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July 25, 2007

Ms. Ann Cole, Director  
Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center, Room 110  
Tallahassee, Florida 32399-0850

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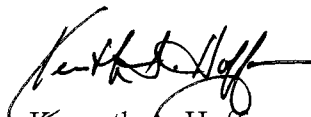
Re: Docket No. 070408-TP

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 Motion to Dismiss and Response to Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC, for Resolution of Interconnection Dispute and Request for Expedited Resolution.

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

- CMP
- COM 5
- CTR
- ECR KAH/rl
- GCL 2 Enclosures
- OPC cc: All Parties of Record  
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Neutral Tandem, Inc. and )	
Neutral Tandem-Florida, LLC for )	Docket No. 070408-TP
Resolution of Interconnection Dispute with )	
Level 3 Communications, LLC, and )	Filed: July 25, 2007
Request for Expedited Resolution. )	
)	

**LEVEL 3 COMMUNICATIONS, LLC'S MOTION TO  
DISMISS AND RESPONSE TO PETITION OF  
NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-FLORIDA,  
LLC, FOR RESOLUTION OF INTERCONNECTION  
DISPUTE AND REQUEST FOR EXPEDITED RESOLUTION**

Level 3 Communications, LLC ("Level 3"), pursuant to Rules 28-106.203, 28-106.204, and 25-22.0365, Florida Administrative Code, hereby files its Motion to Dismiss and Response to Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC (hereinafter referred to collectively as "Neutral Tandem") for Resolution of Interconnection Dispute and Request for Expedited Resolution.

**I. INTRODUCTION**

1. Level 3 is a registered competitive local exchange telecommunications company ("CLEC") providing telecommunications services within the State of Florida.

2. Level 3's address and telephone number are:

Level 3 Communications, LLC  
1025 Eldorado Boulevard  
Broomfield, CO 80021-8869  
720-888-1780 (Telephone)

3. All pleadings, discovery, correspondence, orders or other documents filed or served in this proceeding should be served on the following on behalf of Level 3:

DOCUMENT NUMBER-DATE

06375 JUL 25 08

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4. The fundamental legal issues raised by Neutral Tandem's Petition are:

a. Whether the Commission has the authority to mandate Level 3 to maintain direct physical interconnection of its facilities with Neutral Tandem, a competitive carrier that only provides an alternative transit service;

b. Whether Neutral Tandem has standing, individually or on behalf of its originating carrier customers, to pursue the relief it seeks under state law; and

c. **If** the Commission determines that it has jurisdiction and that Neutral Tandem has standing, whether the Commission has the authority to require Level 3 to terminate Neutral Tandem's transit traffic without compensating Level 3 for the costs of those calls.

5. Neutral Tandem's Petition in this docket represents Neutral Tandem's **third attempt** to secure Commission jurisdiction and sufficient standing to bring this action. As explained below, rather than face a Commission vote on a Staff Recommendation recommending dismissal of Neutral Tandem's original petition, Neutral Tandem filed a Notice of Voluntary Dismissal of its Petition a few days before the scheduled Commission vote. Neutral Tandem's "bobbing and weaving" before the Commission underscores Neutral Tandem's implicit recognition that its lack of standing cannot be cured by this third Petition and that the

Commission lacks the legal authority under the statutes cited by Neutral Tandem, Sections 364.16(2) and 364.162, Florida Statutes, to compel interconnection with **Level 3's facilities** and to establish the rates, terms and conditions associated therewith.

6. Neutral Tandem's willingness to waste the resources of the Commission and Level 3 is evident in its third Petition. Having sought and been denied a request for expedited procedures with its original Petition, Neutral Tandem regurgitates the same allegations and requests the same relief in this second docket. These strategies should be swiftly rejected. Through the oral argument in the previous docket on the same issues, the Commission is aware of Neutral Tandem's "legal" strategy - - smoke, mirrors and gamesmanship. It is time for the Commission to directly respond to Neutral Tandem's tactics and dismiss this third Petition for lack of jurisdiction and standing.

7. Neutral Tandem and Level 3 voluntarily negotiated commercial traffic exchange arrangements for originating and terminating transit service. Now for the third time, Neutral Tandem confirms that Level 3 lawfully terminated its existing transit termination contracts with Neutral Tandem pursuant to the terms and conditions of those contracts. Although Neutral Tandem admits that Level 3 lawfully terminated the commercially negotiated contracts at issue and touts itself as an alternative transit provider, Neutral Tandem now wants this Commission to force Level 3 to continue its business relationship with Neutral Tandem. Neutral Tandem is asking this Commission to venture outside of its statutory authority and establish a new regulatory regime solely for the purpose of supporting Neutral Tandem's arbitrage-centered business strategy - - specifically, to convince state utility commissions to authorize Neutral Tandem to use Level 3's transit termination service for free and to then resell that service to Neutral Tandem's carrier customers at a hefty markup.

8. Lacking statutory support for the relief it seeks, Neutral Tandem has tried to sway this Commission by inventing an alleged crisis by refusing to notify its carrier customers so they can take any necessary steps to ensure that those customers' traffic continues to reach Level 3's customers. In order to create a crisis, Neutral Tandem has alleged that Level 3 represents a bottleneck when it comes to terminating calls to Level 3's end users. Level 3 disagrees and so did Neutral Tandem before the initiation of this proceeding. In a letter to the Federal Communications Commission ("FCC"), Neutral Tandem told the FCC that no such bottleneck existed in the local transit market. Neutral Tandem expressly stated that: "No such bottleneck situation exists here, because any carrier that is able to use Neutral Tandem's transit service can also use an ILEC's transit service, or can establish a direct connection to the terminating carrier."<sup>1</sup>

9. Neutral Tandem's tactics should not sway the Commission. The Commission must abide by its delegated statutory authority. *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 495-96 (Fla. 1973). Since the calls in question are destined to Level 3's customers, Level 3 has no incentive or desire to permit the blocking of calls. Level 3 received and terminated traffic through indirect interconnection from Neutral Tandem's carrier customers for numerous years in Florida before Neutral Tandem arrived on the scene in 2004. Level 3 and the other carriers utilizing the public switched network are capable of exchanging traffic either directly or through the ILEC as has been done for many years.

## **II. BACKGROUND FACTS**

10. Both Level 3 and Neutral Tandem are certificated as competitive local exchange telecommunications companies ("CLECs") by the Commission. Neutral Tandem's Petition

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<sup>1</sup> In the Matter of Developing a Unified Intercarrier Compensation Regime CC Docket No. 01-92, Reply Comments

acknowledges that Neutral Tandem is solely a competitive, alternative transit service provider.<sup>2</sup> Moreover, Neutral Tandem's Petition does **not** allege that Neutral Tandem provides "basic local telecommunications services."<sup>3</sup>

11. There are two traffic exchange agreements involved in this dispute. First, pursuant to a Traffic Exchange Agreement dated July 6, 2004 (the "Level 3 Contract"), Neutral Tandem delivered tandem transit traffic originated by Neutral Tandem's customers to Level 3 for delivery and termination. In exchange for terminating this traffic via a direct connection, **Neutral Tandem paid Level 3** according to a formula contained in the Level 3 Contract. Second, under a Master Services Agreement dated February 2, 2004, Level 3's recently acquired subsidiary, Broadwing Communications, purchased Neutral Tandem's transit services and was required to make certain payments to Neutral Tandem described in the agreement for transit. Broadwing further agreed to provide for termination of Neutral Tandem's transit services to Broadwing telephone numbers (the "Broadwing Contract"). Level 3 and Broadwing no longer send any traffic to Neutral Tandem in Florida.

