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March 20, 2007

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COMMISSION  
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Ms. Ann Cole  
Division of Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32309

**Re: Docket No. 070127-TX - Petition of Neutral Tandem, Inc. For Interconnection with Level 3 Communications and Request for Expedited Resolution**

Dear Ms. Cole:

Enclosed for filing on behalf of Neutral Tandem, Inc., please find the original and 15 copies of Neutral Tandem, Inc.'s Response to Level 3 Communications's Motion to Dismiss the Petition for Interconnection of Neutral Tandem.

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.

Sincerely,

**Beth Keating**  
**AKERMAN SENTERFITT**  
106 East College Avenue, Suite 1200  
Tallahassee, FL 32301  
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BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Neutral Tandem, Inc. ) Docket No. 070127-TX  
for Interconnection with Level 3 )  
Communications and Request for ) Filed: March 20, 2007  
Expedited Resolution )  
)

**NEUTRAL TANDEM’S RESPONSE TO LEVEL 3’S MOTION TO DISMISS**

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

**INTRODUCTION**

Neutral Tandem’s Petition demonstrates that Florida law requires Level 3 to interconnect with Neutral Tandem, so that Neutral Tandem can deliver to Level 3’s network traffic that has been originated on the networks of the third party carriers that use Neutral Tandem’s tandem transit services in Florida.<sup>1</sup> The Petition further demonstrates that Level 3’s demand to receive “reciprocal compensation” payments from Neutral Tandem, instead of seeking such payments from the third party carriers whose end-users originate the traffic terminating to Level 3, is contrary to the “originating carrier pays” principle this Commission found applicable in the transiting context in the *TDS Telecom Order*.<sup>2</sup>

In its motion to dismiss, Level 3 claims this Commission does not even have the authority to consider the merits of Neutral Tandem’s Petition. Level 3 argues that the Commission lacks

<sup>1</sup> As noted in Neutral Tandem’s Petition, “tandem transit” traffic refers to traffic that originates with one carrier and is delivered through the network of the transit provider (either Neutral Tandem or the ILEC), for termination on the network of a different carrier.

<sup>2</sup> See *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 \*36-37 (Sept. 18, 2006) (“*TDS Telecom Order*”).

jurisdiction to order interconnection between Neutral Tandem and Level 3, because neither party is an incumbent local carrier. (Mot. to Dismiss, at 8-13.) Level 3 also claims that Neutral Tandem lacks standing to seek interconnection with Level 3. (*Id.*) Level 3’s arguments should, however, be rejected, and its motion to dismiss should be denied, for at least four reasons.

First, Level 3’s challenge to this Commission’s jurisdiction is contrary both to the recent *TDS Telecom Order* and to clear Florida Supreme Court precedent. This Commission found in the *TDS Telecom Order* that it had ample jurisdiction under FL. STAT. ANN. § 364.16 to require carriers to interconnect for the delivery of transit traffic. In addition, the Florida Supreme Court also has found that this Commission has “authority over the interconnection duties” of competitive carriers such as Level 3.<sup>3</sup>

Second, Level 3’s challenge to Neutral Tandem’s standing is baseless. Level 3 claims that Neutral Tandem “has not alleged that it provides local exchange telecommunications services.” (Mot. to Dismiss, at 13.) That claim is false. Neutral Tandem alleged that it provides local exchange telecommunications services, and Neutral Tandem is certified to provide local exchange telecommunications services in Florida. Level 3 attempts to equate “local exchange telecommunications services” with “basic local telecommunications services,” but that argument is unsupported by Florida law.

Third, Level 3’s suggestion that its network will be used “for free” if Neutral Tandem’s Petition is granted is a red herring. (Mot to Dismiss, at 11.) Consistent with industry practice and the “calling party’s network pays” principle adopted in Florida, Level 3 can seek reciprocal compensation payments from the third party carriers whose end-users originate the traffic that is terminated to Level 3’s end-users. This Commission endorsed the “calling party’s network

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<sup>3</sup> *Level 3 Communications v. Jacobs*, 841 So.2d 447, 454 (Fla. 2003).

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 has agreed to pay 100% of the cost of the transport used to deliver its tandem transit traffic to Level 3.

