Verizon ignores the fact that these interconnection facilities are already in place and to replace them would be a potentially significant capital outlay. In addition, the RLECs are already paying for the exchange of local traffic as contemplated by the FCC -- up to the point of interconnection on their network.”⁵¹

In summary, Verizon has submitted no proof that its local transit service is a competitive service or complies with the procedures necessary to have it declared as such. The language of Chapter 30 requires a far more specific process,⁵² one which Verizon has not undertaken. Therefore, Verizon’s filing of its local transit service is not a filing related to a competitive service and is in violation of Chapter 30, because it was not included as part of that annual filing.

⁴⁸ PTA St. 1 at 21-22 (citing Verizon St. 1.0 at 7, Lines 8-9).

⁴⁹ PTA St. 1 at 22 (citing www.neutraltandem.com/prodServices/index.htm). See PTA Exh, GMZ-4.

⁵⁰ See Verizon St. 1.0 at 6.

⁵¹ PTA RT at 22.

⁵² PTA St. 1 at 6 (“When Verizon introduces a competitive service, it’s Chapter 30 obligation is to ‘...file informational tariffs for services declared competitive....’ [See Bell Atlantic Pennsylvania Inc.’s Alternative Regulation Plan, Part 2 – Competitive Services Deregulation Plan, sub-part A – Impact and Benefits.] This could have been accomplished by filing a new competitive service in the Verizon Pennsylvania, Inc. PA PUC Tariff No. 500, Informational Tariff for Competitive Services. This would not be a new concept for Verizon, as they already have approximately 80 competitive services and/or markets in that tariff. Instead, Verizon filed a new, fully regulated, non-competitive services tariff with the PUC through which it will end-run both the negotiation process for an appropriate agreement and their Chapter 30 obligations, unless the Commission dismisses the tariffs.”).

C. Tariffed Transit Service, As Proposed By Verizon, Fails To Address Incoming Tandem Transit Calling

A significant problem with Verizon's tariffs is the extremely limited definition of tandem service - only focusing upon the originating side and ignoring the terminating service that Verizon also provides when it accepts *and hands off* a local call. Mr. D'Amico conceded that there are two customers on a transited call, a calling and called customer, and two carriers, the originating and terminating carrier.⁵³ While Verizon charges only the originating carrier,⁵⁴ there are functionalities that Verizon also provides to the terminating carrier, one of which is the provision of billing records so that the terminating carrier can also bill the originating carrier.⁵⁵ Indeed, the purpose for Verizon requiring separate trunking for IXC toll is so that it can record local transit traffic (without changing its switch software⁵⁶) and tender a bill.⁵⁷

The PTA disagrees that tariffed tandem transit service should be narrowly viewed as a one-directional offering. Mr. Zingaretti challenged Verizon's notion that tandem transit service applies only to outgoing traffic.

Obviously, [the RLECs] also receive Tandem Transit Traffic. This in and of itself should illustrate how overly restrictive the tariff is and is yet another basis for the Commission to reject the filing. In response to the PTA's concerns, Verizon refuses to discuss the issue ("The only traffic at issue for this transit service is local traffic originating from the RLEC." [See VZ St. 1.0 D'Amico Direct at Page 17, Lines 1-2]) Although Verizon fails to provide a specific reference to support this statement, Section 3.5.4 of the tariff states "The customer may use the service only for Tandem Transit Traffic that originates on the customer's network".⁵⁸

⁵³ NT at 113-114.

⁵⁴ NT at 114.

⁵⁵ NT at 115. ("Q. One of the functionalities that Verizon provides is the billing records to the terminating carrier correct? A. Correct. Q. [Verizon] charges the originating carrier but it also provides functionalities to the terminating carrier correct? A. Correct.")

⁵⁶ NT at 77-78.

⁵⁷ NT at 115.

⁵⁸ PTA St. 1 at 14.

Verizon concedes that, in interconnection agreements, it is the option of the tandem customer to elect two-way or one-way facilities.⁵⁹ However, due to Verizon's narrow view of the tariff transit service as being "a one way service[,]” the customer receiving the tariffed service has no right to elect two-way trunking.⁶⁰ Verizon's interconnection agreements all address two-way traffic and the need for call originating records, but not the tariff, because of Verizon's constrictive view of tariffed tandem transit service.⁶¹

The PTA Companies have been seeking for some time to ensure that the traffic that Verizon sends through to the RLECs contains the calling information necessary to bill the originating carrier. "This lack of detail continues to nag the PTA Companies." An example of the PTA's concerns is exemplified in the ICA that Verizon has requested be approved by the Commission with a company called Halo Wireless.⁶² Not only does Halo misrepresent the nature of traffic, the calls are delivered to the sub-tending LECs with no originating number (Calling Party Number or "CPN") in the billing records, but rather a billing telephone number ("BTN") is intentionally inserted into the call detail record. The BTN provided is local to the called number, although not factually correct, in order to make the call appear to be local, and to enable such traffic to flow over local interconnection trunks instead of IXC trunks.⁶³

The other, related problem is caused by Verizon itself stripping out calling number details and inserting zeros instead. "This is a well known problem that Verizon barely acknowledges

⁵⁹ NT at 84.

⁶⁰ NT at 85.

⁶¹ NT at 112.

⁶² *Joint Petition of Verizon Pennsylvania Inc. and Halo Wireless Services, Inc. for Approval of an Interconnection Agreement and Amendment No. 1 to the Interconnection Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2011-2251147; and *Joint Petition of Verizon North LLC and Halo Wireless Services, Inc. for Approval of a Wireless Interconnection Agreement and Amendment No. 1 Under Section 252(e) of the Telecommunications Act of 1996*, Docket No. A-2011-2250700.

⁶³ PTA St. 1 at 15.

and refuses to do anything about.”⁶⁴ If the PTA Companies are required to provide accurate CPN and other billing data, the tariffs should specify that, so too, are the PTA Companies entitled to receive such information and that Verizon, as the Tandem Operator, should take steps to ensure that neither it nor anyone else strips the data out of the call.

There should be no question that Tandem Transit calls pass both ways. Verizon’s publically-offered, but non-tariffed Access Tandem Connection (“ATC”) service provides transiting from the service provider *to both Verizon and non-Verizon* end offices. In marketing this ATC service, Verizon states that the service allows the purchaser to *send and receive* traffic to third parties. “So purchasers of ... ATC service ... are buying a 2-way product, but the RLECs are only receiving a 1-way service”⁶⁵ under Verizon’s tariffs. A purchaser of tandem transit service should have access to accurate records reflecting both sides of this equation. This is yet another reason why Verizon’s tariffs are inappropriate for tandem transit service.

