

Ruth Nettles

From: Keating, Beth [beth.keating@akerman.com]
Sent: Friday, August 31, 2007 10:51 AM
To: Filings@psc.state.fl.us
Subject: Docket No. 070408
Attachments: 20070831113602393.pdf

Attached for filing in the referenced Docket, please find Neutral Tandem's Notice of Supplemental Authority. Thank you for your assistance, and please do not hesitate to let me know if you have any questions.

Sincerely,

Beth Keating
Akerman Senterfitt
(850) 224-9634
(850) 521-8002 (direct)
beth.keating@akerman.com

A.
Beth Keating
Akerman Senterfitt
106 East College Ave., Suite 1200
Tallahassee, FL 32301
(850) 224-9634
(850) 521-8002 (direct)
(850) 222-0103 (fax)
beth.keating@akerman.com

b. Docket No. 070408-TP: Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for resolution of Interconnection Dispute with level 3 Communications and request for Expedited Resolution

C. On behalf of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC

D. Number of Pages: 17

E: Notice of Supplemental Authority



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Washington, DC
West Palm Beach

Suite 1200
106 East College Avenue
Tallahassee, FL 32301
www.akerman.com
850 224 9634 *tel* 850 222 0103 *fax*

August 31, 2007

VIA ELECTRONIC FILING

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32309

**Docket No. 070408-TP - Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC
for Resolution of Interconnection Dispute with Level 3 Communications and Request for
Expedited Resolution**

Dear Ms. Cole:

Enclosed for filing in the above-referenced Docket, please find an original and 15 copies of Neutral Tandem's Notice of Supplemental Authority.

Your assistance in this matter is greatly appreciated. If you have any questions whatsoever, please do not hesitate to contact me.

Sincerely,

Beth Keating
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, FL 32302-1877
Phone: (850) 224-9634
Fax: (850) 222-0103

Enclosures

{TL135446;1}

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for Resolution of Interconnection Dispute with Level 3 Communications and Request for Expedited Resolution)))))	Docket No. 070408-TP Filed: August 31, 2007
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NOTICE OF SUPPLEMENTAL AUTHORITY

Neutral Tandem, Inc. ("Neutral Tandem"), through its undersigned counsel, hereby files the following as supplemental authority:

A copy of the Georgia Public Service Commission's (GPSC) Order Mandating Direct Interconnection in Docket No. 24844-U: **Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief**, which was filed August 27, 2007.

Respectfully submitted,

NEUTRAL TANDEM, INC.

By:



Beth Keating
Thomas A. Range
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
(850) 521-8002
beth.keating@akerman.com

Attorney for Neutral Tandem, Inc

Ronald Gavillet
Executive Vice President &
General Counsel
Neutral Tandem, Inc.
One South Wacker, Suite 200
Chicago, IL 60606
(312) 384-8000
rongavillet@neutraltandem.com

John R. Harrington
Jenner & Block LLP
330 N. Wabash Ave.
Suite 4700
Chicago, IL 60611
(312) 222-9350
jharrington@jenner.com

CERTIFICATE OF SERVICE

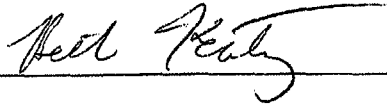
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail and Hand Delivery to Martin McDonnell, Esquire, and Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301, and that an electronic copy has also been provided to the persons listed below on August 31, 2007:

Gregg Strumberger, Esquire
Gregory Rogers, Esquire
Level 3 Communications, Inc.
1025 El Dorado Boulevard
Broomfield, CO 80021
Gregg.Strumberger@level3.com

Adam Teitzman, Staff Counsel
Florida Public Service Commission,
Office of the General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ateitzma@psc.state.fl.us

Beth Salak, Director/Division of Competitive Markets and Enforcement
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
bsalak@psc.state.fl.us

By: _____



Beth Keating
Thomas A. Range
Akerman Senterfitt
106 East College Avenue, Suite 1200
P.O. Box 1877 (32302)
Tallahassee, Florida 32301
Tel : (850) 521-8002
Fax: (850) 222-0103
beth.keating@akerman.com



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EXECUTIVE SECRETARY
G.P.S.C.

