

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
RICHARD M. ELLIS
KENNETH A. HOFFMAN
JOHN M. LOCKWOOD
MARTIN P. McDONNELL
J. STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

R. DAVID PRESCOTT
HAROLD F. X. PURNELL
MARSHA E. RULE
GARY R. RUTLEDGE
MAGGIE M. SCHULTZ
GOVERNMENTAL CONSULTANTS
JONATHAN M. COSTELLO
MARGARET A. MENDUNI

October 5, 2007

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

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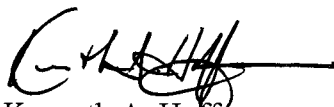
Re: Docket No. 070408-TP

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket on behalf of Level 3 Communications, LLC ("Level 3") are the original and fifteen copies of Level 3's Supplemental Legal Brief Addressing Legal Issues Established by the Prehearing Officer and Supplemental 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,


Kenneth A. Hoffman

- CMP
- COM
- CTR
- ECR
- GCL 2 KAH/rl
- OPC cc: All Parties of Record
- RCA
- SCR
- SGA
- SEC
- OTH

level3\neutraltandem\cole.october 05 07 ltr

DOCUMENT NUMBER-DATE

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 070408-TP

Filed: October 5, 2007

**LEVEL 3 COMMUNICATIONS, LLC'S
SUPPLEMENTAL LEGAL BRIEF ADDRESSING
LEGAL ISSUES ESTABLISHED BY THE PREHEARING
OFFICER AND SUPPLEMENTAL 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, hereby files this Supplemental Brief addressing the issues of law established by the Prehearing Officer in Order No. PSC-07-0392-PCO-TX and Supplemental Memorandum of Law supporting Level 3's Motion to Dismiss the Petition for Resolution of Interconnection Dispute ("Petition") filed by Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC ("Neutral Tandem").¹

I. INTRODUCTION

The Commission should determine that it lacks jurisdiction to mandate a direct interconnection between two CLECs. Such authority has not been granted to the Commission by the Florida Legislature. Further, an expansion of the Commission's jurisdiction for this purpose would allow CLECs to improperly use the Commission to force direct connections with other CLECs for any number of business strategies or reasons. Indeed, a determination by the Commission that it has such authority would allow Level 3 to file petitions mandating direct

¹Level 3 incorporates by reference the legal arguments set forth in Level 3's Legal Brief filed on May 17, 2007 in Docket No. 070127-TX and Motion to Dismiss filed in Docket No. 070408-TP on July 25, 2007.

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interconnection with Neutral Tandem's originating CLEC carriers - - all of which would moot this on-going dispute between Level 3 and Neutral Tandem.

Neutral Tandem lacks standing as confirmed by the June 27, 2007 Staff Recommendation filed in Docket No. 070127-TX, attached hereto as Exhibit A. Neutral Tandem's attempt to create standing based on an agency theory and limited letters of agency ("LOAs")² is legally deficient. There are several reasons why Neutral Tandem's agency theory must fail: (a) There is no statutory authority for such an approach; (b) Neutral Tandem has failed to allege the requisite elements to establish a principal-agency relationship; (c) There is no showing that the originating carriers have legal standing that can be assigned to any authorized agent; (d) The LOAs create an unlawful conflict between principal and agent; and (e) Despite Neutral Tandem's misrepresentation in their pleadings, the limited scope of the LOAs do not convey authority to Neutral Tandem to address compensation issues that must be addressed by *statute* under an arbitration conducted pursuant to Sections 364.16(2) and 364.162, Florida Statutes.

II. LEGAL ISSUES

Level 3's Position on Issue 1: The Commission lacks jurisdiction under Sections 364.16(2) and 364.162(2).

Supplemental Argument: Level 3 has consistently maintained that a logical, consistent reading and interpretation of Sections 364.16(2) and 364.162(2), Florida Statutes, can lead to only one conclusion - - that the Commission lacks jurisdiction under these statutes to mandate a CLEC to provide direct interconnection to its services to another CLEC. Neutral Tandem admits the key components of Level 3's position in its response to Level 3's Motion to

²The LOAs are attached to Neutral Tandem's Petition as Exhibit 8.

Dismiss. There, Neutral Tandem acknowledges that: (1) “Section 364.16(2) adopts the process and procedure outlined in Section 364.162, Florida Statutes;” and (2) Section 364.162, Florida Statutes, applies to interconnection between a CLEC and an ILEC.³ Neutral Tandem’s position ignores the fact that Section 364.162 is limited to CLEC/ILEC disputes (as Neutral Tandem admits). If the Commission accepts Neutral Tandem’s legal argument, the result is an interpretation of Section 364.162 that would permit CLEC/CLEC disputes and arbitrations under that statute - - a conclusion in contravention of the plain meaning of the statute, **as admitted by Neutral Tandem.**⁴

As acknowledged by Staff in its June 27, 2007 Staff Recommendation, at page 7, Chapter 364 does not directly address interconnection arrangements involving alternative transit providers. As a creature of statute, the Commission’s powers are limited to those granted by the Legislature. See, e.g., City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973). Here, the Legislature has not granted the Commission the authority to mandate *direct* interconnection between the *facilities of two CLECs*. An order by the Commission asserting such jurisdiction would exceed the Commission’s statutory authority.

Although Neutral Tandem has repeatedly stated that its competitive transit service provides redundancy to the public switched network and serves the public interest, more recent events confirm Commissioner Carter’s statement at the May 24, 2007 oral argument that this is

³Neutral Tandem’s Response to Level 3’s Motion to Dismiss, at 28.

⁴Neutral Tandem consistently overlooks the key distinguishing feature of the TDS Telecom decision. Specifically, the Commission found jurisdiction in TDS Telecom because the potential Commission mandated interconnection would be between a CLEC and an ILEC and the ILEC in that case, BellSouth, was required to provide interconnection to its facilities under Section 364.16(1) and was subject to state arbitration against the CLECs in TDS Telecom under Section 364.62.

“really... all about the money.”⁵ Neutral Tandem has recently decided to terminate its interconnection with Level 3 in six different states⁶ because traffic volumes in those states and revenues therefrom do not justify continued litigation with Level 3.⁷ Thus, Neutral Tandem’s altruistic claims of serving the public interest are selectively implemented depending on traffic volumes and the success of their business in a particular state. Perhaps it is no coincidence that following Neutral Tandem’s abrupt change in course in the six states, the Maryland Public Commission Staff, in commenting on a Neutral Tandem tariff proposal, stated that it had no objection to approving the tariff so long as it was understood that interconnecting carriers could enter and terminate their relationships with Neutral Tandem freely (without regulatory intervention).⁸

Level 3's Position on Issue 2:

Neutral Tandem lacks standing to seek relief under Section 364.16 and 364.162, Florida Statutes.

Supplemental Argument:

As recognized by Staff, Neutral Tandem lacks standing because it does not provide local exchange telecommunications services and its delivery of transit traffic is not a voice grade exchange service available to the public for hire. Indeed, Neutral Tandem does nothing more than provide a bridge for the exchange of traffic between telecommunications carriers and therefore is statutorily excluded from the definition of a “telecommunications company” under Section 364.02(14)(a) and (b), Florida Statutes. Neutral

⁵See Transcript from May 24, 2007 Oral Argument, at 51 in Docket No. 070127-TX.

⁶ Indiana, New Jersey, Massachusetts, Ohio, Wisconsin and Maryland.

⁷See Affidavits of Dr. Saboo and pp. 351-362 of transcript from Michigan PSC Case No. U-15230 (“Michigan Transcript”) attached hereto as Composite Exhibit B.

⁸See Exhibit C.

Tandem attempts to salvage its standing by alleging that: (1) it provides service to “enterprise customers;” and (2) it may appear as an agent on behalf of certain originating carrier customers.

Neutral Tandem’s attempt to cure its standing problems by alleging that it serves “both carriers and enterprise customers”⁹ is readily transparent. Neutral Tandem’s “enterprise customers” are not end user customers - - they are, in fact Voice Over Internet Protocol service providers.¹⁰ Neutral Tandem previously stated to the Michigan Public Service Commission that it exclusively delivers tandem traffic to Level 3 originated only by other carriers - - not retail end users.¹¹ Neutral Tandem does not serve end user customers, it does not issue telephone numbers, it does not provide access to operator services, 911 services, or relay services to the hearing impaired.¹² Neutral Tandem is clearly not a “telecommunications company” under Section 364.02(14), Florida Statutes, or a “provider of local exchange telecommunications services” under Section 364.16(2), Florida Statutes.

Neutral Tandem’s attempt to create standing under an agency theory¹³ fails for a host of reasons, to-wit:

a. Neutral Tandem’s Petition fails to allege and demonstrate that the originating carriers who submitted the LOAs have standing to petition the FPSC for mandated directed interconnection by a transit provider with whom they have a contract. Since Neutral Tandem has failed to allege and show that the substantial interests of the principals/originating carriers are

⁹Neutral Tandem’s Petition, at 6.