1. **The RLEC Should Have the Right to Request 2-Way Trunking**

The facilities that connect the RLECs and Verizon are not adequately defined in the tariffs. There is no reference assuring that interconnection will continue to be accomplished over two-way trunk groups. Verizon’s interconnection agreements with other service providers allow the use of two-way trunk groups,⁶⁶ including the conversion of one-way trunk groups to two-way trunk groups.⁶⁷ These same network considerations that are included in negotiated agreements, should also be included in the tariffs. “Without clear language addressing the form of interconnection, the PTA companies will be at the mercy of Verizon’s (non)willingness to

⁶⁴ PTA St. 1 at 15.

⁶⁵ PTA St. 1 at 15-16.

⁶⁶ PTA St. 1 at 11 (“For instance, see the Verizon Interconnection Agreement with 321 Communications, filed with the PA PUC on July 22, 2010, Interconnection Attachment, Section 2.4 Two-Way Interconnection Trunks.”).

⁶⁷ PTA St. 1 at 11 (“See Verizon Interconnection Agreement with 321 Communications, filed with the PA PUC on July 22, 2010, Interconnection Attachment, Section 2.4.3.”).

negotiate on this issue.”⁶⁸ The tariffs need to be much more specific as to the facilities contemplated.

2. Verizon Should Commit to Enforcing ICA Commitments Regarding Call Detail and Passing CPN Without Stripping

Verizon should provide adequate call detail records to the terminating company, including the actual originating number (i.e., CPN) and the Carrier Identification Code (“CIC”) of the originating carrier.

There are two principal problems with Verizon’s tandem transit service from the perspective of the terminating carrier -- both are billing issues. The terminating carrier relies upon the Verizon billing records (EMI) to render a bill to the originating carrier.⁶⁹ Where those billing records are not accurate or missing critical information, such as CPN, originating carriers are either not billed accurately or not billed at all.

In attempting to diminish the importance of tandem providers generating accurate call records, Verizon claims that “the RLECs’ arguments about phantom traffic are overblown...”⁷⁰ and that a federal solution is necessary.⁷¹ Actually, what is required is that Verizon enforce its current contracts to ensure that CPN is received and cease stripping out CPN in its tandems.

i. Incoming Call Detail Is Often Missing

Verizon misses the point when it states that it “generally” passes along call detail received from the originating carriers and, if the detail is incomplete, that is “probably” due to

⁶⁸ PTA St. 1 at 11 (“The requirement to ‘cooperate and assist the Company in reconfiguring interconnection facilities, and the trunk groups riding on such interconnection facilities’ is hardly a blueprint of specificity for interconnection.”).

⁶⁹ NT at 94-95.

⁷⁰ Verizon St. 1.0 at 29.

⁷¹ Verizon St. 1.0 at 29.

the actions of the originating local service provider.⁷² Verizon has a contractual right contained in all of its interconnection agreements to obtain CPN on “at least 95%” of all incoming calls, including tandem transit calls.⁷³ Verizon⁷⁴ and the RLECs⁷⁵ abide by this requirement when their customers originate calls.

Yet, Verizon makes little or no attempt to enforce CPN adherence by other originating providers.⁷⁶ There is no process in place for a terminating carrier to even complain about the lack of CPN.⁷⁷ In surrebuttal testimony,⁷⁸ and again on recross, Verizon claimed that it “has no control over what the originating party sends...and I guess that I would characterize that as impossible.”⁷⁹ These claims are exaggerated and simply reflective of the fact that Verizon wants to be paid to provide tandem transit service, but doesn’t want to bear any responsibility for ensuring that the traffic meets contractual standards.

It would not be “impossible” for Verizon to undertake measures to ensure that the tandem traffic delivered to it complies with the interconnection agreement. Verizon simply does not want to do so, as its witness conceded:

Q. So you have a contractual right, if more than five percent of the traffic doesn’t have CPN, to go to the carrier and enforce this contractual provision, correct?

A. I think technically we could do that.

Q. It's not difficult to discover, correct? You know when you're not - - you can do a traffic study for a month to find out what percentage of traffic has calling party number on it. Correct?

⁷² Verizon St. 1.1 at 28.

⁷³ Verizon St. 1.1 at 16 n.3; NT at 117 (...contract provisions require each party to pass calling party information on at least 95 percent of the calls.); *see also* NT at 123.

⁷⁴ NT at 117.

⁷⁵ NT at 94-95.

⁷⁶ NT at 117 (“Q. Does Verizon enforce that provision? A. We try to. The FCC I believe has tried to as well, but you know, sometimes either we don't have the ability to enforce it or there's so many bodies, you can only look at so many, you know, carriers, you know.”).

⁷⁷ NT at 124.

⁷⁸ Verizon St. 1.1 at 22 (Ensuring carrier compliance “would impose impossible obligations...”)

⁷⁹ NT at 122 and 123 (“...impossible for Verizon to control traffic”).

A. Yeah I but traffic studies, you know, I mean, people think traffic studies, you just look at stuff. I mean, there there's a lot of data involved in traffic studies and there's a lot of resources both capturing the call detail and having somebody summarize it and review it. So I mean, it is possible and we do it, but it's not like every day somebody looks at a report and says, CPN is up to 96 percent or down. I mean, it is a special - -

Q. If you get a complaint about a carrier that is not passing CPN, and you look at that carrier's traffic and study it for a month, that's not a big deal, is it?

A. Well, I don't know that we have a process for people to come in and complain about CPN. And once we do identify that carrier - - again, we do it, but it's not an easy thing. It's an administrative burden -- not burden, but it's a lot of administration and it's just a lot of records. I mean, I don't know if you've ever, you know, looked at some of, you know, the detail, but it's just a lot of volume, a lot of volume goes through our tandem.⁸⁰

If the CPN provisioning issue is important enough to include in all of Verizon's interconnection agreements and if the whole purpose of requiring the RLECs to split trunks is to allow Verizon to record and bill for tandem transit service (and render accurate billing records for the carrier's terminating RLEC local calls), then it is not unreasonable for the tariffs to also include tariff language regarding the level of CPN included in traffic delivered to the RLECs.