DEBORAH K. FLANNAGAN
EXECUTIVE DIRECTOR

REECE McALISTER
EXECUTIVE SECRETARY

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STAN WISE

Georgia Public Service Commission

(404) 656-4501
(800) 282-5813

244 WASHINGTON STREET, S.W.
ATLANTA, GEORGIA 30334-5701

FAX: (404) 656-2341
www.psc.state.ga.us

Docket No. 24844-U

In Re: Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications
and Request for Emergency Relief

DOCKET# 24844
DOCUMENT# 105168

ORDER MANDATING DIRECT INTERCONNECTION

I. Statement of Proceedings

On March 2, 2007, Neutral Tandem, Inc. ("Neutral Tandem") petitioned the Georgia Public Service Commission ("Commission") to: " (1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 Communications, Inc. and its subsidiaries (collectively "Level 3"); and (2) issue an interim order on an expedited basis directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while this Petition is pending, so as to avoid disrupting the delivery of calls."

The April 9, 2007 Procedural and Scheduling Order provided that any disconnection of customers that may be appropriate pending the Commission resolution of the merits shall not take place prior to 30 days from such Commission order. (Procedural and Scheduling Order, p. 3). Consistent with the Procedural and Scheduling Order, Level 3 filed its Response to Petition, Motion to Dismiss Petition and Motion for Migration Plan ("Response") on April 6, 2007. On April 13, 2007, the parties simultaneously pre-filed direct testimony. Neutral Tandem sponsored the testimony of Rian J. Wren and Surendra Saboo. Level 3 sponsored the testimony of Timothy Gates and Sara Baack. Neutral Tandem filed its Response to Level 3's Motion to Dismiss on April 16, 2007. On May 3, 2007, the Commission held a hearing on the Petition, and received testimony and evidence from expert witnesses sponsored by both Neutral Tandem and Level 3. On May 15, 2007, the parties filed simultaneous briefs.

¹ Petition of Neutral Tandem, Inc.. for Interconnection with Level 3 Communications and Request for Emergency Relief ("Petition"), p. 1. (footnotes omitted)

II. Statement of the Issues

Neutral Tandem provides "tandem transit services." Ms. Saboo defines this term to mean "the intermediary switching of local and other non-access traffic that originates and terminates on the networks of different telecommunications providers within a local calling area or MTA." (Petition, Exhibit A, p. 2). In its Petition, Neutral Tandem discusses three contracts that provide for the interconnection relationship between Neutral Tandem and Level 3. Pursuant to a contract between Neutral Tandem and Level 3, dated July 6, 2004, Neutral Tandem delivers tandem transit traffic to Level 3 that has been originated by third party carriers, and accepts certain traffic originated by Level 3 for delivery to third party carriers ("Contract No. 1"). (Neutral Tandem Petition, p. 7). Pursuant to a February 2, 2004 contract, Neutral Tandem delivers third party traffic to Level 3's subsidiary, Broadwing Communications ("Broadwing"), and accepts traffic from Broadwing for transiting to third party carriers ("Contract No. 2"). *Id.* Finally, under an August 18, 2005 contract, Neutral Tandem accepts traffic originated by Level 3 for transiting to other carriers ("Contract No. 3").

On January 31, 2007, Neutral Tandem and Level 3 entered into an amendment of Contract No. 3, which continued the arrangement where Neutral Tandem transited Level 3's originated traffic to other carriers. (Petition, p. 7). Hours after this amendment was signed, Level 3 notified Neutral Tandem via facsimile that it was terminating Contract No. 1. *Id.* On February 14, 2007, Level 3 notified Neutral Tandem that it was terminating Contract No. 2, and that both Contract Nos. 1 and 2 would be terminated effective March 23, 2007. *Id.* at 8. In summary, Level 3 terminated the contracts pursuant to which Neutral Tandem would transit traffic to Level 3, but the contract under which Neutral Tandem would deliver traffic originated on Level 3's network to other providers remained in effect.

Neutral Tandem's position is that Level 3 is obligated to interconnect with its network directly, and that it would be unreasonably discriminatory for Level 3 to impose costs or conditions upon Neutral Tandem as a transit provider that Level 3 did not impose on BellSouth Telecommunications, Inc. d/b/a AT&T Georgia ("AT&T"). Level 3's position is that it meets its obligations under the law by interconnecting directly or indirectly with Neutral Tandem. Further, Level 3 argues that it has a reasonable basis for treating Neutral Tandem and AT&T differently with respect to the provision of tandem transit service. Even if the discrimination is reasonable, Level 3 argues that the state law relied upon by Neutral Tandem is inapplicable to the services at issue in this dispute. Finally, Level 3 contends that Neutral Tandem's demands would impose costs upon Level 3 that it should not be obligated to incur.

