

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 070127-TX

In the Matter of:

PETITION FOR INTERCONNECTION WITH
LEVEL 3 COMMUNICATIONS AND REQUEST
FOR EXPEDITED RESOLUTION, BY NEUTRAL
TANDEM, INC.



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PROCEEDINGS: ORAL ARGUMENT

BEFORE: CHAIRMAN LISA POLAK EDGAR
COMMISSIONER MATTHEW M. CARTER, II
COMMISSIONER KATRINA J. MCMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Thursday, May 24, 2007

TIME: Commenced at 9:30 a.m.
Concluded at 11:22 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
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P R O C E E D I N G S

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2 CHAIRMAN EDGAR: I call this hearing to order.

3 Good morning.

4 We will begin by asking our staff to read the notice.

5 MR. TEITZMAN: Pursuant to notice issued May 16th,
6 2007, this time and place has been set for oral argument in
7 Docket Number 070127-TX.

8 CHAIRMAN EDGAR: Thank you.

9 And we'll take appearances.

10 MR. HOFFMAN: Good morning, Madam Chairman,
11 Commissioners. My name is Ken Hoffman. To my right is Marty
12 McDonnell. We are with Rutledge, Ecenia, Purnell & Hoffman in
13 Tallahassee. Directly behind me are Bill Hunt and Gregg
14 Strumberger with Level (3) Communications. We are all here
15 this morning on behalf of Level (3).

16 CHAIRMAN EDGAR: Thank you.

17 MS. KEATING: Good morning, Madam Chair,
18 Commissioners. Beth Keating, Akerman Senterfitt. Here to my
19 left is John Harrington with the law firm of Jenner & Block.
20 We are both here on behalf of Neutral Tandem.

21 CHAIRMAN EDGAR: Thank you. And staff.

22 MR. TIETZMAN: Adam Teitzman and Rick Mann on behalf
23 of Commission staff.

24 CHAIRMAN EDGAR: Thank you.

25 Mr. Teitzman, preliminary matters.

1 MR. TEITZMAN: Yes, Chairman. I'll go over the
2 procedure for today. Pursuant to the first order on procedure,
3 the parties will be presenting oral argument on the following
4 three issues: Number one, does the Commission have
5 jurisdiction over Neutral Tandem's petition? If so, what is
6 the source of the Commission's authority.

7 Number two, if the Commission has jurisdiction over
8 Neutral Tandem's petition, does Neutral Tandem have standing to
9 seek relief under Sections 364.16 and 364.162, Florida
10 Statutes?

11 And, three, if the Commission has jurisdiction over
12 Neutral Tandem's petition and determines that Neutral Tandem
13 has standing to bring its petition, can the Commission require
14 direct interconnection between Level (3) and Neutral Tandem for
15 the purpose of terminating transit traffic from originating
16 carriers delivered by Neutral Tandem to Level (3)?

17 The order sets forth that the parties would have
18 20 minutes each to make their presentation. However, it is
19 staff's understanding that Level (3) would like to request
20 30 minutes and the right to reserve time for rebuttal. If I
21 may, I will defer to Mr. Hoffman to formally make that request.

22 CHAIRMAN EDGAR: Mr. Hoffman.

23 MR. HOFFMAN: Thank you, Madam Chairman. Yes, Level
24 (3), because of the significance of the legal issues before you
25 this morning, thought that it might be helpful for the

1 Commission to have some additional time. So we're asking for
2 30 minutes. And in doing that -- obviously for both sides --
3 in doing that we would ask to reserve some time for rebuttal.
4 Because I think that the way that we have proposed to do this
5 is that the legal issues are really part and parcel of our
6 motion to dismiss, so as the movant on that we would propose to
7 go first.

8 CHAIRMAN EDGAR: Ms. Keating.

9 MS. KEATING: Madam Chair, we have no objection to
10 Mr. Hoffman's request that oral argument be extended to
11 30 minutes. And we also have no objection to their request to
12 reserve time for rebuttal. We ask only that if they are
13 allowed the opportunity to reserve time that we also be allowed
14 the same opportunity.

15 While Mr. Hoffman is right that these jurisdictional
16 issues were presented in their motion to dismiss, the context
17 that we are before you today is not strictly within the context
18 of a motion to dismiss. These issues were presented in a
19 procedural order from the prehearing officer, thus we would ask
20 that we have equal time and equal right for a response.

21 CHAIRMAN EDGAR: Mr. Hoffman, any further comment?

22 MR. HOFFMAN: No, ma'am. I agree. I think that they
23 should have equal time.

24 CHAIRMAN EDGAR: And the opportunity to reserve?

25 MR. HOFFMAN: Yes, ma'am.

1 CHAIRMAN EDGAR: Okay. Commissioners, it's my
2 understanding that the specific length of time for oral
3 argument for each party was not addressed specifically before
4 the prehearing officer. Are there any concerns or objections
5 to that extension of time? Okay. Then that request will be
6 granted and we will have 30 minutes for each party with the
7 opportunity to reserve. I will be keeping track of time, but I
8 will ask that each of you keep track of your time, as well.

9 If there are questions from Commissioners, you have
10 the opportunity to ask them, and I would include that in the
11 30 minutes, since we are extending, if their questions. Not
12 additional. And we will try to approach it that way.

13 Mr. Teitzman, any other preliminary matters before we
14 hear our first oral argument?

15 MR. TEITZMAN: None. I would mention that we believe
16 Level (3) should begin this morning because this was initiated
17 with their motion to dismiss.