Verizon's witness conceded that, were this an interconnection agreement, the CPN obligation would be included and does not disagree that the provision should be included:

Q. If this is standard language in an interconnection agreement and requires Verizon to pass CPN on 95 percent of the calls and that's good enough for the interconnection agreement, why isn't it good enough for the tariff as well?

A. We didn't need to put that provision in for the transit -- let me think about this for a second. I guess we didn't put it in there -- I mean, I wouldn't disagree with everybody passing CPN. We just didn't put it in.⁸¹

⁸⁰ NT at 123-125.

⁸¹ NT at 118.

The PTA submits that the tariffs should be revised to require CPN on 95% of the tandem traffic exchanged on both an incoming and outgoing basis, including when the traffic originates on a third-party network.

ii. Verizon Strips Out the CPN On Billing Records

Verizon, itself, alters call records by replacing the originating number with zeros, as Mr. D'Amico acknowledged.⁸² This action by Verizon precludes the RLECs from determining the correct jurisdiction applicable to tandem transit calls and rendering an accurate bill.

Verizon's witness conceded that its tandem software, where the switch is a "DMS,"⁸³ removes the calling party number from the billing data and populates it with zeros.⁸⁴ The EMI (billing) records then produced by Verizon include either a billing telephone number ("BTN") or, where the BTN is needed to identify the carriers to be billed, "zeros are in the originating number field."⁸⁵ The witness described BTN as "a kind of fictitious number associated with the -- it's used for billing. It's not the actual number of the originating party. It's assigned to that trunk."⁸⁶

Verizon declined to identify the extent of this problem. Its witness did not know how many of the tandems in Pennsylvania are DMS switches.⁸⁷ The witness does not know what portion of the traffic flowing across the tandem is affected by the insertion of a billing number in lieu of the CPN.⁸⁸ Nor would it address the steps needed to fix it. The software problem can be fixed technologically,⁸⁹ and while Verizon has investigated changing the software, it has not

⁸² Verizon St. 1.1 at 18.

⁸³ The DMS Switch is a line of Digital Multiplex System (DMS) telephone exchange switches manufactured by Nortel Networks. http://en.wikipedia.org/wiki/Digital_Multiplex_System.

⁸⁴ NT at 99-100.

⁸⁵ NT at 99-100.

⁸⁶ NT at 100.

⁸⁷ NT at 100.

⁸⁸ NT at 104.

⁸⁹ NT at 102.

remedied the situation.⁹⁰ The Verizon witness did not know how much it would cost Verizon to fix the software problem.⁹¹ Clearly, there is a problem and, once again, Verizon is refusing to address it while at the same time insisting on such things as trunk modifications in order for Verizon to fix and address matters which are of concern to Verizon and its billing issues.

Verizon's tariffs should be modified to require Verizon to include the CPN in the billing records of any tandem transit calls without stripping. Verizon's Tariff Section 3.5.7 requires RLECs to pass both calling party number and called party number when Verizon, itself, does not do this.

3.5.7 Signaling

The customer's facilities shall provide the necessary on-hook, off-hook, answer and disconnect supervision for Tandem Transit Traffic. The customer shall deliver Tandem Transit Traffic to the Telephone Company Tandem or End Office with the ten digits of the calling party number and the ten digits of the called party number dialed by the customer's end user.

3. The Tariffs Should Also Specify When Direct Trunking is Appropriate

Also absent from Verizon's tariffs are any provision defining an appropriate threshold at which point dedicated facilities for the traffic would be more appropriate, thus allowing the exchange of traffic on the RLECs' networks at *any* volume, no matter how high. When the local traffic between a specific CLEC and a RLEC or between the specific CMRS provider and a RLEC reaches the level of traffic that constitutes a level of typically associated with one DS-1, then the CLEC or CMRS provider should be required to provision a dedicated arrangement (i.e., not switched through the Verizon tandem) either through a direct or indirect facilities arrangement consistent with the discussion in paragraph 1039 of the *FCC's Local Competition*

⁹⁰ NT at 101 ("it still is, you know, is out there.").

⁹¹ NT at 102.

Order. If third-party carriers want to exchange local traffic with the RLECs, then those third-party carriers should request an intercarrier agreement as contemplated by the Telecommunication Act wherein the parties negotiate appropriate terms by which the traffic exchanged can be measured and monitored. The RLECs have a statutory right to negotiate these terms, and they should not be forced to accept them as unilaterally provided by Verizon.

D. The Tariff Definition of Local Service Must Be More Specific

The PTA Companies are also concerned about the incomplete tariff definitions proposed by Verizon. The PTA contended in its complaint that the term “Local Service Provider” must be revised so as to exclude Verizon and any third party’s network that uses Verizon’s switching to provide its end user service. In response to this, Verizon states that “the definition of Tandem Transit Traffic already excludes such [Verizon] customers.”⁹² Verizon’s testimony fails to address the second half of that objection, that customers of third party providers that utilize Verizon’s switching must be removed from the equation as well. “Without this correction, calls delivered to resellers of Verizon’s service could result in charges being billed to the RLECs. Verizon would also bill the RLEC to provide Tandem Transit service when these calls are delivered to CLECs purchasing products like Verizon Wholesale Advantage, a “bundle of loop, switching, and enhanced features such as Voice Mail, offered through a commercially negotiated agreement between Verizon and a CLEC.”⁹³ It would seem that this may result in Verizon being compensated twice for the same service.

Moreover, the definition of exchange access in the tariffs is vague, as they simply refer to the legal definition contained in the Telecommunications Act, which “is not a working definition

⁹² PTA St. 1 at 12.

⁹³ See Verizon website at <http://www22.verizon.com/wholesale/local/order/services/1..platform-platform.00.html>, visited July 28, 2011.

of the type employed in the industry, defined by the FCC or by this Commission.”⁹⁴ Verizon states that the tariff definition is intended to “distinguish local traffic (e.g. traffic ‘within a telephone exchange’) from toll traffic (traffic that passes from one exchange to another).”⁹⁵ By relying on definitions provided in the Telecommunications Act, however, Verizon’s tariffs create ambiguities “which will certainly lead to billing disputes.”⁹⁶

Under the Telecommunications Act, “telephone exchange service” means:

(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.⁹⁷

It is anything but clear as to what traffic is subject to transit charges. While Verizon implies that it only applies to local calls, the RLECs are doubtful that it is Verizon’s intent to only apply transit charges.⁹⁸ If Verizon wants to bill Tandem Transit charges for “local” calls as indicated in its witness’ testimony,⁹⁹ the tariffs should be re-written to match. As discussed elsewhere, a negotiated contract would be the better solution to this problem.