12. Neither contract identifies Florida as a covered marketplace. For example, the Level 3 Contract identifies New York, Illinois and Michigan. Only, through "order creep" did the number of states where Level 3 terminates traffic for Neutral Tandem expand to 17.

13. Level 3 informed Neutral Tandem on January 30, 2007 that it was terminating the Level 3 Contract, pursuant to the terms of that agreement, effective March 2, 2007. Level 3 then

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of Neutral Tandem at 3.

<sup>2</sup>Neutral Tandem's Petition, at 6-7.

<sup>3</sup>Under Section 364.02(1), "basic local telecommunications service" is defined as "voice-grade, flat-rate residential, and flat-rate single-line business local exchange services which provide dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multifrequency dialing, and access to the following: emergency services such as "911," all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing."

provided notice that it was terminating the Broadwing Contract, pursuant to the terms of that agreement. In order to align the termination dates, Level 3 extended the termination dates to March 23, 2007. At the same time, Level 3 expressed its desire that the parties negotiate one comprehensive, nationwide agreement governing Neutral Tandem's use of the Level 3 network for termination of traffic. Without a negotiated agreement for direct physical interconnection, the parties would exchange traffic indirectly through their respective connections with the ILEC. In unwinding the previous contractual relationship, Level 3 requested to work with Neutral Tandem to develop a migration plan in order to prevent any impact on the carrier customers of either party. To date, Neutral Tandem has refused to discuss a migration plan.

14. Rather than continue negotiations, Neutral Tandem played "the regulatory card" by filing petitions with numerous state commissions across the country seeking an interim order requiring Level 3 to maintain its direct connection with Neutral Tandem and for expedited procedures to arbitrate a regulatory imposed transit termination contract. One such petition was filed by Neutral Tandem with this Commission on February 26, 2007.<sup>4</sup>

15. Neutral Tandem's Petition requested the Commission to conduct an expedited proceeding, require Level 3 to continue its physical connection with Neutral Tandem, and establish terms and conditions for Level 3's termination of Neutral Tandem's transit traffic.<sup>5</sup> Level 3 filed a Response to Neutral Tandem's Petition and a Motion to Dismiss the Petition. Level 3's Response objected to Neutral Tandem's request for expedited procedures and an interim order requiring Level 3 to maintain its physical connection with Neutral Tandem. Level

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<sup>4</sup>The other petitions were filed in New York, Connecticut, Georgia, Illinois, Indiana, Maryland, Michigan, California and Minnesota.

<sup>5</sup>Neutral Tandem Petition filed in Docket No. 070127-TX, at 20-21.

3 also requested the Commission's assistance in mediating with Neutral Tandem to develop an orderly migration plan in the event Neutral Tandem's Petition was dismissed or denied by the Commission. Neutral Tandem filed a Response to Level 3's Motion to Dismiss.

16. On April 6, 2007, the Prehearing Officer issued Order No. PSC-07-0295-PCO-TX, in Docket No. 070127-TX, *Order Denying Expedited Resolution and/or Interim Relief*. In that Order, the Prehearing Officer denied Neutral Tandem's request for expedited procedures and denied Neutral Tandem's request that Level 3 be required to maintain its existing direct connection with Neutral Tandem. The Prehearing Officer recognized that Neutral Tandem's request that the Commission mandate CLEC-to-CLEC physical interconnection and Commission-imposed rates, terms and conditions is unprecedented in this State and not the type of issue to be resolved on an expedited basis:

... based upon a cursory review, it appears that Level 3 is in compliance with the termination provisions of the parties' negotiated agreement. As such, I do not find it appropriate for the Commission to interfere with the parties' negotiated arrangement by granting Neutral Tandem's Request for Expedited Relief and/or Interim Relief.

Additionally, Neutral Tandem's petition raises issues of first impression before this Commission. The impact of our decisions in these matters will go beyond the interconnection rights of Neutral Tandem and Level 3. For example, our potential consideration of CLEC-to-CLEC interconnection would undoubtedly result in decisions that impact CLECs throughout the State of Florida. Accordingly, I do not find it appropriate to address such a far-reaching policy matter on an expedited basis.

*Order Denying Expedited Resolution and/or Interim Relief*, at 3.

Neutral Tandem declined to seek reconsideration of the Prehearing Officer's *Order Denying Expedited Resolution and/or Interim Relief*.



17. Shortly after the filing of Neutral Tandem's Petition, Level 3 unilaterally and voluntarily extended its physical connection with Neutral Tandem to June 25, 2007. (The Contracts remain terminated as of March 23, 2007). The voluntary three-month extension was intended to ensure that there would be ample time for Neutral Tandem to notify its customers so that they could take appropriate steps to ensure that originating traffic gets to Level 3 by rerouting the traffic from Neutral Tandem to the ILEC. (With the extension, Neutral Tandem had by that time been given at least 120 days to notify its customers.) However, Neutral Tandem continued to refuse to notify its customers or take any steps to develop a plan for the orderly unwinding of the physical connection. Realizing that Neutral Tandem's purposeful actions were designed to manufacture service disruptions on June 25, 2007 that would harm the customers of Neutral Tandem and Level 3's customers (and consumers in Florida), Level 3 decided to maintain the physical connection beyond that date. By letter dated May 8, 2007, Level 3 notified Neutral Tandem that Level 3 would charge Neutral Tandem at a rate of \$0.001 per minute terminated if it chose to continue use of Level 3's network for termination of Neutral Tandem's transit traffic after June 25, 2007.

18. On May 3, 2007, the Prehearing Officer issued the *First Order on Procedure* in Docket No. 070127-TX<sup>6</sup> bifurcating the proceeding and requiring the parties to brief and present oral argument on the legal issues raised by Neutral Tandem's original Petition. On May 24, 2007, Neutral Tandem and Level 3 presented oral argument on the legal issues. On June 27, 2007, the Staff issued a Recommendation recommending that the Commission determine that it has jurisdiction over this dispute while further recommending that the Commission dismiss Neutral Tandem's Petition on the ground that Neutral Tandem lacks standing to seek relief under

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<sup>6</sup>See Order No. PSC-07-0392-PCO-TX.

Section 364.16(2), Florida Statutes. The Staff recommended that Neutral Tandem's Petition be dismissed without prejudice on a theory - - never suggested or even implied by Neutral Tandem - - that "Neutral Tandem **may** have standing if it can demonstrate that it has authority to act as an agent for an originating carrier in negotiating and reaching traffic termination arrangements."<sup>7</sup>

19. The June 27, 2007 Staff Recommendation was scheduled to be considered by the Commission at the July 10, 2007 Agenda Conference. In a transparent attempt to sway the Commission and secure a deferral of the scheduled consideration of the Staff Recommendation, Neutral Tandem preemptively and prematurely filed a Motion for Leave to Amend Petition and an Amended Petition (Neutral Tandem's Second Petition) which attached purported letters of agency from some originating carrier customers of Neutral Tandem - - letters that were executed only days earlier. In its Motion for Leave to Amend, Neutral Tandem continued its pattern of misrepresenting facts. In paragraph 5 of the Motion, Neutral Tandem stated:

Commission staff has suggested in its recommendation to the Commission that such demonstration (of Neutral Tandem's authority to act as agent for its originating customers) **would** remedy the staff's concerns with regard to Neutral Tandem's standing in this matter. (Emphasis supplied.)

