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May 17, 2007

Ms. Ann Cole, Director
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Re: Docket No. 070127-TX

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 Legal Brief Addressing Legal Issues Established by the Prehearing Officer and Memorandum of Law in Support of Level 3's Motion to Dismiss Neutral Tandem's Petition.

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,

Martin P. McDonnell
Martin P. McDonnell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Neutral Tandem, Inc.)
For Interconnection with Level 3)
Communications and Request for)
Expedited Resolution.)
_____)

Docket No. 070127-TX

Filed: May 17, 2007

**LEVEL 3 COMMUNICATIONS, LLC'S
LEGAL BRIEF ADDRESSING LEGAL ISSUES
ESTABLISHED BY THE PREHEARING OFFICER
AND MEMORANDUM OF LAW IN
SUPPORT OF LEVEL 3'S MOTION TO DISMISS
NEUTRAL TANDEM'S PETITION**

Level 3 Communications, LLC ("Level 3"), by and through its undersigned counsel, and pursuant to Order No. PSC-07-0392-PCO-TX issued May 3, 2007 ("*First Order on Procedure*"), files this Brief addressing the issues of law established by the Prehearing Officer in the *First Order on Procedure* and Memorandum of Law supporting Level 3's Motion to Dismiss the Petition for Interconnection and Request for Expedited Resolution ("Petition") filed by Neutral Tandem, Inc. ("Neutral Tandem").

A. INTRODUCTION AND SUMMARY OF POSITION

The fundamental issue raised by Neutral Tandem's Petition is simple and straight forward: does the Commission have jurisdiction to *mandate* Level 3 to maintain *physical interconnection* of its *facilities* with Neutral Tandem, a competitive carrier that only provides an alternative transit service, and to then arbitrate the rates, terms and conditions for the termination of traffic by Neutral Tandem's customers on the Level 3 network. Neutral Tandem seeks this relief solely and exclusively under state law.¹

¹Unless otherwise stated, the references in this Brief to the Florida Statutes are to the 2006 version of the Florida Statutes.

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Both Level 3 and Neutral Tandem are certificated as competitive local exchange telecommunications companies (“CLECs”) by the Commission. Neutral Tandem’s Petition acknowledges that Neutral Tandem is solely a competitive, alternative transit service provider.² Neutral Tandem’s Petition does not allege that Neutral Tandem provides “basic local telecommunications services.”³

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:

(1) 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 ILECs⁴ 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.

(2) The Commission can only require Level 3 to provide access to or interconnection with a CLEC’s “telecommunications services.” Level 3 has offered to provide indirect access to and

²Neutral Tandem’s Petition, at 2, 5.

³Under 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.”

⁴ILECs are referred to in the Florida Statutes as “local exchange telecommunications companies” as defined under Section 364.02(8), Florida Statutes.

interconnection with its transit termination service through the ILEC tandem switches.

(3) 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 services. Section 364.162 is limited to arbitrations between CLECs and incumbent local exchange companies (“ILECs”). Section 364.162 is incorporated in 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.

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

Second, Neutral Tandem lacks standing to pursue the relief it seeks because it is not an ILEC and because it has not alleged that it provides basic local telecommunications services.

Third, the Commission held in the *TDS Telecom Order*⁵ 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 direct

⁵In 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.

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

Neutral Tandem does not dispute that Level 3 lawfully terminated the transit traffic termination contracts. Although Neutral Tandem concedes that Level 3 lawfully terminated these commercially negotiated contracts 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 regulatory regime for Neutral Tandem's business plan. Without any statutory support for the relief it seeks, Neutral Tandem invents an alleged crisis by refusing to unwind its direct connection and notify its customers so they can take any necessary steps to ensure that those customers' traffic continues to reach Level 3's customers.

Such 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 its customers, Level 3 has no incentive or desire to permit the blocking of calls. Level 3 terminated traffic transited by CLECs through the ILECs 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 through the ILEC as has been done for many years.

For the reasons stated below, the Commission should grant Level 3's Motion to Dismiss Neutral Tandem's Petition with prejudice.

B. BACKGROUND

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").

In fact, neither contract identifies Florida as a covered marketplace. For example, the Level 3 Contract identifies New York, Illinois and Michigan. Through "order creep" the number of states where Level 3 terminates traffic for Neutral Tandem has expanded to 17.

Level 3 informed Neutral Tandem on January 30, 2007 that it was terminating the Level 3 Contract effective March 2, 2007. Level 3 then provided notice that it was terminating the Broadwing Contract. In order to align the termination dates of the Contracts, Level 3 extended the traffic exchange termination date to March 23, 2007. Level 3 provided notice of termination pursuant to the terms of the two agreements. 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 exchange traffic indirectly through their respective connections with the ILEC. In unwinding the previous contractual relationship, Level 3 informed Neutral Tandem that it would work with Neutral Tandem to alleviate the impact on the customers of either party.