The draft ICA attached to the PTA’s testimony, sets forth “a more specific and workable definition.”¹⁰⁰

⁹⁴ PTA St. 1 at 12.

⁹⁵ Verizon St. 1.0 at 18.

⁹⁶ PTA St. 1 at 13. Part A of section 2.6 in the proposed tariff calls for the traffic to be (1) within a telephone exchange, or (2) within a connected system of telephone exchanges within the same exchange area. Part B of section 2.6 provides another definition, but that is premised upon such services being “comparable”.

⁹⁷ 47 U.S. C. § 153(47).

⁹⁸ PTA St. 1 at 13 (“While the PTA Companies can make a strong argument that, under the Verizon tariff, the only Tandem Transit charges that could ever be charged would be for calls within a single RLEC exchange, from an RLEC customer to a customer of another service provider. There is no doubt that Verizon’s position would be different – for instance they are likely to look for Tandem Transit charges on intra-MTA wireless traffic, since this is considered local for purposes of intercarrier compensation.”).

⁹⁹ Verizon St. 1.0 at 19.

¹⁰⁰ PTA St. 1 at 14.

2.31 Local Traffic - Traffic where the originating End User and the terminating End User are both physically located within the local calling area or non-optional extended local calling scope area. Local Traffic specifically excludes: (1) any Internet Traffic; (2) traffic that does not originate and terminate within the non-optional Extended Local Calling Scope Arrangement, based upon the actual originating and terminating points of the complete end- to end communications; (3) Toll/Interexchange Traffic; (4) Optional Extended Local Calling Scope Arrangement traffic; (5) Special Access, private line, Frame Relay, ATM, or any other traffic that is not switched by the terminating Party; (6) Voice Information Service Traffic; (7) Virtual NXX Traffic; or (8) Remote call forwarded traffic.¹⁰¹

This definition makes it clear as to what is local traffic subject to transit charges and does not open the door to battles over paying for traffic that is not local in the sense of the originating and terminating end user being physically located in the local calling area. This definition is actually quite similar to what Verizon has used in its agreements for the definition of reciprocal compensation traffic. It clearly identifies what is meant by local and thus the traffic which is subject to transit charges. It avoids the battles that rage over the federal legislative definitions, including as to Core Communications and Halo Wireless.

E. Rule 3.5.1 of Verizon's Tandem Transit Tariffs Required The RLECs To Separate Traffic Because Verizon Will Not Make Software Changes On Its Network And, Then, Gives Verizon The Ability To Unilaterally Force Changes On the RLECs' Networks

Rule 3.5.1 of the proposed tariffs provide as follows:

3.5.1 Established Interconnection

The customer must have interconnection to each Telephone Company Tandem in each LATA where the customer delivers any Tandem Transit Traffic to the Telephone Company. Upon commercially reasonable notice, the customer shall cooperate with and assist the Company in reconfiguring Interconnection facilities, and the trunk groups riding on such interconnection facilities, for use in connection with such services.

The PTA's principal concern with Rule 3.5.1 is the phraseology "the customer *shall* cooperate with and assist the Company" in reconfiguring network facilities.

¹⁰¹ PTA St. 1 at 14, PTA Exh. GMZ-3, ICA Glossary Attachment at 2.31.

This language would invest too much open-ended discretion in Verizon as Mr. Zingaretti testified:

For example, Verizon could demand that the PTA Companies split out existing trunks to separate traffic. We have no idea what this will cost and, as far as we know, neither does Verizon. The language is too vague. The tariff provides that we SHALL reconfigure interconnection facilities, essentially as Verizon directs and we have no say. Such a provision is totally inappropriate and unfair. We also believe that such requests have not been imposed on all other carriers, thus, discriminating against the PTA Companies.¹⁰²

The PTA has identified two situations where network revisions might be required, one immediate (common trunk separation) and one potential (tandem switch locational changes).

Mr. D'Amico argued that Rule 3.5.1 is necessary to address reconfiguration needed to meet industry trunking standards.¹⁰³ This line of argument is not compelling. The tariffs do not state that the parties will follow industry standards; only Verizon standards. When asked, however, the witness could not identify a single industry standard group that establishes trunking standards, other than to say he believes Telcordia may have some published for intraLATA trunking,¹⁰⁴ ignoring the fact that the subject matter here is common trunks and Verizon's desire to separate all IXC trunking. Upon further questioning, Verizon's witness equivocated on whether the tariffs should just simply incorporate industry standards. "I don't think it's specific to just Telcordia... We [Verizon] need to have separate trunk groups and that's what this language is trying to do is, the parties try to work together to establish that."¹⁰⁵ So, instead of an industry required trunk configuration, separation is something that Verizon prefers.¹⁰⁶ This, in a nutshell, is the problem with Rule 3.5.1, as drafted.

¹⁰² PTA St. 1 at 9-10.

¹⁰³ Verizon St. 1.1 at 4.

¹⁰⁴ NT at 61.

¹⁰⁵ NT at 62.

¹⁰⁶ NT at 62.

1. Trunk Separation Is Caused By Deficiencies On Verizon's Network, Not The RLECs'

Common trunk groups between Verizon and the RLECS carry a wide variety of traffic: interexchange carrier ("IXC") toll, ILEC (ITORP) toll, local traffic exchanged with Verizon and local traffic exchanged with other carriers.¹⁰⁷ Verizon desires the RLECs to separate out the IXC traffic into completely separate trunks.¹⁰⁸ The rationale presented is that the inclusion of IXC toll traffic in the common trunk group makes it difficult for Verizon to bill for tandem transit. Were Verizon to begin call recording, its software would then *automatically* begin generating billing records for IXC traffic,¹⁰⁹ resulting in double billing, since the RLEC (under prior agreement with Verizon) already currently bills.¹¹⁰ As Mr. D'Amico explained: "The way the system is set up is, traffic that is recorded is fed into the downstream systems that feed into [Verizon's] billing system."¹¹¹

Verizon's solution to this software deficiency on its network is to require the tandem customer (here RLEC) to configure tandem trucking to separate IXC toll traffic into a different set of trunks. Verizon has undertaken no studies regarding the cost of changing the trunks to isolate out IXC toll traffic.¹¹² Nor does it know whether the cost of separation will exceed the revenues generated by Verizon on Exhibit G.¹¹³

There are alternatives. The information contained in Exhibit G, a study of the traffic contained on the common trunks, could be used for billing purposes in lieu of trunk

¹⁰⁷ NT at 66.