¹⁰See pp. 396-397 of Michigan Transcript attached hereto as Exhibit D.

¹¹See pg. 3 of Neutral Tandem’s Reply Brief (Public Version) filed September 5, 2007 in Michigan PSC Case No. U-15230, attached hereto as Exhibit E.

¹²See pp. 396-397 of Michigan Transcript.

¹³Neutral Tandem’s Petition, at 17.

being determined in this proceeding, there is no legal standing and party status¹⁴ to assign to the purported agent/Neutral Tandem.

b. Under Florida law, an actual agency relationship exists only if the principal retains the right to control the actions of the agent. Villazon v. Prudential Health Care Plan, 843 So.2d 842, 853 (Fla. 2003). Here, the LOAs do not provide the specific originating carriers with the required control over Neutral Tandem's establishment of the technical and operational aspects of terminating transit traffic. Indeed, the LOAs and the expedited manner in which they were secured by Neutral Tandem to attempt to create standing indicate that the "principals" were merely corralled into this proceeding by Neutral Tandem to avoid dismissal.

c. Under established case law, Neutral Tandem may not act as an agent for a principal with whom it has a conflict. State ex. rel. Harris v. Gautier, 147 So. 240, 246 (Fla. 1933). If the Commission determines that it has jurisdiction and that Neutral Tandem has standing, compensation issues must be addressed under the applicable statutes. Level 3 will be entitled to recover its costs involved in the termination of Neutral Tandem's transit traffic. Level 3 will seek to recover those costs from Neutral Tandem consistent with a prior contract between the parties. Neutral Tandem's position, however, is that such costs should be recovered from its alleged "principals," the originating carriers. Florida law does not permit such a principal-agent conflict.

d. Neutral Tandem misleads the Commission regarding the scope of the LOAs.¹⁵ Each LOA states that it is limited to the establishment of technical and operational aspects of

¹⁴ Section 120.52(12)(a) defines a "Party" to include "[s]pecifically named persons whose substantial interests are being determined in the proceeding."

¹⁵Neutral Tandem's Response to Level 3's Motion to Dismiss, at 32.

making arrangements for the termination of transit traffic. Thus, even if the Commission determines that it has jurisdiction and Neutral Tandem has standing, there is still no authority in the LOA for Neutral Tandem to address compensation issues on behalf of these originating carriers pursuant to Sections 364.16(2) and 364.162.

Level 3's Position on Issue 3: The Commission lacks the authority to require direct interconnection and should now dismiss Neutral Tandem's Petition with prejudice.

Supplemental Argument: The Commission should dismiss Neutral Tandem's Petition with Prejudice. Neutral Tandem's voluntary dismissal and refiling have kept this issue alive before the Commission dating back to February 26, 2007, all of which time Neutral Tandem has benefitted from continuing to terminate traffic to Level 3 for free. As confirmed by Dr. Saboo's recent testimony in Michigan, migration of Neutral Tandem's traffic to the ILEC switches in the six states where Neutral Tandem chose to terminate interconnection was accomplished within a matter of weeks¹⁶ and not the "several months" previously represented by Neutral Tandem to this Commission.¹⁷

III. CONCLUSION

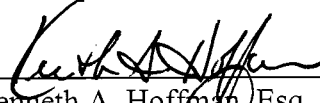
Neutral Tandem's agency theory cannot resurrect its lack of standing. The Commission should now dismiss Neutral Tandem's Petition with Prejudice.¹⁸ No further amendments should be permitted and the Commission should order Neutral Tandem to undertake the orderly migration of the affected traffic to the affected ILEC tandem switches.

¹⁶See pp. 351-353 of Michigan Transcript included in Composite Exhibit B.

¹⁷In its Motion to Strike or Alternative Response filed August 20, 2007, Neutral Tandem stated that its "ability to redirect a small amount of traffic with several months' notice has no bearing on the situation in Florida...."

¹⁸As previously explained by Level 3, the instant Petition is Neutral Tandem's third petition filed with the Commission since February 26, 2007.

Respectfully submitted,



Kenneth A. Hoffman, Esq.

Ken@reuphlaw.com

Martin P. McDonnell, Esq.

Marty@reuphlaw.com

P. O. Box 551

Tallahassee, Florida 32302

(850) 681-6788 (Telephone)

(850) 681-6515 (Telecopier)

- - and - -

Gregg Strumberger, Esq.

Gregg.Strumberger@level3.com

Level 3 Communications, LLC

1025 Eldorado Boulevard

Broomfield, CO 80021-8869

720-888-1780 (Telephone)

720-888-5134 (Telecopier)

Attorneys for Level 3 Communications, LLC

CERTIFICATE OF SERVICE

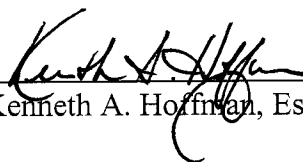
I HEREBY CERTIFY that a copy of Level 3 Communications, LLC's Supplemental Brief was furnished by Electronic Mail and U. S. Mail on October 5, 2007 to the following:

Beth Keating, Esq.
Akerman Senterfitt
106 East College Avenue
Suite 1200
Tallahassee, Florida 32302
beth.keating@akerman.com

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

Ronald Gavillet
Executive Vice President and General Counsel
Neutral Tandem, Inc.
One South Wacker Drive, Suite 200
Chicago, IL 60606
rongavillet@neutraltandem.com

John R. Harrington, Esq.
Jenner & Block
One IBM Plaza
Chicago, IL 60611-7603
jharrington@jenner.com



Kenneth A. Hoffman, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 070408-TP

EXHIBIT A

TO

LEVEL 3'S SUPPLEMENTAL BRIEF

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 27, 2007

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Teitzman, Mann)
Division of Competitive Markets & Enforcement (Lee, King)

RE: Docket No. 070127-TX – Petition for interconnection with Level 3 Communications and request for expedited resolution, by Neutral Tandem, Inc.

AGENDA: 07/10/07 – Regular Agenda – §120.57(2), Florida Statutes, Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: July 10, 2007; Date Level 3 will terminate interconnection agreement with Neutral Tandem.

SPECIAL INSTRUCTIONS: None

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Case Background

On February 26, 2007, Neutral Tandem, Inc. (Neutral Tandem) filed its Petition for Interconnection with Level 3 Communications (Level 3) and Request for Expedited Resolution and/or Interim Relief. Neutral Tandem requests that this Commission: (1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 and its subsidiaries; (2) resolve its Petition on an expedited basis; and (3) issue an interim order directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while its Petition is pending. In its Petition, Neutral

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Docket No. 070127-TX
Date: June 27, 2007

Tandem asserts that Level 3 plans to terminate the parties' agreements as of March 23, 2007.¹ On March 13, 2007, Level 3 filed its Corrected Response and Motion to Dismiss Neutral Tandem's Petition.

By Order No. PSC-07-0295-PCO-TX, issued April 6, 2007, Neutral Tandem's Request for Expedited Resolution and/or Interim Relief was denied.

On May 3, 2007, Order No. PSC-07-0392-PCO-TX (Procedural Order) was issued. The Procedural Order required the parties to file briefs on the legal issues (1-3a), as set forth in Attachment A. Additionally, pursuant to the Procedural Order, Oral Argument took place before the Commission on May 24, 2007.

Two voice over internet protocol (VoIP) providers have filed letters supporting Neutral Tandem's Petition. SunRocket filed its letter of support on June 4, 2007. Vonage filed its letter of support on June 6, 2007.

Staff is aware that identical or similar petitions have been filed in other states. Staff is monitoring these proceedings, however, staff believes consideration of these petitions will be governed by each individual state's law addressing interconnection and telecommunications services.

Staff's recommendation addresses issues 1-3a as set forth in the Procedural Order. Staff notes that this is a case of first impression which presents unique circumstances and policy concerns not previously addressed by the Commission.

¹ Level 3 has subsequently extended the termination date to July 10, 2007.

Discussion of Issues

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

Recommendation: Yes. Pursuant to §364.16(2), Florida Statutes, the Commission has authority to ensure that a CLEC provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services. (TEITZMAN, LEE)

Parties' Arguments

Level 3: Level 3 contends that Neutral Tandem's position that §§364.16(2) and 364.162, Florida Statutes, mandate CLEC-to-CLEC direct interconnection and state arbitration is not supported by the language in the statute, is inconsistent with Commission precedent, is in conflict with federal law, and provides an invitation to a floodgate of CLEC petitions requesting direct interconnection with each other to the ultimate detriment of consumers and competition.