III. Jurisdiction

Pursuant to Section 252 of the Federal Telecommunications Act of 1996, the Commission has jurisdiction to arbitrate, approve or reject interconnection agreements between incumbent local exchange carriers and competitive local exchange carriers as well as resolving disputes that arise from such agreements. The Commission has general jurisdiction over telephone and telecommunications companies under O.C.G.A. § 46-1-1 *et seq.*, 46-2-20 and 46-

2-23. In addition the Commission administers Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. § 46-5-160 *et seq.*

Neutral Tandem filed its Petition pursuant to O.C.G.A. § 46-2-20 and the Georgia Act. The Commission has general supervision over telephone companies as well as the authority to require all companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just." O.C.G.A. § 46-2-20(a) and (c). Neutral Tandem alleged that Level 3 violated O.C.G.A. § 46-5-164(a) and (b) of the Georgia Act by denying its request for reasonable interconnection and unreasonably discriminating against it. (Neutral Tandem Petition, p. 10, 15). O.C.G.A. § 46-5-164(a) provides as follows:

All local exchange companies shall permit reasonable interconnection with other certificated local exchange companies. This subsection includes all or portions of such services as needed to provide local exchange services.

O.C.G.A. § 46-5-164(b) states:

The rates, terms, and conditions for such interconnection services shall not unreasonably discriminate between providers and shall be negotiated in good faith between the providers and filed with the commission.

Level 3 argued that the Commission is preempted from ordering the relief sought by Neutral Tandem in this proceeding. (Neutral Tandem Post-Hearing Brief, p. 8) Specifically, Level 3 argues that construing the Georgia Act to require direct interconnection would conflict with Section 251(a)(1) of the Federal Telecom Act. Section 251(a)(1) obligates all telecommunications companies "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." The Commission disagrees with Level 3.

The Eleventh Circuit recently explained the preemption standard:

[T]he Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. "Express preemption" occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute. If Congress does not explicitly preempt state law, however, preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it – this is known as "field preemption" or "occupying the field." And even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. "Conflict preemption," as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law.

Cliff v. Payco General American Credits, Inc., 363 F.3d 1113, 1122 (11th Cir. 2004) (citations omitted). The fundamental question is the intent of Congress, as revealed in the language of the statute as well as the structure and purpose of the statute. *Id.* See also United Parcel Service, Inc. v. Flores-Galarza, 318 F.3d 323, 334 (1st Cir. 2003).

Every preemption analysis “start[s] with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.” Cliff v. Payco, 363 F.3d at 1122 *citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This presumption also requires that any preemptive effect that is found to exist must be given a narrow application. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The power to pre-empt state law is “an extraordinary power...that we must assume Congress does not exercise lightly.” *Id.*; Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). The presumption against preemption is particularly appropriate where Congress has legislated in a field that has traditionally been regulated by the States, such as local telephone service. Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355 (1986).

Level 3 did not allege that the Commission is expressly preempted from granting the relief requested by Neutral Tandem, and the Commission is not aware of any provision in the Federal Act that provides that states are so preempted. The second type of preemption is field preemption, which as explained above, exists when federal regulation is so pervasive that Congress left no room for states to supplement it. Again, Level 3 did not assert that field preemption exists. The Federal Act expressly preserves state authority to implement and enforce state regulations that are not inconsistent with federal regulations and to impose additional requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, provided that the additional requirements are not inconsistent with the Federal Act or the Federal Communication Commission’s regulations to implement the Federal Act. 47 U.S.C. § 261(b), 47 U.S.C. § 261(c).

Level 3 does assert “conflict” preemption in this case. Specifically, Level 3 claims that construing O.C.G.A. § 46-5-164 to require it to interconnect directly with Neutral Tandem would conflict with its obligations under the Federal Act to interconnect directly or indirectly. (Level 3 Brief, pp. 9-10). In other words, Level 3’s position is that the Federal Act provides local exchange carriers with the option of interconnecting directly or indirectly, and an order by a state commission requiring it to interconnect directly would take away this choice. As such, Level 3 characterizes Neutral Tandem’s Petition as “an impermissible attempt to circumvent the federally-mandated interconnection process . . .” *Id.*