¹⁰⁸ NT at 67.

¹⁰⁹ NT at 67-68.

¹¹⁰ NT at 68.

¹¹¹ NT at 70 ("Verizon would record and then would also send out a bill so there's this potential under Verizon systems of a double billing[.]").

¹¹² NT at 76.

¹¹³ NT at 77-78.

separation.¹¹⁴ However, Verizon prefers not to do so, because the process “would be pretty manual and would soon probably become unmanageable,” but this is based upon the number of factors involved and assumption that this would be undertaken monthly, which is not true.¹¹⁵ Factors are recalculated quarterly, annually or as otherwise agreed to by the parties.¹¹⁶

If the purpose of trunk separation is to allow Verizon to generate bills for tandem transit traffic, it is also fair to require Verizon to pay for trunk reconfiguration. Verizon has declined to fix its billing software issue. Verizon has not studied the cost of revising its software.¹¹⁷ Its witness does not know what it would cost Verizon to revise its tandem software so that when the bill is recorded, it is not billed.¹¹⁸ In essence Verizon is shifting the costs associated with remedying its own billing problems to the RLECs because “well, Verizon is offering a service, a transit service. Part of that service needs to have it designed this way. There’s other reasons, it’s not just billing, the issue with the phantom traffic, but this is the way that it’s set up for other carriers...”¹¹⁹

This rationale ignores the fact that the Verizon/RLEC common trunks between Verizon and the RLECs were set up long ago. Verizon has had plenty of time to fix its software issues, but prefers that the RLECs reconfigure the common trunks at their cost rather than use a factor or have Verizon fix the software issue.

¹¹⁴ NT at 71.

¹¹⁵ NT at 72-73. The Verizon witness agreed that, typically, nobody recalculates factors on a monthly basis. NT at 73-74.

¹¹⁶ NT at 73-74 (“Q. ...It’s up to the parties, correct? A. Yes.”).

¹¹⁷ NT at 79.

¹¹⁸ NT at 79.

¹¹⁹ NT at 77-78.

2. **Tandem Reconfiguration Would Be On the Verizon Side of the Meet Point and, Hence, Verizon's Expense.**

Rule 3.5.1 also requires the PTA Companies to “have interconnection to each Telephone Company [Verizon] Tandem in each LATA where the customer delivers any Tandem Transit Traffic to the Telephone Company.” Verizon could, under 3.5.1, “require RLECs to duplicate their Tandem Transit trunks ... should Verizon re-home an end office to a different tandem” or switch out tandems. This action could cause the RLEC to invest in new infrastructure to connect to Verizon.¹²⁰ No one knows what the tandem change might be, so that “[t]he RLECs cannot predict this additional cost, and neither can Verizon.”¹²¹ However, tandems do change.¹²² The tariffs, therefore, unnecessarily and discriminatorily, “obligates the RLECs to new capital and operating costs as directed by or at the whim of Verizon.”¹²³

Moreover, the “follow the tandem” language conflicts with the Verizon witness’ version of meet point responsibility.¹²⁴ Mr. D’Amico agreed that Verizon is responsible for costs on *its side* of the meet point,¹²⁵ and acknowledged that including a provision expressly recognizing Verizon’s responsibility in this regard is something that he thinks Verizon would be “willing to look at it. [But], I can’t commit to specific language right now.”¹²⁶

¹²⁰ PTA St. 1 at 10 (“RLECs and their customers would be better served investing in their broadband infrastructure rather than playing a game of “follow the leader” in search of Verizon end offices.”).

¹²¹ PTA St. 1 at 9.

¹²² While the Verizon witness stated that he can’t remember the last time a tandem was changed out in Pennsylvania (attempting to minimize the PTA’s concerns), but then was not aware that three years ago, Verizon re-homed Pittsburg traffic to its Oakland tandem. NT at 81.

¹²³ PTA St. 1 at 11.

¹²⁴ Verizon St. 1.1 at 11 (“Whatever rearrangements and/or additional trunk groups the RLEC might need would only be on the RLEC side of the meet point. The RLECs would not be building interconnection facilities into Verizon’s service territory to reach Verizon’s tandems.”).

¹²⁵ NT at 82.

¹²⁶ NT at 83.

3. Summary of Rule 3.5.1 Discussion

The RLECs' concerns over open-ended tariff language that would require them ("the customer *shall* cooperate with and assist the Company") in reconfiguring network facilities are justified. The PTA Companies proposed, instead, the following language (as part of the interconnection agreement):

2.2.1 The Parties have established various trunk groups under their pre-existing interconnection arrangements, under which the Parties provide services, including the transit service which is the subject hereof. ("Interconnection Trunks") Any new trunk groups necessitated by the provision of services hereunder shall be on terms to which both Parties mutually agree.¹²⁷

In other words, cooperation, not dictation, is required. Verizon's witness found this unacceptable because trunk separation was not required.¹²⁸

Again, this is the type of issue that the parties should work out in an agreement. If a tariff is to be required, however, the PTA's general language should be adopted and the trunk specific languages proposed in Verizon's surrebuttal testimony added.¹²⁹ Verizon's witness agreed that current language at 3.5.1 requires that, "if Verizon asks for it, [the RLECs] shall cooperate and assist Verizon in doing whatever it is that Verizon wants."¹³⁰ This is too open ended. If Verizon desires a specific change in the network architecture, the parties can discuss and accommodate the proposal. However, the Verizon language would always compel the RLEC to do what Verizon says. That is unfair.

¹²⁷ PTA St. 1, Exhibit GMZ-3, page 26, ICA at § 2.2.1.

¹²⁸ NT at 108 ("I don't read that to say that there's going to be a separate trunk group... Sometimes the 'mutually' part causes problems.").