18 CHAIRMAN EDGAR: Thank you. Any other matters for
19 the parties before we go into the next step?

20 Ms. Keating.

21 MS. KEATING: Madam Chairman, I don't know if you
22 want to address this at this time or when it is Neutral
23 Tandem's time to present oral argument, but --

24 CHAIRMAN EDGAR: If there are issues, let's go ahead
25 and deal with it if we can.

1 MR. TEITZMAN: We would like to ask permission to use
2 a demonstrative exhibit at the beginning of our presentation.
3 This is purely an illustrative exhibit that demonstrates the
4 things that are -- the explanation of Neutral Tandem's service
5 that is already in Neutral Tandem's petition. We believe this
6 will be helpful in explaining Neutral Tandem's service which
7 directly relates to the legal issues that are before you.

8 CHAIRMAN EDGAR: Mr. Hoffman.

9 MR. HOFFMAN: Madam Chairman, I object.

10 This is a document that was not filed as part of
11 their brief, and that in and of itself, that is one problem.
12 The real problem is that this is the first, and I think I'm
13 probably going to hear more this morning, of Neutral Tandem's
14 attempt to mix what are purely legal issue before you this
15 morning with questions of fact.

16 Now, when I was handed a copy of this this morning, I
17 was told by Neutral Tandem's counsel that this is a document
18 that explains the way that calls flow. There is a lot more on
19 this page, as you can see. We have got --

20 CHAIRMAN EDGAR: I haven't seen it.

21 MR. HOFFMAN: Oh, okay. I've got a copy of it, Madam
22 Chairman. It depicts wireless carriers, it depicts amounts
23 that carriers pay, it depicts costs, it depicts charges, none
24 of which are before you this morning. We are here this morning
25 on the issue of jurisdiction and the issue of Neutral Tandem's

1 standing. If this was a picture of simply -- a very simple
2 diagram that showed an originating call to an intermediary
3 transit carrier to a terminating carrier, I would have no
4 problem with it whatsoever. But this is an attempt to put
5 before you a bunch of other information, and they have got the
6 cart before the horse, so we object to the use of the document.

7 CHAIRMAN EDGAR: Mr. Teitzman, have you had the
8 opportunity to look at the paper or exhibit that is being
9 described?

10 MR. TEITZMAN: I had a very brief look at it. Can we
11 pass it around at this time?

12 CHAIRMAN EDGAR: If you would, let's take a minute to
13 do that so that we all know what it is that we are talking
14 about. And we will give our legal staff a moment to review.

15 (Pause.)

16 CHAIRMAN EDGAR: Mr. Teitzman.

17 MR. TEITZMAN: Yes, Chairman. In light of the ruling
18 earlier that the parties will have an opportunity for rebuttal,
19 staff would recommend that this be used as a demonstrative
20 exhibit and not be entered into the record as a record exhibit.

21 CHAIRMAN EDGAR: And, Mr. Teitzman, could I ask you
22 to elaborate, for my benefit, on the point raised by Mr.
23 Hoffman regarding mixing questions of fact with legal issues?

24 MR. TEITZMAN: That is certainly a concern this
25 morning. The arguments that are to be presented are to be

1 legal in nature. However, I do believe that as this being used
2 as a demonstrative exhibit, there will be some discussion as to
3 exactly what the relationship between the parties are to inform
4 you further on the law, the applicable law. So I believe that
5 this would fall in place with that same line of thinking that
6 this could be used strictly to demonstrate call paths, and
7 Level (3) will have an opportunity to rebut that, as well.

8 CHAIRMAN EDGAR: Mr. Hoffman, do you have further
9 comment?

10 MR. HOFFMAN: Only to say that the title of this
11 document is not the path of the call -- my words. The title of
12 this document is "'Calling Party Pays' Principle." That issue
13 is not before you this morning. "Originating Carrier
14 Responsible for Call Transport and Termination Costs." Those
15 issues are not before you this morning.

16 CHAIRMAN EDGAR: Ms. Keating.

17 MS. KEATING: Madam Chair, if I may?

18 CHAIRMAN EDGAR: You may.

19 MS. KEATING: We'll be more than happy to strike out
20 the title. Because I can tell you that the intent of using
21 this demonstrative today is purely to show the service that
22 Neutral Tandem provides and why we are here today. And we
23 believe that that ties directly to the legal issues that are
24 before you, because Level (3) is questioning what type of
25 service Neutral Tandem provides, whether that service is in the

1 Commission's jurisdiction and whether Neutral Tandem has
2 standing. This exhibit is used simply to demonstrate those
3 things, the service that Neutral Tandem provides and why we are
4 here today.

5 CHAIRMAN EDGAR: Mr. Teitzman, procedurally, how can
6 we use the visual portion of the document without the title?

7 MR. TEITZMAN: Well, I guess at this point if we --
8 you would either cross them out, hand it back -- Ms. Keating
9 has a -- I don't know if there's other copies of it that they
10 would be able to provide.

11 MS. KEATING: I'll be more than happy to scratch them
12 out.

13 CHAIRMAN EDGAR: We no longer keep whiteout up here
14 at the bench, so --

15 MR. TEITZMAN: Madam Chair, if I may?

16 CHAIRMAN EDGAR: Mr. Teitzman.

17 MR. TIETZMAN: If your decision is not to enter this
18 into the record, it's our position that really the title at
19 this point doesn't matter. Obviously we all have the ability
20 to ignore the title and just look at the diagram, and it won't
21 be in the record.