Level 3 also argues that the Federal Act indicates Congressional intent to displace state regulatory authority to allow state commissions to mandate competitive local exchange carrier (“CLEC”) to CLEC direct interconnection. (Level 3 Brief, p. 13). Level 3 argues that the premise of the Federal Act is to leave CLEC to CLEC interconnection to the market. *Id.* at 14. Neutral Tandem argues that Section 251(a)(1) does not specify which party has the choice of direct or indirect interconnection or the circumstances of the interconnection. (Neutral Tandem Brief, p. 11). Neutral Tandem also argues that state authority to impose requirements that foster local interconnection and local competition is preserved by Section 261 of the Federal Act. *Id.* at 17,

citing to Michigan Bell Tel. Co. v. MCI Metro Access Transmission Serv., Inc., 323 F.3d 348 (6th Cir. 2003). Neutral Tandem contends that its infrastructure investment provides valuable redundancy and resiliency to the Georgia telecommunications network. *Id.* at 21. Neutral Tandem also states its position would honor the cost causation principle of the “calling party” pays.” *Id.* at 22. In addition, Neutral Tandem argues that its presence provides a competitive alternative to AT&T as the transit traffic provider. *Id.* at 24.

The Commission does not agree with Level 3’s position that a decision that required it to directly interconnect with Neutral Tandem would conflict with the Federal Act.² The first step in the analysis is to determine the obligations of CLECs under the Federal Act to interconnect. Section 251(a)(1) requires all local exchange carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” Level 3’s apparent position is that this statutory provision is satisfied if a LEC agrees to do either. However, the statute does not say that the party from whom interconnection is being requested is permitted to demand its preferred form of interconnection and limit the type of interconnection to which the requesting party is entitled.

Further, as discussed above, Section 261(b) preserves state authority to enforce regulations prescribed prior to the enactment of the Federal Act if such regulations are not inconsistent with the Federal Act. In addition, Section 261(c) preserves state authority to impose additional requirements on telecommunication carriers that are necessary to further competition, provided the requirement is not inconsistent with the Federal Act or FCC regulations to implement the Act. At issue in this proceeding are the obligation of LECs to provide reasonable interconnection and the prohibition on unreasonable discrimination in the provision of interconnection services. O.C.G.A. § 46-5-164. As part of the Georgia Act, these regulations existed at the time that the Federal Act was enacted. However, even if these requirements had not been in existence at that time, the Commission would still not be preempted from imposing them because they meet the standard set forth in Section 261(c).

For the public policy goals cited to in Neutral Tandem’s brief and discussed herein, requiring Level 3 to interconnect directly with Neutral Tandem is necessary to further competition. Neutral Tandem sponsored testimony that there were three benefits to the service that it offered. First, the transit service offered by Neutral Tandem offers a competitive option to the incumbent local exchange company (“ILEC”) for other carriers. (Tr. 62). Second, Neutral Tandem’s service improves the reliability of the system by providing redundancy. (Tr. 63). Third, the investment that Neutral Tandem has made in Georgia enhances economic development within the state. (Tr. 63). The Commission finds that these benefits are necessary to further competition and are not inconsistent with the Federal Act or the federal regulations promulgated to implement the Federal Act. In Michigan Bell, the Sixth Circuit found that as long as state regulations do not prevent carriers from taking advantage of Sections 251 and 252 of the Federal Act, state regulations are not preempted. 323 F.3d at 358-59. For the reasons discussed

² In fact, in Docket No. 16772-U, the Commission ordered parties to interconnect directly once a threshold number of minutes was reached. *See*, Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies (March 24, 2005)

above, the Commission does not believe that requiring Level 3 to interconnect directly with Neutral Tandem would prevent a carrier from taking advantage of Section 251 or 252.

The case law relied upon by Level 3 in support of its preemption argument does not apply to the relief sought in this case. For example, in Wisconsin Bell v. Bie, 340 F.3d 441 (7th Cir. 2003), the Seventh Circuit found preemption where a state tariff required the ILEC to state a reservation price. The Court concluded that the Federal Act's arbitration procedure was interfered with by the state requirement that effectively mandated that negotiations begin at the reservation price listed in the tariff. 340 F.3d at 445. The Court also found that the tariff would result in appeals being filed in state court as opposed to federal court as required in the Federal Act for appeals of state commission decisions under Section 252. *Id.* at 445. Neither of those circumstances is present in this dispute. The Federal Act neither sets forth the detailed process for CLEC to CLEC arbitrations that it does for ILEC to CLEC arbitrations, nor does it require state commission decisions on CLEC to CLEC interconnection be appealed to federal court.