*Fourth*, this Commission should not ignore the practical impact of Level 3’s sweeping challenge to its jurisdiction. Level 3 candidly acknowledges that it views blocking traffic as “a critical part of the negotiating toolkit[.]” (Mot. to Dismiss, at 7.) Whatever role Level 3 believes blocking traffic should play in the largely unregulated context of delivering internet backbone traffic, it certainly has no role where the traffic at issue indisputably is critical local telecommunications traffic traversing the public switched telephone network (“PSTN”) in Florida. This Commission should not abdicate its regulatory oversight of the PSTN in Florida at the behest of a carrier that has a history of using traffic blockage as a negotiating tactic, and makes no secret of its intention to do so again.<sup>4</sup>

### **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.<sup>5</sup> In considering Level 3’s motion to dismiss, all “material allegations” of Neutral Tandem’s Petition

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<sup>4</sup> Level 3’s motion to dismiss was combined with a substantive response to Neutral Tandem’s Petition. By addressing Level 3’s motion to dismiss in this response, Neutral Tandem in no way concedes that any of the arguments Level 3 has made in the other parts of its response to Neutral Tandem’s Petition have any merit. Neutral Tandem will respond to those arguments through other appropriate submissions.

<sup>5</sup> *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

“must be construed against” Level 3’s request for dismissal.<sup>6</sup> 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.<sup>7</sup>

## ARGUMENT

### **I. This Commission Has Jurisdiction Over the Terms and Conditions of Interconnection Between Neutral Tandem and Level 3.**

Neutral Tandem’s Petition demonstrated that this Commission has jurisdiction, pursuant to FL. STAT. ANN. § 364.16(2), to order interconnection between Level 3 and Neutral Tandem on nondiscriminatory terms and conditions. (Pet., at 3-4, 9-15.) 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.” 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.

Level 3 argues that the Commission “lacks the statutory authority to grant the relief sought by Neutral Tandem.” (Mot. to Dismiss, at 11.) Level 3’s challenge to this Commission’s statutory authority should be rejected for numerous reasons.

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<sup>6</sup> *Id.*

<sup>7</sup> *In re Complaint against KMC Telecom III, LLC, by Sprint-Florida, Inc.*, Docket No. 041144-TP; Order No. PSC-05-1065-FOF-TP, 2005 Fla. PUC LEXIS 239, at \*4-5 (Nov. 1, 2005).

**A. The Commission Has Clear Statutory Authority To Address Neutral Tandem's Petition.**

First, despite Level 3's claim, this Commission's "statutory authority" over interconnection between Level 3 and Neutral Tandem could not be clearer. As shown above, 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 statutory authority to address Neutral Tandem's Petition.

**B. The Commission Found in the *TDS Telecom Order* that it Has Authority Over Interconnection for Transiting Purposes.**

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[.]"<sup>8</sup> The Commission further found that "[t]ransit service is clearly an interconnection arrangement under Section 364.16, Florida Statutes."<sup>9</sup> Contrary to Level 3's claim that Section 364.16(2) does not provide the Commission with authority to order direct

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<sup>8</sup> See *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 \*21 (Sept. 18, 2006).

<sup>9</sup> *Id.* at \*22.

interconnection, this Commission found in the *TDS Telecom Order* that Section 364.16(2) gives it the authority to require direct interconnection.<sup>10</sup>

Level 3 tries to distinguish the *TDS Telecom Order* by noting that it “arose out of petitions challenging a transit traffic service filed by an ILEC[.]” (Mot. to Dismiss, at 12.) That is a distinction without a difference. 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.<sup>11</sup>

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 12.) 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 negotiations regarding the terms and conditions of transiting failed.<sup>12</sup> That is what Neutral Tandem has done in this case.<sup>13</sup>

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<sup>10</sup> *Id.* at \*24.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at \*131.

<sup>13</sup> Level 3 claims that “Neutral Tandem does not assert that the *TDS Telecom Order* provides a basis for the Commission’s assertion of jurisdiction over its Petition.” (Mot. to Dismiss, at 12.) That claim is false. Neutral Tandem stated in its Petition that, in the *TDS Telecom Order*, the Commission “found that it has authority to establish the terms and conditions of interconnection for tandem transit services provided between the networks of different carriers.” (Pet. at 9.) Neutral Tandem’s Petition squarely invoked the Commission’s finding of jurisdiction over transiting services in the *TDS Telecom Order*.