22 CHAIRMAN EDGAR: Work with me, Mr. Hoffman.

23 MR. HOFFMAN: Whatever your pleasure, Madam Chairman.

24 Again, what I was trying to get across is that if
25 this document had the four boxes, like a baseball diamond, and

1 the arrows, I've got no problem with it. So I would ask that
2 you Commissioners, respectfully, ignore the cost information,
3 the wording on the document. Because other than that, I've got
4 no problem at all with what is depicted in the document in
5 terms of it trying to educate on how a call travels.

6 CHAIRMAN EDGAR: Okay. And I appreciate that
7 cooperation, and from you as well, Ms. Keating, of course.

8 MS. KEATING: Absolutely.

9 CHAIRMAN EDGAR: Realizing that it will not be
10 admitted into evidence. Realizing that in telecom often a
11 picture for me, anyway, can be helpful in following the
12 arguments that are being raised.

13 And I assure you, Mr. Hoffman, that I am more
14 interested in listening to the arguments that you are going to
15 present to us. With that, we will allow the visual for
16 purposes of clarification, illustrative, as you have described,
17 and I am more interested in listening to your arguments than in
18 reading the words, quite frankly, so we will approach it that
19 way. And I think that that will work. Are there any other
20 matters before we move to oral argument?

21 MS. KEATING: Thank you, Madam Chair.

22 CHAIRMAN EDGAR: Okay. Seeing none. Mr. Hoffman,
23 you are up first, thirty minutes. Do you want to reserve time
24 at the end?

25 MR. HOFFMAN: Madam Chairman, I'm going to shoot to

1 reserve nine or ten minutes for rebuttal.

2 CHAIRMAN EDGAR: Okay. Again, I will be watching the
3 clock, but we will ask you to mind your time as well with your
4 team, and we are ready whenever you are.

5 MR. HOFFMAN: This case, Commissioners, involves a
6 petition filed by Neutral Tandem, an alternative transit
7 provider, requesting the Commission to require Level (3) to
8 maintain its existing physical connection with Neutral Tandem's
9 facilities; and, secondly, to conduct an arbitration to
10 establish the rates, terms, and conditions for the termination
11 of Neutral Tandem's transit traffic by Level (3).

12 Neutral Tandem is a competitive local exchange
13 company, a CLEC. So is Level (3). As the prehearing officer
14 noted in her initial order, this is a case of first impression.
15 Neutral Tandem is the first CLEC in 12 years to ask this
16 Commission to mandate direct interconnection with another CLEC.
17 No other CLEC has secured such relief from the Commission since
18 the legislature enacted comprehensive legislation in
19 1995 requiring the incumbent local exchange companies to open
20 up their historic legacy networks to the upcoming competitors
21 of local service.

22 There are a few points to keep to find as I get into
23 the legal argument. First, we hope that you see the irony in
24 the relief that Neutral Tandem seeks. Neutral Tandem touts
25 itself as an alternative provider of transit service. Meaning,

1 presumably, that carriers like Level (3) have a choice in
2 whether they use Neutral Tandem's service. Yet the position
3 that they take is we have no choice, and we must interconnect
4 with Neutral Tandem for the purposes of them providing transit
5 service.

6 Secondly, there is no disagreement that Level (3)
7 lawfully terminated the two existing contracts with Neutral
8 Tandem pursuant to the 30-day termination provisions. Now
9 Neutral Tandem is seeking to create a regulatory framework and
10 regulatory requirements that are not found in Chapter 364 in
11 order to prevent Level (3) from moving on from its business
12 arrangement with this alternative provider. So Neutral Tandem
13 is trying to create statutory authority that does not exist to
14 accommodate its business plan and its business model.

15 Third, the prehearing officer, Commissioner
16 McMurrin, has bifurcated this proceeding. So the issues
17 before you this morning are strictly legal issues,
18 jurisdictional and standing issues, which, as I mentioned, are
19 part of Level (3)'s motion to dismiss.

20 So we are not here this morning to discuss factual
21 issues such as how many minutes of traffic Neutral Tandem has
22 been sending to Level (3) under the terminated contracts, or
23 whether Neutral Tandem or some other carrier is to compensate
24 Level (3) for the use of its network.

25 The last thing that I ask you to keep in mind is that

1 there is no issue here or any remote possibility that calls
2 will be blocked. Whether you grant Level (3)'s motion to
3 dismiss or not, Level (3) is not going to act precipitously and
4 physically disconnect from Neutral Tandem without some
5 assurance until we know that calls are not going to be dropped.
6 So that is a nonissue.

7 I mentioned transit service. What is that? Transit
8 service involves an indirect interconnection. When you have a
9 direct interconnection, calls are exchanged between Carrier A
10 and Carrier B by a direct physical connection between the two
11 companies networks. Transit service involves indirect
12 interconnection where the call originates with one carrier and
13 then is sent to one or more intermediary transiting carriers
14 who then send the call to the terminating carrier.

15 Transiting service was historically provided by the
16 incumbent companies. Before Level (3) entered into its two
17 contracts with Neutral Tandem, Level (3) always utilized the
18 incumbent companies for indirect interconnection. The
19 incumbent companies still provide transit service. So if the
20 Commission grants Level (3)'s motion to dismiss, Level (3) and
21 Neutral Tandem will simply use their respective connections
22 with the incumbents for the completion of the calls from the
23 originating carriers of Neutral Tandem. And keep in mind, we
24 are talking about the traffic of the originating carriers.
25 It's not Neutral Tandem's traffic, it's the traffic of these

1 originating carriers.

2 I can't emphasize enough the calls would not stop.
3 They would not be blocked. Level (3) obviously has no desire
4 to incur disruption of service to our customers.