However, Neutral Tandem refused to discuss any such plan.

Rather than providing notice to its customers in the event such negotiations were unsuccessful, Neutral Tandem played “the regulatory card” by filing petitions with eight state commissions across the country seeking an interim order requiring Level 3 to maintain its direct connection with Neutral Tandem and expedited procedures to arbitrate a regulatory imposed transit termination contract. One such petition was filed by Neutral Tandem with this Commission on February 26, 2007.⁶

Neutral Tandem’s Petition requested the Commission to conduct an expedited proceeding,⁷ order 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.⁸ 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 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.

On April 6, 2007, the Prehearing Officer issued Order No. PSC-07-0295-PCO-TX, *Order Denying Expedited Resolution and/or Interim Relief*. In that Order, the Prehearing Officer denied Neutral Tandem’s request for expedited procedures and Neutral Tandem’s request that Level 3 be

⁶The other petitions were filed in New York, Connecticut, Georgia, Illinois, Michigan, California and Minnesota.

⁷See Commission Rule 25-22.0365, Florida Administrative Code.

⁸Neutral Tandem Petition, at 20-21.

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*.

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. As of the date of this filing, 80 days since Neutral Tandem filed its Petition, Neutral Tandem has brazenly ignored the interests of end users on the networks of both

companies by failing to make contingency plans. This fact should not be lost on the Commission as it considers the legal issues established by the Prehearing Officer for resolution in this case and Level 3's Motion to Dismiss.

C. LEGAL ISSUES

Issue 1: **Does the Commission have jurisdiction over Neutral Tandem's Petition? If so, what is the source of the Commission's authority?**

Level 3's Position: No, the Commission lacks jurisdiction over Neutral Tandem's Petition. Neutral Tandem alleges that the Commission has jurisdiction over its Petition under Sections 364.16(2) and 364.162(2), Florida Statutes. The Commission lacks jurisdiction under Sections 364.16(2) and 364.162(2).

Argument: 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.⁹ Those statutes, however, confirm that the Commission lacks the authority suggested by Neutral Tandem.

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*

⁹Neutral Tandem Petition, at 1, 3.

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 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

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

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).¹⁰ 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. 4th DCA 2003).

¹⁰In 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).

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. Section 364.162 applies only to ILEC/CLEC arbitrations. As recognized by the Prehearing Officer, the notion of a CLEC/CLEC arbitration under this statute has no precedent in Florida.

Neutral Tandem's response to Level 3's Motion to Dismiss indicates that Neutral Tandem has conceded this point. Neutral Tandem admits:

Section 364.162 applies to incumbent "local exchange telecommunications companies," and neither Neutral Tandem nor Level 3 is an incumbent "local exchange telecommunications company."¹¹

Having admitted that Section 364.162 provides an ILEC/CLEC negotiation and arbitration process, Neutral Tandem wants to skirt the logical conclusion that 364.16(2) and 364.162 must be read in harmony to apply only to ILEC/CLEC negotiations and arbitrations by claiming that it was not "bringing its Petition pursuant to Section 364.162."¹² Neutral Tandem cannot pick and choose which portions of Section 364.16(2) apply. Neutral Tandem's avoidance of the express inclusion of the ILEC/CLEC arbitration process in Section 364.16(2) must be rejected. 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

¹¹Neutral Tandem's response to Level 3's Motion to Dismiss, at 12.

¹²*Id.*

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

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 for addressing interconnection between non-ILECs, and left that process to commercial negotiations.

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 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 (7th 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).

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 (9th 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.

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, 104th Cong., 1st Sess. (as reported in the Senate) (1995). *See also* S. Rep. 104-23, 104th Cong., 1st 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).

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 (6th Cir. 2002) (holding that state tariffing of interconnection is inconsistent with Section 252).

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 (7th 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.

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

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. The Commission 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 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. There is no ruling or determination in the *TDS Telecom Order* that gives any hint or suggestion that the Commission has statutory authority to arbitrate CLEC to CLEC interconnection issues. 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.¹³ 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.

Finally, Neutral Tandem's reliance on *Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447 (Fla. 2003)¹⁴ is inapposite. Neutral Tandem asserts that the *Level 3* case involved "a similar challenge by Level 3 to this Commission's jurisdiction."¹⁵ Neutral Tandem's assertion is, at best, misleading. The issue in the *Level 3* appeal was whether the Commission was authorized under the

¹³*TDS Telecom Order*, at 44.

¹⁴See Neutral Tandem's response to Level 3's Motion to Dismiss, at 2, 7-8.

¹⁵*Id.*, at 7.

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.

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

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 the language in the statute, inconsistent with Commission precedent, 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.

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 leverage other CLECs into inefficient direct interconnections or extract other considerations, including financial considerations, from other CLECs who refuse to accommodate this type of request. 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 other CLECs. Ironically, such an interpretation of Sections 364.16(2) and 364.162(2) undermines the efficiencies that Neutral Tandem claims it brings to the market as an alternative transit provider - - the ability of CLECs to use these alternative transit services in lieu of unnecessarily incurring the investments for direct interconnections 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.

