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August 3, 2007

VIA HAND DELIVER

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

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

Dear Ms. Cole:

Enclosed for filing in the above-referenced Docket, please find an original and 15 copies of Neutral Tandem's Response in Opposition to Level 3's Motion to Dismiss.

Please acknowledge receipt of this filing by stamping and returning the extra copy of this letter to me. Your assistance in this matter is greatly appreciated. If you have any questions whatsoever, please do not hesitate to contact me.

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Sincerely,

Beth Keating

Beth Keating
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Enclosures

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-FLORIDA, LLC'S RESPONSE IN OPPOSITION TO LEVEL 3 COMMUNICATIONS' MOTION TO DISMISS

Pursuant to Rule 28-106.204, Florida Administrative Code, petitioner Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC ("Neutral Tandem") respectfully submits its response to the motion to dismiss filed by respondent Level 3 Communications, LLC ("Level 3").

INTRODUCTION

It is not surprising that Level 3's motion to dismiss attempts to smear Neutral Tandem, because it plainly is in Level 3's interest that this Commission never reach the merits of the parties' dispute. The same Level 3 conduct that Neutral Tandem complains of here already has been found to constitute an effort by Level 3 to "knowingly impede the development of competition" in another state. Level 3 has been ordered to "cease and desist from its threat to disconnect or otherwise disrupt the physical interconnection" with Neutral Tandem in that state. Other state commissions also have rejected Level 3's claim as well, and have granted Neutral Tandem the same relief it seeks before this Commission.

The Commission Staff's prior recommendation in Docket No. 070127-TP echoed these concerns regarding Level 3's conduct, noting that "Level 3's refusal to directly interconnect with Neutral Tandem hinders the further development of a competitive telecommunications market in

the State of Florida."[1] Staff also has noted that Florida law "charge[s] this Commission with the responsibility of fostering a competitive environment for the provisioning of telecommunication services," and that "the entry of Neutral Tandem into the market as an alternative transit service provider is an important step in the building of a competitive PSTN."[2]

It is clear that Level 3's conduct is wrongful and anticompetitive. The fundamental issue posed in this case is whether this Commission has the power to rectify this obvious wrong. The plain answer is yes. It is undisputed that the transit traffic carried by Neutral Tandem is ***local*** telecommunications traffic -- traffic that both originates and terminates over the PSTN within the State of Florida. This Commission already has found, in the *TDS Telecom Order*,[3] that it has authority to establish terms and conditions for the delivery of local transit traffic. This Commission also found in the *TDS Telecom Order* that the "originating carrier pays" principle applies in the transiting context. This Commission plainly has jurisdiction to address Neutral Tandem's Petition and to order the relief Neutral Tandem seeks.

Neutral Tandem also has standing to bring its Petition for interconnection. This standing is directly conferred by Section 364.16(2), Florida Statutes. Section 364.16(2) imposes an affirmative obligation on Level 3 to "provide access to, ***and interconnection with***, its telecommunications services to ***any other provider of local exchange telecommunications services***." The statute further provides that, if the parties are unable to establish mutually agreeable interconnection terms through negotiation, "***either party*** may petition" the Commission to establish those terms. Neutral Tandem's Petition invokes its clear statutory right

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[1] Staff Recommendation, released June 27, 2007, in Docket No. 070127-TX – Petition for interconnection with Level 3 Communications and Request for expedited resolution, by Neutral Tandem, Inc., at 7.

[2] *Id.*

[3] *See In re Joint Petition by TDS Telecom, et al.*, Docket Nos. 050119-TP, D050125-TP; Order No. PSC-06-0776-FOF-TP, 2006 Fla. PUC LEXIS 543, at *36-37 (Sept. 18, 2006) ("*TDS Telecom Order*").

to petition this Commission, to ensure that Level 3 lives up to its interconnection obligations under Florida law.

Notwithstanding Level 3's claims, the plain terms of Section 364.16(2) do ***not*** limit Level 3's interconnection obligation to providers of "basic local telecommunications services." To the contrary, the Florida Legislature specifically chose ***not*** to limit Level 3's obligations in that manner. Instead, Section 364.16(2) expansively requires Level 3 to interconnect with any provider of "local exchange telecommunications services." Although this term is not defined in Chapter 364, the Florida Legislature specifically directed this Commission to interpret the term "service" in "its broadest and most inclusive sense." Again, the traffic delivered by Neutral Tandem unquestionably is local telecommunications traffic originated and terminated in the State of Florida. There is no legitimate basis in Chapter 364 to interpret the term "local exchange telecommunications provider" in Section 364.16(2) to exclude Neutral Tandem. If the Florida Legislature had intended to restrict the applicability of Section 364.16(2) to providers of "basic local telecommunications services," it would have used that term in Section 364.16(2). It did not do so, and it would be contrary to the plain language of the statute to read it in such a restrictive manner.

Finally, Level 3's claim that this Commission is preempted from addressing Neutral Tandem's Petition is flawed. Nothing in the federal Telecommunications Act of 1996 preempts this Commission from addressing Neutral Tandem's Petition. Level 3's argument already has been rejected by several other state commissions and in Staff's prior recommendation, and it should be rejected again.

At bottom, the question this Commission must answer is whether it will allow Level 3's plainly anticompetitive conduct -- conduct that directly impacts the delivery of 65,000,000

minutes per month of local telecommunications traffic on the PSTN in Florida, as well as the development of local competition in this State -- to go unremedied. Level 3 desperately seeks to prevent this Commission from even considering the merits of its conduct, and for good reason. Not a single state commission has agreed that Level 3 should be allowed to impose its discriminatory and anticompetitive conduct on Neutral Tandem and its customers. This Commission can and should at least consider the merits of Neutral Tandem's Petition. Level 3's motion to dismiss should be denied.

LEGAL STANDARD

In accordance with the well-recognized standard of review for a Motion to Dismiss in Florida, Level 3 must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted.[4] In considering Level 3's motion to dismiss, all "material allegations" of Neutral Tandem's Petition "must be construed against" Level 3's request for dismissal.[5] The Commission has found that where, as here, a motion to dismiss is "based on lack of subject matter jurisdiction" and "raises solely a question of law," the Commission "may properly go beyond the four corners of the complaint" to decide the motion.[6]

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[4] *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla.1st DCA 1993); *Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963); Rule 1.130, Florida Rules of Civil Procedure (the Commission should confine itself to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss).

[5] *Id.*

[6] *In re: Complaint against KMC Telecom III, LLC, KMC Telecom V, Inc., and KMC Data, LLC by Sprint-Florida, Incorporated*, Docket No. 041144-TP; Order No. PSC-05-1065-FOF-TP, 2005 Fla. PUC LEXIS 239, at *4-5 (Nov. 1, 2005).

ARGUMENT

I. This Commission Has Jurisdiction To Resolve This Dispute.

Neutral Tandem's Petition demonstrates that this Commission has jurisdiction, pursuant to Section 364.16(2), Florida Statutes, to order interconnection between Level 3 and Neutral Tandem on nondiscriminatory terms and conditions. (Pet., at 3-4, 13-17.) Section 364.16(2) provides that: "Each competitive local 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."[emphasis added]. Section 364.16(2) further provides that, if "the parties are unable to negotiate mutually acceptable prices, terms and conditions after 60 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." In turn, Section 364.162(2) provides that the Commission shall, within 120 days after receiving a petition, "set nondiscriminatory rates, terms, and conditions" for interconnection. By its plain language, Section 364.16(2) applies to Neutral Tandem's petition. Neutral Tandem is, in fact, a "provider of local exchange telecommunications" service seeking interconnection with a CLEC.

A. Clear Statutory Authority

This Commission's statutory authority over interconnection between Level 3 and Neutral Tandem could not be clearer. Section 364.16(2) requires every "competitive local telecommunications company," including Level 3, to "provide access to, *and interconnection with*, its telecommunications services" to any other local carrier that requests interconnection, "at nondiscriminatory prices, terms, and conditions." Section 364.16(2) also allows "either party" to

petition the Commission if the parties cannot reach terms and conditions through negotiation, and it *requires* this Commission to "set nondiscriminatory rates, terms, and conditions" for such interconnection within 120 days. It is difficult to imagine how the Florida Legislature could have provided a clearer statement of this Commission's authority to address Neutral Tandem's Petition.