Of course, as noted above, staff only suggested that the agency theory **may** convey standing.

20. On July 9, 2007, having learned that its attempt to secure a deferral had been denied, Neutral Tandem decided to avoid an adverse Commission vote and filed a notice of voluntary dismissal. Once again, Neutral Tandem was less than candid with the Commission. In its Notice of Voluntary Dismissal, Neutral Tandem offered the following justification for its sudden voluntary dismissal:

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<sup>7</sup>See June 27, 2007 Staff Recommendation issued in Docket No. 070127-TX, at 11.

Neutral Tandem believes its motion to amend its Petition was appropriate under applicable procedural rules and case law. However, in order to alleviate any potential procedural concerns regarding the Commission's ability to consider Neutral Tandem's amended Petition, Neutral Tandem is voluntarily dismissing its Petition without prejudice.

Neutral Tandem fools only itself. Neutral Tandem could have waited for the Commission vote and filed its motion for leave to amend if the Staff Recommendation had been approved. Alternatively, after failing in its attempt to secure a deferral through its prematurely filed Motion for Leave to Amend, Neutral Tandem could have withdrawn the motion and refiled it after the Commission vote. Perhaps Neutral Tandem was concerned that the Commission would dismiss on jurisdictional grounds or justifiably reject Staff's suggestion that the agency theory may cure the lack of standing. In any case, Neutral Tandem's gamesmanship remains at work and should not be tolerated by the Commission.

21. Two days after the filing of its Voluntary Dismissal, Neutral Tandem filed its Third Petition which is the Petition at issue in this docket. Level 3 respectfully submits that Neutral Tandem's Petition must now be dismissed with prejudice on the grounds that the Commission lacks jurisdiction to grant the relief sought, lacks jurisdiction over Neutral Tandem, and Neutral Tandem lacks standing to seek Commission mandated physical direct interconnection and Commission mandated rates for Level 3's termination of Neutral Tandem's transit traffic.

### **III. MOTION TO DISMISS**

#### **A. Summary of Grounds for Dismissal**

22. As Level 3 will demonstrate, Neutral Tandem's Petition must be dismissed with prejudice. The Petition relies on Sections 364.16(2) and 364.162(2), Florida Statutes, as grounds for Commission jurisdiction. The Commission lacks jurisdiction to grant the relief sought because:

a. Under Section 364.16(2), the Commission has no authority to compel interconnection - - direct or indirect - - with Level 3's facilities. The Commission's authority to require facilities access or interconnection is limited to ILECs<sup>8</sup> under subsection (3) of Section 364.16. Neutral Tandem's Petition requests the Commission to mandate direct interconnection with Level 3's terminating facilities. The Commission lacks such authority. Accordingly, the Commission lacks jurisdiction to grant the relief sought in the Petition.

b. The Commission can only require Level 3 to provide access to or interconnection with its "telecommunications services." If the physical connection between Level 3 and Neutral Tandem is removed, Level 3 will remain indirectly interconnected with the carriers customers of Neutral Tandem who originate traffic. Neutral Tandem neither originates or terminates any traffic.

c. Under Section 364.16(2), state commission arbitration is available under Section 364.162(2) if an agreement cannot be reached between a CLEC (Level 3) and another provider of local exchange telecommunications services. Section 364.162 is limited to arbitrations between CLECs and incumbent local exchange companies ("ILECs"). Section 364.162 is incorporated in

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<sup>8</sup>ILECs are referred to in the Florida Statutes as "local exchange telecommunications companies" as defined under Section 364.02(8), Florida Statutes.

Section 364.16(2). As such, Level 3 is only required to provide access to and interconnection with its telecommunications services to an ILEC. Neutral Tandem is not an ILEC. Therefore, the Commission lacks jurisdiction over Neutral Tandem's Petition.

d. Finally, any order by the Commission mandating *direct* interconnection between two CLECs is preempted by federal law.

23. Neutral Tandem also lacks standing to pursue the relief it seeks because it is not an ILEC, it is not a regulated "telecommunications company," and because it has not alleged that it provides basic local telecommunications services. Neutral Tandem is now attempting to salvage its standing by alleging that it is an authorized agent of certain originating carriers - - a theory hinted-at by the Commission Staff but not approved by the Commission in the prior docket. As Level 3 will demonstrate, the "agency" argument has no support in the pertinent statutes and the limitations on the purported agency authority conveyed to Neutral Tandem by certain originating carrier customers of Neutral Tandem defeats any argument that such agency rights are sufficient to convey standing to seek relief under Section 364.16(2).

24. Finally, the Commission held in the *TDS Telecom Order*<sup>9</sup> that it will not mandate direct interconnection between a CLEC and an ILEC. In *TDS Telecom*, the Commission held that the option of direct or indirect interconnection allowed by federal law is best left to negotiations between the ILEC and the CLEC. Certainly, the same principle applies to the option of a direct interconnection between two CLECs. Any attempt by the Commission to mandate

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<sup>9</sup>In re: Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ("Joint Petitioners") objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc. and In re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-284 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC, Order No. PSC-06-0776-FOF-TP issued September 18, 2006 in Docket Nos. 050119-TP and 050125-TP.

direct interconnection between two CLECs conflicts with Commission precedent and is preempted by federal law.

**B. The Commission Lacks Jurisdiction Under State Law Over Neutral Tandem's Petition**

25. Neutral Tandem asserts that the Commission has the authority to require Level 3 to **directly** interconnect with Neutral Tandem under Commission imposed rates, terms and conditions, pursuant to Sections 364.16(2) and 364.162(2), Florida Statutes.<sup>10</sup> Section 364.16 provides, in pertinent part:

*(2) Each competitive local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions. If the parties are unable to negotiate mutually acceptable prices, terms, and conditions after 50 days, either party may petition the commission and the commission shall have 120 days to make a determination after proceeding as required by s. 364.162(2) pertaining to interconnection services.*

*(3) Each local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications facilities to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, rates, terms, and conditions established by the procedures set forth in s. 364.162. (Emphasis supplied).*

Section 364.162, which is expressly incorporated in Section 364.16(2), provides, in pertinent part:

*(1) A competitive local exchange telecommunications company shall have 60 days from the date it is certificated to negotiate with a local exchange telecommunications company mutually acceptable prices, terms, and conditions of interconnection and for the resale of services and facilities. If a*

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<sup>10</sup>Neutral Tandem Petition, at 1, 3-4.

negotiated price is not established after 60 days, *either party may petition the commission* to establish nondiscriminatory rates, terms, and conditions of interconnection and for the resale of services and facilities. *The commission shall have 120 days to make a determination after proceeding as required by subsection (2).* Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

(2) In the event that the commission receives a single petition relating to either interconnection or resale of services and facilities, it shall vote, within 120 days following such filing, to set nondiscriminatory rates, terms, and conditions, *except that the rates shall not be below cost.* If the commission receives one or more petitions relating to both interconnection and resale of services and facilities, the commission shall conduct separate proceedings for each and, within 120 days following such filing, make two separate determinations setting such nondiscriminatory rates, terms, and conditions, *except that the rates shall not be below cost.* (Emphasis supplied).