In Pacific Bell v. Pac-West Telecomm., 325 F.3d 1114 (9th Cir. 2003), the Ninth Circuit found a general rulemaking inconsistent with the Federal Act because it changed the terms of "applicable interconnection agreements" and contravened the provision that agreements have the force of law. 325 F.3d at 1127. An order requiring Level 3 to interconnect directly with Neutral Tandem under the terms set forth in Staff's recommendation would not change the terms of applicable interconnection agreements or contravene the Federal Act's provision that agreements have the force of law.

Level 3 also relies upon the decision in MCI v. Illinois Bell, 222 F.3d 323 (7th Cir. 2000). Level 3 states that the Court concluded that "Congress 'invit[ed]...the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market' but precluded the states from regulating such issues except on Congress's terms." (Level 3 Brief, p.11, citing to 222 F.3d at 343) However, this portion of the Court's decision involves a discussion of whether the state has waived its Eleventh Amendment immunity by participating in the Federal Act's scheme. It is not discussing the issue of preemption. The question of state regulations that are necessary to further telecommunications competition and are not inconsistent with the Federal Act were not before the Court so there is no analysis of what type of state regulation would survive preemption.

For the foregoing reasons, the Commission concludes that it is not preempted from granting the relief requested by Neutral Tandem.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Positions of the Parties

Neutral Tandem complains that Level 3 refuses to interconnect directly with it unless Neutral Tandem pays Level 3 reciprocal compensation, or some other fee in addition to its costs, for traffic that originates on the networks of a carrier customer of Neutral Tandem and terminates

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on Level 3's system, or if Neutral Tandem collects the reciprocal compensation payment from the carrier customer and passes it on to Level 3. (Petition, p. 9). Neutral Tandem charges that Level 3's refusal to directly interconnect with it absent this condition violates the Georgia Telecommunications and Competition Development Act of 1995 ("State Act") O.C.G.A. § 46-5-160 *et seq.*, which requires local exchange companies to allow for reasonable interconnection and prohibits local exchange companies from discriminating in the provision of interconnection services. (See, O.C.G.A. § 46-5-164(a) and (b)). Neutral Tandem states that Level 3 directly interconnects with AT&T as a tandem traffic provider, and therefore, should directly interconnect with Neutral Tandem. (Petition, p. 15).

Level 3 rebuts the Petition with the following arguments:

- 1) The State Act is preempted by the Federal Telecommunications Act of 1996 ("Federal Act"), 47 U.S.C. 251 *et seq.*
- 2) Neutral Tandem is not providing an "interconnection service" as defined in the State Act; therefore the State Act cannot be construed to prohibit discrimination against it.
- 3) State Act only requires "reasonable" interconnection. It does not require direct interconnection.
- 4) AT&T is an incumbent local exchange company ("ILEC"), and Neutral Tandem is not. Therefore, a reasonable basis exists for treating the two providers differently.
- 5) Cost recovery arrangements proposed by Level 3 were intended to defray delivery costs borne by Level 3 as a result of the direct interconnection.

B. Discussion

1. Preemption

The reasons for the Commission's determination that it is not preempted from granting the relief requested by Neutral Tandem are set forth in Section III of this Order. Construing the Georgia Act in the manner urged by Neutral Tandem would not conflict with the Federal Act.

2. Interconnection Service

The Georgia Act prohibits local exchange companies from discriminating unreasonably in the provision of interconnection services. O.C.G.A. § 46-5-164(b). Neutral Tandem has alleged that Level 3 has discriminated against it unreasonably because it is conditioning direct interconnection with Neutral Tandem on a condition that is not required of AT&T. (Petition, pp. 14-15). The condition relates to calls that originate on the networks of one Neutral Tandem's carrier customers. Specifically, Level 3 conditions direct interconnection with Neutral Tandem on Neutral Tandem's agreement to either pay Level 3 reciprocal compensation in association with these calls or collect reciprocal compensation payments from its carrier customers and pass these payments on to Level 3. *Id.*

Level 3 denies that it is discriminating unreasonably against Neutral Tandem. However, more fundamentally, Level 3 contends that even if it were discriminating unreasonably against Neutral Tandem it would not violate the provisions of the Georgia Act at issue. Level 3 argues that Neutral Tandem is not providing an "interconnection service" because it does not originate or terminate telecommunications service. (Level 3 Brief, pp. 26-27). Because O.C.G.A. § 46-5-164(b) only prohibits unreasonable discrimination in the provision of an "interconnection service," Level 3 argues that Neutral Tandem is not entitled to the relief that it seeks. *Id.* at 26.