5 Now, a new requirement that two CLECs, Neutral Tandem
6 and Level (3), be directly connected goes against the very
7 logic and purpose of fostering competition and the benefits of
8 competition. Carriers across the country that do not have
9 sufficient volumes of traffic to justify the cost of a direct
10 line use indirect interconnection. A ruling by this Commission
11 that one CLEC can mandate a direct interconnection with another
12 CLEC would open the floodgates to allowing other CLECs to come
13 to this Commission and demand these inefficient direct
14 interconnections. Or, at minimum, to use the precedent to
15 taint what has always been and should remain purely commercial
16 negotiations free of regulatory oversight.

17 Factually, I just want to give you a quick snapshot
18 of the background facts. There are two traffic exchange
19 agreements that have been involved in this dispute. When the
20 two companies were unable to successfully negotiate a renewal
21 of those two contracts, Level (3) provided notice that it was
22 terminating the two contracts, as it was entitled to under the
23 agreements. The 30-day termination provisions, keep in mind,
24 that is what these two parties bargained for and agreed to in
25 the contracts.

1 The termination dates were set for March 23rd of
2 2007. Level (3) informed Neutral Tandem that it would work
3 with Neutral Tandem to alleviate the impact on the customers of
4 both parties by working to have Neutral Tandem's originating
5 carriers traffic redirected so that it would go indirectly
6 through the incumbent companies in Florida so the calls would
7 not be dropped. Rather than working with Level (3) on these
8 contingency arrangements, Neutral Tandem filed petitions with a
9 number of states across the country, including Florida, seeking
10 an interim order requiring Level (3) to stay directly connected
11 with Neutral Tandem and seeking an expedited arbitration
12 proceeding.

13 Commissioner McMurrian issued an order on April 6th
14 of this year denying the request for expedited procedures and
15 denying the request for the interim order that would have
16 required Level (3) to maintain that physical connection.
17 Commissioner McMurrian noted in her order that the issue of
18 mandated CLEC-to-CLEC interconnection was one of first
19 impression and would clearly impact CLECs throughout the state
20 of Florida. Neutral Tandem could have, but did not seek
21 reconsideration of that order with the full Commission.

22 Shortly after they filed their petition, Level (3)
23 unilaterally and voluntarily extended the time frame for the
24 direct physical connection to June 25th of 2007. Here again,
25 the purpose of that extension was to ensure that there would be

1 ample time for Neutral Tandem to notify its customers, so that
2 they could take appropriate steps, and their customers are
3 carriers, so they could take appropriate steps to ensure that
4 the originating traffic would get to Level (3) by rerouting
5 through the ILECs.

6 Neutral Tandem has known for over six weeks since the
7 prehearing officer issued her order on April 6th that their
8 request to maintain that physical interconnection has been
9 denied. So they should have been taking steps to unwind their
10 contractual arrangements with Level (3) and they have not.

11 Moving to the legal issues. The first issue,
12 Commissioners, focuses on jurisdiction, and Level (3)'s basic
13 position on Issue 1 is that the Commission lacks jurisdiction
14 over this petition under the two statutes relied upon by
15 Neutral Tandem, which are Sections 364.16(2) and 364.162.

16 We focus first on the difference in the language in
17 Subsections 2 and 3 of Section 364.16. We go into this in
18 detail in our brief, but I'm going to give you a snapshot of
19 our argument. Neutral Tandem is asking the Commission to
20 mandate a direct physical connection with Level (3)'s
21 facilities. The Commission does not have that power.

22 Under Subsection 3 of the statute, the Commission has
23 that authority if the request is directed to an incumbent
24 company. But this request is directed to Level (3), and Level
25 (3) is a CLEC. Under Subsection 2 of the statute, the

1 Commission only has the authority to require a CLEC to provide
2 access to or interconnection with its telecommunications
3 services. Not facilities, services. Neutral Tandem is asking
4 for a direct physical connection to our facility, and the
5 Commission lacks that authority because Level (3) is not an
6 ILEC, we are a CLEC.

7 Secondly, the Commission lacks jurisdiction because
8 Neutral Tandem is not an ILEC. Now, again, this is a
9 meticulous statutory interpretation argument that we have gone
10 into in detail in our brief, but we think that once you have
11 had an opportunity, if you haven't already, to focus on our
12 brief, we think it's clear that once you look at the two
13 statutes, the clear conclusion is that the two statutes that I
14 have talked about, the interconnection statute and the
15 arbitration statute, provide a mechanism for an ILEC and only
16 an ILEC to request access to or interconnection with a CLEC's
17 services, and then allows for a state arbitration if the ILEC
18 and CLEC aren't able to reach an agreement.

19 Neutral Tandem has acknowledged in its petition and
20 in its response to Level (3)'s motion to dismiss that the
21 arbitration statute, which is 364.162, must be considered by
22 the Commission and that the statute by its own terms applies
23 only to ILECs and CLECs. It does not provide for CLEC-to-CLEC
24 arbitration, which is why this Commission has never adjudicated
25 in 12 years CLEC-to-CLEC arbitrations. So, since the statutes

1 are limited to CLEC/ILEC negotiations and arbitrations, and
2 since Neutral Tandem is not an ILEC, our position is the
3 Commission lacks jurisdiction over Neutral Tandem's petition.

4 We also believe that any ruling by this Commission
5 that would require direct interconnection between two CLECs is
6 preempted by federal law. There is no debate between the
7 parties that under federal law a CLEC cannot go to a state
8 commission to arbitrate interconnection with another CLEC. So
9 that is why Neutral Tandem has attempted to create this cause
10 of action solely under state law. But Congress has expressly
11 left the matter of CLEC-to-CLEC interconnection to commercial
12 negotiations. In addition, a ruling by this Commission that
13 direct physical interconnection is required between two CLECs
14 under the Florida Statutes would directly conflict with Section
15 251(a) of the 1996 Federal Act which expressly allows direct or
16 indirect interconnection.