**1. The Commission Lacks Jurisdiction to Require Access to or Interconnection with Level 3's Terminating Network Facilities**

26. Section 364.16(2) requires a CLEC to provide access to and interconnection with its *telecommunications services* to any other provider of local exchange telecommunications services. If the requesting provider and the CLEC fail to reach agreement, either may petition for a state arbitration under Section 364.162(2). In this proceeding, Neutral Tandem has not petitioned for access to or interconnection with a Level 3 **service**. Neutral Tandem has asked the Commission to order Level 3 to maintain existing interconnections between the two companies' **facilities** and to establish terms and conditions for a mandated direct interconnection with Level 3's network. The Commission lacks jurisdiction to grant this relief. Section 364.16(2) is limited to access to and interconnection with a CLEC's services. Level 3 has advised Neutral Tandem

that it is willing to provide indirect access to Level 3's terminating transit service by routing the traffic from Neutral Tandem through an ILEC. Mandated interconnection with **telecommunications facilities** can only be imposed on ILECs under subsection (3) of Section 364.162. Mandated facilities interconnection cannot be imposed on a CLEC like Level 3. Accordingly, the Commission lacks jurisdiction over Neutral Tandem's Petition.

**2. The Commission Lacks Jurisdiction because Neutral Tandem is not an ILEC**

27. Section 364.16(2) incorporates 364.162(2). 364.162(2) is referenced in 364.162(1). Subsections (1) and (2) of Section 364.162 are integrally related and must be considered in the interpretation and application of Section 364.16(2).<sup>11</sup> Since the two statutes address connected subjects, under the case law, the meaning of one (364.162) informs the meaning of the other (364.16(2)). *Brown v. State*, 848 So.2d 361, 364 (Fla. 4<sup>th</sup> DCA 2003).

28. Subsection (1) of Section 364.162 by its terms applies only to negotiations between CLECs and ILECs. If the negotiations fail, the Commission has 120 days to make a determination pursuant to subsection (2). Either the ILEC or the CLEC can file the petition for the Commission arbitration. Subsection (2) insures that the ILEC rate for interconnection is not below cost. Hence, Section 364.162 applies only to ILEC/CLEC arbitrations. As recognized by the Prehearing Officer, the notion of CLEC/CLEC arbitration under this statute has no precedent in Florida.

29. Neutral Tandem conceded this point in its response to Level 3's Motion to Dismiss in Docket No. 070127-TX:

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<sup>11</sup>In ascertaining the legislative intent, a court must consider the plain language of the statute, give effect to all statutory provisions, and construe related provisions in harmony with one another. *Hechtman v. Nations Title Insurance of New York*, 840 So.2d 993 (Fla. 2003). It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give full effects to all statutory provisions in harmony with each other. *Forsythe v. Longboat Key Beach Erosion Control District*, 603 So.2d 452 (Fla. 1992).



Section 364.162 applies to incumbent “local exchange telecommunications companies,” and neither Neutral Tandem nor Level 3 is an incumbent “local exchange telecommunications company.”<sup>12</sup>

30. Having admitted that Section 364.162 provides an ILEC/CLEC negotiation and arbitration process, Neutral Tandem cannot avoid the express inclusion of this statute in Section 364.16(2). To give meaning and effect to the ILEC/CLEC state arbitration provisions in Section 364.162, the only reasonable and harmonious interpretation of the phrase “any other provider of local exchange telecommunications services” in Section 364.16(2) is that it refers to an ILEC because only a CLEC and ILEC could utilize the Section 364.162 arbitration provision referenced in 364.16(2). Thus, the Commission lacks jurisdiction over Neutral Tandem’s Petition because Neutral Tandem is not an ILEC.

**3. Sections 251 and 252 of the Telecommunications Act Preempt State Regulation of CLEC-to-CLEC Interconnection and Traffic Exchange**

31. In the Telecommunications Act, Congress expressly created a federally-mandated arbitration process to govern interconnection between ILECs and telecommunications carriers seeking to interconnect and exchange traffic with ILECs. Congress expressly chose not to provide any *regulatory* process to compel interconnection between non-ILECs, and left that process to commercial negotiations.

32. When Congress enacted the Telecommunications Act, it “unquestionably...t[ook] the regulation of local telecommunications competition away from the States.” *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378, n. 6 (D.C. Cir. 1999). The Court further explained that even though “it is true that the 1996 Act entrusts state commissions with the job of approving

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<sup>12</sup>Neutral Tandem’s response to Level 3’s Motion to Dismiss in Docket No. 070127-TX, at 12.

interconnection agreements and granting exemptions to rural LECs,” state regulators are subject to *federal* control in the performance of those functions. *See Id.*, at 385 (citations omitted). *See also MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343 (7<sup>th</sup> Cir. 2000) (explaining that in the 1996 Act, Congress “invited[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).

33. Sections 251 and 252 “replace[d] a state-regulated with a market-driven system that is self-regulated by binding interconnection agreements.” *Pacific Bell v. Pac-West Telecomm.*, 325 F.3d 1114, 1128 (9<sup>th</sup> Cir. 2003) (“*Pacific Bell*”). In that system, Congress placed a duty on ILECs, but not other telecommunications carriers, to negotiate formal interconnection agreements in good faith and provided for arbitration of all disputes which arose in the formation of such agreements by state public utility commissions. *See* 47 U.S.C. §§251(c)(1) and 252. Congress created no similar mechanism for resolving interconnection disputes between non-ILECs.

34. The legislative history of the Telecommunications Act is clear this was a deliberate choice, not an oversight. In the Senate version of the bill that became the Telecommunications Act, the Senate required only “a local exchange carrier, or class of local exchange carriers, determined by the Commission to have market power in providing telephone exchange service or exchange access service” to negotiate in good faith and provide interconnection on reasonable and nondiscriminatory rates and terms. S. 652, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (as reported in the Senate) (1995). *See also* S. Rep. 104-23, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1995). Consistent with its “inten[t] to encourage private negotiation of interconnection agreements,” the

Senate created no similar duties or remedies for interconnection negotiations between non-ILECs. *Id.*

That version was carried over into the Telecommunications Act as finally adopted. Section 251 establishes three groups of duties. Section 251(a) duties apply to all telecommunications carriers. Section 251(b) duties apply to local exchange carriers, including new entrants. Sections 251(c) and 252, by contrast, apply only to interconnection provided by ILECs. Like the Senate, the Congress as a whole created no provision for arbitration of CLEC-to-CLEC interconnection disputes. *See* 47 U.S.C. §252(b)(5).

35. The Courts have recognized that the detailed provisions of Sections 251 and 252, and particularly the dispute resolution provisions in those sections, expressly preempt state law. *See Wisconsin Bell v. Bie*, 340 F.3d 441, 444-5 Posner, J.) (2003) (holding that state tariffing requirement conflicted with the arbitration provisions of Section 252); *Pacific Bell*, 325 F.3d at 1126 (“the authority granted to state regulatory commissions is confined to the role described in §252:); *Verizon North Inc. v. Strand*, 309 F.3d 935, 943-4 (6<sup>th</sup> Cir. 2002) (holding that state tariffing of interconnection is inconsistent with Section 252).