Level 3 is correct that Neutral Tandem does not originate or terminate telecommunications service; however, its conclusion that Neutral Tandem is not providing an "interconnection service" is incorrect. The Georgia Act defines "interconnection service" to mean "the service of providing access to a local exchange company's facilities for the purpose of enabling another telecommunications company to originate or terminate telecommunications service." O.C.G.A. § 46-5-162(8). This definition does not require that the LEC originate or terminate a call in order for the service to constitute an "interconnection service." The Commission finds the transit service provided by Neutral Tandem meets the definition of "interconnection service" because it provides access to a LEC's facilities for the purpose of enabling another company to originate or terminate telecommunications service. Unreasonable discrimination in the rates, terms and conditions for the service provided by Neutral Tandem would therefore violate O.C.G.A. § 46-5-164(b) of the Georgia Act.

3. Reasonable Interconnection

Neutral Tandem has requested that Level 3 interconnect with it directly. In response, Level 3 has stated that it will interconnect indirectly with Neutral Tandem, and has conditioned any direct interconnection on the payment of reciprocal compensation. (Petition p. 11, 16-18). Level 3 argues that the Georgia Act does not require CLECs to interconnect directly with one another.

The Georgia Act requires that "All local exchange companies shall permit reasonable interconnection with other certificated local exchange companies." O.C.G.A. § 46-5-164(a). It is undisputed that Level 3 and Neutral Tandem are both certificated local exchange companies in Georgia. The issue of whether direct or indirect interconnection is "reasonable" in a given instance is a determination for the Commission.

Neutral Tandem is a provider of transit services. Its carrier customers use its service to transport calls that originate on one of their networks and terminate on the network of another. AT&T also provides transit services and is interconnected directly with the other telecommunications companies as a result of its historic position in the market. It would not serve any purpose for a carrier to transport a call originating on its network through Neutral Tandem if that call still must be transported through AT&T in order to terminate on Level 3's system. The carrier would simply use AT&T as the transit provider and exclude Neutral Tandem from the process. Therefore, indirect interconnection is not a reasonable option for Neutral Tandem. Under the condition that Neutral Tandem pays all of Level 3's reasonable costs for interconnection, Level 3 is not harmed by a requirement that it interconnect directly with Neutral Tandem. Level 3 does not have a reasonable basis for refusing direct interconnection under such

circumstances: The Commission finds that subject to the condition that Neutral Tandem pays all of the reasonable costs for interconnection, direct interconnection is reasonable.

4. Unreasonable Discrimination

As discussed above, Level 3 refused to interconnect directly with Neutral Tandem unless Neutral Tandem pays it reciprocal compensation or some other fee in addition to its costs. Neutral Tandem asserts that Level 3 did not require a comparable payment from AT&T as a condition of direct interconnection. (Petition, p. 14). Neutral Tandem charges that this refusal constitutes unreasonable discrimination in violation of Georgia law. (Petition, p. 15). The Georgia Act provides that "The rates, terms, and conditions for such interconnection services shall not unreasonably discriminate between providers . . ." O.C.G.A. § 46-5-164(b). Level 3 responds that the differences between AT&T and Neutral Tandem provide a justifiable basis for the disparate treatment. (Response, pp. 17-18). Specifically, Level 3 argues that it is not unreasonable for it to treat Neutral Tandem differently than AT&T because Neutral Tandem is a CLEC and AT&T is an ILEC. (Response, p. 17). Furthermore, Level 3 states that it receives other services and benefits from direct interconnection with AT&T. (Level 3 Brief, p. 28). Specifically, Level 3 argues that direct interconnection with AT&T allows it to deliver traffic to the AT&T's end users on balanced economic terms and AT&T pays Level 3 directly for approximately 90% of the traffic that Level 3 accepts over that infrastructure. (Tr. 173-74). Additionally, Level 3 also points out that AT&T may be required to provide transit services as a result of its historically derived ubiquitous network. (Level 3 Brief, p. 28).

That AT&T is an ILEC and Neutral Tandem is a CLEC does not by itself constitute a reasonable basis for discriminating between the two providers. There has to be a distinction that provides a reason for treating the two differently in this instance. Level 3 concedes that the transit service provided by Neutral Tandem is "essentially the same" as the transit service AT&T provides. (Tr. 285-86). Neutral Tandem provides Level 3 with the same records and billing information that AT&T provides Level 3 in connection with its transit service. (Tr. 290-91). The fact that AT&T became in effect a default transit service provider as a result of its ubiquitous network is not a reasonable basis for Level 3 to refuse as favorable terms and conditions from another transit service provider. The fact that AT&T provides other services to Level 3 that have nothing to do with transit traffic is not a reasonable basis to refuse to interconnect directly with another transit provider. Level 3 acknowledges that it is not receiving reciprocal compensation from AT&T in connection with its position as transit traffic provider. (Tr. 286). Level 3's defense that it receives reciprocal compensation from AT&T for calls that originate on AT&T's network is not relevant. (Tr. 286). Those are not the types of calls at issue in this proceeding. If the calls from Neutral Tandem's carrier customers were transported to Level 3 using AT&T as a transit provider, Level 3 would not receive reciprocal compensation from AT&T and would not be given any better or additional information about the originating carrier.