In addition to the Commission's broad authority under Section 364.16(2), the Commission has independent authority to require direct interconnection between Level 3 and Neutral Tandem pursuant to Section 364.01, Florida Statutes.[7] Section 364.01 gives this Commission "broad regulatory powers over the telecommunications industry."[8] Under Section 364.01, the Commission has been charged by the Legislature to exercise its "exclusive jurisdiction" over telecommunications companies to "encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services."[9] The Commission has the power and the **duty** to "[p]romote competition by encouraging innovation and investment in telecommunications markets" and "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior."[10] Notably, the matters at issue in this case are not among those identified in Section 364.011, Florida Statutes, as being exempted from Commission oversight.

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[7] *See, e.g. Fla. Interexchange Carriers Ass'n v. Beard*, 624 So.2d 248, 251 (Fla. 1992).

[8] *Level 3*, 841 So.2d at 450-54. *See also Fla. Pub. Telecomm. Ass'n v. City of Miami Beach*, 321 F.3d 1046, 1049-50 (11th Cir. 2003) ("[t]he language of [Section 364.01] leaves no doubt about the broad and exclusive powers granted to the FPSC to regulate telecommunications companies.")

[9] § 364.01(4)(e), Fla. Stat.

[10] § 364.01(4)(d),(g), Fla. Stat.

Finally, Level 3 contends that the Commission cannot mandate that a CLEC directly interconnect with another provider, because Section 364.16(2) refers to "access to or interconnection with a Level 3 service." (Mot. to Dismiss, at 14). Level 3 argues that this precludes interconnection with Level 3's facilities, as requested by Neutral Tandem. (*Id.* at 15). This argument should be summarily rejected. First and foremost, this Commission already has found, in the *TDS Telecom Order*, that Chapter 364 grants it jurisdiction over interconnection for transiting purposes. The Commission found that "[t]ransit service is clearly an interconnection agreement under Section 364.16, Florida Statutes."[11] Based on that finding, the Commission held that it would "use our authority under state law . . . to require the parties to establish rates, terms, and conditions for transit service[.]"[12] Second, but equally important, the use of the term "interconnection" in Section 364.16(2) clearly contemplates a physical connection of two carriers' facilities.

B. Applicability of TDS Telecom Decision

Furthermore, this Commission found in the *TDS Telecom Order* that Chapter 364 gives it jurisdiction over interconnection for transiting purposes. Specifically, the Commission held that it would "use our authority under state law . . . to require the parties to establish rates, terms, and conditions for transit service[.]"[13] The Commission further found that "[t]ransit service is clearly an interconnection arrangement under Section 364.16, Florida Statutes."[14] Contrary to Level 3's claim that Section 364.16(2) does not provide the Commission with authority to order direct (as

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[11] *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *22.

[12] *Id.* at *21.

[13] *Id.*

[14] *Id.* at *22.

opposed to indirect) interconnection, the Commission found in the *TDS Telecom Order* that Section 364.16(2) gives this Commission the authority to require direct interconnection.[15]

Level 3 tries to distinguish the *TDS Telecom Order* by emphasizing that the *TDS* case addressed ". . . whether the originating carrier should pay for BellSouth's transit transport and switching services." (Mot. to Dismiss, at 19.) Level 3 states that "[t]he proceeding did not focus on whether an originating carrier should pay the costs of terminating a local call." (*Id.*). That is true. However, the issue of whether an originating carrier pays the costs of terminating a local call was already a non-issue; the fact of the matter is that FCC rules require that the originating carrier pay the costs of terminating a local call, and that payment is known as reciprocal compensation. *See* 47 C.F.R. §§ 51.701 and 51.703. Nevertheless, in spite of the fact that the underlying dispute in the *TDS Telecom* case was slightly different, the essential findings are equally applicable here, including the conclusion regarding jurisdiction. As noted above, the interconnection obligations of Section 364.16(2) plainly apply to *competitive* local carriers such as Level 3, and the Commission squarely relied on Section 364.16(2) in finding that it had authority to require interconnection for transiting purposes.[16]

Furthermore, Level 3's attempt to distinguish the *TDS Telecom* case completely ignores the Commission's analysis of the "originating carrier pays" principle, which Neutral Tandem references in its Petition. (Pet., at 18.) For instance, at pages 23 and 24 of Order No. PSC-06-0776-FOF-TP, the Commission conducted the following analysis:

> . . . The choice of how the originating call is delivered to the end user is not the choice of the terminating carrier, but rather the choice of the originating carrier, even if the originating carrier is a Small LEC.

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[15] *Id.* at *24.

[16] *Id.*

> The parties rely on several Circuit Court decisions and FCC orders to support their respective positions. Atlas, Mountain, Texcom, and Texcom Reconsideration are all consistent with FCC Rule 51.703(b), holding that the originating carrier is responsible for transit costs. In Atlas, the 10th Circuit concluded that CMRS providers should not have to bear the costs of transporting calls that originated on the networks of rural LECs across the ILEC's network. (Atlas fn 11) [The 10th Circuit also found that the §251(a) obligation of all telecommunications carriers to interconnect directly or indirectly is not superseded by the more specific obligations under §251(c)(2).] In the Texcom Order, the FCC held that for third-party originating traffic, "the originating third party carrier's customers pay for the cost of delivering their calls to the LEC, while the terminating CMRS carrier's customers pay for the cost of transporting that traffic from the LEC's network to their network. (Texcom Order ¶6) On reconsideration, the FCC stated that the carrier providing the transit service may charge the terminating carrier "for the cost of the portion of these facilities used for transiting traffic, and [the terminating carrier] may seek reimbursement of these costs from originating carriers through reciprocal compensation." (Texcom Recon Order ¶4) Thus, costs should be borne by the originating carrier. The Texcom Order and the Texcom Recon Order reflect the FCC's intent to allow the transiting LEC to recover its cost of providing the transiting service from the originating LEC. Under the Texcom Recon Order, the terminating provider may seek reimbursement of these costs from the originating carrier. There is no mention that the terminating carrier would not be able to recover these costs, and no basis for the argument that the terminating carrier should have to bear any of the costs of transporting a call to the terminating carrier across the transiting carrier's system.
>
> The reasoning in the Atlas and the Texcom Orders is compelling. They are consistent with and appear to confirm the principle that the originating party must bear the costs of transiting the call.

While the case itself focused on whether the transit carrier, BellSouth, could require payment from the originating carrier, the essential findings are equally applicable to this case. In fact, the above analysis even references the *Texcom Reconsideration Order*, in which the FCC stated that the transiting carrier could charge the terminating carrier for the costs of transport.[17] Nowhere is there any discussion of the converse proposition that would allow the terminating carrier to seek reciprocal compensation payments from the transit carrier. In fact, the Commission specifically

[17] Order No. FCC 02-96, *Texcom, Inc. v. Bell Atlantic Corp., d/b/a Verizon Communications*, File No. EB-00-MD-14, released March 27, 2002, Order on Reconsideration.

concluded that, "The originating carrier is also responsible for compensating the terminating carrier for terminating the traffic to the end user."[18]

To be clear, Level 3 has the ability to seek payment for the call termination service it provides from originating carriers in accordance with FCC Rules on reciprocal compensation. The originating carriers are the entities that actually use Level 3's network, because it is their customer that has originated a call directed to a Level 3 customer[19] This Commission endorsed the "calling party's network pays" principle in the *TDS Telecom Order*. Neutral Tandem has made clear that it will pass all signaling information from originating carriers to Level 3, so that Level 3 can charge reciprocal compensation to the originating carriers, just as incumbent carriers do when they provide tandem transit services. In addition, Neutral Tandem pays 100% of the cost of the transport used to deliver its tandem transit traffic to Level 3. Notably, in the identical situation involving the ILECs' transit service, Level 3 pays the cost of the transport, not the ILECs.

