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December 17, 2007

Ms. Ann Cole, Director
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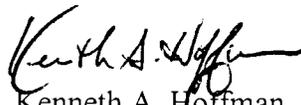
Re: Docket No. 070408-TP

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket on behalf of Level 3 Communications, LLC ("Level 3") are the original and fifteen copies of Level 3's Response in Opposition to Neutral Tandem's Request for Oral Argument.

Please acknowledge receipt of these documents by stamping the extra copy of this letter filed and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,


Kenneth A. Hoffman

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FPSC-COMMISSION CLERK

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, LLC, and)
Request for Expedited Resolution.)
_____)

Docket No. 070408-TP

Filed: December 17, 2007

**LEVEL 3 COMMUNICATIONS, LCC'S
RESPONSE IN OPPOSITION TO NEUTRAL TANDEM'S
REQUEST FOR ORAL ARGUMENT**

Level 3 Communications, LLC ("Level 3") files its Response in Opposition to the Request for Oral Argument filed by Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC ("Neutral Tandem") on December 13, 2007. In support of this Response, Level 3 states:

A. Introduction.

1. Neutral Tandem's Request for Oral Argument is the latest in a series of tactics employed by Neutral Tandem to delay a Commission decision on the legal issues of jurisdiction and standing, thereby enabling Neutral Tandem to secure through delay the substantive relief initially sought in this proceeding. These two legal issues, jurisdiction and standing, have been the subject of two rounds of briefing by the parties and an extensive oral argument before the full Commission. Neutral Tandem's untimely request for oral argument would waste Commission time and resources as the issues of jurisdiction and standing have already been thoroughly briefed and argued. Nothing in Neutral Tandem's oral argument will cure its statutory deficiencies. The last minute retention of new counsel to secure a deferral of the consideration of this matter at the December 4, 2007 Agenda Conference does not provide a basis for granting oral argument. This is especially true there where Neutral Tandem agreed that extensive oral argument had been provided and that no further oral argument was necessary and had not filed a request for oral

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argument prior to the December 4, 2007, Agenda Conference. Neutral Tandem's Request for Oral Argument is untimely and fails to demonstrate that it would aid the Commission in evaluating the two legal issues that have been thoroughly briefed and presented through oral argument. In sum, this matter should proceed to vote and disposition by the Commission at the January 8, 2008, Agenda Conference without oral argument, as previously scheduled and intended by the Commission for the December 4, 2007 Agenda Conference.

B. Background.

2. On February 26, 2007, Neutral Tandem filed a Petition with the Commission requesting the Commission to enter an Order mandating Level 3 to maintain its existing physical direct interconnection with Neutral Tandem. Level 3 moved to dismiss the Petition on grounds that the Commission lacked jurisdiction to mandate direct physical interconnection between two competitive local exchange companies ("CLECs") and that Neutral Tandem lacked standing to seek such relief. Level 3 voluntarily and unilaterally agreed to maintain its physical direct interconnection with Neutral Tandem up to and until June 26, 2007, to allow the Commission sufficient time to resolve the issues of jurisdiction and standing raised in Level 3's Motion to Dismiss. Level 3 continues to maintain that direct interconnection for the sole purpose of receiving traffic from Neutral Tandem.

3. Pursuant to Order No. PSC-07-0392-PCO-TX issued by the Prehearing Officer on May 3, 2007, the parties filed briefs addressing the legal issues. Thereafter, on May 24, 2007, the full Commission heard extensive oral argument on the issues of jurisdiction and standing.

4. On June 27, 2007, the Commission Staff filed a recommendation for the July 10, 2007 Agenda Conference. The Staff recommended that the Commission determine that it has jurisdiction over Neutral Tandem's Petition but that it dismiss Neutral Tandem's Petition without

prejudice for lack of standing. In that recommendation, the Staff suggested that Neutral Tandem may have standing “if it can demonstrate that it has authority to act as an agent” for its third-party carrier customers.¹ Up to this point, Neutral Tandem had never suggested that it had a principal-agent relationship, as that relationship has been defined by Florida law, with its third-party carrier customers. Nonetheless, Neutral Tandem reacted to the Staff Recommendation by securing purported “Letters of Agency” from certain carrier customers dated July 2, 2007.