It is also not persuasive that Level 3 has a more complex interconnection agreement with AT&T than it does with Neutral Tandem. (Tr. 286). As Neutral Tandem argues in its brief, it is likely that there will always be differences in the business relationships between two sets of carriers, but the issue is whether the services involved are the same. (Neutral Tandem Brief, p.

7). In this instance, it is agreed that the transit traffic service provided by AT&T is essentially the same as the service provided by Neutral Tandem. Level 3 does not offer any reasonable explanation as to why the more extensive relationship it has with AT&T would justify refusing direct interconnection with Neutral Tandem when the terms of the transit service are as favorable.

In addition, imposing the obligation to pay reciprocal compensation on the transit provider would be inconsistent with federal law and the March 24, 2005 Commission Order ("Transit Traffic Order") in Docket No. 16772-U,⁴ Under 47 C.F.R. § 51.701(e), "a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier." Imposing reciprocal compensation costs on the transit provider would be inconsistent with this federal regulation. Moreover, in the Commission's March 24, 2005 Order in Docket No. 16772-U, the Commission relied upon the FCC's *Texcom Orders* in endorsing the "calling party pays" principle. The FCC stated that "the [LEC] may charge the [terminating carrier] for the cost of the portion of these facilities used for transiting traffic, and [the terminating carrier] may seek reimbursement of these costs from originating carriers through reciprocal compensation." (*Texcom Recon Order*, ¶ 4). The Commission construed the provision in the FCC's order that entitled the terminating carrier to seek reimbursement of the costs of the facilities used for transiting the traffic from the originating carrier to be consistent with the "calling party pays" principle. (Transit Traffic Order, p. 8).

It would be reasonable for Level 3 to object to Neutral Tandem's request if there were costs related to directly interconnecting with Neutral Tandem that Neutral Tandem was not willing to cover. There was conflicting record evidence on this issue. Neutral Tandem contends that the direct interconnection it requests would not impose any costs on Level 3. (Tr. 128). Level 3 sponsored testimony stating that it did incur costs as a result of interconnecting with Neutral Tandem. (Tr. 165). Level 3 claimed that concerns associated with directly interconnecting with Neutral Tandem were "personnel issues, mechanical issues, [and] physical facilities that have to be installed and maintained and monitored." (Tr. 293). However, Level 3 did not quantify those costs. (Tr. 197). The Commission finds interconnection between the parties to be reasonable provided Neutral Tandem pays for all reasonable costs associated with direct interconnection.

5. Cost Recovery

Level 3 argues that the cost recovery arrangements were intended to defray delivery costs borne by Level 3 from the traffic sent to it by Neutral Tandem. (Response, p. 18). As previously

³ Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies.

⁴ In Re: BellSouth Telecommunications Inc.'s Petition for a Declaratory Ruling Regarding Transit Traffic.

stated, the Commission finds as a matter of fact that Level 3 is not placed in any worse position as a result of directly interconnecting with Neutral Tandem provided Neutral Tandem pays all reasonable costs associated with direct interconnection. Level 3 raises the argument that it will be difficult for it to collect compensation from the wireless carrier customers of Neutral Tandem for calls that originate on the wireless carriers' networks. (Level 3 Brief, p. 5). However, the same difficulty exists for calls that originate on the networks of wireless carriers, then transit AT&T's network prior to terminating on Level 3's network. Because Neutral Tandem provides Level 3 with the same records and billing information that AT&T provides, Level 3 is no worse off with Neutral Tandem providing transit service than it is with AT&T. (Tr. 290-91) Again, even Level 3 has conceded that the transit service provided is "essentially the same." (Tr. 285-86).

C. Commission Decision

The Commission orders Level 3 to interconnect directly with Neutral Tandem subject to the condition that Neutral Tandem pays all of the reasonable costs associated with direct interconnection. Neutral Tandem should not be required to pay reciprocal compensation or an additional fee to Level 3 as a condition of the direct interconnection. Neutral Tandem should also not be required to collect reciprocal compensation payments from its carrier customers to pass on to Level 3 as a condition of the direct interconnection.