**C. The Florida Supreme Court Has Confirmed this Commission’s Broad Authority Over the Interconnection Duties of All Telecommunications Carriers**

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 v. Jacobs*, the Florida Supreme Court rejected a similar challenge by Level 3 to this Commission’s jurisdiction.<sup>14</sup> 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.”<sup>15</sup>

Notably, in successfully 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 most fundamental duties of all competitive carriers in Florida under Section 364.16(2), and that the Commission therefore 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.<sup>16</sup>

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.”<sup>17</sup> The

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<sup>14</sup> *Level 3*, 841 So.2d at 450-54.

<sup>15</sup> *Id.* at 453.

<sup>16</sup> Amended Answer Brief of the Fla. Pub. Serv. Comm’n, *Level 3 Communications v. Jacobs*, No. SC01-2050, at 19 (Fla. Dec. 27, 2001) (emphasis added).

<sup>17</sup> *Level 3*, 841 So.2d at 454.



Supreme Court specifically determined that Section 364 “gives the PSC authority over interconnection duties of both ILECs and [competitive local carriers].”<sup>18</sup> Inexplicably, Level 3 never even *acknowledges* in its motion the Supreme Court’s direct rejection of Level 3’s restrictive theory of this Commission’s authority with respect to Level 3’s fundamental interconnection duties.

**D. Direct Interconnection is Consistent with Federal Law.**

Level 3’s suggestion that requiring it to directly interconnect with Neutral Tandem “violates federal law” is incorrect and self-contradictory. (Mot. to Dismiss, at 8.) Level 3 cites no authority holding or even suggesting that it would violate federal law for the Commission to order direct interconnection between Level 3 and Neutral Tandem under Florida law. The reason for this omission is simple: There is no such authority, because direct interconnection does not violate federal law.

Indeed, 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 two months ago, Level 3 noted that one key component of the Missoula Plan is its “affirmative obligation for *all* carriers to accept direct interconnection[.]”<sup>19</sup> Level 3 specifically told the FCC that direct interconnection is “not only entirely consistent with applicable law, but

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<sup>18</sup> *Id.*; see also *Fla. Pub. 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”).

<sup>19</sup> See The Missoula Plan Supporters’ Reply Comments in Support of the Missoula Plan at 22, filed in CC Docket No. 01-92, February 1, 2007 (emphasis in original). Neutral Tandem is aware that this Commission filed comments opposing the Missoula Plan (which deals with a number of complex compensation issues) but does not interpret the Commission’s FCC comments as taking a position against direct interconnection.

fair and efficient for all carriers.”<sup>20</sup> 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 two months ago.<sup>21</sup>

**E. Neutral Tandem Seeks Enforcement of Statutory Interconnection Obligations, Not a Commercial Contract.**

Finally, Level 3 claims that Neutral Tandem’s Petition “asks the Commission to impose a new commercial contract compelling Level 3 to deliver for free ‘Transit Termination Services’.” (Mot. to Dismiss, at 11.) Level 3 later claims that, if the Commission addresses the merits of Neutral Tandem’s Petition, it would “need to address all of the issues required to establish a comprehensive ‘traffic exchange agreement’ or master services agreement between the parties -- including, presumably, the rates that would be paid by Level 3 when it purchases tandem transit service from Neutral Tandem.” (*Id.* at 14.) Those claims are simply false.

Neutral Tandem’s Petition does not seek imposition of a commercial contract between the parties. Neutral Tandem also has made clear that it is *not* asking this Commission to require Level 3 to become a customer of Neutral Tandem’s tandem transit service or to originate any traffic through Neutral Tandem. (Pet., at 14.) Neutral Tandem has never even heard of Level 3’s purported “Transit Termination Service” prior to Level 3’s motion. All Neutral Tandem seeks is enforcement of the clear statutory interconnection obligations of Florida law, so that

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<sup>20</sup> *Id.*

<sup>21</sup> As discussed in Neutral Tandem’s Petition, competitive tandem switching capacity builds necessary redundancy into the telecommunications sector and infrastructure, which in turn enhances homeland security and disaster recovery. Indeed, the FCC has noted that the impact of Hurricane Katrina “highlighted the need for [tandem] diversity of call routing and avoiding strict reliance upon a single routing solution.” (Pet., at 10-11.) In addition to being required by Florida law, direct interconnection is needed to promote these important policy goals.