36. This is not a case where state regulation merely fills in the holes or supplements the federal regulatory scheme and is, therefore, consistent with federal requirements. In contrast to the acceptance testing considered by the Court in *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 393 (7<sup>th</sup> Cir. 2004), Neutral Tandem’s request is to have this Commission mandate not just direct interconnection but also traffic exchange for a CLEC transit provider and the specific rates, terms and conditions of both. That request goes against the thrust of Congress’ vision of an interconnection regime that relied primarily on voluntary negotiation.

37. In summary, as Congress recognized, there is no need for intrusive government oversight of the interconnection relationship between two CLECs at any level. Neither Level 3 nor Neutral Tandem possesses significant market power. There is no need here to “neutraliz[e] the competitive advantage inherent in incumbent carriers’ ownership of the physical networks required to supply telecommunications services.” *Pacific Bell*, 325 F.3d at 1118. Voluntary negotiation is the mechanism Congress chose to establish interconnection and traffic exchange duties as between CLECs, and this Commission should honor that choice.

**4. Neutral Tandem’s Reliance on the *TDS Telecom Order* and *Level 3 Communications, LLC v. Jacobs* is Misplaced and Unpersuasive**

38. Neutral Tandem places significant reliance on the *TDS Telecom Order*. That order is easily distinguishable. In *TDS Telecom*, the primary issue in the case focused on challenges to BellSouth’s transit tariff and whether BellSouth could use a tariff mechanism, rather than negotiated interconnection arrangements, to impose a default price for *originating* transit service. Contrary to Neutral Tandem’s characterization of the Order,<sup>13</sup> the issue in *TDS Telecom* was whether the originating carrier should pay for BellSouth’s transit transport and switching services. The proceeding did not focus on whether an originating carrier should pay the costs of terminating a local call. The Commission held that originating carriers were responsible for paying BellSouth’s transit costs but further held that BellSouth could not use a tariff to establish a default pricing mechanism. All of the rulings in *TDS Telecom* were predicated on the Commission’s encouragement of the use of negotiations and, if necessary, arbitration, to establish the transit rate of an ILEC - - a result consistent with the state arbitration

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<sup>13</sup>See Neutral Tandem’s Petition, at 4.

provisions in Section 364.162. The Commission never indicated that it could mandate direct interconnection between two carriers. In fact, it held to the contrary. *TDS Telecom Order*, at 31.

39. There is no ruling or determination in the *TDS Telecom Order* that gives any hint or suggestion that the Commission has statutory authority under Section 364.16(2) to arbitrate CLEC to CLEC interconnection issues or to mandate direct interconnection between two carriers. The Commission's authority is limited by statute and any attempt by the Commission to create new legislative authority in the form of a direct interconnection requirement would violate a consistent line of precedent established by Florida's appellate courts<sup>14</sup> and would be preempted by federal law. The ruling in *TDS Telecom* was that the Commission remained available to resolve unsuccessful transit negotiations between CLECs and an ILEC, BellSouth. Indeed, as to the relationship between two CLECs who are on the originating and terminating side of BellSouth's transit service, the Commission simply acknowledged that Section 251(a) of the federal act obligates carriers to interconnect either directly or indirectly.<sup>15</sup> In fact, if the physical interconnection link between Level 3 and Neutral Tandem is removed, the parties will remain indirectly connected through their connections with the ILEC.

40. Finally, Neutral Tandem's reliance on *Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447 (Fla. 2003) in Docket No. 070127-TX and anticipated reliance thereon again in this proceeding is inapposite. The issue in the *Level 3* appeal was whether the Commission was authorized under the regulatory assessment fee statutes (Sections 350.113 and 364.336, Florida Statutes (2001)) to include CLEC collocation revenue in the calculation of Level 3's regulatory assessment fee. The substantive issue in the *Level 3* decision has no bearing on this case.

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<sup>14</sup>See *City of Cape Coral v. GAC Utilities, Inc. of Florida*, *supra*.

<sup>15</sup>*TDS Telecom Order*, at 44.

41. The *Level 3* decision undermines Neutral Tandem's discrimination argument.<sup>16</sup> In its Petition, Neutral Tandem alleges that requiring it to pay compensation to Level 3 for termination of transit traffic would unlawfully discriminate against Neutral Tandem because BellSouth does not make similar payments to Level 3. Neutral Tandem Petition, at 20. Neutral Tandem offers no citation to legal authority for this argument and its assertion is ludicrous. The very essence of commercial negotiations between two competitive carriers is that it is a voluntary negotiation that is not "backstopped" by a "default" compensation mechanism negotiated with a different carrier. In *Level 3*, Level 3 argued that it was discriminatory to require Level 3 to pay regulatory assessment fees on collocation revenues when its competitors who are not CLECs were not required to pay such fees. The court rejected this argument noting that:

Level 3 is not similarly situated to companies that solely engage in the rental of collocation facilities. Under section 364.02(12)(a)-(f), a company that only provides facilities to other telecommunications providers is not considered a telecommunications company. Since Level 3 is not in the same class as those companies, because it provides facilities and telecommunications services, it has failed to show that it has been denied equal protection.

*Level 3*, 841 So.2d at 454. Neutral Tandem, like Level 3 and the unregulated collocation providers in the *Level 3* decision, is not similarly situated with BellSouth and has no legal basis to claim discrimination against Level 3.

**5. The Granting of Neutral Tandem's Petition Would Result in Adverse Consequences for the CLEC Industry and Consumers in General**

42. The position advanced by Neutral Tandem (that Sections 364.16(2) and 364.162 allow mandated CLEC-to-CLEC direct interconnection and state arbitration) is not supported by

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<sup>16</sup>See Neutral Tandem's Petition, at 4-5.

the language in the statute, inconsistent with Commission precedent, is in conflict with federal law, and provides an invitation to a floodgate of CLEC petitions requesting direct interconnection with each other to the ultimate detriment of consumers and competition.

43. An order requiring Level 3 to provide direct interconnection with Neutral Tandem would be unprecedented and provide a ticket to CLECs throughout the State of Florida to force other CLECs into inefficient direct interconnections or extract other considerations, including financial considerations. **This prospect bears repeating - - a Commission order authorizing one CLEC to mandate direct interconnection with another CLEC would open the door to all CLECs in the state to request and receive similar direct interconnections.** This very point was tersely stated by Commissioner Carter at the oral argument in the preceding docket:

COMMISSIONER CARTER: . . . I am saying that basically what you guys are saying is that you want to be an ILEC, but you don't want to call yourself an ILEC. And the Commission, this perspective of CLEC-to-CLEC we will be here forever dealing with nothing but CLEC-to-CLEC issues that have to deal primarily with business and contractual matters. Help me understand that. That is what I'm trying to find.<sup>17</sup>

If Neutral Tandem is afforded its requested relief, the efficient network envisioned by the Florida Legislature, this Commission and Congress would have the potential to evolve into a series of unnecessary, and inefficient direct connections. **Yet Neutral Tandem, in an unabashed attempt to conceal its arbitrage-centered business model, actually asserts that the failure to grant its request for a mandated direct connection would result in more inefficient networks.**<sup>18</sup>

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<sup>17</sup> PSC Docket No. 070127-TX, In the matter of: Petition for Interconnection with Level 3 Communications and Request for Expedited Resolution, by Neutral Tandem, Inc., Transcript of Oral Argument, May 24, 2007, pp. 52-53.

<sup>18</sup>Neutral Tandem Petition, at 16.