Level 3 asserts that §364.16(2), Florida Statutes, requires a CLEC to provide access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services. Level 3 argues that Neutral Tandem has not petitioned for access to or interconnection with a Level 3 service but rather has petitioned the Commission to maintain existing interconnections between the two companies' facilities. Level 3 asserts that §364.16(2), Florida Statutes, is limited to access to and interconnection with a CLEC's **services** and therefore, the Commission lacks jurisdiction to mandate **facilities** interconnection on a CLEC like Level 3. (Level 3 BR at 9-10)

Level 3 argues that Neutral Tandem incorrectly relies on §364.162(2), Florida Statutes to support its position that under §364.16(2), Florida Statutes, the Commission may arbitrate an interconnection agreement between a CLEC and an ILEC. Level 3 asserts that §364.162(1), Florida Statutes, explicitly applies only to negotiations between CLECs and ILECs. Level 3 argues further that to give meaning and effect to the ILEC/CLEC state arbitration provisions in §364.162, Florida Statutes, the only reasonable and harmonious interpretation of the phrase "any other provider of local exchange telecommunications services" in §364.16(2), Florida Statutes, is that it refers to an ILEC because only a CLEC and ILEC could utilize the §364.162, Florida Statutes, arbitration provision referenced in §364.16(2), Florida Statutes. (Level 3 BR at 11)

Next, Level 3 asserts that §§251 and 252 of the Telecommunications Act of 1996 (the Act) preempt state regulation of CLEC-to-CLEC interconnection and traffic exchange. Level 3 contends that Congress recognized that there is no need for intrusive government oversight of the interconnection relationship between two CLECs at any level. Level 3 argues that voluntary negotiation is the mechanism Congress chose to establish interconnection and traffic exchange duties as between CLECs and is the appropriate mechanism in the instant case. (Level 3 BR at 12-14)

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Finally, Level 3 counters Neutral Tandem's reliance on the *TDS Telecom Order*² and *Level 3 Communications v. Jacobs*.³ Level 3 asserts that the issue in *Level 3 Communications v. Jacobs* was whether the Commission was authorized under the regulatory assessment fee statute to include CLEC collocation revenue in the calculation of Level 3's regulatory assessment fee. Level 3 argues the substantive issue in the Level 3 decision has no bearing in this case. Level 3 argues that in the *TDS Telecom Order* the Commission held that it remained available to resolve unsuccessful transit negotiations between CLECs and BellSouth, an ILEC. Level 3 asserts that with regard to the relationship between two CLECs, the Commission simply acknowledged that § 251(a) of the Act obligates carriers to interconnect either directly or indirectly. (Level 3 BR at 14-16)

Neutral Tandem: In its brief, Neutral Tandem asserts that §364.16(2), Florida Statutes, provides the Commission with clear jurisdiction over its Petition. Neutral Tandem argues that §364.16(2), Florida Statutes, specifically requires competitive carriers such as Level 3 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." Neutral Tandem argues further that §364.16(2), Florida Statutes, sets forth that if competitive carriers are unable to reach agreement on the terms and conditions of interconnection, the Commission shall "set nondiscriminatory rates, terms and conditions" for interconnection within 120 days after a carrier files an interconnection petition. (Neutral Tandem BR at 5)

Neutral Tandem contends the Commission has already found that Chapter 364 grants it jurisdiction over interconnection for transiting purposes. Neutral Tandem cites to the *TDS Telecom Order* where the Commission held that "transit service is clearly an interconnection agreement under §364.16, Florida Statutes." Neutral Tandem notes that the fact that the *TDS Telecom Order* arose out of petitions challenging an ILEC's transit traffic tariff is a distinction without a difference under §364.16(2), Florida Statutes. (Neutral Tandem BR at 5-6)

Neutral Tandem argues that Level 3's assertions that the Commission lacks jurisdiction to order interconnection because neither party is an incumbent carrier is without merit and is contrary to Florida Supreme Court precedent. Neutral Tandem notes that in *Level 3 v. Jacobs*, the Court rejected a similar challenge by Level 3 to the Commission's jurisdiction when it found that Chapter 364 "gives the PSC authority over interconnection duties of both ILECs and [competitive local carriers]." (Neutral Tandem BR at 7)

Neutral Tandem also disagrees with Level 3's assertions that the granting of its Petition would supplant commercial negotiations. To the contrary, Neutral Tandem asserts that it has been able to arrive at interconnection arrangements through negotiation with every other carrier

² See 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., Docket Nos. 050119-TP, 050125-TP; Order No. PSC-06-0776-FOF-TP, issued September 18, 2006. (*TDS Telecom Order*)

³ *Level 3 v. Jacobs*, 841 So.2d 447 (Fla. 2003).

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Date: June 27, 2007

with which it has sought interconnection in Florida. Neutral Tandem contends that 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, that Commission intervention is necessary in this matter. (Neutral Tandem BR at 8-9)

In concluding its jurisdictional arguments, Neutral Tandem asserts that the Commission should be mindful of the potential implications that granting Level 3's Motion would have on the Commission's ability to oversee the flow of traffic on the public switched telecommunications network (PSTN). Neutral Tandem contends that the issues presented in its Petition deal directly with traffic traversing the PSTN which fall directly within the Commission's jurisdiction and within the Commission's plenary authority over the integrity of the telecommunications delivery system. (Neutral Tandem BR at 12)

Staff Analysis:

Section 364.16(2), Florida Statutes, sets forth that:

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 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.

Pursuant to §364.16(2), Florida Statutes, staff believes that Level 3, as a CLEC, is required to provide interconnection with its telecommunications services to any other provider of local exchange telecommunications services requesting such interconnection. As set forth above Level 3 asserts that "any other provider of local exchange telecommunications services" refers solely to ILECs. Staff disagrees with this assertion. Staff believes inclusion of the terms "any other" before "provider of local exchange telecommunications services" rather than "local exchange telecommunications company" as appears in §364.162(1), Florida Statutes, contemplates that a CLEC is required to provide access and interconnection with both ILECs and CLECs.

Staff further notes that §364.01(2), Florida Statutes, provides that the Commission has exclusive jurisdiction over all matters set forth in Chapter 364, Florida Statutes. Additionally, as noted by Neutral Tandem, the Florida Supreme Court held in Level 3 v. Jacobs that "[i]nterconnection is a fundamental duty of all local telecommunications providers in both Florida law and Federal Law." Consequently, staff believes that if providers of local exchange telecommunications services are unable to reach mutually acceptable prices, terms, and conditions for interconnection, the Commission may arbitrate the prices, terms, and conditions to ensure the requirements of §364.16(2), Florida Statutes, are met.

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Date: June 27, 2007

Level 3 also asserts that the Commission is preempted by federal law from arbitrating CLEC-to-CLEC interconnection arrangements. Staff finds Level 3's arguments in support of this assertion unpersuasive. The U.S. Supreme Court has stated there are three circumstances in which preemption may be found: (1) express preemption from the terms of a statute, (2) "field preemption" which can be inferred or implied from the pervasiveness of a federal scheme leaving no room for a state to supplement it, or (3) conflict preemption, where the state law would conflict with federal law so that it is impossible for a private party to comply with both. Fife v. Cooksey, 403 F. Supp. 2d 1131, 1133 (M.D. Fla. 2005). See also English v. General Electric Co., 496 U.S. 72, 78-9, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Cliff v. Payco Gen. Am Credits, Inc., 363 F3d. 1113, 1122 (11th Cir. 2004).

Level 3 fails to cite, nor is staff aware of, any provision in the Act that expressly precludes a state commission from arbitrating a CLEC-to-CLEC interconnection agreement. Additionally, §§261(b) and (c) of the Act explicitly preserve state authority to impose requirements on a telecommunications carrier, subsequent to the date of enactment of the Act, for intrastate services that are necessary to further competition in the provision of telephone exchange service, so long as the State's requirements are not inconsistent with the Act or FCC regulations to implement the Act. Section 251(a)(1) of the Act specifically provides that each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities of other telecommunications carriers. Consequently, staff does not believe that the Commission is preempted from requiring Level 3 to interconnect directly or indirectly with the facilities of other telecommunications carriers pursuant to state law.

Staff believes it is important that the Commission further expand its consideration of this issue to address Level 3's obligation to provide access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services. Staff is concerned that if Level 3 is allowed to refuse direct interconnection with Neutral Tandem, Level 3 is unilaterally removing an originating carrier's right to choose a transit provider and negotiate on its own behalf the rates, terms, and conditions for transiting its traffic over the PSTN and jeopardizing the efficient and reliable exchange of traffic over the PSTN. Staff believes that if petitioned by an originating carrier, i.e., a provider of local exchange telecommunications services, pursuant to §364.16(2), Florida Statutes, the Commission may require Level 3 to directly interconnect with Neutral Tandem for purposes of terminating the originating carrier's traffic on Level 3's network.

In the *TDS Telecom Order* the Commission held, in pertinent part, that "BellSouth's transit service is more characteristic of an interconnection arrangement..." (*TDS Telecom Order* at 17) Staff notes that although BellSouth is an ILEC, the transit service provided by BellSouth in that proceeding is identical to Neutral Tandem's offering in the instant proceeding. Accordingly, staff believes the same finding applies in this proceeding.

Additionally, in the *TDS Telecom Order* the Commission held that "[t]he 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 carrier is a Small LEC." (*TDS Telecom Order* at 23) Staff notes that the Commission made no distinction between whether an

Docket No. 070127-TX
Date: June 27, 2007

originating carrier utilizes an ILEC's transit service or an alternative transit provider, nor does staff believe a distinction would be appropriate.