¹²⁹ Verizon St. 1. at 9 ("The customer will establish, and will use, as appropriate, the following separate and distinct trunk groups over its pre-existing interconnection facilities: Interconnection Trunks for the transmission and routing of Telephone Exchange Service Traffic, IntraLATA Toll Traffic, Tandem Transit Traffic, and dial-up switched Internet traffic within a local calling area; Access Toll Connecting Trunks for the transmission and routing of Exchange Access traffic, including translated toll free service access code (e.g., 800/888/877) traffic, between customer's Telephone Exchange Service end users and purchasers of Switched Exchange Access Service via a Verizon access Tandem.").

¹³⁰ NT at 63("Right.").

F. The Verizon North Tandem Transit Rate is Unsupported and Should Be Rejected

Verizon PA proposes to charge a rate of \$0.001362 per minute-of-use and Verizon North proposes a much higher rate of \$0.0047856 per minute-of-use.¹³¹

Verizon PA's Tandem Transit Traffic Service rate of \$.001362 "is derived by adding the applicable rate elements established by this Commission for unbundled network elements ("UNEs") for the separate functionalities that combine to provide transit service."¹³² Mr. Zingaretti found that "based on TELRIC principles, [the Verizon PA rate] could be considered appropriate."¹³³

There is no such rate development for Verizon North, however, to justify a rate that is almost three and one half times higher.¹³⁴ Verizon North has no UNE tariff.¹³⁵ It offered no cost¹³⁶ or other support for the rate, other than it has been accepted by CLECs in interconnection agreements.¹³⁷ The fact that the rate might have been voluntarily accepted previously is insufficient grounds to include the rate in a tariff. At the very least, Verizon North should have presented a similar cost study to that employed to justify the Verizon PA rate.

Without a cost study, Verizon North cannot justify a higher rate higher than Verizon PA. There is no difference between the tandem transit service offered by Verizon North and Verizon PA.¹³⁸ There are no additional elements being offered.¹³⁹ Mr. D'Amico was unaware of any

¹³¹ Verizon St. 1 at 10.

¹³² Verizon St. 1 at 11; See also NT at 58.

¹³³ PTA St. 1 at 9.

¹³⁴ PTA St. 1 at 9.

¹³⁵ NT at 58.

¹³⁶ NT at 58.

¹³⁷ Verizon St. 1 at 13.

¹³⁸ NT at 57.

¹³⁹ NT at 57.

different components of the network being used and could only vaguely refer to “potentially different switch types or different network architectures.”¹⁴⁰

The PTA, therefore, takes the position that no rate has been justified by Verizon North as just and reasonable. Given the identical nature of the service, the PTA would agree to accept, however, a Verizon North rate that mirrors that of Verizon PA, but no more.

IV. CONCLUSION

Wherefore the PTA and its member companies request that this Commission:

1. Reject Verizon’s attempt to tariff a service which has been and continues to be the product of a negotiated interconnection agreement and require the RLECs and Verizon to negotiate an interconnection agreement.
2. In the alternative, if this Commission accepts that a tariff can be filed by Verizon, it deny the tariff as unlawfully filed or, if lawfully filed, require Verizon to revise the tariff to correct for the issues identified by the PTA in this Brief.

Respectfully Submitted,

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¹⁴⁰ NT at 57.

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C

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United States District Court,
D. Nebraska.

QWEST CORPORATION, Plaintiff,

v.

COX NEBRASKA TELCOM, LLC, Nebraska
Public Service Commission, Gerald L. Vap, in their
official capacities as Commissioners of the Nebraska
Public Service Commission, Anne C. Boyle, in their
official capacities as Commissioners of the Nebraska
Public Service Commission, Tim Schram, in their
official capacities as Commissioners of the Nebraska
Public Service Commission, Rod Johnson, in their
official capacities as Commissioners of the Nebraska
Public Service Commission, and Frank E. Landis Jr.,
in their official capacities as Commissioners of the
Nebraska Public Service Commission, Defendants.

No. 4:08CV3035.
Dec. 17, 2008.

West KeySummaryTelecommunications 372
857

372 Telecommunications

372III Telephones

372III(F) Telephone Service

372k854 Competition, Agreements and
Connections Between Companies

372k857 k. Duty to Connect with Other
Lines or Furnish Service Thereto; Collocation. Most
Cited Cases.

The incumbent local exchange carrier (ILEC) was required to provide transit service to a competitive local exchange carrier (CLEC). CLEC wanted to purchase transit service from the ILEC to enable the CLEC to indirectly interconnect with other carriers, so CLEC customers could call customers of a third carrier. Although interconnection is not defined under the Telecommunications Act, the unambiguous language of the federal statute provides that ILEC must provide transit service directly or indirectly to other carriers. Communications Act of 1934, § 1, 47 U.S.C.A. § 151; Telecommunications Act of 1996, § 101, 47 U.S.C.A. § 251.

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MEMORANDUM OPINION

LYLE E. STROM, Senior District Judge.

*1 This matter comes before the Court on Qwest Corporation's ("Qwest") petition for review of the Nebraska Public Service Commission's ("Commission") Order (*See* Filing No. 1).

BACKGROUND

1. Factual Background

This case arises under the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151 et seq., and involves the issue of whether an incumbent local exchange carrier ("ILEC") is required to provide transit service to a competitive local exchange carrier ("CLEC") pursuant to the ILEC's interconnection obligations under Section 251 of the Act.^{FN1} In this case, Qwest is an ILEC, and Cox Nebraska Telecom, LLC ("Cox") is a CLEC.

^{FN1} ILEC means "a local telephone service provider that used to have a monopoly in a certain area." Qwest Corp. v. Pub. Utils. Comm'n of Colo., 479 F.3d 1184, 1186 (10th Cir.2007); *see also* 47 U.S.C. § 251(h). CLEC means a telecommunications carrier that competes with already existing carriers in a local market. *See Qwest Corp.*, 479 F.3d at 1186.

Cox wants to purchase transit service from Qwest to enable Cox to indirectly interconnect with other carriers.^{FN2} Cox benefits from an indirect interconnection because it enables Cox customers to call customers of a third carrier without requiring Cox to directly interconnect with the third carrier. To

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achieve an indirect interconnection, Cox needs a carrier, such as Qwest, to act as a transiting carrier. As a transit carrier, Qwest acts as a bridge between the networks of Cox and the third carrier, transiting traffic that originates from an end user on Cox's network and terminates to an end user on the third carrier's network (See R-00827).