Level 3 also points out that, in the *TDS Telecom Order*, the Commission left the establishment of specific terms and conditions of interconnection for transiting to negotiation in the first instance. (Mot. to Dismiss, at 19.) However, as Level 3 concedes, the Commission found that "in the event negotiations failed," the terms of interconnection "would be established by the Commission." (*Id.*) Indeed, the Commission specifically reaffirmed in the *TDS Telecom Order* that carriers "may file for arbitration under Section 364.16, Florida Statutes" if

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[18] *Id.* at 24.

[19] Level 3's own witnesses have acknowledged that Level 3 has not even bothered to seek reciprocal compensation payments from certain originating carriers, alternatively explaining that Level 3 has not done so because it would be "hard," or "not worth their [Level 3's] time. *In re Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Commc'ns*, Tr. of 4/12/07 Evidentiary Hearing, at 245-46 (hereinafter the N.Y. Tr.); Docket No. 24844-U, *In re Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Commc'ns*, Ga. Pub. Serv. Comm'n, Tr. of 05/03/07 Evidentiary Hearing, at 293.

negotiations regarding the terms and conditions of transiting failed.[20] That is what Neutral Tandem has done in this case.

Level 3 also asserts that the Commission did not indicate that it could mandate direct interconnection between two carriers. (Mot. to Dismiss, at 20; citing page 31 of the *TDS Telecom Order*.) To be clear, the Commission actually stated that it would not mandate direct interconnection *"based upon a specific threshold of any kind."*[21] The issue being addressed by the Commission at p. 31 of the *TDS Telecom Order* was whether, at some specified level, the amount of traffic exchanged between carriers should be used as a determining factor such that the carriers should be required to directly interconnect, rather than use the transit service of another carrier. Thus, the Commission declined to mandate direct interconnection based upon a static factor such as the amount of traffic exchanged between two carriers. The Commission in no way indicated that it could not, or would not mandate direct interconnection when appropriate. [22]

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[20] *In re Joint Petition by TDS Telecom*, Docket Nos. 050119-TP, D050125-TP; Order No. PSC-06-0776-FOF-TP, 2006 Fla. PUC LEXIS 543, at *131 (Sept. 18, 2006).

[21] *Id.* at. 31.

[22] Level 3 notes that if the physical interconnection between it and Neutral Tandem is removed, Neutral Tandem will still remain interconnected with Level 3, albeit it indirectly, via the ILEC tandem. (Mot. to Dismiss, at 20) This is not, however, a viable arrangement. In fact, such a situation wherein an originating carrier sends its traffic to one transit provider, who then sends it to another transit provider, and then to the terminating carrier - does nothing more than impose an inefficient, costly and at best, duplicative service on carriers that have otherwise chosen to use Neutral Tandem as their transit provider. See *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n Docket No. 07-0277, Final Order of the Illinois Commerce Commission, at 6 (July 10, 2007) (hereinafter the "Illinois Order") ("NT accurately characterizes Level 3's scheme, with two transit providers, two sets of costs, and mandatory routing of traffic through the ILEC, as functionally equivalent of a refusal by Level 3 to interconnect with Level 3.") A copy of the Order was Attached as Exhibit 9 to the Petition.

Furthermore, the Commission has specifically stated that it is the originating carrier's decision how a call will be delivered to the end user, not the terminating carrier's choice.[23] The Florida Statutes are also clear that the Legislature never intended for the terminating carrier to have this level of control over the routing of a call being terminated to its network. Section 364.30(1), Florida Statutes, which is applicable to "any telecommunications company operating within this state," states that ". . .the company with which the call is initiated shall be the sole judge" regarding the proper facilities and routing of a call.[24] Subsection 2 provides that "[a]ny connecting telecommunications company refusing to give and make a connection with the company through which the call was initially placed, over any connecting point not in use, commits violation of this section." Neutral Tandem's customers, including originating carriers, have decided that they want to use Neutral Tandem's service and facilities to send traffic to Level 3's network for termination, thereby exercising their right to choose how to send traffic to the terminating carrier. If Level 3 prevails in this case, the originating carrier's right to choose how to send traffic to a terminating carrier, which was specifically recognized by the Commission in the *TDS Telecom Order*, will be rendered an absolute nullity.

C. Broad Authority Over Activities of Local Telecommunications Providers

In addition, Level 3's assertion that the Commission lacks jurisdiction to order interconnection between Level 3 and Neutral Tandem, because neither party is an incumbent carrier, is contrary to Florida Supreme Court precedent. In *Level 3 Communications, LLC v. E. Leon Jacobs*, the Florida Supreme Court rejected a challenge by Level 3 to this Commission's

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[23] *Id.* at 23.

[24] Notably, Section 364.30, Florida Statutes, is not among the list of statutory provisions from which competitive carriers are exempt, as set forth in Section 364.337(2), Florida Statutes.

jurisdiction.[25] As it does here, Level 3 made a sweeping argument aimed at severely limiting this Commission's jurisdiction; namely that the Commission lacks jurisdiction over any services that do "not involve the provision of basic local telecommunications service."[26]

Notably, in defending against Level 3's broad assault on its authority in that case, this Commission argued to the Florida Supreme Court that interconnection is among the fundamental duties of all competitive carriers in Florida under Section 364.16(2), and that the Commission has authority over Level 3's interconnection duties:

> As described above, the Commission retains authority over a wide variety of activities of all local telecommunications providers in Florida, including the interconnection duties of both ILECs and [competitive carriers] and the means and manner of interconnection. Interconnection is a fundamental duty of all local telecommunications providers in both Florida law and Federal Law.[27]

The Florida Supreme Court agreed with the Commission and rejected Level 3's jurisdictional attack. The Supreme Court found that "Level 3's argument that the PSC has limited authority over [competitive local carriers] ignores the numerous statutes which give the PSC authority over a variety of activities of all local telecommunications providers."[28] The Supreme Court specifically determined that Section 364 "gives the PSC authority over interconnection duties of both ILECs and [competitive local carriers]."[29]

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[25] *Level 3*, 841 So.2d at 450-54.

[26] *Id.* at 453.

[27] Amended Answer Brief of the Florida Public Service Commission, *Level 3 Communications, LLC v. E. Leon Jacobs*, No. SC01-2050, at 19 (Fla. Dec. 27, 2001).

[28] *Level 3*, 841 So.2d at 454.

[29] *Id.; see also Florida Public Telecomms. Ass'n v. City of Miami Beach*, 321 F.3d 1046, 1049-50 (11th Cir. 2003) (holding that "[t]he language of the statute leaves no doubt about the broad and exclusive powers granted to the FPSC to regulate telecommunications companies including their services and facilities" and finding it "unpersuasive to argue that the Florida Legislature should have itemized the powers of the FPSC when it gave it such broad and exclusive authority over telecommunications companies.").

Level 3 attempts to distinguish the *Level 3* Supreme Court decision by arguing that the substantive issue in that case, the calculation of regulatory assessment fees, has no bearing on this case. (Mot. to Dismiss, at 20.) Level 3 further argues that the Court's conclusions in the *Level 3* decision actually contradict Neutral Tandem's argument that to require Neutral Tandem to pay reciprocal compensation for traffic it delivers to Level 3's network, when BellSouth (or other ILECs for that matter) is not required to pay a similar charge when delivering transited traffic, would be discriminatory. Level 3 argues that the Court in the *Level 3* decision required Level 3 to pay regulatory assessment fees, even though its competitors who were non-telecommunications companies, were not required to do so. The Court concluded that Level 3 and its competitors were not "in the same class." (Mot. to Dismiss, at 21; citing *Level 3*, 841 So. 2d at p. 454). Level 3, therefore, concludes that there would be nothing discriminatory about requiring Neutral Tandem to pay for termination of transited traffic, even though BellSouth (AT&T) is not required to do so, because Neutral Tandem and BellSouth (AT&T) are not similarly situated.

Level 3 ignores, however, a very essential and glaring element in the *Level 3* case – the Commission cannot require an unregulated, non-telecommunications company to pay regulatory assessment fees under any circumstance.