Although this proceeding has primarily been focused on questions of law, it is nonetheless quite clear in both parties' filings that the crux of this dispute involves compensation to Level 3 from Neutral Tandem for terminating traffic on Level 3's network. Staff notes that the Commission has already established in the *TDS Telecom Order* that originating carriers are obligated to: (1) compensate the transit provider; (2) deliver traffic to the transit provider in such a manner that it can be identified, routed, and billed; and (3) compensate the terminating carrier for terminating the traffic to the end user.⁴ (*TDS Telecom Order* at 24) Accordingly, staff believes that any dispute regarding compensation for Level 3's terminating service is more appropriately brought against an originating carrier of local exchange telecommunications services and not the transit provider, in this case Neutral Tandem.

Finally, staff believes Level 3's refusal to directly interconnect with Neutral Tandem hinders the further development of a competitive telecommunications market in the State of Florida. Although staff acknowledges that Chapter 364, Florida Statutes, does not directly address interconnection arrangements involving alternative transit providers, it does charge this Commission with the responsibility of fostering a competitive environment for the provisioning of telecommunication services. Staff believes 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. As a result of Neutral Tandem's entry into the marketplace, originating carriers are no longer limited to utilizing an ILEC's facilities to deliver their traffic to a terminating carrier where Neutral Tandem operates.

In conclusion, staff recommends the Commission find it has jurisdiction pursuant to §364.16(2), Florida Statutes, to ensure that a CLEC provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services.

⁴ Staff notes again that although the *TDS Telecom Order* dealt with an ILEC's transit service, these obligations are applicable whether transit service is provided by an ILEC or an alternative transit service provider. The Commission found that these obligations are consistent with the "originating carrier pays" regime currently in place in the industry. (*TDS Telecom Order* at 24)

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

Recommendation: No, staff does not believe Neutral Tandem's delivery of transit traffic constitutes provision of local exchange telecommunications services for the purposes of §364.16(2), Florida Statutes. Accordingly, staff recommends the Petition be dismissed without prejudice for lack of standing. (TEITZMAN, LEE)

Parties' Arguments

Level 3: Level 3 argues that Neutral Tandem lacks standing because it fails to allege in its Petition that it provides basic local telecommunications services. Level 3 further disagrees with Neutral Tandem's assertions that it provides "local exchange telecommunications services" and that it has standing because it is a certificated CLEC in the State of Florida. Level 3 contends that the fact an entity has been granted a CLEC certificate does not in any way speak to whether that entity is providing the type of service contemplated by the Legislature and by the Commission for CLECs. (Level 3 BR at 17-18)

Level 3 asserts that the only reasonable interpretation of §364.16(2), Florida Statutes, is that it requires a CLEC to provide access to and interconnection with another provider of basic local telecommunications services. Level 3 notes that §364.337, Florida Statutes, 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." Level 3 asserts that the principles of statutory construction require that the specific CLEC and definition sections of Chapter 364 be construed *in pari materia* (in the same matter) with the term "local exchange telecommunications services" provided by a CLEC under §364.16(2), Florida Statutes. Level 3 notes that further support is found in Rules 25-24.830(1) and (2), Florida Administrative Code, which describe a CLEC customer as a "basic local exchange telecommunications customer." Level 3 argues that because Neutral Tandem does not provide basic local telecommunications services, including access to 911 emergency services and relay services for the hearing impaired, it lacks standing to pursue the relief sought in its Petition under §364.16(2), Florida Statutes. (Level 3 BR at 18-20)

Neutral Tandem: Neutral Tandem asserts that 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. Second, 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. Neutral Tandem argues it satisfies both of these standards. (Neutral Tandem BR at 13)

Neutral Tandem contends that the plain language of §364.16(2), Florida Statutes, confers standing on Neutral Tandem to seek the relief sought in its Petition. Neutral Tandem argues that §364.16(2), Florida Statutes, 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 the parties cannot arrive at mutually agreeable terms and conditions through negotiation. Neutral Tandem asserts it is a certificated provider of local

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exchange telecommunications services, and thus has standing to petition the Commission to establish terms and conditions for interconnection with Level 3. (Neutral Tandem BR at 14)

Neutral Tandem disagrees with Level 3's contention that it has failed to allege that it provides "local exchange telecommunications services." Neutral Tandem further disagrees with Level 3's assertion that "basic local telecommunication services" and "local exchange telecommunications services" are synonymous. Neutral Tandem argues that nothing in the plain language of Chapter 364 indicates that the terms "basic local telecommunication services" and "local exchange telecommunications services" share a common meaning and that to the contrary the use of different terms in Chapter 364 serves as strong evidence that different meanings were intended. Furthermore, Neutral Tandem notes that the Commission has already found in the *TDS Telecom Order* that transiting service should be categorized as "an interconnection arrangement" under §364.16, Florida Statutes." (Neutral Tandem BR at 14-15)

Neutral Tandem further contends that it has standing because it faces immediate and substantial harm of the type that §364.16(2), Florida Statutes, was designed to address. Neutral Tandem argues that Level 3's actions will result in: (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. Neutral Tandem asserts these immediate and direct injuries meet the standard required to establish standing. (Neutral Tandem BR at 16)

Staff Analysis: To meet the standard of standing for a petition under Rule 28-106.201(2), Florida Administrative Code, a petitioner must explain how the petitioner's substantial interest will be affected by the agency determination. "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981).

Staff believes that Neutral Tandem has met the first prong of *Agrico* by adequately alleging it will suffer an injury in fact of sufficient immediacy if Level 3 terminates direct connection between the parties. However, as discussed below, staff believes ultimately Neutral Tandem lacks standing to bring its Petition because its substantial interests do not fall within the zone of interest to be protected under §364.16(2), Florida Statutes.

Is Neutral Tandem a CLEC?

A competitive local exchange telecommunications company (CLEC) is defined in §364.02(5), Florida Statutes, as "a company certificated by the [C]ommission to provide local

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exchange telecommunications services.”⁵ Section 364.337(1), Florida Statutes, provides that an entity petitioning to provide competitive local exchange service be granted a certificate of authority by the Commission upon a showing of sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served. Section 364.337(2), Florida Statutes, states in pertinent part that:

[t]he 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 . . .

Staff believes that there is no statutory requirement that a certificated CLEC actively provide local exchange telecommunications services. Certification simply means the Commission found the company has the “technical, financial, and managerial capability” to provide service. However, if a certificated CLEC provides basic local telecommunications service it must provide access to operator services, 911 services, and relay services for the hearing impaired. As discussed in more detail below, staff does not believe that, for the purposes of the instant proceeding, Neutral Tandem is providing local exchange telecommunications services in its provisioning of transit service. Therefore, for the purposes of this proceeding staff does not believe that Neutral Tandem is acting as a certificated CLEC.

Is Neutral Tandem acting as a local exchange telecommunications provider in its delivery of transit traffic?

As discussed in Issue 1, §364.16(2), Florida Statutes, requires that each CLEC shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services. Staff does not believe that Neutral Tandem serves as a local exchange telecommunications provider pursuant to Chapter 364, Florida Statutes, when it delivers transit traffic. Therefore, its substantial interests do not fall within the zone of interest to be protected under §364.16(2), Florida Statutes.

As both parties note, “local exchange telecommunications services” is not defined within Chapter 364. However, staff believes within Chapter 364, the term “local exchange telecommunications services” contemplates voice-grade exchange service which is available to the public for hire.⁶ Staff believes Neutral Tandem’s delivery of transit traffic is clearly not a voice-grade exchange service available to the public for hire.

⁵ The original term (alternative local exchange company or ALEC) was changed to CLEC on May 23, 2003.

⁶ See §364.16(4), Florida Statutes, states that, in order to assure that consumers have access to different local exchange service providers without being disadvantaged, deterred, or inconvenienced by having to give up the consumer’s existing local telephone number, all providers of *local exchange services* must have access to local telephone numbering resources and assignments on equitable terms that include a recognition of the scarcity of such resources and are in accordance with national assignment guidelines. Each local exchange provider, except small local exchange telecommunications companies under rate of return regulation, shall provide a temporary means of achieving telephone number portability. The parties, under the direction of the commission, shall set up a number

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Furthermore, staff notes that §364.02(14)(a), Florida Statutes, excludes from the definition of telecommunications company "an entity which provides a telecommunications facility exclusively to a certificated telecommunications company." Staff believes Neutral Tandem is essentially providing its facilities as a pathway or bridge for transit traffic to other certificated telecommunications companies and voice communication providers. Pursuant to §364.02(14)(a), Florida Statutes, because Neutral Tandem's transit traffic service is not an offering to the public for hire but rather an offering to other carriers, staff believes that a colorable argument could be made that Neutral Tandem is not operating as a telecommunications company in the instant case.