FN2. The term interconnect will be discussed in more detail below, but generally, carriers use the term interconnect "to refer to the physical linking and use of networks owned by different carriers to permit customers of one carrier to call customers of another carrier ." *Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F.Supp.2d 850, 855 n. 6 (S.D.Iowa 2005).

Transit service is a switching and transport function that Qwest provides carriers to indirectly interconnect with other carriers (Filing No. 43, p. 8). Although Qwest is willing to provide transit service, the parties dispute whether Qwest is required to provide the service at cost-based rates.^{FN3}

FN3. Even though Qwest is willing to provide transit service, the Court must determine whether Qwest is required to provide transit service under Section 251 of the Act because this finding impacts the proper rate for the service.

2. Procedural Background

Qwest and Cox attempted to negotiate an interconnection agreement as required by the Act. The parties failed to negotiate the rate at which Qwest would offer transit service, and Cox submitted the issue to arbitration.^{FN4} The arbitrator determined that Qwest was required to provide transit service under Section 251 at "total element long run incremental cost" ("TELRIC") based rates (See R-01528-10538). The Commission adopted the arbitrator's findings (See R-02088-02089).

FN4. The parties submitted several issues to arbitration, but Qwest's obligation to provide transit service is the only issue on appeal.

Qwest petitioned the Court for review of the Commission's order, seeking declaratory and injunctive relief.^{FN5} Qwest claims the Commission errone-

ously interpreted Section 251 of the Act and acted ultra vires when it regulated the rates for transit service. Qwest claims transit service is governed by Section 271 of the Act, and the Federal Communications Commission ("FCC") has sole jurisdiction over the pricing of network elements governed by Section 271.

FN5. The Court has jurisdiction over all of Qwest's claims pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 47 U.S.C. § 252(e)(6).

STANDARD OF REVIEW

The Court reviews a state commission's interpretation and application of federal law de novo. See *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 530 F.3d 676, 682 (8th Cir.2008).

DISCUSSION

In this case, Section 251 of the Act is at issue. "The plain meaning of a statute controls, if there is one, regardless of an agency's interpretation." *Horras v. Leavitt*, 495 F.3d 894, 900 (8th Cir.2007)(quoting *Hennepin County Med. Ctr. v. Shalala*, 81 F.3d 743, 748 (8th Cir.1996)). "If there is ambiguity in a statute that an agency has been entrusted to administer, however, the agency's interpretation is controlling when embodied in a regulation, unless the interpretation is 'arbitrary, capricious, or manifestly contrary to the statute.' " *Id.* The FCC is the agency entrusted to administer the Act,^{FN6} and therefore, the Court must defer to reasonable FCC interpretations of the Act where applicable.

FN6. 47 U.S.C. § 151.

*2 Section 251 of the Act establishes a "three-tiered hierarchy of escalating obligations" on telecommunications carriers based on the type of carrier involved. *Total Telecomms. Servs., Inc.*, 16 F.C.C.R. 5726, 5737 (2001). The first tier imposes limited obligations on all telecommunications carriers, including a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a)(1) (emphasis added). The second tier imposes additional obligations on all local exchange carriers ("LEC"), including a duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). The third

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tier imposes more stringent obligations on ILECs, including a duty to interconnect an ILEC's network with the facilities and equipment of a requesting CLEC. 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a). Specifically, Section 251(c)(2) states an ILEC has the following duty:

... to provide, for the

facilities and equipment of any requesting telecommunications carrier, **interconnection** with the local exchange carrier's network-

(A) for the transmission and routing of telephone exchange service and exchange access;^{FN7}

^{FN7}. The Act defines "telephone exchange service" as: "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). The Act defines "exchange access" as: "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

47 U.S.C. § 251(c)(2) (emphasis added).

The parties dispute whether an ILEC's interconnection obligations under Section 251(c)(2) include a duty to provide transit service when an interconnecting CLEC seeks to indirectly interconnect with a third carrier. The plain meaning of the statute's text establishes Congress's clear intent to impose such a duty on ILECs.

The Act does not define interconnection, but the unambiguous language of Section 251 demonstrates that an ILEC must provide transit under Section 251(c)(2). Section 251(a) requires all carriers to interconnect and provides that a carrier may fulfill its interconnection obligation by interconnecting directly or indirectly with other carriers. 47 U.S.C. § 251(a)(1). By permitting carriers to fulfill their interconnection obligations through indirect interconnection, Congress clearly envisioned that indirect interconnections would be an available means of interconnection. Transit service plays a critical role in the availability of indirect interconnections. See Developing a Unified Intercarrier Comp. Regime, 20 F.C.C.R. 4685, 4740 (2005)(Further Notice of Proposed Rulemaking)("Further Notice of Proposed Rulemaking"). As recognized by the FCC, carriers "often rely upon transit service from the incumbent ILECs to facilitate indirect interconnection with each other." *Id.* Because transit service is essential to indirect interconnections, the text of Section 251(a) strongly indicates that an ILEC is required to provide transit under the Act.

*3 When Section 251(a) is read in conjunction with Section 251(c), it is clear that Congress imposed this obligation in Section 251(c) of the Act.^{FN8} Under Section 251(c), an ILEC must allow a CLEC to interconnect its facilities and equipment with the ILEC's network "for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. § 251(c)(2)(A); 47 C.F.R. § 51.305(a). Accordingly, an ILEC must provide transit service when a CLEC interconnects with the ILEC for the purpose of indirectly interconnecting with a third carrier. Otherwise, the indirect interconnection could not be used "for the transmission and routing of telephone exchange service and exchange access," and an ILEC could frustrate the flow of traffic and prevent carriers from indirectly interconnecting. Such a finding would render the "indirectly" language in Section 251(a)

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meaningless. The clear language of Section 251 requires ILECs to directly interconnect with competitors and facilitate competitors' ability to indirectly interconnect.

FN8. Section 251(b)(5) which requires LECs to establish compensation arrangements for the transport and termination of telecommunications does not apply when a carrier is acting as a transiting carrier. See Further Notice of Proposed Rulemaking, 20 F.C.C.R. at 4737-38. Section 251(b) applies to arrangements between an originating carrier and a terminating carrier. Id. at 4737. In the context of transit, the transiting carrier is not the originating or terminating carrier. Accordingly, Qwest is not required to provide transit under Section 251(b).