5. On July 5, 2007, Neutral Tandem filed a Motion for Leave to Amend Petition and an accompanying Amended Petition with the attached “Letters of Agency.” This attempt to salvage standing was undertaken despite the fact that Neutral Tandem’s tariffs and standard customer contract specifically state that neither Neutral Tandem nor its customers will act as agent for the other. Moreover, the new agency letters were specifically limited to the technical and operational aspects of terminating traffic to Level 3 and did not authorize Neutral Tandem to address intercarrier compensation on behalf of the putative principals to this supposed agency relationship, the originating carriers. Thus, the purported “Letters of Agency,” as the Staff explains in its current recommendation, are not only insufficient for the purposes of alleging and demonstrating under Florida law that Neutral Tandem serves as an agent for these third party carriers,² but their limited scope would preclude the Commission from addressing the “prices, terms and conditions” of interconnection between Level 3 and the originating carrier under Section 364.16(2), Florida Statutes.

6. A few days later, on July 9, 2007, Neutral Tandem reversed field and filed a Notice of Voluntary Dismissal of its Petition without prejudice. As a result of that filing, the

¹ See Staff Recommendation dated June 27, 2007, in Docket No. 070127-TX, at page 11.

² See Staff Recommendation dated November 20, 2007, in Docket No. 070408-TP, at 13-14.

Commission did not consider the June 27, 2007, Staff Recommendation to dismiss Neutral Tandem's Petition without prejudice for lack of standing.

7. On July 11, 2007, Neutral Tandem filed a new Petition - - its third petition -- in Docket No. 070408-TP. The new Petition essentially mirrored the proposed Amended Petition in Docket No. 070127-TX and attached the same "Letters of Agency." With the filing of the new Petition, the parties, the Commission staff and the Commission were now faced with potentially repeating the entire process of pleadings, briefing and oral argument undertaken over the previous four-month period. By hitting the "reset button," Neutral Tandem successfully secured additional months of delay that would inevitably result from a filing of a Motion to Dismiss, potential additional briefs, and the filing of a Staff Recommendation addressing essentially the same petition previously filed as a proposed Amended Petition in Docket No. 070127-TX. In the meantime, Level 3, consistent with its commitment to the Commission to not unilaterally terminate the direct interconnection with Neutral Tandem, maintained the interconnection in place and Neutral Tandem continued to receive the ultimate remedy sought in its initial Petition - - free direct physical interconnection with Level 3.

8. On August 2, 2007, the Staff filed a Staff Recommendation in Docket No. 070127-TX, recommending that the Commission acknowledge Neutral Tandem's Notice of Voluntary Dismissal of its initial Petition without prejudice. At the August 14, 2007 Agenda Conference, the Commission heard oral argument from the parties. Level 3 asserted that the tactics employed by Neutral Tandem to avoid a Commission vote dismissing its Petition without prejudice and to delay these proceedings to secure further substantive relief justified a Commission decision dismissing Neutral Tandem's Petition in Docket No. 070127-TX with prejudice. The Commission voted to acknowledge Neutral Tandem's voluntary dismissal

without prejudice with Commissioner Argenziano dissenting, and voting that Neutral Tandem's initial Petition should be dismissed with prejudice.

9. Thereafter, Level 3 filed a Motion to Dismiss Neutral Tandem's current Petition and Neutral Tandem filed a Response to the Motion to Dismiss. Neutral Tandem failed to file a separate and contemporaneous request for oral argument with its Response to the Motion to Dismiss. Due to the fact that the legal issues of jurisdiction and standing had been thoroughly vetted through briefing and oral argument, the Commission staff convened a conference call on August 23, 2007, to discuss whether further briefing or oral argument should be permitted. Consistent with its decision not to file a request for oral argument, Neutral Tandem explicitly stated during the conference call that no further oral argument was necessary and that any further briefing should be limited to the issue of whether Neutral Tandem had standing based on a principal-agent relationship with its third-party carrier customers. Level 3 agreed that no further oral argument was necessary but requested that any supplemental briefs authorized by the prehearing officer not be limited to the principal-agent standing issue.

10. On September 21, 2007, the Prehearing Officer issued Order No. PSC-07-0772-PCO-TP, allowing supplemental briefs limited to five pages, excluding attachments, addressing Issues 1-3(a) of Order No. PSC-07-0392-PCO-TX. In that Order, the Prehearing Officer confirmed the representations of the parties at the August 23, 2007 conference call that "**neither party seeks additional oral argument before the Commission.**" (Emphasis added.) Thereafter, Level 3 and Neutral Tandem filed their respective Supplemental Briefs.