Based on the above analysis, staff does not believe Neutral Tandem's delivery of transit traffic constitutes provision of "local exchange telecommunications services" for the purposes of §364.16(2), Florida Statutes. Therefore, staff recommends that the Petition be dismissed without prejudice for lack of standing. Section 120.569(2)(c), Florida Statutes, provides that "dismissal of a petition, shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." Staff believes a dismissal without prejudice is appropriate because Neutral Tandem may have standing if it can demonstrate that it has authority to act as an agent⁷ for an originating carrier in negotiating and reaching traffic termination arrangements.

portability standards group by no later than September 1, 1995, for the purposes of investigation and development of appropriate parameters, costs, and standards for number portability. If the parties are unable to successfully negotiate the prices, terms, and conditions of a temporary number portability solution, the commission shall establish a temporary number portability solution by no later than January 1, 1996. Each local exchange service provider shall make necessary modifications to allow permanent portability of local telephone numbers between certificated providers of *local exchange service* as soon as reasonably possible after the development of national standards. The parties shall negotiate the prices, terms, and conditions for permanent telephone number portability arrangements. In the event the parties are unable to satisfactorily negotiate the prices, terms, and conditions, either party may petition the commission and the commission shall, after opportunity for a hearing, set the rates, terms, and conditions. The prices and rates shall not be below cost. Number portability between different certificated providers of local exchange service at the same location shall be provided temporarily no later than January 1, 1996. (emphasis added)

⁷ "An agent is one who manifests consent to act for and under the control of a principal who manifests consent to the agent acting in such a manner." Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990)

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Issue 3(a): If the Commission has jurisdiction over Neutral Tandem's Petition and determines that Neutral Tandem has standing to bring its Petition:

- a. Can the Commission require direct interconnection between Level 3 and Neutral Tandem, for the purpose of terminating transit traffic from originating carriers, delivered by Neutral Tandem to Level 3?

Recommendation: If the Commission approves staff's recommendation in Issue 2, this issue will be rendered moot. (TEITZMAN)

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, this issue will be rendered moot.

If, however, the Commission determines it has jurisdiction over Neutral Tandem's petition and that Neutral Tandem does have standing, it may be appropriate to order Level 3 to maintain the parties' existing interconnection arrangements to preserve continuity of service pending the Commission's final decision on the merits.

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Issue 4: Should this docket be closed?

Recommendation: Yes, if the Commission approves staff's recommendation in Issue 2, this docket should be closed. (TEITZMAN)

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, this docket should be closed.

If the Commission denies staff's recommendation in Issue 2, this docket should be set for hearing to address Issues 3(b) – 4(a-c).

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 070408-TP

COMPOSITE EXHIBIT B

TO

LEVEL 3'S SUPPLEMENTAL BRIEF

BEFORE THE MARYLAND PUBLIC SERVICE COMMISSION

In the Matter of the Petition of)
Level 3 Communications, LLC To Direct) Docket No. _____
Neutral Tandem-Maryland, LLC To Provide)
Notice To Its Customers Of The Termination)
Of Certain Contract Arrangements)
)

AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Maryland, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiaries (collectively "Level 3"), in Maryland via existing direct interconnections between Neutral Tandem and Level 3.

3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in Maryland through the parties' existing direct interconnections.

AFFIANT FURTHER SAYETH NOT.

Surendra Saboo

Dr. Surendra Saboo

Sworn to and subscribed before me

this 2 day of August, 2007



BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

LEVEL 3 COMMUNICATIONS, LLC)

Petitioner,)

v.)

NEUTRAL TANDEM, INC. AND NEUTRAL)
TANDEM-ILLINOIS, LLC,)

Respondents.)

Case No. _____

AFFIDAVIT OF DR. SURENDRA SABOO

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiaries (collectively "Level 3"), in Wisconsin via existing direct interconnections between Neutral Tandem and Level 3.

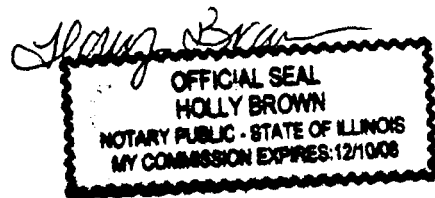
3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in Wisconsin through the parties' existing direct interconnections.

AFFIANT FURTHER SAYETH NOT.

Dr. Surendra Saboo
Dr. Surendra Saboo

Sworn to and subscribed before me

this 2 day of August, 2007



STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Petition of)
)
Level 3 Communications, LLC To Direct)
Neutral Tandem-New Jersey, LLC To) BPU Docket No. TD07050334
Provide Notice To Its Customers Of The)
Termination Of Certain Contract)
Arrangements)

AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

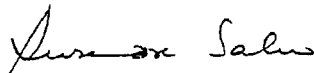
1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-New Jersey, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiary, Broadwing Communications, LLC, (collectively "Level 3"), in the State of New Jersey via existing direct interconnections between Neutral Tandem and Level 3.

3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in the State of New Jersey through the parties' existing direct interconnections.

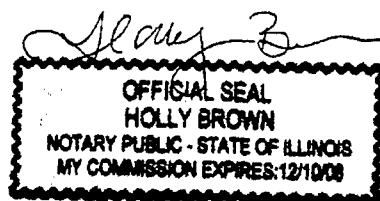
4. As of August 3, 2007, Level 3 no longer orders services from Neutral Tandem's tariffs in New Jersey.

AFFIANT FURTHER SAYETH NOT.



Dr. Surendra Saboo

Sworn to and subscribed before me
this 1 day of August, 2007



COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

In the Matter of the Petition of)
Level 3 Communications, LLC To Direct) DTC No. 07-3
Neutral Tandem-Massachusetts, LLC To)
Provide Notice To Its Customers Of The)
Termination Of Certain Contract Arrangements)
)

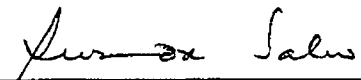
AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Massachusetts, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

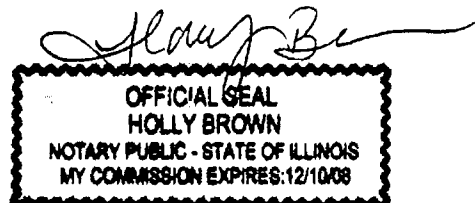
2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiary Broadwing Communications, LLC (collectively "Level 3"), in the Commonwealth of Massachusetts via existing direct interconnections between Neutral Tandem and Level 3.

3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in the Commonwealth of Massachusetts through the parties' existing direct interconnections.



Dr. Surendra Saboo

Sworn to and subscribed before me
this 2 day of August, 2007



1 STATE OF MICHIGAN
2 BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION
3 In the matter of the complaint
and application for emergency
4 relief by Neutral Tandem, Inc. Case No. U-15230
for interconnection with Level 3
5 Communications. Volume 5

6 CROSS-EXAMINATION

7 Proceedings held in the above-entitled matter
8 before Sharon L. Feldman, J.D., Administrative Law
9 Judge with SOAHR, at the Michigan Public Service
10 Commission, 6545 Mercantile Way, Room C, Lansing,
11 Michigan, on Thursday, August 9, 2007, at 9:00 a.m.

12 APPEARANCES:

13 MICHAEL S. ASHTON, ESQ.
14 Fraser, Trebilcock, Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
15 Lansing, Michigan 48933

16 -and-

17 JOHN R. HARRINGTON, ESQ.
MATT BASIL, ESQ.
18 Jenner & Block, LLP
One IBM Plaza
19 Chicago, Illinois 60611-7603

20 On behalf of Neutral Tandem, Inc.

21

22

23

24

25 (Continued)

1 A That's correct.

2 Q And those states would be Maryland, Indiana,
3 Massachusetts, New Jersey, Wisconsin and Ohio, correct?

4 A Yeah, I think so. Those seem to be right.

5 MR. KELLY: Your Honor, if I may have
6 this document marked as Exhibit R-5.

7 JUDGE FELDMAN: Yes.

8 (Document marked for identification as Exhibit No.
9 R-5.)

10 Q (By Mr. Kelly): Dr. Saboo, let me show you what's been
11 marked as Exhibit R-5; and this is a copy of the
12 affidavit that you submitted to the Wisconsin Public
13 Service Commission, correct?

14 A Yes.

15 Q Now, here you say in paragraph 3 that as of August 3rd,
16 2007, Neutral Tandem no longer delivers tandem transit
17 traffic to Level 3 in Wisconsin through the parties'
18 existing direct interconnections. Do you see that?

19 A Yes.

20 Q When did Neutral Tandem decide it would no longer deliver
21 tandem transit traffic to Level 3 in Wisconsin?

22 A That's seven months ago.

23 Q When did Level 3 -- when did Neutral Tandem stop
24 delivering traffic to Level 3 in Wisconsin?

25 A As of August 3rd.

1 Q Did Neutral Tandem provide notice to its customers in
2 Wisconsin that it would no longer be delivering traffic
3 to Level 3 in Wisconsin?