Neutral Tandem can deliver traffic on behalf of the third party carriers that have chosen to use Neutral Tandem's competitive and diverse tandem transit services.<sup>22</sup>

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

In addition to challenging this Commission's jurisdiction, Level 3 also argues that Neutral Tandem lacks standing to seek interconnection. Level 3 claims that Neutral Tandem "has not alleged that it provides local exchange telecommunications services," and that Neutral Tandem is not a "local exchange telecommunications company" under Florida law. (Mot. to Dismiss, at 10, 13.) These claims are both factually and legally meritless.

Contrary to Level 3's incorrect assertions, Neutral Tandem has, in fact, alleged that it "is a registered competitive local exchange telecommunications company within the State of Florida." (Pet., at 2.) Under Florida law, a "competitive local exchange telecommunications company" means "any company certificated by the Commission *to provide local exchange telecommunications services* in this state on or after July 1, 1995."<sup>23</sup> Indeed, this Commission specifically certified Neutral Tandem "to provide Competitive Local Exchange Telecommunications Services" in Florida.<sup>24</sup> Level 3 cannot in good faith argue that Neutral Tandem did not allege that it provides "local exchange telecommunications services" when (i) Neutral Tandem has alleged that it is a certified competitive local exchange telecommunications company in Florida, (ii) such an entity by definition provides "local exchange

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<sup>22</sup> Thus, the Florida Supreme Court case on which Level 3 relies is inapposite. *United Tel. Co. of Fla v. Pub. Serv. Comm'n*, 496 So.2d 116 (Fla. 1986). (Mot. to Dismiss, at 11). In *United Telephone*, the Supreme Court held that the Commission lacked authority to modify certain private contractual agreements. Neutral Tandem's Petition does not seek modification or imposition of any private contractual arrangements.

<sup>23</sup> FL. STAT. ANN. § 364.02(5) (2006) (emphasis added).

<sup>24</sup> *Application for certificate to provide competitive local exchange telecommunications service by Neutral Tandem-Florida, LLC*, order granting certification to provide CLEC service, Docket No. 040831; Order No. 11298 (Oct. 20, 2004).

telecommunications services,” and (iii) Neutral Tandem has in fact been certified to provide “local exchange telecommunications services” in Florida.

Level 3 tries to bolster its incorrect characterization of the services Neutral Tandem offers, by referring to statements in Neutral Tandem’s tariff that it “does not undertake to transmit messages.” (Mot. to Dismiss, at 10.) The language to which Level 3 refers is boilerplate tariff language found even in *Level 3’s own tariff*,<sup>25</sup> as well as the tariffs of incumbents such as BellSouth.<sup>26</sup> Under Level 3’s argument, therefore, there apparently are no providers of “local exchange telecommunications services” in Florida.

Significantly, Level 3’s assertion that Neutral Tandem does not provide “local exchange telecommunications services” finds no support in Florida law. As Level 3 acknowledges, “the term ‘local exchange telecommunications services’ is not defined in Chapter 364.” (Mot. to Dismiss, at 9.) Level 3 therefore argues that the term should be defined by reference to whether a company provides “Basic local telecommunications service.” (*Id.* at 9-10.) Level 3 fails, however, to provide any support for this narrow definition. To the contrary, the Florida legislature’s use of “basic local telecommunications service” and “local exchange telecommunications service” as separate phrases within Section 364, suggests that the legislature did not intend for the terms to share the same meaning.

Moreover, Chapter 364 specifically provides that the term “service” should “be construed in its broadest and most inclusive sense.”<sup>27</sup> Level 3’s attempt to limit “local exchange

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<sup>25</sup> Level 3 Communications, LLC, First Revised Price List Schedule Applicable to Switched Access Service within the State of Florida, Section 2.1.1 (effective July 21, 2001) (stating that Level 3 “does not undertake to transmit messages” under this Tariff.).

<sup>26</sup> BellSouth Telecommunications, Inc., Access Services Tariff, Section E2.1.1 (A) (effective Mar. 1, 1997). The language appears to be legacy boilerplate to ensure that live operators would not be required to transmit personal messages between callers.

<sup>27</sup> FL. STAT. ANN. § 364.02(13) (2006).

telecommunications services” under Section 364.16(2) to the definition of “basic local telecommunications service” is unsupported by Florida law and is contrary to the broad and inclusive definition of “service” in Section 364.