Furthermore, there can be no dispute that ILEC transit service is identical to the transit service provided by Neutral Tandem. Thus, in the limited, albeit crucial, context of the provision transit service, Neutral Tandem and the ILECs are most certainly similarly situated. When providing transit service, ILECs and Neutral Tandem carry local calls, enabling those calls to be completed on another carrier's network. Likewise, when providing transit service, neither the ILECs nor Neutral Tandem are the originating carriers of the transited traffic. The service is the

same; the function is the same; the result is the same; and the service providers are both certificated by the Commission. The Commission must, therefore, conclude that in this context, BellSouth (AT&T) and Neutral Tandem are similarly situated.[30] Consequently, if the Commission were to allow Level 3 to force Neutral Tandem to pay reciprocal compensation payments for the termination of transited traffic, when the Commission has not allowed Level 3 to assess BellSouth (AT&T) a similar charge under identical circumstances, then the Commission would be sanctioning discriminatory treatment of a new entrant in the telecommunications market. This would establish an insurmountable barrier to competition in the provision of competitive transit traffic telecommunications services in Florida, contrary to the Legislature's intent as expressed in Section 364.01(4), Florida Statutes. If Level 3 prevails, only ILECs will have the right to terminate transit traffic at non-discriminatory rates, terms, and conditions, which clearly flies in the face of the Florida Legislature's rewrite in 1995 of Chapter 364. Neutral Tandem's ability to compete in the market at all, much less effectively, will be directly, immediately, and substantially harmed, because it will be subject to a different standard for interconnection and transiting services than are the ILECs. That harm extends far beyond

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[30] As the Staff of the Georgia Public Service Commission recently stated, "That AT&T is an ILEC and Neutral Tandem is a CLEC does not by itself constitute a reasonable basis for discriminating between the two providers...The fact that AT&T provides other services to Level 3 that have nothing to do with transit traffic is not a reasonable basis to refuse to interconnect directly with another transit provider." Docket No. 24844-U, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief*, Ga. Pub. Serv. Comm'n , Consideration of Staff's Recommendation, at 5 (June 12, 2007) (orally adopted by the Commission on June 19, 2007) (hereinafter the "Adopted Georgia Staff Recommendation.") (attached as Exhibit 9 to Petition). *See also In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc. Against Level 3 Commc'ns and the Application of Level 3 Commc'ns LLC to Terminate Services to Neutral Tandem, Inc.*, Minn. Pub. Utils. Comm'n, Docket No. P5733/C-07-296 and P5733, 6403/M-07-354, *Reply* Testimony of Michelle Rebholz on Behalf of the Minnesota Department of Commerce, at 13:19-14:22 (July 12, 2007) (discussing how Level 3's reason for treating Neutral Tandem differently than Qwest (the ILEC) amounts to price discrimination).

Neutral Tandem, and encompasses all carriers (and their customers) that use Neutral Tandem's services.

This situation is analogous to a prior Commission Docket, Docket No. 971194-TP, *Petition by Wireless One Network, L.P., d/b/a Cellular One of Southwest Florida for Arbitration with Sprint-Florida, Incorporated pursuant to Section 252 of the Telecommunications Act of 1996.* In that case, Wireless One, a wireless carrier, sought arbitration before the Florida Commission of an interconnection agreement with Sprint-Florida (n/k/a Embarq). In spite of negotiations, the parties had been unable to resolve essential compensation issues associated with the transport and termination of telecommunications traffic. Although the parties agreed that Wireless One should pay for transport between switches, tandem switching, and end office switching for traffic going to Sprint's network from Wireless One's network, the parties were unable to agree that the same compensation elements applied when traffic originated on Sprint's network and was being sent to Wireless One's network. As summarized by the Commission, the essential issue was "whether the components of Wireless One's network [were] equivalent to the components of Sprint's network for purposes of compensation for terminating land to mobile traffic."[31] The Commission ultimately decided that Wireless One should be compensated for the same rate elements when it received traffic from Sprint's network that it paid when it sent mobile traffic to Sprint for termination.[32]

Although the facts and dispute in that case were somewhat different than those before the Commission in this Docket, the analysis and conclusions in the *Wireless One* case should inform the Commission's deliberations on the present matter. The essential finding of the Commission in the *Wireless One* case lends support to Neutral Tandem's arguments that it should be afforded

[31] Order No. PSC-98-0140-FOF-TP, issued January 26, 1998, in Docket No. 971194-TP, at p. 2.

[32] *Id.* at pages 18-19.

similar, if not identical, rights with regard to the termination of transit traffic as those the Commission acknowledged apply to BellSouth's (AT&T) service in the *TDS Telecom Order.* Specifically, in analyzing the network elements of Sprint and Wireless One in order to determine what type of compensation was appropriate, the Commission determined for purposes of transporting, switching, and terminating telecommunications traffic, the networks of the ILEC and the wireless provider were functionally equivalent, even though the carriers themselves, and the technologies they used, were very different. Thus, Wireless One was allowed to recover those rate elements.[33] The Commission concluded that, " . . . this construction best comports with the intent of the Act, that alternative local carriers with different network technologies not be disadvantaged with respect to methods of cost recovery solely because their networks are not identical to those of the incumbents."[34] The PSC further cited to the FCC's First Report and Order, Order No. 96-325, at paragraph 1090, wherein the FCC stated that States should:

> consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch.

The situation at issue in the present proceeding should be even clearer than that presented by *Wireless One.* Here, Neutral Tandem uses the same technology to perform tandem switching and transit service as does BellSouth (AT&T). Under the rationale expressed in Order No. PSC-98-0140-FOF-TP, calls terminating on Level 3's network using Neutral Tandem's transit service

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[33] Notably, the arbitration involved a wireless carrier and the issues in dispute involved wireless traffic and facilities. Even at the time the *Wireless One* arbitration was conducted, wireless carriers were excluded from the definition of "telecommunications company" under Section 364.02, Florida Statutes. Section 364.011, Florida Statutes, was not implemented until 2005.

[34] *Id.* at 18.

should be priced the same as calls sent to Level 3 for termination using BellSouth's (AT&T) transit service.

Finally, Level 3's suggestion that "neither Level 3 nor Neutral Tandem possess market power" is inapt. (Mot. to Dismiss, at 19.) To the contrary, the FCC has found that non-incumbent carriers can wield market power in terms of unreasonably leveraging access to their end-user customers. For example, in the access charge context, the FCC found that, because CLECs controlled access to their end-user customers, regulation was necessary to "prevent CLECs from exploiting the market power in the rates that they tariff for switched access services."[35]

Level 3 is making a similar attempt to leverage its bottleneck access[36] to its end-user customers to extract inappropriate and unreasonable payments from Neutral Tandem as a transit provider.[37] Specifically, facts developed in hearings on Neutral Tandem's petitions in other

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[35] *In re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 9923, ¶ 34 (rel. Apr. 27, 2001).

[36] Neutral Tandem's recent filing with the FCC does not speak to whether Level 3 has bottleneck access over its end-users. (Mot. to Dismiss, at 4.) In actuality, Neutral Tandem only argued that *Neutral Tandem's service* (as a tandem transit provider) is not a bottleneck service "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." *See Reply Comments of Neutral Tandem Concerning the Missoula Plan*, at 3, CC Docket No. 01-92 (Feb. 1, 2007). Because these alternatives exist, Neutral Tandem cannot force carriers to originate traffic to Level 3 using Neutral Tandem's transiting services (and Neutral Tandem, as it has stated several times that it is not attempting to gain this right via this petition). In comparison, Level 3 clearly controls a bottleneck to its end-users, because there is no way to deliver traffic to those end-users without going through Level 3's switch. Hence, Level 3 can utilize this bottleneck to impose discriminatory terms and conditions on carriers seeking access to those end-users.

[37] As noted by the New York Public Service Commission in its recent ruling in a similar proceeding, "denial of the relief sought by Neutral Tandem would create potential impediments to competition, by enhancing Level 3's capacity to act as a bottleneck between its end-users and CLECs... Neutral Tandem has shown that Level 3 allowed incoming traffic to be disrupted in analogous situations in the past. Level 3's potential bottleneck function becomes an even greater concern insofar as Level 3 may seek to provide tandem switch service in competition with Neutral Tandem." Case No. 07-C-0233, *In re Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Commc'ns,* N.Y. Pub. Serv. Comm'n Case No. 07-C-0233, Order Preventing Service Disruption and Requiring Continuation of Interim Connection (hereinafter the "New York Order"), at 7 (June 22, 2007) (attached as Exhibit 9 to Petition.)

states underscore the fundamentally unfair and self-serving nature of Level 3's position. Level 3 has admitted in other states that it already recovers reciprocal compensation payments from originating carriers for some of the traffic transited to Level 3's network by Neutral Tandem.[38] Thus, not only are Level 3's attempts to recover additional reciprocal compensation payments from Neutral Tandem contrary to well-established compensation principles, they amount to an improper attempt to obtain double recovery for terminating the same traffic.