17 Now, what does Neutral Tandem say in their brief on
18 the issue of jurisdiction? They rely primarily on your TDS
19 Telecom order and the Level (3) versus Jacobs court decision,
20 and we think both are easily distinguishable. TDS Telecom
21 involved a transit tariff filed by BellSouth -- BellSouth is an
22 ILEC -- where BellSouth sought to use a tariff to establish a
23 default price for providing originating transit service where
24 negotiations between BellSouth and a connecting carrier were
25 unsuccessful.

1 The Commission held that arbitration was available
2 between BellSouth and the CLECs if agreements could not be
3 reached. That ruling is entirely consistent with the fact that
4 Section 364.162, which I mentioned before, is limited to
5 arbitrations between an ILEC and a CLEC.

6 TDS Telecom was never about and never involved a
7 potential arbitration between two CLECs. It involved a
8 potential arbitration for transit service between a CLEC and an
9 ILEC, BellSouth. In addition, in TDS Telecom the Commission
10 acknowledged that Section 251(a) of the Federal Act allows
11 carriers to interconnect either directly or indirectly, as I
12 mentioned before. So here if the direct connection between
13 Level (3) and Neutral Tandem were to be removed, the parties
14 still remain indirectly connected through their respective
15 connections with the incumbent LECs in Florida.

16 The Commission also held in TDS Telecom that it will
17 not require a direct interconnection between carriers based on
18 how much traffic is exchanged because that is a
19 company-specific issue that is best left to the two carriers.
20 So, in TDS Telecom the Commission held that if two CLECs could
21 not reach a negotiated agreement on establishing a direct line
22 between them, then they had BellSouth's transit service
23 available, and then it was up to them to negotiate with
24 BellSouth. And if that didn't work, to arbitrate with
25 BellSouth.

1 Now, Neutral Tandem also relies on the Level (3)
2 versus Jacobs decision of the Florida Supreme Court. Well,
3 that decision doesn't apply either. The issue in that case was
4 whether Level (3) was required to include collocation revenue
5 of Level (3) in calculating the amount of Level (3)'s
6 regulatory assessment fee that it would pay to the Commission.

7 That case involved different statutes than this case.
8 That case did not involve any interpretation and application of
9 the two statutes that are relied upon by Neutral Tandem in this
10 proceeding, and certainly that case never remotely approached
11 the issue of whether one CLEC could compel direct
12 interconnection and arbitration with a second CLEC under state
13 law.

14 The second issue that the prehearing officer has
15 established as a legal issue concerns Neutral Tandem's
16 standing. So if the Commission were to rule that a CLEC can
17 bring an arbitration action to compel a direct interconnection,
18 our position is that Neutral Tandem cannot because it has not
19 alleged in its petition that it provides the type of service
20 for which it was granted a CLEC certificate. And what is that.
21 That is basic local telecommunication services.

22 The operative issue here focuses on the language in
23 Subsection 2 of 364.16. There a CLEC is required to provide
24 access to its telecommunications services to any other provider
25 of local exchange telecommunications services. That term is

1 not defined under Chapter 364. Now, Neutral Tandem argues that
2 it is a provider of those services. Why? Neutral Tandem says
3 because we have a CLEC certificate. Level (3) says not enough
4 to establish standing.

5 As you know, there are many companies certificated by
6 this Commission as a CLEC and many do nothing. They are simply
7 certificated. Once again, we think that you should look to a
8 specific statute in Chapter 364 to inform the meaning of the
9 phrase any other provider of local exchange services.

10 The statute that we ask you to focus on is
11 Section 364.337. That is the CLEC certification statute. When
12 you have a chance to look at that statute, you will see that a
13 CLEC is given the authority when it gets its certificate to
14 offer basic local telecommunications services, which is a
15 defined term under Chapter 364. And that reference doesn't
16 appear once, it appears repeatedly throughout Section 364.337.

17 It doesn't stop there. Further support comes from
18 the Commission's rules. Under the Commission's CLEC rules, the
19 Commission repeatedly refers to a CLEC's basic local exchange
20 telecommunications service and a CLEC's basic local exchange
21 telecommunications customer. As I have discussed, our position
22 is that only an ILEC can come to the Commission and secure
23 interconnection with the services of a CLEC by arbitration if
24 necessary. If you were to rule for the first time that that
25 relief is available to a CLEC, then Neutral Tandem must allege

1 that it is a provider of basic local telecommunications
2 services to trigger the operation of that statute.

3 This they have not done in their petition and they
4 cannot do because there is no debate that they are solely an
5 alternative transit provider. So for this reason, we believe
6 Neutral Tandem lacks standing to seek relief under 364.16,
7 Subsection 2. Neutral Tandem attempts to cure this standing
8 problem in their brief by citing case law from what I call the
9 Agrico line of cases which stand for the proposition that
10 parties whose substantial interests are affected by an agency's
11 proposed agency action or affected by action an agency may take
12 where a third-party files a petition and they seek
13 intervention, those are what those cases are about.

14 That is not what this case is about. This is not a
15 case where Neutral Tandem has filed a petition to challenge
16 proposed agency action. They have not sought to intervene in a
17 complaint or a petition filed by someone else. This is their
18 petition, and they are requesting the Commission to take
19 action, but you can only take action if Neutral Tandem has
20 standing under the statute that I have cited. And since they
21 have not alleged and cannot allege that they provide basic
22 local telecommunications services, they lack that standing.