11. On November 20, 2007, the Commission staff filed a Staff Recommendation for the December 4, 2007 Agenda Conference on the jurisdiction and standing issues. The Staff Recommendation suggests that the Commission determine that it has authority to ensure a CLEC

provides access to and interconnection with telecommunications services to any other provider of local exchange telecommunications services and further recommends that the Commission determine that Neutral Tandem lacks standing to seek the relief sought by Neutral Tandem under Sections 364.16 and 364.162, Florida Statutes, either in its own capacity or as a purported “agent” for its third-party carrier customers. The Staff Recommendation was noticed and scheduled for consideration by the Commission for the December 4, 2007 Agenda Conference, with participation limited to the Commissioners and Staff, since the parties had agreed to forego further oral argument, as memorialized by the Prehearing Officer in Order No. PSC-07-0772-PCO-TP.

12. On November 28, 2007, counsel for Level 3 was advised by Staff Counsel that the Commission had granted a deferral and postponement of its scheduled December 4, 2007 consideration of the Staff Recommendation. Level 3’s counsel was advised that the deferral arose as a result of a verbal request to Commission Staff from a new attorney who would be representing Neutral Tandem. It was unclear whether Neutral Tandem’s new counsel would be substituting for existing counsel or would be additional counsel for Neutral Tandem as no pleading addressing that issue had been filed with the Commission as of November 28, 2007.

13. Some two weeks later, on December 13, 2007, new counsel for Neutral Tandem filed a Notice of Appearance as additional counsel of record and the Request for Oral Argument which is the subject of this Response.

14. This matter is now scheduled to be considered by the Commission at its January 8, 2008 Agenda Conference. As a result of the most recent delay tactic employed by Neutral Tandem, and Level 3’s commitment to the Commission to maintain the direct interconnection and ensure the stability of the public switch network and the completion of calls to its own

customers, Neutral Tandem has managed to secure over ten months of free direct interconnection with Level 3. This result has occurred even though Neutral Tandem lacks standing to pursue mandated direct interconnection from Level 3, either in its own capacity or as a purported agent of its third-party carrier customers.

C. Neutral Tandem's Request for Oral Argument Should be Denied.

15. At the outset, it must be emphasized that Neutral Tandem expressly agreed that no further oral argument was necessary and that this agreement was memorialized by the Prehearing Officer in Order No. PSC-07-0772-PCO-TP. It must also be emphasized that prior to securing the deferral of the consideration of the Staff Recommendation, Neutral Tandem had not filed a request for oral argument. Neutral Tandem's decision to obtain new counsel to secure a deferral does not provide a basis for oral argument.

16. Neutral Tandem now asserts, some four months after the August 23, 2007 conference call, that its agreement that oral argument was not necessary was limited to the time period prior to the issuance of the Staff Recommendation.³ This eleventh hour creation should be rejected. Neutral Tandem never attempted to make such a distinction during that conference call. Moreover, Neutral Tandem failed to file a Motion for Reconsideration or Clarification of the Prehearing Officer's Order memorializing the fact that neither party sought additional oral argument before the Commission. Despite the fact that it has been represented through the first nine months of this proceeding by two large law firms and capable telecommunications counsel, Neutral Tandem was able to secure a deferral by adding new counsel. That decision by Neutral Tandem changes nothing with respect to what had transpired in this proceeding prior to the addition of new counsel and provides no justification for a second round of oral argument. The

³ Neutral Tandem's Request for Oral Argument, at ¶4.

fact of the matter is that Neutral Tandem made a decision to not request oral argument, received an adverse Staff Recommendation, and decided to hire new counsel to secure a deferral and attempt to create a justification for oral argument.