44. This Commission has rejected the imposition of direct interconnection requirements between carriers. *TDS Telecom Order*, at 31 (“... we find that the record evidence weighs heavily on the side of not mandating direct interconnection based upon a specific (traffic) threshold of any kind.”). This Commission should not extend an invitation to CLECs throughout the State and across the country to file petitions to mandate the inefficient use of the public switched network by mandating direct interconnections with all other CLECs - - even where traffic levels do not justify the investments. This type of inefficient mandated investment undermines the provisions of federal law which allow CLECs the alternative to use either direct or indirect interconnection. This absolute federal right of a CLEC to provide interconnection either directly or indirectly was recognized by this Commission in the *TDS Telecom Order*, at 44. A new network paradigm of hordes of inefficient direct interconnections that would arise from the precedent of granting Neutral Tandem’s Petition can only serve to drive up prices for consumers.

45. In sum, the Commission lacks the statutory authority to grant the relief sought by Neutral Tandem. Sections 364.16(2) and 364.162 impose an obligation on Level 3 to provide access or interconnection to Level 3’s telecommunications services to an ILEC either through negotiation or a state conducted arbitration. These statutes were never intended to be used and have never been used by the Commission to mandate CLEC to CLEC interconnection. The impact of such a ruling would open the floodgate for CLEC petitions for direct interconnection with each other, impose inefficient and costly network investments to the detriment of consumers, lead to inefficient network design, allow for abuse of the historic commercial negotiations process between CLECs by providing a tool to leverage other concessions by



threatening to petition for direct interconnection, and ultimately impose a requirement that is preempted by federal law.

**6. Other State Decisions**

46. Neutral Tandem's one-sided discussion of some of the decisions of other state commissions concerning the Neutral Tandem/Level 3 dispute is of little value to the Commission. Neutral Tandem filed its Petition solely and exclusively under the Florida Statutes. Decisions of other states interpreting different state law may be informative but not precedential. Moreover, Neutral Tandem has failed to fully inform the Commission regarding the full nature of these other state decisions. For example, Neutral Tandem does not mention that its petition for interim, emergency relief was denied by an administrative law judge sitting on behalf of the Public Utilities Commission of the State of California in an opinion filed March 6, 2007.<sup>19</sup> Neutral Tandem fails to mention that in Georgia and New York, the state regulatory commissions rejected the notion that Neutral Tandem should be able to avoid paying Level 3 for termination of Neutral Tandem's transit traffic.<sup>20</sup> Finally, in discussing the decision of the Connecticut Department of Public Utility Control, Neutral Tandem fails to mention that the Connecticut DPUC found that Connecticut state law did not provide the relief requested by Neutral Tandem, that Neutral Tandem was not entitled to the same treatment as the incumbent local exchange

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<sup>19</sup>*Neutral Tandem California, LLC v. Level 3 Communications and its Subsidiaries*, Public Utilities Commission of the State of California, Case No. 07-03-008, filed March 6, 2007.

<sup>20</sup>*See Petition of Neutral Tandem-New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption, Order Preventing Service Disruption and Requiring Continuance of Interim Interconnection*, State of New York Public Service Commission, Case No. 07-C-0233, Opinion issued and effective June 22, 2007; *Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief*, Georgia Public Service Commission's Consideration of Staff Recommendation, Docket No. 24844-U, adopted on June 19, 2007.

company, and ordered the parties to continue negotiations and report back to the Commission no later than November 15, 2007.<sup>21</sup>

**C. Neutral Tandem Lacks Standing to Seek Relief Under Sections 364.16 and 364.162, Florida Statutes**

**1. Neutral Tandem Lacks Standing**

47. Neutral Tandem lacks standing to pursue mandated interconnection with Level 3 because it fails to allege in its Petition that it provides basic local telecommunications services. As previously discussed in Docket No. 070127-TX, the fact that Neutral Tandem has been granted a CLEC certificate does not in any way, shape or form speak to whether that entity is in fact providing the type of service contemplated by the Legislature and by this Commission for CLECs - - basic local telecommunications services. There are hundreds of CLECs registered in this state. Some provide basic local telecommunications services; others do not. If the Commission disagrees with Level 3 and interprets Section 364.16(2) to require a CLEC to provide access to and interconnection with **its telecommunications services** to another CLEC, then to establish standing under Section 364.16(2), Neutral Tandem must allege and prove that it provides basic local telecommunications services. This Neutral Tandem cannot do as it has conceded that it is purely a transit service provider.

48. Under Section 364.16(2), a CLEC is required to provide access to or interconnection with its telecommunications services “**to any other provider of local exchange telecommunications services.**” The term “local exchange telecommunications services” is not defined under Chapter 364. However, the specific CLEC certification statute, Section 364.337, consistently and repeatedly describes the service to be provided by a certificated CLEC that is

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<sup>21</sup>See *Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Communications*, Connecticut Department of Public Utility Control, Docket No. 07-02-29, Order issued June 20, 2007.

subject to Commission jurisdiction as “basic local telecommunications service” or “basic local exchange telecommunications services”:

**364.337 Competitive local exchange telecommunications companies... certification**

(1) ... The Commission shall grant a certificate of authority to provide competitive local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served. A competitive local exchange telecommunications company may not offer *basic local telecommunications services* within the territory served by a company subject to s. 364.052 prior to January 1, 2001....

(2) ... *The basic local telecommunications service* provided by a competitive local exchange telecommunications company must include access to operator services, “911” services, and relay services for the hearing impaired. A competitive local exchange telecommunications company’s “911” service shall be provided at a level equivalent to that provided by the local exchange telecommunications company serving the same area. There shall be a flat-rate pricing option for *basic local telecommunications services*, and mandatory measured service for *basic local telecommunications services* shall not be imposed.

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(5) The commission shall have continuing regulatory oversight over the provision of *basic local exchange telecommunications service* provided by a certificated competitive local exchange telecommunications company.... (Emphasis supplied).

49. Established principles of statutory construction require that the specific CLEC and definitional sections of Chapter 364 be construed *in pari materia* with the term “local exchange telecommunications services” provided by a CLEC under Section 364.16(2). Under those principles, the meaning of “local exchange telecommunications services” is informed by the

specific and repeated use of “basic local telecommunications services” in defining the type of regulated services provided by a certificated CLEC. *See Brown v. State, supra.*

50. Further support is found in the Commission’s own rules. Rule 25-24.830(1) and (2), Florida Administrative Code, describe a CLEC customer as a “basic local exchange telecommunications customer.” Rule 25-24.840(1), addressing service standards and access to 911, requires “[e]ach provider of competitive local exchange telecommunications service (to) make access to 911, emergency services available to each of its basic telecommunications service customers at a level equivalent to the service provided by the incumbent local exchange company.”

51. The only reasonable interpretation of Section 364.16(2) is that it requires a CLEC to provide access to and interconnection only with another provider of **basic local telecommunications services**. The pertinent parts of Section 364.337 and the Commission’s rules governing CLECs are unequivocal that CLECs who choose to provide telecommunications services pursuant to CLEC certificates issued by the Commission in Florida are required to provide basic local telecommunications services, including access to 911 emergency services and relay services for the hearing impaired. This statutory mandate was not lost on the Commission during the oral argument in the previous docket:

COMMISSIONER ARGENZIANO: . . . In looking at the statutes under the certification language it does say that - - and I wasn’t sure that it was issued, the certificate, wrongly or in error. But it does say to me that the basic local telecommunications service provided by a competitive local exchange telecommunications company must include access to operator services, 911 services, and relay services for the hearing impaired.