D. No Preemption

Level 3's suggestion that requiring it to directly interconnect with Neutral Tandem is contrary to and preempted by the Federal Telecommunications Act of 1996 is incorrect. Level 3 observes that the Federal Act does not address interconnection between CLECs, and concludes, *ergo*, that the Florida Commission must therefore be preempted from imposing the duty to interconnect upon CLECs. However, the authority cited by Level 3 does not hold, or even suggest, that it would violate federal law for the Commission to order direct interconnection between Level 3 and Neutral Tandem under Florida law. There simply is no such authority, because direct interconnection does not violate federal law. In fact, oddly enough, Level 3 itself has advocated vigorously in support of direct interconnection rights at the FCC. In its reply brief at the FCC in support of the Missoula Plan, which was filed less than six months ago, Level 3 noted that one key component of the Missoula Plan is its "affirmative obligation for *all* carriers to accept direct interconnection." Level 3 specifically told the FCC that direct interconnection is "not only entirely consistent with federal law, but fair and efficient for all carriers." *See Reply Comments of the Missoula Plan Supporters in Support of the Missoula Plan*, at 22, CC Docket No. 01-92 (Feb. 1, 2007). Thus,

[38] Docket No. 07-02-29, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc'ns*, Conn. Dep't of Pub. Util. Control, Tr. of 05/07/07 Evidentiary Hearing at 42-43; N.Y. Tr., at at 184, 193.

Level 3's suggestion before this Commission that direct interconnection would violate federal law is irreconcilable with the arguments Level 3 advanced before the FCC less than six months ago.[39]

Contrary to Level 3's arguments here, when Congress enacted the 1996 Act, "it did not expressly preempt state regulation of interconnection."[40] Congress made clear that the 1996 Act was not to be construed to have preemptive effect unless that preemption was express:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[41]

Furthermore, none of the cases relied upon by Level 3 in its Motion to Dismiss stand for the proposition that a state commission cannot impose interconnection obligations upon CLECs similar to those imposed on ILECs by the Federal Act. Rather, the cases cited generally stand for the proposition that state commissions cannot impose interconnection obligations and requirements on ILECs that exceed the interconnection obligations of the Federal Act, except in limited circumstances.

Level 3's argument that Sections 251 and 252 of the 1996 Act preempt the Commission from addressing interconnection between non-ILECs is contradictory on its face and finds no support in the 1996 Act. As Level 3 admits, the point of the 1996 Act's interconnection agreement process was to establish a process for interconnection between incumbents and competitive carriers, not between and among competitive carriers. (Mot. to Dismiss, at 17.) Nothing in the 1996 Act provides that the negotiation or arbitration provisions of the Act relating to interconnection apply to requests for interconnection between two non-incumbent competitive

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[39] Notably,Level 3 has itself filed for arbitration of this very same dispute before several other state commissions.

[40] *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003).

[41] 1996 Act § 601(c), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152); *see also Mich. Bell*, 323 F.3d at 358.

carriers, because that Act was designed to address a specific federal concern – the facilitation of competition in a market otherwise dominated by incumbent providers capable of exercising overwhelming monopoly market power. The 1996 Act does not, however, preclude the application by state legislatures of interconnection requirements between and among competitive carriers.[42]

Case law is clear that federal law only preempts state law in three situations: (1) express preemption, which is evidenced by express language revealing congressional intent to preempt state law; (2) field preemption, which occurs when the federal regulatory requirements are so pervasive as to leave no room for state law; and (3) conflict preemption, which occurs when implementation of the state law would thwart the full accomplishment of congressional objectives.[43] Again, nothing in the 1996 Act expressly preempts the states' ability to address interconnection rights between competitive carriers. Likewise, the regulatory field of operation covered by the 1996 Act certainly leaves room for states to address competitive carriers' interconnection obligations, and implementation and enforcement of Florida's state law authority over competitive carrier interconnection obligations does not conflict with or impair the enforcement of federal interconnection obligations applicable to incumbents.

Nonetheless, Level 3 claims that, even though the 1996 Act does not address interconnection between competitive carriers, the Act somehow preempts the Commission's authority to do so. Level 3's attempt to impute preemptive force to the 1996 Act's silence is contrary to Congress' clear directive that the 1996 Act does not preempt state law except where

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[42] Indeed, each of the Commissions which have considered this issue have rejected Level 3's assertion that the Act preempts states from granting the relief sought in Neutral Tandem's complaint. *See, e.g.,* Ex. 9 to Petition)

[43] *See, e.g., Southwestern Bell Wireless, Inc. v. Johnson County*, 199 F. 3d 1185, 1190 (10th Cir. 1999).

"expressly so provided." In sum, the Commission's authority to require direct and non-discriminatory interconnection between Level 3 and Neutral Tandem is in no way inconsistent with, or preempted by, the Act.

E. A Finding Mandating Direct Interconnection Will Not Result in Flood of Interconnection Petitions

Finally, Level 3 claims that an Order granting Neutral Tandem's Petition "would open the door to all CLECs in the state to request and receive similar direct interconnections." The result, according to Level 3, would be "a series of unnecessary, and inefficient direct connections." (Mot. to Dismiss, at 22.) Here, Level 3 raises the specter that Neutral Tandem's Petition would supplant commercial negotiations between competitive carriers, and result in a flood of interconnection arbitrations being brought before the Commission. (Mot. to Dismiss, at 22-23.) Level 3 is wrong for several reasons.

First, all Neutral Tandem seeks is enforcement of Level 3's interconnection obligations under Florida law to *receive* traffic that other carriers have chosen to deliver to Level 3 through Neutral Tandem and to do so on a non-discriminatory basis. Neutral Tandem is unaware of *any* other carrier in Florida that would seek interconnection with Level 3, or with any other carrier in Florida, solely for the purpose of delivering transited traffic.

Second, Level 3's assertion that granting Neutral Tandem's Petition would usurp commercial negotiations between competitive carriers is a red herring. With almost no exception, Neutral Tandem has been able to arrive at interconnection arrangements through negotiation with every other carrier with which it has sought interconnection in Florida. It also attempted similar such negotiations with Level 3. It is only because of Level 3's refusal to acknowledge the applicability of this Commission's adoption of the well-established principle

that terminating carriers should seek recovery of their termination costs from *originating* carriers, rather than transiting carriers,[44] that Commission intervention is necessary in this matter.[45] There is no other forum for this matter.

Finally, Level 3's position is tantamount to an attempt to read a new right into Section 364.16(2) - namely that terminating carriers can dictate how calls are routed. If Level 3's view that all terminating carriers could choose how to receive traffic were to prevail, terminating carriers could force originating carriers to bear the cost of inefficient interconnection arrangements, and originating carriers would have no recourse for recovering the cost of those inefficiencies other than to raise their end-user retail rates. Because originating carriers already bear the cost to transport and terminate traffic, and also must consider redundancy and reliability factors, they should be allowed to choose the methods through which their traffic will be terminated, including through the transit carrier of their choice.[46] As stated previously herein, CLECs use Neutral Tandem's service, as well as the transit service provided by the incumbent local exchange carriers, because it is frequently much more efficient and less expensive to

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[44] *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *35-*45.