Finally, contrary to Level 3’s argument that Neutral Tandem cannot “bring an action to compel interconnection under Section 364.162,” because Neutral Tandem and Level 3 are not incumbent local carriers, Neutral Tandem has never claimed that it was bringing its Petition pursuant to Section 364.162. Section 364.162 applies to incumbent “local exchange telecommunications companies,” and neither Neutral Tandem nor Level 3 is an incumbent “local exchange telecommunications company.” Rather, as Neutral Tandem pointed out clearly in its Petition, Section 364.16(2), which *does* apply to Neutral Tandem and Level 3, incorporates the requirement of Section 364.162 that the Commission “shall vote, within 120 days” of the filing of a petition for interconnection, to “set nondiscriminatory rates, terms, and conditions” for the interconnection. (Pet., at 3.)<sup>28</sup>

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<sup>28</sup> Level 3’s claim that granting Neutral Tandem’s Petition would lead to “arbitrated interconnections between all CLECs in the state of Florida, resulting in substantial additional work for the Commission,” is meritless. (Mot. to Dismiss, at 16.) As noted in Neutral Tandem’s Petition, Neutral Tandem occupies a unique position as an independent provider of tandem transit services to other carriers. Indeed, the availability of Neutral Tandem’s alternative tandem transit services likely *reduces* the need for competitive carriers to engage in direct interconnection, since they are able to obtain transiting services more economically from Neutral Tandem than they can from incumbent carriers. Further, because Neutral Tandem is prepared to pay 100% of the transport cost to deliver traffic to Level 3, simple economics will serve to curb such requests, since other carriers without the traffic to support incurring the transport costs will not seek such interconnection. In any event, should generally applicable interconnection issues ever arise among competitive carriers, the Commission easily could address such issues through a rulemaking. Commission involvement in this case is only necessary because of Level 3’s attempts to unlawfully block traffic from Neutral Tandem, as well as Level 3’s insistence that Neutral Tandem pay it reciprocal compensation, in clear violation of the “calling party’s network pays” principle adopted by this Commission.

**III. Level 3's Assertion That Its Network Will Be Used "For Free" if Neutral Tandem's Petition is Granted is Baseless.**

A recurring theme throughout Level 3's motion is its assertion that Neutral Tandem's Petition amounts to a request that the Commission order Level 3 to deliver so-called "Transit Termination Services" to Neutral Tandem "for free." (Mot. to Dismiss, at 11.) Indeed, Level 3's motion mentions this so-called "Transit Termination Service" more than a dozen times, and the motion repeatedly suggests that Neutral Tandem is seeking free use of this "service." (*Id.* at 2, 3, 4, 5, 6, 7, 8, 11, 13, 14, 15, 17, 19.)

At the outset, Level 3's so-called "Transit Termination Service" is not, to Neutral Tandem's knowledge, a tariffed service that Level 3 offers in Florida or anywhere else. Rather, it appears to be a litigation-driven, *post hoc* description by Level 3 of its terminating carrier status, irrespective of whether that traffic is delivered by Neutral Tandem or an ILEC as the transiting carrier.

Moreover, Level 3's claim that granting Neutral Tandem's Petition would result in the "free" use of Level 3's network is false. As discussed above and in Neutral Tandem's Petition, this Commission already has determined that terminating carriers such as Level 3 are entitled to be compensated for the use of their networks in delivering traffic to their end-users.<sup>29</sup> Critically, this Commission determined that the "calling party's network pays" principle applies in the transiting context, consistent with industry and FCC practice.<sup>30</sup> This Commission also found that the "calling party's network pays" principle "is well-established policy based on principles of cost causation[.]" Thus, the Commission concluded in the *TDS Telecom Order* that "[t]he

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<sup>29</sup> Notably, Neutral Tandem has agreed to pay 100% of the transport cost to deliver tandem transit traffic to Level 3.

<sup>30</sup> See *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 \*36-45 (Sept. 18, 2006).

originating carrier [not the transit provider] is . . . responsible for compensating the terminating carrier for terminating the traffic to the end-user.”<sup>31</sup>

This Commission has made perfectly clear that originating carriers are responsible for compensating terminating carriers in the transiting context. Neutral Tandem has also made clear that it will pass all signaling information it receives from originating carriers to Level 3, just as Neutral Tandem does for other terminating carriers, and just as incumbent carriers do when they deliver transited traffic. This will enable Level 3 to charge the originating carriers reciprocal compensation. Thus, Level 3’s suggestion that it will not be compensated for the use of its network if Neutral Tandem’s Petition is granted is both misleading and, if true, entirely due to Level 3’s own decision not to seek compensation from the originating carriers.<sup>32</sup> Consistent with the “calling party’s network pays” principle Level 3 has endorsed in other contexts, Level 3 should not be allowed to deprive third party carriers of their preferred method of transporting their traffic to Level 3.<sup>33</sup>

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<sup>31</sup> *Id.* at \*37.