Do you provide those services?

MR: HARRINGTON: Neutral Tandem does not provide the services that a CLEC serving end users provides to those end users.<sup>22</sup>

Neutral Tandem does not allege that it provides such services. Accordingly, Neutral Tandem lacks standing to pursue the relief sought in its Petition under Section 364.16(2).

52. Neutral Tandem's attempt to create standing by referring to the definition of "service" in Section 364.02(13), Florida Statutes, is unavailing.<sup>23</sup> Under Section 364.02(13), the term "service" should "be construed in its broadest and most inclusive sense." This general statement must, as a matter of law, accede to the specific definition of CLEC service, *i.e.*, basic local telecommunications service, repeatedly stated in Section 364.337 and reiterated in the Commission's CLEC rules. Under general principles of statutory construction, the Commission must be guided by the language in the specific statutes as it is these statutes which are controlling over the general statement made in the "Definitions" section under Section 364.02 referenced by Neutral Tandem. *See, e.g., Maggio v. Fla. Dept. of Labor & Emp. Sec.*, 899 So.2d 1074, 1079-80 (Fla. 2005).

53. Neutral Tandem's lack of standing is underscored by the fact that, despite having received a CLEC certificate, it is not regulated by the Commission. Section 364.01(14), Florida Statutes, provides in pertinent part:

(14) "Telecommunications company" includes every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire

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<sup>22</sup> PSC Docket No. 070127-TX, In the matter of: Petition for Interconnection with Level 3 Communications and Request for Expedited Resolution, by Neutral Tandem, Inc, Transcript of Oral Argument, May 24, 2007, p. 48.

<sup>23</sup> *See* Neutral Tandem's Petition, at 7-8.

within this state by the use of a telecommunications facility. The term “telecommunications company” does not include:

(a) An entity which provides a telecommunications facility exclusively to a certificated telecommunications company;

(b) An entity which provides a telecommunications facility exclusively to a company which is excluded from the definition of a telecommunications company under this subsection;

(c) A commercial mobile radio service provider.

54. As noted by the staff in the Staff Recommendation dated June 27, 2007, in Docket No. 070127-TX, Staff believes that Neutral Tandem is not operating as a regulated “telecommunications company” but as a non-jurisdictional entity which provides a telecommunications facility exclusively to a certificated telecommunications company.

Staff believes Neutral Tandem is essentially providing its facilities as a pathway or bridge for transit traffic to other certificated telecommunications companies and voice communications providers.

June 27, 2007 Staff Recommendation in Docket No. 070127-TX, at 11.

**2. Neutral Tandem’s Lack of Standing Cannot be Cured by Agency Letters from Its Originating Carrier Customers**

55. Neutral Tandem asserts now, in the alternative, that it has standing under Section 364.16(2) as the authorized agent for certain originating carrier customers. This attempt to salvage standing fails for a number of reasons. First, there is **nothing** in Section 364.16 which authorizes one carrier (Neutral Tandem) to represent the interests of another carrier. This is particularly true where, as here, Neutral Tandem is not even subject to the Commission’s

jurisdiction and has failed to allege that these originating carriers are themselves subject to Commission jurisdiction. Second, even assuming *arguendo* that Neutral Tandem could lawfully file a petition for an originating carrier as that carrier's agent, the issues in such a petition would logically focus on the requisite allegations and disputes between the originating carrier and Level 3. Neutral Tandem's Petition fails on this score as well as it focuses on the prior contractual arrangements between Neutral Tandem and Level 3, and the current dispute between Neutral Tandem and Level 3. Third, the real parties in interest under Neutral Tandem's agency theory, the principles under the purported agency principle relationship, the originating carriers, have failed to file as petitioners in this docket. Fourth, the letters of agency attached as Exhibit 8 to the Petition all limit the authority granted by the originating carrier to Neutral Tandem to the establishment of technical and operational aspects of making arrangements for the termination of transit traffic routed through Neutral Tandem to terminating carriers. These letters of agency do not authorize Neutral Tandem to address intercarrier compensation on behalf of the principles. Thus, these letters of agency cannot cure Neutral Tandem's lack of standing as they would prohibit the Commission from conducting an interconnection proceeding under Section 364.16(2), Florida Statutes, which requires the Commission to address the "**prices, terms, and conditions**" of interconnection. (Emphasis supplied).

#### **D. Conclusion**

56. Based on the foregoing, Level 3 respectfully requests that the Commission dismiss this Third Petition filed by Neutral Tandem **with prejudice**. Neutral Tandem has attempted for a second time to cure the legal defects in its Petition. No further opportunities for amendment should be authorized by the Commission.

#### IV. LEVEL 3'S RESPONSE TO NEUTRAL TANDEM'S PETITION FOR EXPEDITED DISPUTE RESOLUTION

Subject to and without waiving the standing and jurisdictional arguments in its Motion to Dismiss, Level 3 provides the following Response to Neutral Tandem's Petition including its Response to Neutral Tandem's position that this matter should be processed under Rule 25-22.0365, Florida Administrative Code, entitled *Expedited Dispute Resolution Process for Telecommunications Companies*.

57. If the Commission were to act outside of its jurisdiction and entertain the Petition of Neutral Tandem, the Commission would need to address complex issues of first impression. Contrary to Neutral Tandem's contentions, the portion of the *TDS Telecom Order* requiring that the "calling party pays" was applied in that direction to require the *originating* carrier to pay BellSouth, the *transiting* carrier, a *transiting* charge for *originating* traffic. This case, however, deals not with any request for payment to the provider of transit services (which in this instance is Neutral Tandem); rather, this case deals with Neutral Tandem's demand that Level 3 deliver Transit Termination Services free of charge. In the *TDS Telecom Order*, the Commission did not direct a compensation rate but instead directed the parties to address a rate in negotiations. Level 3's commercial request that Neutral Tandem compensate Level 3 for the costs Neutral Tandem imposes on Level 3's network is not in violation of the *TDS Telecom Order*.

58. Further, in the *TDS Telecom Order*, the Commission **declined** to establish a rate to be paid by the originating carrier for BellSouth's transit service, leaving that issue to negotiation and potential arbitration by the parties.<sup>24</sup> (emphasis added.) Should the Commission

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<sup>24</sup>The Neutral Tandem-Time Warner Telecom Contracts cited and attached by Neutral Tandem to its Petition (Petition, at p. 17, fn. 20, Ex. 5) have no particular relevance in this proceeding other than to perhaps reflect certain



proceed forward with Neutral Tandem's Petition, the Commission would need to address all of the issues required to establish a comprehensive "traffic exchange agreement" or master services agreement between the parties - - including, presumably, the rates that would be paid by Level 3 when it purchases tandem transit service from Neutral Tandem.

59. The Commission should not consider Neutral Tandem's Petition on an expedited basis pursuant to the procedure set forth in Rule 25-22.0365.