[45] As noted by the testimony of the staff of the Department of Commerce in a similar proceeding pending in Minnesota , "I am not persuaded by Level 3's claim that a Commission decision in Neutral Tandem's favor will result in a flood of filings by CLECs seeking Commission 'arbitration' of CLEC-CLEC agreements. The Commission issues involved in the present docket are sufficiently discrete such that a result-oriented decision based on case management concerns, as Level 3 suggests, is unwarranted.... However, a Commission decision in Level 3's favor, were it based on Level 3's arguments, ***would appear to be far more likely to result in additional filings by carriers seeking compensation from other carriers -- including their competitors, to which they are not otherwise entitled."*** *See, In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc. Against Level 3 Commc'ns and the Application of Level 3 Commc'ns LLC to Terminate Services to Neutral Tandem, Inc.*, Minn. Pub. Utils. Comm'n, Docket No. P5733/C-07-296 and P5733, 6403/M-07-354, *Minnesota Dep't Testimony,* at 20 (emphasis added).

[46] Indeed, Level 3 advocated to the FCC in support of the Missoula Plan that "[I]t is always the option of the carrier with the financial duty for transport [*i.e.*, the originating carrier] to choose how to transport its traffic to the terminating carrier's [network]: direct interconnection to the [network] via its own facilities, use of the terminating carrier's facilities, or via the facilities of a third party." *Reply Comments of the Missoula Plan Supporters in Support of the Missoula Plan*, at 26, CC Docket No. 01-92 (Feb. 1, 2007).

interconnect with each other at tandem switches, where they can interconnect with several carriers at one location.[47] The suggestion that there would be a rush by a multitude of CLECs to direct connect with each other based on a decision in this Docket simply ignores all of the obvious economic barriers that preclude such a result. Moreover, the very fact that this is a case of first impression for the Commission belies the implication by Level 3 that this situation is so prevalent that a plethora of petitions would ensue should the Commission accept jurisdiction, and certainly is not a valid basis for denying Neutral Tandem due process.

II. Level 3's Claim that Neutral Tandem Lacks Standing to Seek Interconnection with Level 3 Is Without Merit

Under Florida law, a party can establish its standing to seek relief under a statutory provision in one of two ways. First, the party can demonstrate that the statute itself has conferred the party with standing to seek relief.[48] Second, even if a statute has not expressly conferred standing, the party can demonstrate that it will suffer direct injury unless it is allowed to seek relief under the statute, and that the harm to be suffered is of the type that the statute was intended to address.[49] Neutral Tandem satisfies both of these standards.

A. Neutral Tandem Has Standing under the Plain Terms of Section 364.16(2).

The plain language of Section 364.16(2) confers standing on Neutral Tandem to seek the relief set forth in the Petition. As noted above, Section 364.16(2) requires Level 3 to provide "access to, and interconnection with, its telecommunications services to any other provider of

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[47] The right of the originating carrier to choose its routing is also consistent with the Act. *See, e.g.*, Ex. 9 to Petition, New York Order, at 7 ("The network configuration contemplated in the Act is one that provides the originating CLEC and its end-users the opportunity to choose their preferred routing based on consideration of all relevant factors such as cost, reliability, and efficiency.")

[48] *See Maverick Media Group, Inc. v. Fla. Dep't of Transp.*, 791 So.2d 491, 492-93 (1st Dist. 2001).

[49] *See Agrico Chemical Co. v. Dept. of Environmental Regulation,* 406 So.2d 478, 482 (1st Dist. 1981); *Ybor III, Ltd. v. Fla. Hous. Fin. Corp.*, 843 So.2d 344, 346 (1st Dist. 2003).

local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions." Section 364.16(2) further provides that, if the parties are "unable to negotiate mutually acceptable prices, terms, and conditions," then "either party may petition" the Commission to establish nondiscriminatory prices, terms, and conditions for interconnection.

This section plainly confers standing on any "provider of local exchange telecommunications services" both to seek interconnection and to petition the Commission to establish the terms of interconnection if they cannot arrive at mutually agreeable terms and conditions through negotiation. Neutral Tandem's Petition demonstrates that it "is a registered competitive local exchange telecommunications company within the State of Florida." (Pet., at 2.) This Commission specifically has certified Neutral Tandem "to provide Competitive Local Exchange Telecommunications Services" in Florida.[50] Neutral Tandem is a certificated provider of local exchange telecommunications services, and thus has standing to petition the Commission to establish terms and conditions for interconnection with Level 3.

More importantly, Neutral Tandem has alleged that it is a provider of "local exchange telecommunications services" as contemplated by Section 364.16(2), Florida Statutes. As stated on pages 16 and 17 of the Petition, the traffic Neutral Tandem carries consists entirely of local telephone calls, and if calls sent to Level 3 by Neutral Tandem are blocked, end use customers will be unable to complete local calls. Clearly, Neutral Tandem is carrying local calls, and if it is unable to terminate those calls, the calls will fail. Neutral Tandem's service is integral to the completion of local telecommunications traffic. As such, there can simply be no doubt that it is,

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[50] *See* p.2 *supra*.

in fact, a "provider of local exchange telecommunications services" with interconnection rights provided by Section 364.16, Florida Statutes.

While Level 3 has asserted that "local exchange telecommunications services" is synonymous with another statutory term, "basic local telecommunications services," that claim lacks any statutory support and does not comport with a "plain language" reading. As Level 3 acknowledges, "the term 'local exchange telecommunications services' is not defined in Chapter 364." (Mot. to Dismiss, at 25.) Moreover, nothing in the plain language of Chapter 364 indicates that the terms "basic local telecommunications services" and "local exchange telecommunications services" share a common meaning.[51] To the contrary, the Florida legislature's election to "use different words" within Chapter 364 "is strong evidence that different meanings were intended."[52]

This Commission has already determined that transiting services should be categorized as "an interconnection arrangement under Section 364.16, Florida Statutes."[53] This Commission's finding is consistent with the Legislature's determination that the term "service" should "be construed in its broadest and most inclusive sense."[54] Indeed, as noted by the Florida Supreme Court, "while the statute at issue in the instant case is not a paragon of clarity with regard to

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[51] In fact, Section 364.337(5) seems to bifurcate the definition of "basic local exchange telecommunications service" so that a different definition applies in the competitive arena. As set forth in that section, the Commission has continuing regulatory oversight over "basic local exchange telecommunications service" provided by both CLECS *and AAVs*, which, based on the definition of an AAV, by necessity broadens the definition of "basic local exchange telecommunications service" provided by competitive carriers to include non-switched service, including point-to-point, private line service. In other words, in the competitive context, "basic local exchange telecommunications service" is something less than the service contemplated by the definition of "basic local telecommunications service" found in Section 364.02(1).

[52] *Maddox v. State of Fla.*, 923 So.2d 442, 446 (Fla. 2006).

[53] *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *22-*24.

[54] § 364.02(11), Fla. Stat..

precisely describing operative service categories, it certainly is clear that the Legislature intended to draft the definition of 'service' contained in section 364.02(11) extremely broadly."[55] Transiting services, such as those provided by Neutral Tandem, clearly are "local exchange telecommunication services" under Florida law. The traffic Neutral Tandem carries consists entirely of local calls. Neutral Tandem therefore has standing to seek relief under Section 364.16(2) under the express terms of the statute.

In addition, Level 3 claims that Neutral Tandem lacks standing because it is not a regulated "telecommunications company." To the contrary, Neutral Tandem is clearly a regulated "telecommunications company." Neutral Tandem is the holder of a Competitive Local Exchange Carrier certificate issued by the Florida Public Service Commission; it maintains a Tariff on file with the Commission; and it pays Regulatory Assessment Fees on the revenues derived from telecommunications services provided in Florida.[56] While Neutral Tandem makes no claim to be currently providing "basic local telecommunications service," as that term is defined in Section 364.02, Florida Statutes, it is important to note that the statutory definition of a CLEC specifically applies to any company *certificated* to provide service.[57]

It is also notable that the specific statutory language of Section 364.16(2), Florida Statutes, does not indicate that a "provider of local exchange telecommunications services" seeking interconnection with a CLEC must necessarily be a CLEC or an ILEC, nor does it require that such a provider meet the definition of a "telecommunications company" set forth in

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[55] *BellSouth Telecomm., Inc. v. Jacobs,* 834 So.2d 855, 859 (Fla. 2002).

[56] To be specific, Neutral Tandem has paid $7,360.31 in Regulatory Assessment fees to the Florida Commission on its revenues derived from the provision of telecommunications services in Florida, since January 2005.