<sup>32</sup> Level 3 asserts that, under the parties’ prior contracts, Neutral Tandem paid Level 3 “in exchange for” Level 3 agreeing to receive traffic from Level 3. (Mot. to Dismiss, at 4.) To the contrary, as Neutral Tandem noted in its Petition, Neutral Tandem provided Level 3 with an interim transport recovery charge, in consideration for Level 3, which did not have the technical routing capability to send just local traffic to Neutral Tandem at the time, to establish a two-way business relationship with Neutral Tandem. (Pet., at 13 n.16.) The Broadwing Agreement did not contain any analogous transport recovery fee, nor do any of Neutral Tandem’s other agreements in Florida. As Neutral Tandem has pointed out, such payments would not be appropriate in the context of the establishment of nondiscriminatory terms and conditions for one-way traffic termination interconnection. (*Id.*)

<sup>33</sup> In supporting the Missoula Plan, Level 3 told the FCC that “it 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.” See The Missoula Plan Supporters’ Reply Comments in Support of the Missoula Plan at 26, filed in CC Docket No. 01-92, February 1, 2007.

#### IV. The Commission Should Not Ignore the Implications of Level 3's Challenge to its Jurisdiction Over the PSTN.

Finally, 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. As noted above, Level 3's motion offers the view that blocking traffic "is a critical part of the negotiating toolkit[.]" (Mot. to Dismiss, at 7.) 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, simply because they are not incumbent LECs. Neutral Tandem's Petition deal squarely with traffic traversing the PSTN, which falls directly within the Commission's jurisdiction. As the FCC has noted, tactics like those employed by Level 3 in the internet backbone context have no place in the PSTN: "If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through."<sup>34</sup> 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.<sup>35</sup>

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<sup>34</sup> *In re Access Charge Reform*, Docket No. 96-262, 16 FCC Rcd 9923, at 25-26 (Apr. 27, 2001). Level 3's suggestion that courts have sanctioned the blocking of traffic in the long distance context rests on a distortion of the cases Level 3 cites. (Mot. to Dismiss, at 7.) In *AT&T v. FCC*, 317 F.3d 227 (D.C. Cir. 2003), the court recognized the general rule that resort to "self-help" such as call blocking is inappropriate. *Id.* at 233. In that case, the court noted that the FCC "recognized an exception to the rule" because the carrier at issue had created a "sham entity" for the sole purpose of extracting higher access charges. *Id.* at 234. Even in that context, the court noted that, if the FCC later found that the entity was not a "sham," the blocking carrier would have been "liable" for "blocking the calls." *Id.* In *AT&T v. FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002), the court simply held that the FCC had not followed the appropriate procedures to require interconnection. The court did not sanction call blocking as Level 3 suggests, and this Commission should never allow a company to use blocking of PSTN traffic as a negotiating tactic.

<sup>35</sup> Level 3 repeatedly suggests that the Commission should refrain from addressing Neutral Tandem's Petition because Level 3 "do[es] not possess market power" and the terms of interconnection should be left to negotiation. (Mot. to Dismiss, at 6, 7.) Contrary to Level 3's self-serving characterization, the

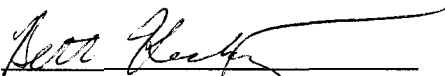


## CONCLUSION

Thus, for the reasons set forth herein and in its Petition for Interconnection and Request for Expedited Resolution, Neutral Tandem respectfully requests that the Commission deny Level 3's motion to dismiss in its entirety and order Level 3 not to discontinue the parties' existing interconnections while Neutral Tandem's Petition is pending.

Respectfully submitted,

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FCC has found that non-incumbent carriers can wield market power, in terms of restricting access to their end-user customers. *In re Access Charge Reform*, 16 FCC Rcd 9923, at 38. 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 they tariff for switched access services." Level 3 is making a similar attempt to leverage its bottleneck access to its end-user customers.

**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 Hand Delivery to Martin McDonnell, Esquire, and Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301, and that a copy has also been provided to the persons listed below this 20th day of March, 2007:

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