Competitive Telecomms. Ass'n v. FCC, 117 F.3d 1068 (8th Cir.1997) (“CompTel”) does not compel a contrary finding. In CompTel, the Eighth Circuit Court of Appeals reviewed portions of the FCC’s First Report and Order,^{FN9} including the FCC’s definition of interconnection. Id. at 1070-71. The Court affirmed the FCC’s construction of interconnection as the physical linking of networks and not the transportation of traffic. Id. at 1071-72. In so finding, the Court determined that the language “for the transmission and routing of telephone exchange service ...” in Section 251(c)(2) merely described what the interconnection would be used for and did not create a duty to transport traffic. Id. However, transit service was not at issue in CompTel. While the Court was correct in finding that interconnection does not generally include the transport of traffic, an ILEC’s obligation to provide transit service is an exception to the general rule. Based on the facts that Section 251 explicitly supports the availability of indirect interconnections, transit is critical to the availability of indirect interconnections, and Section 251(b)(5) does not apply to transiting carriers, the Court finds that an ILEC’s interconnection obligations must include the duty to provide transit even though interconnection does not usually include transport.

FN9. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15499 (1996) (“First Report and Order”), aff’d in part and rev’d in part, AT & T Corp. v. Iowa Utils. Bd., 525

U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

The Court’s finding is consistent with the purpose of the Act. Congress passed the Act to encourage competition among telephone service providers. Sw. Bell Tel., L.P., 530 F.3d at 680. Ensuring that carriers can obtain transit service at cost-based rates facilitates this goal. The FCC has recognized that “carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks” without the continued availability of transit service. Further Notice of Proposed Rulemaking, 20 F.C.C.R. at 4740. Carriers that cannot indirectly interconnect with other carriers will be required to directly interconnect with every carrier they need to exchange traffic with (See R01529). This alternative is neither economical nor efficient for some carriers, and as a result, may prevent carriers from entering the market. AT & T commented on the relationship between the availability of transit service and competition during the FCC’s notice and comment rulemaking proceedings, stating: “transiting lowers barriers to entry because two carriers avoid having to incur the costs of constructing the dedicated facilities necessary to link their networks directly.” Further Notice of Proposed Rulemaking, 20 F.C.C.R. at 4740. Construing Section 251 in a manner that requires ILECs to provide transit service furthers the Act’s purpose.^{FN10}

FN10. The Court is not persuaded by Qwest’s unsupported claims that transit service falls under the scope of Section 271 rather than Section 251 of the Act.

*4 Qwest claims that FCC rules and decisions preclude the Court’s finding that an ILEC must provide transit under Section 251(c). The FCC has defined interconnection and analyzed an ILEC’s interconnection obligations in other contexts; however, the FCC has not yet determined whether an ILEC is required to provide transit service pursuant to its interconnection obligations. Further Notice of Proposed Rulemaking, 20 F.C.C.R. at 4737. Indeed, the FCC is currently seeking comment on its authority to promulgate transit rules and the need for rules that directly cover an ILEC’s transit obligations. See Further Notice of Proposed Rulemaking, 20 F.C.C.R. 4685. While the Court does not have the benefit of the FCC’s guidance on this issue, the FCC’s statements in

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its current notice and comment rulemaking proceedings indicate that the FCC's existing rules and decisions do not preclude the Court's finding that Section 251(c) requires ILECs to provide transit service. *See id.*

The FCC's existing rules and decisions establish that interconnection does not generally include the transport of traffic. However, the FCC has left open the possibility that interconnection may include transport in specific and narrow circumstances. The FCC's rules define interconnection as "the linking of two networks for the mutual exchange of traffic" and notes "[t]his term does not include the transport and termination of traffic." 47 C.F.R. § 51.5. The FCC has applied this definition to Section 251(a)^{FN11} and Section 251(c),^{FN12} and federal courts have affirmed the FCC's definition of interconnection as a permissible construction of the statute.^{FN13} Despite the apparent clarity of the FCC's definition, the FCC has more recently found that an ILEC's interconnection obligations include the duty to provide entrance facilities, a form of transport, when entrance facilities are used to transport ILEC to CLEC traffic or CLEC to ILEC traffic. *See Unbundled Access to Network Elements*, 20 F.C.C.R. 2533, 2611-12 (2005); *Sw. Bell Tel., L.P.*, 530 F.3d at 683-84.

^{FN11}. *Total Telecomms. Servs., Inc.*, 16 F.C.C.R. at 5736-37.

^{FN12}. First Report and Order, 11 F.C.C.R. at 15588-90.

^{FN13}. *Comp Tel*, 117 F.3d at 1072; *AT & T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C.Cir.2003).

This case differs from the FCC's entrance facilities order in that transit service involves CLEC to CLEC traffic. Nonetheless, the FCC's entrance facilities order demonstrates that interconnection can include transport in limited circumstances.

The Court has thoroughly considered the FCC rules and decisions cited by Qwest, but the Court does not find that the FCC intended for these authorities to be conclusive on the issue of whether an ILEC is required to provide transit. Nonetheless, the clear language of Section 251 requires an ILEC to provide transit service pursuant to its interconnection obliga-

tions under Section 251(c)(2).^{FN14} Thus, Qwest must provide transit service to Cox.

^{FN14}. Because the Court finds that Qwest is required to provide transit under Section 251(c)(2), it is not necessary to determine whether Section 251(a) provides an independent basis for requiring Qwest to provide transit service.

Finally, the Court must determine whether Qwest must provide transit service at TELRIC-based rates. Interconnection must be offered at cost-based rates established by state commissions. 47 U.S.C. § 252(d). The FCC has approved TELRIC as a proper methodology for determining the rates for interconnection. First Report and Order, 11 F.C.C.R. at 15844. The Commission acted within its authority and did not err when it determined that Qwest was required to provide transit service at TELRIC-based rates. Accordingly, the Commission's Order will be affirmed. A separate order will be entered in accordance with this memorandum opinion.

D.Neb.,2008.

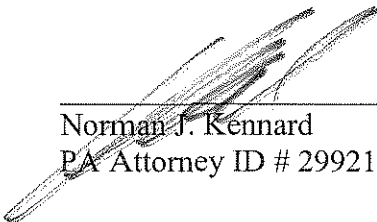
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END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2011, I did serve a true and correct copy of the foregoing upon the persons below via electronic mail and first class mail as follows:

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