[57] It is also worth noting here, that there is absolutely no language requiring that such certificated company be providing "*basic* local telecommunications service," as that unique term is defined in Florida Statutes, in order to meet the specific definition of a CLEC in Section 364.02, Florida Statutes.

Section 364.02. In fact, the specific language chosen by the Florida Legislature indicates that they actually intended to extend interconnection rights to a broader range of local telecommunications providers.

Specifically, Section 364.16(2), Florida Statutes, provides for interconnection between a "competitive local exchange telecommunications company," a term which is specifically defined in Section 364.02(5), Florida Statutes, and "any other provider of local exchange telecommunications service," a term Level 3 concedes is undefined in the Statutes. For purposes of arbitrating the terms and conditions of interconnection between a CLEC and a "provider of local exchange telecommunications service," Section 364.16(2) adopts the process and procedure outlined in Section 364.162, Florida Statutes. Section 364.162, Florida Statutes, as Level 3 has emphasized, pertains to the resolution of interconnection disputes between a CLEC and a "local exchange telecommunications company," another defined term, as set forth in Section 364.02(8), Florida Statutes.

Both statutes make use of terms defined in Section 364.02, Florida Statutes, namely "competitive local exchange telecommunications company" and "local exchange telecommunications company." It is undisputed that Section 364.162, Florida Statutes, applies to interconnection between a "competitive local exchange telecommunications company" and a "local exchange telecommunications company." Thus, the Legislature must have intended a "competitive local exchange telecommunications company" to interconnect with a much broader range of local telecommunications service providers altogether.[58]

Had the Legislature intended for the CLEC to only allow interconnection with an ILEC, the Legislature would have used the term "local exchange telecommunications company" in

[58] *A.R. Douglass, Inc. v. McRainey*, 137, So. 2d 157, 159 (Fla. 1931)(if the language of the statute is clear, there is no need to resort to rules of statutory interpretation and construction).

Section 364.16(2), as it did in Section 364.162, Florida Statutes. Had it intended the CLEC's interconnection obligation to extend only to other CLECs, then it would have simply said that a "competitive local exchange telecommunications company must provide access to, and interconnection with, its telecommunications services to any other [competitive local exchange telecommunications company]." It did neither. Instead, the Legislature chose a very broad term, otherwise undefined in Florida Statutes, "any other provider of local exchange telecommunications services."[59]

As set forth in the Petition, Neutral Tandem currently provides service to enterprise customers, as well as other carriers, and its Tariff is clear that any person or entity that desires to purchase such services may do so under the terms of the Tariff. The service it offers and provides to customers in Florida is unquestionably a telecommunications service that employs telecommunications facilities and is bi-directional as required by the customer. Finally, Neutral Tandem is not a VOIP or broadband service provider. As such, there can be no doubt that Neutral Tandem is, in fact, a regulated telecommunications company.

Level 3 further contends that Neutral Tandem cannot attain standing through the use of Letters of Agency issued by its originating carrier customers which demonstrate that Neutral Tandem has the authority to act on their behalf in negotiating and reaching traffic termination arrangements. Neutral Tandem attached six such letters to its petition, each specifically stating that Neutral Tandem acts as the carrier's agent "for the purpose of making arrangements for the

[59] The Commission should be wary of dismissing this action solely on the basis of whether Neutral Tandem is or is not "regulated." For instance, like Section 364.16, there are other sections of Chapter 364, which contemplate that the Commission can provide relief, even though an entity involved in the dispute is not "regulated." For example, consider Section 364.025, and Rule 25-4.084, Florida Administrative Code, pertaining to petitions for waiver of the carrier of last resort (COLR) obligation, which provides that developers may seek relief from a COLR's refusal to serve.

termination of transit traffic routed through Neutral Tandem to other carriers."[60] Level 3's argument once again fails because it lacks legal and factual support.

Level 3's first misguided attack on Neutral Tandem's standing based on its status as agent asserts that Section 364.16 is silent as to whether one carrier may represent the interests of another carrier; that Neutral Tandem itself is not subject to the Commission's jurisdiction; and that Neutral Tandem failed to allege that the originating carriers are themselves subject to the Commission's jurisdiction. (Mot. to Dismiss, at 29). The fact that Section 364.16 is silent as to whether a carrier can be represented by an agent does not lead to the conclusion that such an activity is specifically barred by the statute, and such an interpretation would negate the entire body of agency case law. It is well-established law that a corporation may act as an agent for another corporation.[61] It is similarly well-established that an agent need not have the same legal qualifications as the principal in order to make a contract on behalf of that principal, but rather stands in the place and stead of the principal.[62] The principals involved here include, as **was** alleged in the Petition, the numerous telecommunications carriers that have chosen to use Neutral Tandem's services, including the leading wireless and wireline competitive telecommunications carriers in Florida, all of whom are naturally subject to the Commission's jurisdiction. (Petition, at 2) Additionally, as explained above, Neutral Tandem is itself subject to the Commission's jurisdiction, as proven by its certificate as a CLEC and its payment of regulatory assessment fees to the Commission on the revenues derived from the telecommunications services it provides in Florida.

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[60] *See* Exhibit 8 to Neutral Tandem's Petition, containing Letters of Agency from XO Communications; Sprint; Comcast; Alltel; FDN Communications; and AT&T.

[61] *See, e.g., United Bonding Ins. Co. v. Banco Suizo-Panameno, S.A.*, 422 F.2d 1142, 1146 (5th Cir. 1970)

[62] Fla. Jur. 2d *Agency & Employment* § 3; *Wright v. Sterling Drug, Inc.*, 321 So. 2d 460 (Fla. 2d DCA 1975), quashed on other grounds 342 So. 2d 503.

Level 3 next attempts to frame the Petition as solely being based on the prior contractual arrangements between Neutral Tandem and Level 3, and the parties' current dispute. (Mot. to Dismiss, at 30) This, however, ignores the very-same concession Level 3 made in its previous sentence, namely that Neutral Tandem is acting as an agent on behalf of the originating carriers. The Petition does not ask the Commission to remedy any issue regarding the prior contractual arrangement. The Petition solely asks the Commission to resolve the issue of the attempted non-compliance of a CLEC (Level 3) with the Florida Statutes which require that CLEC to "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." §364.16(2), Fla. Stat. The fact that Level 3 complied with the statute in the past by contracting directly with Neutral Tandem is irrelevant to Level 3's current and future unwillingness to abide by statutory requirements. It is the customers of the originating carriers who would be most harmed by Level 3's non-compliance with the statute, and the needs of those customers, coupled with Level 3's recalcitrance, forced Neutral Tandem to submit its Petition.

Neutral Tandem, as agent for these carriers, is empowered to stand in the shoes of the principal carriers, including by pursuing this litigation.[63] Level 3's final arguments, that the principals are not named as petitioners and that the letters themselves do not allow Neutral Tandem to address intercarrier compensation, are as incorrect as each of its other arguments. The originating carriers do not need to be parties to the petition, as the dispute that has arisen is based on Level 3's refusal to abide by its statutory requirement to interconnect with "any provider" and Neutral Tandem certainly qualifies as "any provider," regardless of its status as

[63] *See* Exhibit 8 letters, authorizing dealings with Neutral Tandem "on all matters pertaining to the traffic termination arrangement."

agent for the carriers. Further, while Florida law *allows* a party bound by an agent to a third party by a contract to sue that third party under the principal's own name, there is *no requirement* that this be the case.[64] Finally, Level 3 points to specific language in the letters of agency which indicates that the authority granted by the principals is "limited to the establishment of technical and operational aspects" of making arrangements for the termination of transit traffic routed through Neutral Tandem to other carriers. (Mot. to Dismiss, at 30) Level 3 interprets this limitation as preventing Neutral Tandem from any discussion relating to the prices used in intercarrier compensation. However, the letters clearly state that the Agent (Neutral Tandem) may deal with third parties "on all matters pertaining to the traffic termination arrangement."