4 A Well, we worked with our customers, if that's considered
5 notice. We worked with our customers up to --

6 Q When did you provide notice to the customers? I'm sorry.

7 JUDGE FELDMAN: Mr. Kelly, please don't
8 cut the witness off while he's speaking.

9 Had you finished?

10 A Yes.

11 JUDGE FELDMAN: O.K.

12 Q (By Mr. Kelly): O.K. I'm sorry. When did you provide
13 notice to your customers?

14 A Again, I don't know about notice, but it was several
15 weeks ago.

16 Q So in July?

17 A I don't know the exact date when we got started with
18 letting customers know that they need to start to reroute
19 traffic.

20 Q Did you advise customers that in Wisconsin, Level 3
21 telephone numbers would, that calls could no longer be
22 delivered to Level 3's telephone numbers?

23 A Yes. We had to give them Level 3's codes.

24 Q The NPA-NXX's?

25 A That's correct.

1 Q NPA-NXX's. You sent them an e-mail telling them that
2 Level 3's NPA-NXX's would no longer be routed or
3 transitted by Neutral Tandem in Wisconsin?

4 A I don't exactly know the logistics, but it's probably an
5 e-mail with a phone call as well with the specifics of
6 the NPA-NXX's.

7 Q And the customers rerouted their traffic?

8 A Actually, yes, some of them have completed, some of them
9 haven't completed rerouting the traffic.

10 Q So the calls that, for those companies that have not
11 rerouted traffic -- strike that.

12 When you say rerouted traffic, you mean
13 that they are no longer delivering calls destined to
14 Level 3, they are no longer delivering those calls to
15 Neutral Tandem for transit, correct?

16 A Yes. Some portions of -- they haven't completed entirely
17 moving the traffic.

18 Q O.K. When they are moving the traffic, though, you're
19 talking about how they are finding another route to
20 deliver traffic destined to Level 3, perhaps the ILEC?

21 A Yes.

22 Q For those calls that have not been rerouted, how are
23 those calls being delivered to Level 3, if at all?

24 A We are using our connections with the LEC to transport
25 that call through the ILEC tandem to give time for our

1 customers to complete the rerouting.

2 Q Did you solicit from your originating carriers their
3 consent to no longer deliver traffic directly through
4 Level 3?

5 MR. HARRINGTON: Objection. Vague, your
6 Honor.

7 JUDGE FELDMAN: If the witness
8 understands the question, I'll allow him to answer it.

9 A I'm not sure what you mean by solicit, but, you know, we
10 worked with them and gave them Level 3's codes and asked
11 them to not route those calls to us and to start finding
12 other ways; and as I said, some of them have done some
13 amount of the work and some of them have not, and for
14 those that have not, we are tandeming through the ILEC
15 tandem.

16 Q (By Mr. Kelly): Did you ask them permission to do that?

17 A Well, they have to do a lot of the work, so I'm not sure
18 the permission aspect of it, but we work with them
19 because they have to do the work in terms of rerouting.

20 Q Did Neutral Tandem inform Level 3 that it would be
21 advising, that Neutral Tandem would be advising its
22 customers that calls would no longer be delivered to
23 Level 3 through the direct interconnection arrangement in
24 Wisconsin?

25 A No, we did not. But we had testimony from Level 3 that
Metro Court Reporters, Inc. 248.426.9530

1 they had capacity already augmented with a LEC before we
2 did this.

3 Q Are originating carriers being harmed in Wisconsin by
4 Neutral Tandem's election to no longer deliver traffic to
5 Level 3 through the direct interconnection?

6 A Let me just answer by saying that, are the originating
7 carriers' costs going up and they're getting harmed
8 because of lesser, less reliability; yes, they are having
9 to pay more to go through the ILEC tandem, and it's in
10 some sense not a free election to go to that, it's
11 because of the petitions that Level 3 put in place in
12 these states to disconnect and force us to incur
13 additional costs. So from a cost benefit analysis, for
14 the amount of traffic it was, we had no other choice, we
15 were left with no other choice other than to ask our
16 customers to do that. And other than fighting these
17 cases and incurring legal costs that are very high, we
18 had to ask our customers to do that.

19 Q And you say this decision to do that was made seven
20 months ago?

21 MR. HARRINGTON: Objection, your Honor.

22 A I said several.

23 MR. HARRINGTON: He said several.

24 MR. KELLY: I'm sorry.

25 MR. HARRINGTON: You misstated his

1 testimony. Dr. Saboo testified several months ago, not
2 seven.

3 JUDGE FELDMAN: And that's correct,
4 Dr. Saboo?

5 A Yes.

6 JUDGE FELDMAN: Thank you for the
7 clarification.

8 MR. KELLY: O.K. I apologize.

9 Q (By Mr. Kelly): When you say several months ago, when
10 was the decision made to do that in Wisconsin?

11 A We looked at all those states, six states or so that you
12 mentioned as a group, and those are the states that we
13 did not file in, they were the smaller states for us in
14 terms of traffic; and so the intent was if Level 3 was
15 going to push those cases, which Level 3 did, then, you
16 know, we'd, through the -- so we've been -- we did not
17 petition in these states with the plan that if we were
18 required to, this amount of traffic was small enough, or
19 if we were required to or forced to, then we would have
20 to do that, so.

21 Q So the decision to terminate the exchange of traffic with
22 Level 3 in Wisconsin was made before Level 3 actually
23 filed the petition in Wisconsin, correct?

24 A Well, that was what triggered it. We had not filed in
25 Wisconsin ourselves, like we have done here in Michigan,

1 because of there's a lot of more traffic here, but we had
2 not done it; and then when, I believe when Level 3
3 finally filed their petition to disconnect in Wisconsin
4 is when it became more of an active issue for us.

5 MR. KELLY: Excuse me a second, your
6 Honor. Your Honor, could I just have a second? I have
7 other -- let me just tell you why. I have other
8 affidavits. I would prefer to just go through all of
9 them sort of as a single set, given his answers with
10 respect to Wisconsin, rather than go through each of the
11 individual states and ask the same questions. So what
12 I'd like to do is aggregate my exhibits.

13 JUDGE FELDMAN: Let's go off the record
14 so that you have an opportunity to get your exhibits
15 marked.

16 (At 10:05 a.m., there was a brief in-place recess.)

17 (Document marked by the court reporter as Exhibit
18 No. R-6.)

19 (Document was marked for identification by the Court
20 Reporter as Exhibit No. R-7.)

21 JUDGE FELDMAN: Anytime you're ready,
22 Mr. Kelly.

23 Q (By Mr. Kelly): Dr. Saboo, let me direct your attention,
24 if you would please, to what's been handed to you and
25 marked by the court reporter as Exhibit No. R-6.

1 A Yes.

2 Q Let me ask you: These are the affidavits that you had
3 signed for submission to the Indiana, Ohio, Maryland, New
4 Jersey, and Massachusetts commissions?

5 A Yes.

6 Q Let me just for brevity sort of go through the same
7 questions I just asked you with respect to Wisconsin.
8 Your answers may be the same based on your prior
9 testimony, but just so that the record is clear.

10 For each of these states did you decide
11 several months ago that you would terminate the exchange
12 of traffic with Level 3 in those states?

13 A Each of these states, I wouldn't say we decided. We held
14 off on petitioning in these states in case -- because of
15 the low amount of traffic, and if we were forced to do
16 this, then we would take the traffic off.

17 Q When you say there was a low amount of traffic, did you
18 do a cost benefit analysis and say or discuss with people
19 at Neutral Tandem that it wasn't worth the cost to
20 maintain the direct interconnection given the amount of
21 traffic with Level 3?

22 MR. HARRINGTON: I'll object to the
23 extent it would require Mr. Saboo to divulge
24 attorney-client privilege. If Mr. Kelly is limiting the
25 question to non-privileged communications, I have no

1 objection.

2 MR. KELLY: I would not ask him to
3 disclose the subject of attorney-client privileged
4 communications.

5 JUDGE FELDMAN: Thank you.

6 MR. HARRINGTON: Just for clarification
7 I'm not sure Mr. Saboo -- Dr. Saboo, if your Honor could
8 instruct him that he can only answer that question if he
9 is aware of nonprivileged communication. I think that
10 there may be some confusion on Dr. Saboo's part about
11 what he can and can't answer.

12 JUDGE FELDMAN: Do you understand the
13 question? And do you understand the point about you are
14 not being required to answer with regard to privileged
15 attorney-client communications?

16 A Yes. Well, the answer to Mr. Kelly's question would
17 require me to divulge information that I have only under
18 attorney-client privilege, with my internal counsel.

19 MR. KELLY: Then I'll withdraw the
20 question.

21 JUDGE FELDMAN: Thank you.

22 Q (By Mr. Kelly): Neutral Tandem informed its customers
23 several weeks ago in each of these states that calls
24 could no longer be routed to Level 3 via a direct
25 physical interconnection between Neutral Tandem and Level

1 3, correct?