The Commission finds as a matter of fact that: (1) the service provided by Neutral Tandem offers a competitive option to the ILEC for other carriers, improves the reliability of the system by providing redundancy and the investment that Neutral Tandem has made in Georgia enhances economic development within the state; (2) the transit service provided by Neutral Tandem provides access to a LEC's facilities for the purpose of enabling another company to originate or terminate telecommunications service; (3) indirect interconnection is not reasonable in this case, given that Neutral Tandem is providing a transit service; (4) direct interconnection is reasonable subject to the condition that Neutral Tandem pays all of the reasonable costs associated with direct interconnection; (5) the transit service provided by Neutral Tandem is "essentially the same" as the transit service that AT&T provides to Level 3; (6) Level 3 does not require AT&T to pay reciprocal compensation or an additional fee as a condition of direct interconnection, and Level 3 does not require AT&T to collect reciprocal compensation payments from third party carriers to pass on to Level 3; (7) Level 3 is not worse off as a result of being required to directly interconnect with Neutral Tandem provided that Neutral Tandem pays all of the reasonable costs of direct interconnection than it would be if it did not interconnect directly with Neutral Tandem; (8) it is not reasonable for Level 3 to charge Neutral Tandem reciprocal compensation or an additional fee as a condition of the direct interconnection; (9) it is not reasonable for Level 3 to require Neutral Tandem to collect reciprocal compensation payments from its carrier customers to pass on to Level 3 as a condition of the direct interconnection; (10) the evidence was not adequate to determine whether the direct interconnection requested by Neutral Tandem would impose any costs upon Level 3; and (11) Neutral Tandem should be required to pay all of the reasonable costs associated with the direct interconnection.

The Commission concludes as a matter of law that: (1) it is not preempted from ordering the relief sought by Neutral Tandem in this docket; (2) the benefits offered by Neutral Tandem's service are necessary to further competition and are not inconsistent with the Federal Act or the federal regulations promulgated to implement the Federal Act; (3) the transit service provided by Neutral Tandem is an "interconnection service" as that term is defined in O.C.G.A. § 46-5-162(8); (4) unreasonable discrimination against Neutral Tandem in the rates, terms and conditions for its transit service violates O.C.G.A. § 46-5-164(b); (5) there is not a reasonable basis for Level 3 to discriminate between Neutral Tandem and AT&T with regard to the provision of transit service; (6) given the findings of fact reached by the Commission in this matter and the conditions imposed upon the interconnection, it is unreasonably discriminatory for Level 3 to require that Neutral Tandem pay reciprocal compensation or some other fee, or collect reciprocal compensation payments from its carrier customers to pass on to Level 3, as a condition of direct interconnection; (7) the requirement imposed on all local exchange companies in O.C.G.A. § 46-5-164(a) to permit reasonable interconnection with other certificated local exchange carriers requires Level 3, under the facts of this case, to permit direct interconnection with Neutral Tandem; (8) imposing reciprocal compensation obligations on the transit provider would be inconsistent with 47 C.F.R. 51.701(e), the FCC's decisions in the *Texcom Orders* and the Commission's orders in Docket No. 16772-U

V. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission for decision should be resolved as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

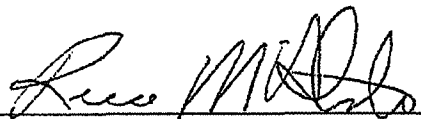
ORDERED FURTHER, Level 3 is ordered to permit direct interconnection with Neutral Tandem at a technically feasible location provided Neutral Tandem pays all of the reasonable costs associated with said direct interconnection.

ORDERED FURTHER, Neutral Tandem is ordered to provide all records necessary for Level 3 to bill originating carriers for calls transiting Neutral Tandem's network in a manner consistent with the process outlined in the Commission's March 24, 2005 Order in Docket No 16772-U.

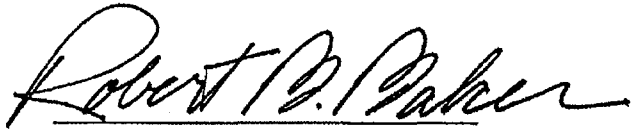
ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 19th day of June, 2007.



Reece McAlister
Executive Secretary



Robert B. Baker, Jr.
Chairman

8-27-07
Date

August 27, 2007
Date