23 The third issue asks if the Commission decides that
24 it has jurisdiction and decides that if Neutral Tandem has
25 standing can the Commission require direct interconnection

1 between Level (3) and Neutral Tandem. The answer to that
2 question is no for a very simple reason, and I have already
3 discussed it. The Commission has already acknowledged in the
4 TDS Telecom order that Section 251(a) of the Federal Act
5 permits direct or indirect interconnection. A mandate of
6 direct interconnection would violate federal law and contradict
7 the Commission's ruling in the TDS Telecom order.

8 Commissioners, I'm going to just try to wrap it up
9 and save my remaining time. We are asking the Commission --
10 Neutral Tandem, excuse me, is asking the Commission to
11 essentially do two things that are both unprecedented and
12 unlawful. First, they are asking you to compel direct
13 interconnection between two CLECs. Secondly, they are asking
14 you to dictate the financial terms of that interconnection.

15 We would submit that the Commission, as I have
16 stated, lacks the authority to grant this relief, and if you
17 take this unprecedented and unlawful step, we believe you will
18 see a significant uptick of CLEC direct interconnection
19 petitions seeking relief similar to what Neutral Tandem has
20 sought in this proceeding. So, we believe that the law
21 supports granting Level (3)'s motion to dismiss with prejudice.

22 By the way, Commissioners, I do have copies of the
23 statutes that I have referred to. I'm going to ask Mr.
24 McDonnell to hand those out in the event that you have any
25 questions on my remaining time when I'm allowed to present my

1 remaining argument.

2 Thank you.

3 CHAIRMAN EDGAR: Thank you, Mr. Hoffman.

4 And, Ms. Keating, we will wait a minute to have that
5 material be distributed.

6 Mr. Hoffman, I'm showing eight minutes left. (Pause.)

7 And, Ms. Keating, can you give me an estimate of how
8 you would like to use your time?

9 MS. KEATING: Madam Chair, if I may, I'm going to
10 defer to Mr. Harrington to present Neutral Tandem's argument
11 today.

12 CHAIRMAN EDGAR: Okay. Mr. Harrington.

13 MR. HARRINGTON: Madam Chairman, Commissioners, good
14 morning. My name is John Harrington, and I represent Neutral
15 Tandem together with Ms. Keating.

16 I would probably seek to do something similar to Mr.
17 Hoffman and shoot for somewhere between five and ten minutes of
18 rebuttal, if that's acceptable.

19 CHAIRMAN EDGAR: Okay. That's fine. It is helpful
20 for me to keep track. Yes, Ms. Keating.

21 MS. KEATING: Madam Chair, with your permission, if I
22 may --

23 CHAIRMAN EDGAR: Yes, ma'am.

24 (Pause.)

25 CHAIRMAN EDGAR: Mr. Harrington, are you ready?

1 MR. HARRINGTON: I am, Madam Chair.

2 CHAIRMAN EDGAR: Your time begins.

3 MR. HARRINGTON: Thank you. Madam Chair.

4 Commissioners, good morning. Again, my name is John
5 Harrington, and on behalf of Neutral Tandem let me say that we
6 appreciate the opportunity to present argument to the
7 Commission this morning.

8 Madam Chair, Commissioners, I actually agree with Mr.
9 Hoffman about one thing. This is a new issue. This is
10 something that has come up in the past few years specifically
11 as a result of the development of competition in the local
12 telecommunications market in the state of Florida and
13 throughout the country. Neutral Tandem, beginning in 2004, has
14 developed a redundant network infrastructure within the state
15 of Florida and throughout the country to provide competitive
16 tandem transit services. We believe that this is exactly the
17 type of new innovative service that the legislature envisioned
18 when in 1995 it passed the state Telecommunications Act and
19 charged this Commission to regulate local telecommunications in
20 this state in order to promote competition, innovative
21 services, and network investment.

22 And what I will attempt to show this morning is that
23 Neutral Tandem's presence in the marketplace is exactly the
24 type of new innovative service that the legislature intended
25 for this Commission to promote. I will further attempt to show

1 that Neutral Tandem is not seeking any special treatment in
2 this case. I will attempt to show that Neutral Tandem is
3 simply seeking a level playing field so that it can provide its
4 services and bring the substantial benefits that we have
5 discussed in our petition to the state of Florida and to the
6 consumers and carriers of this state.

7 To do that I would like to do just a few things. I
8 would like to use the chart for just a moment to explain in a
9 little more detail exactly what the tandem transit services are
10 that Neutral Tandem provides, and then I will attempt to
11 explain and elaborate on the points in our petition about why
12 those services, these new services are important to this state,
13 important to the development of a competitive marketplace in
14 this state, important to network redundancy, and disaster
15 recovery within the telecommunications infrastructure of this
16 state, and important to promoting consumer choice and better
17 telecommunications options for end user customers in this
18 state.

19 I will then very briefly discuss this dispute from
20 Neutral Tandem's perspective. As you can imagine, it is a
21 little bit different from the perspective Mr. Hoffman provided
22 a few moments ago. And then I will address the legal issues
23 that have been set forth in the issue identification -- from
24 the issue identification memorandum. If I may, Madam Chairman,
25 may I approach the chart?

1 CHAIRMAN EDGAR: Yes, sir.

2 MR. HARRINGTON: Thank you.

3 Thank you very much. In the modern
4 telecommunications marketplace, as Mr. Hoffman alluded to,
5 there are a variety of competitive carriers of local
6 telecommunications traffic in addition to the historic
7 ILECs/incumbents. You have the traditional CLECs, the
8 competitive carriers, but you also have cable companies and
9 wireless providers providing local telecommunications traffic
10 in this state.