2 A We gave them certain codes and asked them to not route
3 traffic to us, and those certain codes were Level 3
4 codes. I'm trying to answer the question but -- so the
5 way we communicated with them was: Here are the codes
6 that we don't want you to send traffic to us.

7 Q Is it -- just to be clear, I mean you did not identify
8 those codes as particular Level 3 codes; is that true?

9 MR. HARRINGTON: Judge, respectfully,
10 Mr. Kelly has spent a fair amount of time now questioning
11 Dr. Saboo about items in other states, I understand that
12 perhaps there would be some tangential relevance to that
13 in other states, but I think we have gone quite a bit of
14 a way down this line of questioning. I would object to
15 further questions about Neutral Tandem's actions in other
16 states.

17 JUDGE FELDMAN: I'm going to allow
18 Mr. Kelly to continue, but you are free to renew your
19 objections subsequently.

20 MR. HARRINGTON: Thank you, Judge.

21 A What is the question again?

22 Q (By Mr. Kelly): Just to be clear, and I'm just trying to
23 get the record clear -- did you tell the customers that
24 these were Level 3 NPA-NXX's or did you just say: Don't
25 deliver calls destined to these NPA-NXX's to Neutral

1 Tandem?

2 A I think just the NPA-NXX's. We don't mention it, that
3 it's Level 3. It's just -- we just -- it's just these
4 NPA-NXX's.

5 Q Is it true in each of these other states that originating
6 carriers are both routing calls through some other means
7 and also still continuing to route calls to Neutral
8 Tandem for calls that are destined to Level 3?

9 A Yes. I mean -- as I said, they are partially completed
10 moves, so they are partially terminating through the ILEC
11 and still continue to terminate through us. But we are
12 rerouting through the ILEC. So I just want to be clear
13 that we are not routing to Level 3, but they are sending
14 traffic to us that is designated to Level 3 still.

15 Q And when that happens in each of these states, you are
16 rerouting or routing calls through the ILEC so that the
17 ILEC would deliver that call to Level 3?

18 A That's correct.

19 Q How long did it take Neutral Tandem in each of these
20 states to reconfigure its switches so that traffic would
21 not be delivered to Level 3 over the interconnection
22 facilities connecting Neutral Tandem to Level 3?

23 A For Neutral Tandem itself? For us?

24 Q Yes, to reconfigure its switches so that traffic would no
25 longer be delivered over the interconnection trunks

1 between Neutral Tandem and Level 3?

2 A As I mentioned before, we have -- we already have our
3 switches programmed for emergency situations to, on a
4 realtime basis, to direct traffic to the ILEC if the
5 trunk group is disconnected. So that programming is
6 already in our switches to handle emergency situations,
7 so we utilize that same program.

8 Q Did Neutral Tandem disconnect the interconnection
9 facilities, connecting the Neutral Tandem switch to Level
10 3 switch in each of these six states?

11 A No, we have not disconnected.

12 Q What did you do to route traffic destined to the Level 3
13 NPA-NXX's so that the calls would be routed to the ILEC
14 tandem rather than over those interconnection trunks?

15 A Well, we have to instruct the switch to -- in its routing
16 logic -- to not use the existing interconnection that we
17 have with Level 3 that is still up, to use that as part
18 of the routing logic, as the first route. And to
19 instruct the switches not to do that and go to the next
20 route that will route it to the LEC.

21 Q And how long did it take you to perform the functions
22 necessary to so instruct the switch?

23 A I personally don't know, but it's been done over the same
24 timeframe that we had talked to our customers, so I don't
25 exactly know how long it took.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Neutral Tandem, Inc. and)
Neutral Tandem-Florida, LLC for)
Resolution of Interconnection Dispute with)
Level 3 Communications, LLC, and)
Request for Expedited Resolution.)

Docket No. 070408-TP

EXHIBIT C

TO

LEVEL 3'S SUPPLEMENTAL BRIEF

NUMBER: S-864
DATE: September 18, 2007
MAIL LOG NO.: 106474, 107256

TO: Steven B. Larsen, Chairman
Harold D. Williams, Commissioner
Allen M. Freifeld, Commissioner
Susanne Brogan, Commissioner
Lawrence Brenner, Commissioner

FROM: Anthony Myers, Assistant Executive Director

RE: Neutral Tandem-Maryland, LLC-Revisions to PSC MD Tariff No. 2.

Description of Petition:

Neutral Tandem-Maryland, LLC ("Neutral Tandem") proposes to revise its Tariff No. 2 to change terms and conditions concerning interference with or impairment of service and to add terms and conditions concerning exchange of traffic and information, non-authorized traffic and refusal or discontinuance of service, individual case basis (ICB) offerings and transit, access service and collocation service.

Groups which should receive a copy of Staff Recommendations:

Neutral Tandem-Maryland, LLC
Level 3 Communications, LLC

Recommended Action:

Staff recommends that the Commission accept the tariff for filing.

Merwin Sands, Director
Telecommunications Division

James W. Boone
Staff Counsel

Commission Action on: _____

Approved: _____ **Disapproved:** _____ **Accept for Filing:** _____

cc: Douglas R.M. Nazarian, General Counsel
O. Ray Bourland, Executive Secretary
Bryan G. Moorhouse, Chief Hearing Examiner
LaWanda Edwards, Manager of External Relations

Comments of the Staff Counsel Division
Date: September 18, 2007
Re: Neutral Tandem-Maryland, LLC
Mail Log No.: 106474, 107256

Summary of Filing:

On June 8, 2007, the Neutral Tandem filed revisions to its Tariff 2 to change certain terms and conditions regarding interference with or impairment of service and to add terms and conditions concerning exchange of traffic and information, non-authorized traffic, refusal or discontinuance of service, individual case basis (ICB) offerings and transit, access service and collocation service. The tariff was originally set to be considered at the July 11, 2007 Administrative Meeting as a consent agenda item. On July 10, 2007, Level 3 Communications, LLC (Level 3) filed an Emergency Motion to Remove Item from Consent Agenda and Consolidate with Pending Petition or, in the Alternative to Deny or Hold in Abeyance Tariff Revisions claiming that the tariff revisions directly related to an ongoing dispute between Neutral Tandem and Level 3. (ML 106728). In response to the Level 3 motion, Neutral Tandem agreed to remove the item from the consent agenda and to revise its proposed tariff to remove the provisions that Level 3 found objectionable. On July 13, 2007, Level 3 filed a letter specifically citing the provisions it found objectionable.

On August 23, 2007, Neutral Tandem filed revisions to its proposed tariff that removed many provisions that Level 3 found objectionable. Certain provisions that Level 3 objected to and which were removed by Neutral Tandem would have required carriers to maintain their existing interconnections with Neutral Tandem even after the carrier had elected to discontinue receiving service under the tariff. In addition, Neutral Tandem agreed to remove provisions that would have required carriers who were in the process of negotiating interconnection agreements with the Company to submit disputes to arbitration by the State Public Service Commission. Other provisions related to Tandem Service and to Transit Service were also removed.

The only provisions that Neutral Tandem did not remove from its tariff that Level 3 found objectionable concern Meet Point Billing for Transit and Access Service. The original proposal in Section 3.3.1 provided:

Transit Service shall be on a Meet Point Billing (“MPB”), with the Terminating Carrier and the Company billing their respective portions of the charges directly to the Originating Carrier, and neither the Terminating Carrier nor the Company will be required to function as a billing intermediary, e.g. clearinghouse.

This language was moved verbatim to Section 3.3.2 of the revised tariff. In addition, Neutral Tandem added a definition of Meet Point Billing to Section 1.3.8 as follows:

2

Comments of the Staff Counsel Division

Date: September 18, 2007

Re: Neutral Tandem-Maryland, LLC

Mail Log No.: 106474, 107256

Similarly, Neutral Tandem did not remove the Meet Point Billing language from the Access Service portion of its bill. The revised tariff provisions state:

Access Service shall be on a Meet Point Billing basis (as defined in 1.3.8), with the Terminating and Originating Carriers billing their respective portions of the charges directly to the Toll Service provider, and neither the Terminating and Originating Carriers nor the Company will be required to function as a billing intermediary, e.g. clearinghouse.

Level 3 claims that these tariff provisions prejudice issues that are in dispute between the companies. Level 3 is referring to its petition, filed with the Commission on May 23, 2007, to settle a dispute that arose in connection with Level 3's decision to terminate traffic exchange arrangements with Neutral Tandem. (ML#106207). At the time the Level 3 petition was filed, Staff recommended that the Commission initiate a proceeding to investigate whether non-ILEC telecommunications carriers are obligated under Section 251(a) of the Act to maintain previously agreed upon direct interconnection arrangements when the carriers are unable to reach a mutually acceptable agreement to continue the relationship. In response to the Level 3 petition, Neutral Tandem filed a Motion to Dismiss which included an Affidavit of Neutral Tandem's Chief Operating Officer and Executive Vice President, Dr. Surendra Saboo, stating that as of August 3, 2007 Neutral Tandem is no longer delivering traffic in Maryland to Level 3 over the parties' existing direct interconnection. Because the direct interconnection arrangements were the only portion of the dispute that Staff recommended the Commission investigate, and since the direct interconnection was no longer being utilized in Maryland, Staff recommended that the Commission grant Neutral Tandem's Motion to Dismiss.