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.

Issue 2: **If the Commission has jurisdiction over Neutral Tandem's Petition, does Neutral Tandem have standing to seek relief under Sections 364.16 and 364.162, Florida Statutes?**

Level 3's Position: The Commission lacks jurisdiction over Neutral Tandem's Petition. Assuming for purposes of argument that the Commission has jurisdiction over Neutral Tandem's Petition, Neutral Tandem lacks standing to seek relief under Section 364.16 and 364.162, Florida Statutes.

Argument: In its Motion to Dismiss, Level 3 asserts that Neutral Tandem lacks standing

because it fails to allege in its Petition that it provides basic local telecommunications services. Neutral Tandem responded by first arguing that it in fact “alleged that it provides local exchange telecommunications services” in its Petition¹⁶ - - a false statement - - and then later arguing that it need not make such allegations because it is a certificated CLEC.¹⁷ As Neutral Tandem and this Commission understand, the fact that an entity 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 and will not do as it is conceded by Neutral Tandem that it is purely a transit service provider.

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

¹⁶Neutral Tandem’s response to Level 3’s Motion to Dismiss, at 2.

¹⁷Neutral Tandem’s response to Level 3’s Motion to Dismiss, at 10.

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.

* * *

(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).

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.*

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."

The only reasonable interpretation of Section 364.16(2) is that it requires a CLEC to provide access to and interconnection 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. 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).

Neutral Tandem's attempt to create standing by referring to the definition of "service" in Section 364.02(13), Florida Statutes, is unavailing.¹⁸ 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

¹⁸See Neutral Tandem's response to Level 3's Motion to Dismiss, at 11-12.

“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).

Issue 3: **If the Commission has jurisdiction over the Petition and determines that Neutral Tandem has standing, can the FPSC require direct interconnection between Level 3 and Neutral Tandem for the purpose of terminating tandem traffic from originating carriers delivered by Neutral Tandem to Level 3?**

Level 3's Position: No. The Commission has already acknowledged that it cannot require direct interconnection and that indirect interconnection is permissible under federal law.

Argument: Level 3 has demonstrated that the Commission lacks jurisdiction, as a matter of law, over Neutral Tandem’s Petition and that, as a matter of law, Neutral Tandem has failed to allege facts sufficient to demonstrate that it has standing to seek the relief sought under Sections 364.16(2) and 364.162. Assuming *arguendo* that the Commission determines that it has jurisdiction and that Neutral Tandem has standing to pursue the relief sought, then Issue 3 raises an issue which has already been resolved by the Commission. In the *TDS Telecom Order*, the Commission acknowledged that under Section 251(a) of the Federal Act, direct or indirect interconnection is permissible. There is nothing in Section 364.16(2) that indicates or implies that direct interconnection between two carriers is required. Indeed, the Commission’s authority is limited to the statutory authority granted by the Legislature and any attempt by the Commission to create new legislative authority in the form of a direct interconnection requirement would violate both Florida case law and would be preempted by federal law.

D. NEUTRAL TANDEM’S REQUEST FOR INTERIM RELIEF

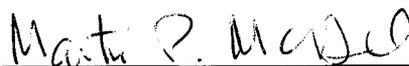
As previously noted, the Prehearing Officer previously denied Neutral Tandem’s request for an interim order requiring Level 3 to maintain its direct connection with Neutral Tandem pending

a decision in this case. In the *First Order on Procedure*, the Prehearing Officer advised the parties that the Commission may revisit this issue depending on its determinations on the three legal issues discussed above. Level 3 submits that the Commission lacks statutory authority to require a direct interconnection with Level 3's network under Section 364.16(2). No new facts have been raised since the Prehearing Officer's denial of Neutral Tandem's Request for Interim Relief. Neutral Tandem should not be rewarded for its dilatory tactics. Neutral Tandem should not be rewarded for failing to take advantage of the additional 90 days granted by Level 3 to provide notice to their originating customers of the potential or different transiting arrangements. The Prehearing Officer's decision should not be disturbed.

E. PRAYER FOR RELIEF

WHEREFORE, Level 3 respectfully requests that the Commission find, as a matter of law, that it lacks jurisdiction over Neutral Tandem's Petition and that Neutral Tandem lacks standing to pursue the relief requested in the Petition. Based on these findings, Level 3 respectfully requests that the Commission grant Level 3's Motion to Dismiss Neutral Tandem's Petition with prejudice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

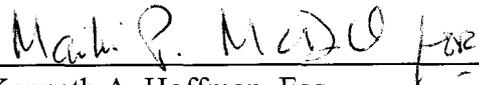
I HEREBY CERTIFY that a copy of Level 3 Communications, LLC's Brief was furnished by Electronic Mail and U. S. Mail on May 17, 2007 to the following:

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