17. Neutral Tandem justifies its action by arguing that Rule 25-22.0022, Florida Administrative Code, does not preclude its untimely request for oral argument. This argument has no merit. As Neutral Tandem acknowledges, the purpose of this rule “is to establish an orderly process pursuant to which interested parties may request an opportunity to present argument”⁴ With that acknowledged goal in mind, the only reasonable interpretations of the Commission’s rule is that only moving parties seeking affirmative relief may request oral argument or that the responding party must likewise request oral argument by a separate written request, contemporaneous with the filing of its response. Otherwise, the orderly process that Neutral Tandem touts is reduced to chaos and confusion as a responding party could file a request for oral argument at any time prior to the scheduled agenda conference consideration by the Commission of the subject motion. Accordingly, Neutral Tandem’s post-Staff Recommendation attempt to create a justification for oral argument must be rejected. Neutral Tandem already agreed oral argument was not necessary, knew a Staff Recommendation would be forthcoming, and cannot now use an adverse Staff Recommendation on the issue of standing as a basis for an untimely request for oral argument. As previously stated, the securing of a deferral does not provide a basis or justification for oral argument and does not transform an untimely request for oral argument into a timely request for oral argument. Neutral Tandem’s failure to timely file its Request for Oral Argument constitutes a waiver thereof under Rule 25-22.0022, Florida Administrative Code, as applied to a respondent to a motion.

⁴ Neutral Tandem’s Request for Oral Argument, at ¶3

18. In addition to being untimely, Neutral Tandem's Request for Oral Argument fails to "state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided . . ." as required under Rule 25-22.0022. In its Request, Neutral Tandem attempts to meet this standard by arguing that oral argument was conducted more than six months ago and prior to the issuance of the Staff Recommendation.⁵ These arguments lack merit. It is standard practice for the Commission to make decisions and rule on issues many months after hearings and arguments have been presented to the Commission. Almost always, as in this case, a transcript of the proceeding is available for review by the Commissioners as necessary. Further, the fact that oral argument was conducted prior to the issuance of the Staff Recommendation was a fact known to Neutral Tandem when it affirmatively agreed that no further oral argument was necessary.

19. Finally, Neutral Tandem asserts that the public interest and dangers to consumers justify oral argument.⁶ First, these arguments have already been thoroughly vetted and examined through the two rounds of briefs and the extensive oral argument before the Commission. Second, the argument rings hollow. The only party who has gone above and beyond what is required to protect the public switched network and consumers is Level 3. Level 3 has unilaterally agreed to keep this interconnection in place until the Commission rules on the issues of jurisdiction and standing -- a decision that has resulted in substantial adverse financial implications for Level 3 as a result of Neutral Tandem's procedural tactics. To Neutral Tandem, the public interest is a matter of self interest. The Commission will recall through filings made in this docket that Neutral Tandem has abandoned its interconnection with Level 3 in a number

⁵ Neutral Tandem's Request for Oral Argument, at ¶15. Neutral Tandem's other statements in paragraph 5 of its Request fail to explain with particularity why additional oral argument is necessary to address issues that are fully covered in the pleadings and briefs and have been the subject of extensive oral argument.

of other states where the amount of traffic at issue did not, in Neutral Tandem's mind, justify the supposed protection of public interest in consumers. Neutral Tandem's arguments about consumers are equally specious. Again, it is Level 3 that has gone above and beyond to protect consumers. Neutral Tandem does not have any originating or terminating customers. In the end, as Commissioner Carter stated in rebuffing Neutral Tandem's public interest cries at the May 24, 2007, oral argument:

. . . we are not really talking about whether or not the citizens have access to a telephone service, it's really all about the money.⁷

20. Level 3 respectfully submits that it is time for the Commission to bring this matter to a close. The Commission has been thoroughly and extensively briefed on the two legal issues in this proceeding and has had the benefit of extensive oral argument. The Prehearing Officer has already ruled that no further oral argument will be taken in this proceeding. Neutral Tandem's Request for Oral Argument is untimely and fails to meet the standard under Rule 25-22.0022, Florida Administrative Code. Level 3 respectfully requests that the Commission proceed forward on January 8, 2008, without oral argument, dismiss Neutral Tandem's Petition with prejudice and order Neutral Tandem to notify its customers within three days of the January 8, 2008, Agenda Conference that they can no longer route traffic directly from Neutral Tandem to Level 3 after January 22, 2008, and that Neutral Tandem's senior management be required to file an affidavit with the Commission indicating the Company's compliance.

⁶ Neutral Tandem's Request for Oral Argument, at ¶12.

⁷ See Transcript of May 24, 2007 Oral Argument, at 51.

WHEREFORE, Level 3 respectfully requests that the Commission deny Neutral Tandem's Request for Oral Argument.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Electronic Mail and U. S. Mail on December 17, 2007 to the following:

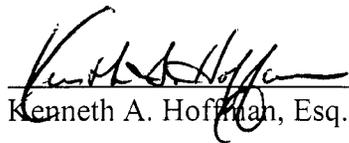
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