As elucidated herein and in Neutral Tandem's Petition, if Level 3's view that all terminating carriers could choose how to receive traffic were to prevail, terminating carriers could force originating carriers to bear the cost of inefficient interconnection arrangements, and originating carriers would have no recourse for recovering the cost of those inefficiencies other than to raise their end-user retail rates. Carriers would, thus, be deprived of their ability to choose a competitive alternative to the ILEC tandem service, thereby increasing their costs to serve their millions of Florida customers. Furthermore, should Level 3 prevail here, any calls sent to Level 3 via Neutral Tandem could be blocked, resulting in the originating carriers' customers being unable to complete local calls. Clearly, these Neutral Tandem customers will be directly and immediately harmed if Level 3 continues to refuse to accept terminating traffic from Neutral Tandem on reasonable, non-discriminatory terms. Neutral Tandem is specifically authorized to act on behalf of the identified originating carrier customers for the purpose of negotiating the arrangements for the termination of traffic routed to other carriers using Neutral

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[64] *See, e.g., Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 610 F.2d 371, 372 (5th Cir. 1980).

Tandem's service.[65] Thus, in addition to having standing in its own right, Neutral Tandem has standing as the authorized agent for its originating carrier customers.

B. Neutral Tandem Also Has Standing Because it Faces Immediate and Substantial Harm of the Type Section 364.16(2) Was Designed to Address.

Neutral Tandem also has standing to pursue its Petition because its substantial and direct interests are at issue here. If Level 3 is allowed to follow-through on its threat to disconnect the parties' existing interconnections and stop accepting transited traffic from Neutral Tandem, Neutral Tandem "will suffer injury in fact that is of sufficient immediacy to entitle [it] to a section 120.57 hearing," and its "substantial injury is of a type or nature that the proceeding is designed to protect."[66]

At the outset, it is clear that Level 3's actions will cause Neutral Tandem substantial and immediate injury in fact, including: (1) the loss of direct interconnection with Level 3; (2) immediate and substantial economic loss and harm to its reputation when customers are required to re-route traffic through the ILEC tandems; (3) immediate impairment of Neutral Tandem's ability to provide tandem transit services for calls to Level 3's network and to provide competitive alternatives to the ILECs' transit services; and (4) harm to Neutral Tandem's ability to expand its presence in the Florida market, and even its ability to continue providing tandem transit services.[67] These immediate and direct injuries more than meet the standard required to establish standing.[68] These harms are defined and assured consequences to Neutral Tandem if

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[65] *See* composite Exhibit 8 to Neutral Tandem's Petition.

[66] *See, e.g. Ybor III, Ltd..*, 843 So.2d at 346.

[67] *See* Saboo Testimony, at 15.

[68] *See In re Petition by Verizon Fla. Inc. to Reform Intrastate Network Access and Basic Local Telecomm. Rates*, Order Granting Intervention, Docket Nos. 030868-TL, 030961-TI; Order No. PSC-03-1325, at 3-5 (November 19, 2003) ("*Petition by Verizon Fla Inc.*"); *In re: Application for Certificate to Provide Alt.*

Level 3 prevails in this matter. As such, these injuries amount to much more than speculative or perceived future economic harm.[69]

Neutral Tandem's asserted injuries also are of the type Chapter 364 was designed to protect. As noted above, the very point of Section 364.16(2) is to prevent competitive carriers from discriminating with respect to the terms and conditions for interconnection they offer to other competitive providers. Chapter 364, Florida Statutes, was "designed to facilitate competition,"[70] and the harm to the competitive market for tandem transit services that will result from Level 3's discriminatory actions are the type of harm the statute was designed to address. Furthermore, it is clear that the Legislature considered the ongoing applicability of Section 364.16 to competitive carriers to be a matter of significant concern, as demonstrated by Section 364.337(2), Florida Statutes, wherein the Legislature expressly stated that competitive carriers may **not** seek a waiver of Section 364.16.

III. OTHER STATE DECISIONS

As for the decisions issued in other states, Neutral Tandem suggests that these cases speak for themselves, and Neutral Tandem has attached the full text of the State decisions it has referenced in its Petition as an Exhibit to the Petition. These decisions were provided to the Commission as informative documents regarding how other states have addressed this same issue.

First, it is notable that Level 3's Motion omitted discussion of the July 10, 2007 decision of the Illinois Commerce Commission. As noted in the introduction to this memorandum, that

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Local Exch. Telecomm. Serv. by BellSouth BSE, Inc., Order Denying Motion to Dismiss, Docket No. 971056-TX; Order No. PSC-98-0562, at 4 (April 22, 1998).

[69] *Cf. Ameristeel Corp. v. Clark,* 691 So.2d 473, 477-78 (Fla. 1997).

[70] *See Petition by Verizon Fla. Inc.*, Docket Nos. 030868-TL, 030961-TI, Order No. PSC-03-1325, at 5.

commission found that Level 3's conduct constituted an attempt to "knowingly impede the development of competition" in Illinois. The Illinois Commission ordered Level 3 to "cease and desist" from its threats to disconnect the parties' existing interconnections.

Similarly, state commissions in Georgia, New York also have found that: (1) Neutral Tandem has the right to remain directly interconnected with Level 3 for the continued delivery of tandem transit traffic; and (2) Level 3 cannot require Neutral Tandem to pay reciprocal compensation or the equivalent rate ($0.0007 per minute) for the calls coming from Neutral Tandem's network. Level 3's suggestion that those commissions found that "Neutral Tandem should be able to avoid paying Level 3 for termination of Neutral Tandem's transit traffic" is simply false.

Contrary to Level 3's claims, the Connecticut Department of Public Utility Control did not find that "Connecticut state law did not provide the relief requested by Neutral Tandem." To the contrary, the Department specifically found that Connecticut law "may provide the Department with the requisite authority to address this issue," but decided that the parties should make additional, good faith efforts to resolve their dispute through negotiation.[71] The Department required that the parties report back on the status of their negotiations by November 15, 2007.

Level 3's reference to the March 6, 2007, decision of the Public Utilities Commission of California is equally misleading. The Administrative Law Judge denied Neutral Tandem's

[71] *See* Docket No. 07-02-29, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc'ns*, Conn. Dep't of Pub. Util. Control, 06/20/207 Opinion, at 5 (noting that the Commission may have jurisdiction over Neutral Tandem's complaint, because "Connecticut law gave the Department "the ability to facilitate the development of competition for all telecommunications services within the state") (Exhibit 9 to Petition.).

request for interim, emergency relief ***only*** after concluding that Level 3 would continue to accept traffic from Neutral Tandem pending resolution of the parties' dispute in that case.[72]

CONCLUSION

This Commission should be aware of the potential implications that granting Level 3's motion to dismiss could have on the Commission's ability to oversee the flow of traffic on the PSTN. This Commission should be especially wary of Level 3's attempts to unduly circumscribe the Commission's authority to regulate the terms and conditions of interconnection between carriers in Florida. Accepting Level 3's unduly narrow view of this Commission's authority over the interconnection duties of non-incumbent carriers could hamper the Commission's ability to address blocking issues in the future, especially if Level 3 begins providing tandem transit services in Florida, as well as other intercarrier issues affecting the provision of telecommunications services to Florida consumers.

Thus, for all of the foregoing reasons, Neutral Tandem respectfully requests that Level 3 Communications' Motion to Dismiss be denied and that this matter be set directly for a Section 120.57(1), Florida Statutes, hearing on an expedited basis.

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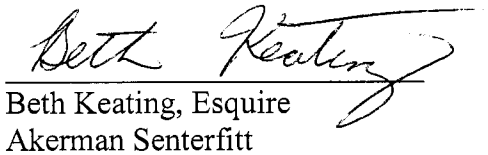
[72] *Neutral Tandem California, LLC v. Level 3 Communications and its Subsidiaries*, Public Utilities Commission of the State of California, Case No. 07-03-008, filed March 6, 2007.

Respectfully submitted,

NEUTRAL TANDEM, INC.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail First Class and Electronic Mail to Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301 (ken@reuphlaw.com), and that a copy has also been provided to the persons listed below this 3rd day of August, 2007:

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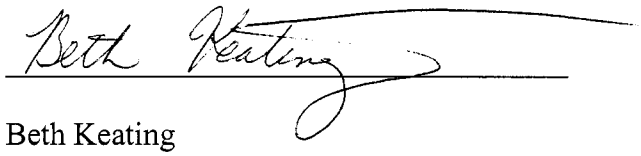
By: 

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