Similarly, the Neutral Tandem tariff revisions have been changed to remove the only portion of the Company's dispute with Level 3 that Staff believes is properly before the Commission, that is, the requirement that an interconnecting carrier maintain a direct interconnection to Neutral Tandem's tandem switch even after the interconnection agreement governing the interconnection relationship is terminated. So long as interconnecting carriers are able to enter and terminate their relationships with Neutral Tandem freely, Staff does not believe there is any legal basis or public policy reason to reject the Neutral Tandem tariff.

Company Requested Commission Action:

Neutral Tandem asks the Commission to approve its tariff revisions.

Comments of the Staff Counsel Division
Date: September 18, 2007
Re: Neutral Tandem-Maryland, LLC
Mail Log No.: 106474, 107256

Analysis/Background:

Question Presented:

Are provisions governing interconnection arrangements between competitive interexchange carriers permitted to be placed in a tariff? What is the Commission's policy regarding tariff provisions that govern interconnection arrangements between competing carriers?

Discussion:

With the tariff revisions filed on August 23, 2007 (ML#107256), Neutral Tandem requests that the Commission accept for filing tariff revisions that change or add administrative provisions to the Company's current tariff. The administrative provisions concern items such as interference with service, exchange of traffic and information, non-authorized traffic and refusal and discontinuation of service. In addition, the revised tariff adds terms and conditions concerning transit service, access service and collocation service. While these types of provisions are generally part of an interconnection agreement, competitive local exchange carriers in Maryland have attempted to place these provisions in their tariffs. For the most part, these provisions have been accepted by the Commission. For example, a few weeks ago PaeTec Communications, Inc. filed a revision to its tariff for transport service that governed billing for carriers that charge for the use of meet point facilities. The Commission accepted that tariff revision. On the other hand, the Commission has rejected tariffs that would have retroactive application. For example, the Commission suspended and, after investigation, rejected, a tariff provision filed by Core Communications that would have required Verizon to pay collocation charges for equipment that was already in place and for which no collocation charges had been assessed prior to the tariff being filed.¹

Staff recommends these tariff provisions be accepted for filing. While these provisions are routinely negotiated with other interconnecting carriers and could certainly be contained in an interconnection agreement rather than a tariff, the Company has decided to place the terms in a tariff and thus make these provisions available on a non-discriminatory basis to all potential interconnecting carriers. In the past, the Commission has accepted similar tariff provisions from other carriers so long as the provisions are non-discriminatory and do not apply to other carriers retroactively. Staff believes that this policy is consistent with federal and Maryland law, and recommends that the Commission continue the policy.

¹ *Re Core Communications, Inc. (Case 8967)*, 95 MD PSC 446 (2004).

Comments of the Staff Counsel Division
Date: September 18, 2007
Re: Neutral Tandem-Maryland, LLC
Mail Log No.: 106474, 107256

Staff Recommendation:

Staff recommends that the Commission accept the tariff for filing.

Janice M. Flynn
Assistant Staff Counsel

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 070408-TP

EXHIBIT D

TO

LEVEL 3'S SUPPLEMENTAL BRIEF

1 STATE OF MICHIGAN
2 BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION
3 In the matter of the complaint
4 and application for emergency Case No. U-15230
5 relief by Neutral Tandem, Inc. for interconnection with Level 3
6 Communications. Volume 5

7 CROSS-EXAMINATION

8 Proceedings held in the above-entitled matter
9 before Sharon L. Feldman, J.D., Administrative Law
10 Judge with SOAHR, at the Michigan Public Service
11 Commission, 6545 Mercantile Way, Room C, Lansing,
12 Michigan, on Thursday, August 9, 2007, at 9:00 a.m.

13 APPEARANCES:

14 MICHAEL S. ASHTON, ESQ.
15 Fraser, Trebilcock, Davis & Dunlap, P.C.
16 124 West Allegan Street, Suite 1000
17 Lansing, Michigan 48933

18 -and-

19 JOHN R. HARRINGTON, ESQ.
20 MATT BASIL, ESQ.
21 Jenner & Block, LLP
22 One IBM Plaza
23 Chicago, Illinois 60611-7603

24 On behalf of Neutral Tandem, Inc.

25 (Continued)

1 sometimes require us to do that.

2 Q Is that true in Michigan?

3 A I don't know.

4 Q So Neutral Tandem also doesn't issue telephone numbers
5 to, directly to end-user customers, correct?

6 A In Michigan?

7 Q Yes.

8 A Not that I know of.

9 Q Neutral Tandem doesn't provide operator services or
10 directory assistance services, correct, in Michigan?

11 A Directly to end users, no.

12 Q Neutral Tandem doesn't have any end-user customers that
13 it originates traffic for, correct?

14 A I guess it depends on how you define end users. We have
15 enterprise customers that are not certified CLECs that
16 originate traffic to us.

17 Q And those would be VOIP providers?

18 A I think generally they are VOIP providers; they're not
19 certified CLECs, and they are considered as enterprise
20 customers.

21 Q When you say enterprise customers, what do you mean by
22 that?

23 A I mean they're not a carrier or a CLEC, so we consider it
24 as an end user, I guess.

25 Q Is it your understanding that they are interconnected or
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1 VOIP providers that have end users that, like a Vonage
2 type customer?

3 A Yeah. They may ultimately have an end user as well.

4 Q Does Neutral Tandem provide dial tone through its switch
5 to the VOIP provider?

6 A Technically the dial tone is actually provided through
7 the box that's at the home, like the ATA that Vonage
8 gives you when you sign up for Vonage. So really the
9 dial tone comes from the physical box that you have at
10 the home; so no, we don't.

11 Q And that box is interconnected or connected to a
12 broadband capacity service?

13 A Generally you need broadband access, either DSL or a
14 broadband cable, high-speed data service to do that kind
15 of VOIP service.

16 Q O.K. And Neutral Tandem neither provides the box, nor
17 does it provide the broadband cable service to those end
18 users, correct?

19 A No, we don't.

20 Q Would you agree that in Michigan, a majority of the
21 traffic that you transit, locally transit is wireless
22 traffic?

23 A I don't know the exact numbers, I don't know if it's
24 majority or not, but it's a substantial amount.

25 Q Dr. Saboo, thank you very much for your patience. I'm

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 070408-TP

EXHIBIT E

TO

LEVEL 3'S SUPPLEMENTAL BRIEF

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of Complaint and Application) Case No.U-15230
for Emergency Relief by Neutral Tandem,)
Inc. for Interconnection with Level 3)
Communications)

**REPLY BRIEF OF
NEUTRAL TANDEM, INC.**

*****PUBLIC VERSION*****

NEUTRAL TANDEM, INC.

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

Michael Ashton
Fraser Trebilcock Davis &
Dunlap, P.C.
124 W. Allegan, Suite 100
Lansing, MI 48933
(517) 377-0875
Mashton@fraserlawfirm.com

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

...
serving and inaccurate claim that, by finding in Neutral Tandem's favor, the commissions would somehow "open the floodgates" to a spate of new direct interconnection requests among CLECs. To the contrary, unlike any other competitive carrier, Neutral Tandem not only exclusively delivers tandem transit traffic originated by other carriers to Level 3 -- traffic that cannot feasibly be delivered through the "indirect" interconnection Level 3 claims to seek -- Neutral Tandem also pays 100% of the cost to deliver traffic to Level 3. Under these circumstances, Level 3 cannot plausibly claim that receiving traffic from Neutral Tandem imposes any burden on it whatsoever.

To be clear, Level 3 put on absolutely no evidence that it incurs any costs to receive traffic from Neutral Tandem that it could not recover through reciprocal compensation payments from originating carriers, if Level 3 elected to pursue such payments. Indeed, the undisputed testimony of Dr. Saboo shows that Level 3 actually saves money when it receives tandem transit traffic from Neutral Tandem, instead of receiving that same traffic from ILECs, because Level 3 is required to share interconnection costs with the ILECs. Particularly given this undisputed evidence, as well as Level 3's acknowledged efforts to begin providing tandem transit services, this Commission should reject Level 3's attempt to use its bottleneck control over access to its end-users as a lever to force an inferior and discriminatory interconnection on Neutral Tandem. Neutral Tandem's complaint should be granted.

II. ANALYSIS

A. **LEVEL 3 ATTEMPTS TO CIRCUMVENT THE CLEAR MANDATES OF MICHIGAN LAW THAT REQUIRE LEVEL 3 TO RECOVER RECIPROCAL COMPENSATION PAYMENTS FOR TRANSITED TRAFFIC FROM THE ORIGINATING CARRIERS.**

Level 3's initial brief would have the Commission believe that MTA Section 305a is incidental to the resolution of this dispute. Indicative of Level 3's proclivity to distort and