**a. Number and Complexity of Issues**

Contrary to its assertions, Neutral Tandem's Petition raises factual and legal issues that are complex and broad in their application. The fundamental legal issue is whether under Florida law an alternative, competitive transit provider may compel interconnection and whether the Commission has authority to establish rates, terms and conditions for Transit Termination Services. Contrary to the statements of Neutral Tandem, an appropriate rate for Transit Termination Service was not established by the Commission in the *TDS Telecom Order*. The Commission will need to consider testimony and evidence addressing fact specific issues related to Level 3's network, Neutral Tandem's network, and the networks of affected third-party carrier customers of Neutral Tandem; and the relevant facts and circumstances concerning whether Level 3's proposed terms for the delivery of Transit Termination Services are reasonable and nondiscriminatory under applicable law.

**b. Policy Implications that Resolution of the Dispute is Expected to Have**

The fundamental issue raised by Neutral Tandem's Petition is whether a competitive, alternative transit provider may compel direct interconnection and whether the Commission can

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terms and conditions of interconnection which Neutral Tandem supports in the event the Commission does not dismiss Neutral Tandem's Petition.

impose, rates, terms and conditions for transit service under Sections 364.16(2) and 364.162, Florida Statutes. The fundamental legal issues have broad policy implications for CLECs, ILECs and wireless carriers in the State of Florida. Indeed, if the Commission were to venture outside of its jurisdiction and entertain this Petition, the Commission would likely need to address the legal question and policy implications of compelling **direct** interconnections, upon request, between competitive providers across the state. Such would be the result of entertaining Neutral Tandem's position - - a result that is inconsistent with 47 U.S.C. §251 which permits a carrier to directly *or indirectly* interconnect with another carrier. In addition, if the Commission granted competitive providers the right to arbitrate interconnection or traffic exchange agreements with other competitive providers, this would substantially expand the arbitration rights contemplated under state and federal law. Under Florida law, CLECs can only arbitrate agreements with local exchange companies (defined as being certificated prior to June 30, 1995) and not against each other. The federal Telecommunications Act of 1996 follows the same course and does not grant any right to CLEC-CLEC arbitrations under Sections 251 and 252. Both the United States Congress and the Legislature are in agreement that when non-ILECs are seeking to interconnect with each other, those parties will utilize commercial negotiations. If the Commission accepts Neutral Tandem's argument, in contradiction of the expressed intent of the U.S. Congress and the Legislature, the result would require arbitrated interconnection between hundreds of CLECs in the state of Florida, resulting in substantial unnecessary work for the Commission.

Further, the potential cost impact on each and every CLEC in Florida could be catastrophic. First, CLECs would face immense legal costs of continual interconnection arbitrations. In addition, each CLEC would be required to establish network interconnection with every requesting CLEC or transit provider (even those with no facilities or end-users), thus

resulting in substantial duplication of required network facilities and unnecessary network expenditures to the detriment of end users in Florida.

**c. Topics on which Level 3 Plans to Conduct Discovery**

Neutral Tandem states in its Petition that it does not anticipate serving discovery although it reserves the right to do so. Level 3, without conceding Commission jurisdiction or waiving the arguments set forth in its Motion to Dismiss, has already served initial discovery on Neutral Tandem, copies of which are attached hereto as Composite Exhibit A. Should the Commission deny Level 3's Motion to Dismiss, extensive additional written discovery and depositions will be necessary to develop information and prepare for hearing on the factual issues. Level 3 will need to conduct discovery to formulate prospective positions on the appropriate rates, terms and conditions for delivery of Transit Termination Services to Neutral Tandem and to prepare its own testimony addressing an appropriate rate to be paid by Neutral Tandem to Level 3 for the termination of Neutral Tandem's traffic, as well as other terms and conditions for interconnection with Neutral Tandem.

**d. Attempts to Resolve the Dispute Informally**

Level 3 agrees with Neutral Tandem that the parties have engaged in negotiations toward a comprehensive agreement addressing all of Level 3's traffic in the State of Florida and that such negotiations have not been successful. Level 3 has insisted through its negotiations with Neutral Tandem that it cannot be compelled to maintain the existing commercial agreement and cannot be forced into rates, terms and conditions that are not commercially reasonable and not commercially balanced between the two parties.

e. **Any Other Matter Level 3 Believes Relevant to Determining Whether the Dispute is One Suited for An Expedited Proceeding**

The Commission has already determined that Neutral Tandem's Petition should not be addressed on an expedited basis. Neutral Tandem has offered no grounds in its Petition to reverse or modify the decision of the Prehearing Officer on this issue in Docket No. 070127-TX.

As previously stated, Neutral Tandem is attempting to invoke this Commission's expedited procedures process by relying upon a crisis of its own creation. Neutral Tandem is willing to expose its third party carrier customers and their end user consumers to potential service interruption by ignoring Level 3's termination rights and failing to take prudent steps to ensure an orderly migration of Level 3's terminating traffic to other carriers. In fact, by ignoring its customers and not providing notice to them, Neutral Tandem may be violating the terms of Section 3.10.10 of its own price list which provides:

3.10.10 Notice of Service Affecting Activities

The Telephone Company will provide the customer reasonable notification of service affecting activities that may occur in the normal operation of its business. Such activities may include, but are not limited to, equipment or facilities additions, *removals or rearrangements*, routine preventive maintenance and major switching machine change out. Generally, such activities are not customer service specific, they affect many customer services. No specific advance notification period is applicable to all service activities. The Telephone Company will work cooperatively with the customer to determine reasonable notification requirements.<sup>25</sup> (emphasis added)

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<sup>25</sup>Neutral Tandem-Florida LLC, Florida Price List No. 2, Effective March 18, 2005.

**f. Preliminary Statement of Issues and Positions**

Although Neutral Tandem has attempted to use its tactic of filing a voluntary dismissal and refile a Petition two days later to avoid the denial of expedited procedures in Docket No. 071027-TX, Level 3 reasonably anticipates that the Commission will take a consistent course in this docket and will not order expedited procedures. Neutral Tandem has not included a preliminary statement of issues and positions in its Petition and Level 3 will not do so in this Response. Assuming the Commission follows the course it had undertaken in Docket No. 070127-TX, Level 3 expects the Commission to **resume the course of a bifurcated proceeding**. Level 3's positions on the legal issues in this proceeding, are set forth in its Motion to Dismiss. If the Commission denies Level 3's Motion to Dismiss and schedules this case for an administrative hearing, Level 3 will submit positions on the specific issues for hearing.

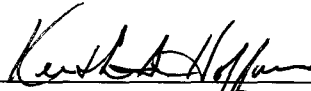
**PRAYER FOR RELIEF**

WHEREFORE, for the reasons set forth herein, Level 3 respectfully requests that the Commission **grant Level 3's Motion to Dismiss Neutral Tandem's Petition with prejudice**. If the Commission denies Level 3's Motion to Dismiss, Level 3 requests the Commission to:

A. Deny Neutral Tandem's request to resolve its Petition on an expedited basis pursuant to Rule 25-22.0365, Florida Administrative Code; and

B. Issue a Case Assignment and Scheduling Record with reasonable time frames for the filing of prefiled testimony and the scheduling of a formal administrative hearing in this proceeding to establish an appropriate rate and other appropriate terms and conditions for terminating Level 3's transit traffic through Neutral Tandem to third-party carriers.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

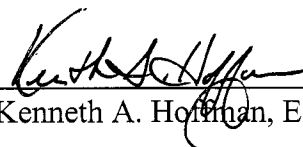
I HEREBY CERTIFY that a copy of the foregoing was furnished by Electronic Mail and U. S. Mail on July 25, 2007 to the following:

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/Level3/finalmotionto dismiss