11 As Mr. Hoffman indicated, these carriers typically
12 are not directly interconnected most of the time because they
13 don't have sufficient traffic volumes flowing between the
14 various networks to justify direct interconnection. So they
15 use what is called a tandem transit service. In the example we
16 have on the board, we have metroPCS as a provider of cell phone
17 service, and in this case Level (3) as a provider of telephone
18 service to receive a phone call.

19 Historically, the way such a call would be completed,
20 if metroPCS and Level (3) were not themselves directly
21 interconnected, would be that the metroPCS end user obviously
22 places the call, initiates the call through metroPCS. MetroPCS
23 would then route that call to AT&T, to the tandem switch of
24 AT&T. AT&T would switch that call, direct it to the Level (3)
25 end user, or to the Level (3) network. Level (3) would then

1 receive that call and pass it on to the end user.

2 What Neutral Tandem has done is invested millions of
3 dollars to develop a redundant tandem infrastructure, so that
4 with the advent of Neutral Tandem in the market, metroPCS,
5 rather than having to route all traffic through AT&T, now has a
6 choice. And metroPCS is just one carrier. You can imagine
7 that since we only have two competitive carriers here, if we
8 were to try to illustrate the whole market you would see dozens
9 of carriers on this side of the chart and dozens of carriers on
10 this side of the chart all routing their traffic through a
11 single point, the AT&T tandem switches.

12 What Neutral Tandem has done, as I said, is developed
13 a redundant alternative competitive tandem infrastructure to
14 provide tandem transit services in competition with AT&T. To
15 be clear, it is a matter of public record that AT&T hates
16 providing this service. Verizon hates providing this services
17 because these are their competitors, and all they are doing in
18 their view is facilitating the ability of their competitors to
19 provide service. It's a service they have provided reluctantly
20 and typically under regulatory compulsion.

21 What Neutral Tandem has done is provided a redundant
22 alternative. And Neutral Tandem, as the name implies, is
23 neutral. It doesn't compete with its carrier customers. It
24 provides an alternative ability for these calls to be
25 completed. In doing this, Neutral Tandem has brought

1 significant benefits, and this is a matter of our petition and
2 a matter of the record materials that we have cited in our
3 petition, to the competitive market in the state of Florida.

4 First and foremost, it is the fact, it is the case
5 that Neutral Tandem saves these carriers, these originating
6 carriers a lot of money in terms of the costs that they incur
7 to transport this network. It is a matter of our petition that
8 under well-established telecommunications policy, typically the
9 originating carrier is responsible for the cost of completing a
10 call, and from a policy perspective the reason that makes sense
11 is because the originating carrier is the cost-causer. They
12 are the ones whose end user has brought the call onto the
13 network and, therefore, has imposed costs on the network,
14 including costs on the terminating carriers. Because it's also
15 a fundamental principle of telecommunications policy in this
16 state and throughout the country that carriers have an
17 obligation to receive this traffic. They are assigned phone
18 numbers by this Commission. They don't get to pick and choose
19 whether to receive calls.

20 And there is no dispute that they incur costs to do
21 that. It is almost a sort of passive arrangement. They have
22 to sit back and receive traffic not just from metroPCS, but
23 from everybody on this side of the chart. They don't have a
24 choice. And in return for that, in return for fulfilling their
25 obligations to receive traffic, they are entitled to

1 compensation for the costs that they incur. And it is a
2 well-established legal principle under both federal law and in
3 this Commission's prior TDS transiting decision that the
4 calling party is responsible for paying reciprocal compensation
5 to the terminating carrier. And that's true irrespective of
6 whether metroPCS and Level (3) decided to build this link to do
7 a direct connection, they are perfectly free to do that. If
8 so, and if metroPCS originates a call, it pays Level (3)
9 reciprocal compensation. The same principle applies in the
10 transiting context as this Commission found in the TDS
11 transiting order.

12 When metroPCS chooses to route a call through a
13 transit provider for reasons of its own business understanding,
14 it's still responsible to compensate the terminating carrier
15 for the costs it incurs to receive that call. And with that
16 obligation, with the calling party pays obligation come certain
17 rights. The originating carrier dictates the path through
18 which the call is routed.

19 This Commission found in the TDS transiting order
20 that the terminating carriers do not control how traffic comes
21 to their network. They have an obligation to receive the
22 traffic, they are entitled to compensation for fulfilling that
23 function of receiving the traffic, but they don't dictate how
24 other carriers choose to route traffic to them. That is a
25 fundamental principle of telecommunications policy.

1 It is embodied in this Commission's TDS transiting
2 order, and from a legal perspective, Neutral Tandem
3 respectfully submits that it is Level (3) that is attempting to
4 assert a new legal right, the right of a terminating carrier to
5 dictate to other carriers that are sending traffic to it how
6 those carriers' calls should be routed and how those carriers'
7 calls should be delivered to it.

8 That is a brief discussion of the benefits and the
9 issues with respect to the carriers from Neutral Tandem's
10 perspective, but let me spend just a moment talking about the
11 public issues and issues with respect to the public switched
12 telephone network. Network engineers will tell you that if you
13 have an alternative path, a redundant path, that's a good thing
14 from a network engineering perspective because it avoids what
15 is called the single point of failure problem.

16 As I said before, if you imagine carriers on both
17 sides of this chart, all of which are routing traffic through
18 AT&T, if AT&T's tandem fails, it is a single point of failure
19 for telecommunications infrastructure and affects the ability
20 of numerous carriers to complete their calls.

21 By allowing a redundant path, Neutral Tandem frankly
22 on its own dime through its own private investment in network
23 infrastructure has brought much needed redundancy and diversity
24 to the telecommunications infrastructure and the PSTN in the
25 state of Florida. The FCC recently, in response to Hurricane

1 Katrina, specifically noted that in New Orleans the
2 concentration of telecommunications traffic within particular
3 tandems was a problem in terms of the ability for the
4 communications infrastructure to survive natural disasters.
5 The FCC found in its report on Hurricane Katrina that that
6 actually illustrated the need to avoid reliance on a single
7 routing solution and the need to have diversity in call routing
8 for disaster recovery purposes.

9 Neutral Tandem, as I said, has built this
10 infrastructure within the state of Florida not under a legacy
11 monopoly regime under which it could recover all costs, but on
12 its own nickel in a competitive marketplace. We think that is
13 a good thing and a positive policy outcome for the state of
14 Florida.

15 The other substantial public benefit to the
16 telecommunications infrastructure is tandem exhaust. It might
17 seem a little counterintuitive at first that if traffic is
18 being moved off of this tandem and onto Neutral Tandem's tandem
19 that there would be an exhaust problem, that there wouldn't be
20 capacity here. Why wouldn't there be excess capacity? Recall
21 that I said AT&T hates doing this. They are not doing this of
22 their own free will, and they don't leave capacity laying
23 around on their tandems unused for the benefit of their
24 competitors. And so it is alleged and mentioned in our
25 petition, and if this case is allowed to go forward on the

1 merits we would show that there have been numerous instances in
2 which tandem exhaust has led to call blockage both in Neutral
3 Tandem's home state of Illinois, for example, and even earlier
4 this year here in Florida.

5 Neutral Tandem received a request from an affiliate
6 of an incumbent LEC for additional tandem capacity from Neutral
7 Tandem because the incumbent LEC's own affiliate could not get
8 sufficient capacity at the affiliated company's own tandem.

9 Tandem exhaust is a very real problem. If this case is allowed
10 to go forward on the merits we will present facts to illustrate
11 that.

12 Let me briefly discuss from Neutral Tandem's
13 perspective what the dispute with Level (3) is all about, and
14 it really can be summed up in two words: Reciprocal
15 compensation. We don't believe that this is at all a dispute
16 about direct interconnection, because Level (3) has never
17 disputed that it would provide direct interconnection to
18 Neutral Tandem. But Level (3) has insisted and demanded that
19 it will only provide direct interconnection to Neutral Tandem
20 if Neutral Tandem agrees to make reciprocal compensation
21 payments that as a matter of law and telecommunications policy
22 should be made by the originating carrier, that the facts we
23 have developed in other states have shown that Level (3) does
24 in some instances already receive from originating carriers,
25 and that it is undisputed that Neutral Tandem's only

1 competitor, the incumbents, do not make to Level (3) when they
2 deliver traffic.

3 So what is happening is Level (3) is demanding
4 payments that it should be, can be, and in some cases does
5 already receive from the originating carriers also be made by
6 Neutral Tandem. We believe that is a discriminatory demand for
7 a discriminatory payment in violation of federal and Florida
8 state law.

9 As Mr. Hoffman said, the parties were engaged and
10 directly interconnected pursuant to a series of contracts.
11 It's important to note the distinction between that contractual
12 relationship and the relief Neutral Tandem seeks here. That
13 contractual relationship between the parties was a two-way
14 relationship. It was a commercial arrangement. Neutral Tandem
15 provided services to Level (3). To illustrate, Level (3) was
16 on the other side of my chart. They were in the metroPCS
17 position originating traffic to other carriers through Neutral
18 Tandem.

19 That is a commercial arrangement. Nobody has to buy
20 services from Neutral Tandem. The parties negotiated that, and
21 that was a freely negotiated contract and contained give and
22 take just like any commercial arrangement. And Level (3)
23 terminated that contract and informed Neutral Tandem that it
24 would only -- not only was it terminating the originating
25 portion of that contract, but it would only allow the delivery

1 of traffic that other carriers have chosen to route through
2 Neutral Tandem if Neutral Tandem would make these
3 discriminatory reciprocal compensation payments.

4 It is important to note as well that there is not one
5 minute of traffic that Neutral Tandem sends to Level (3) that
6 it wouldn't have to receive anyway. Neutral Tandem doesn't
7 originate calls. One way or another, Level (3) has an
8 obligation under Florida law to receive traffic that other
9 carriers intend to send to its end users, and it is going to
10 receive that traffic either from AT&T or from Neutral Tandem.
11 So it is really a zero sum game.

12 But what Level (3) sought to do was impose on Neutral
13 Tandem a charge that we would show, if this case is allowed to
14 proceed on the merits, as a practical matter, would have driven
15 Neutral Tandem from the marketplace if applied across the
16 board. And to be clear, Level (3) has a significant
17 terminating business. They have a business plan based in large
18 part on serving internet service providers. They receive a
19 disproportionate amount of traffic. A significant percentage
20 of the traffic that Neutral Tandem switches in this state is
21 delivered to Level (3)'s end users.

22 And although Mr. Hoffman said this case is not about
23 the volume of traffic, it absolutely is, and it is alleged in
24 our petition and shown in our brief that Neutral Tandem
25 delivers 75 million minutes a month of traffic to Level (3).

1 There is no dispute and there will never be any evidence
2 presented in this jurisdiction or any other that 75 million
3 minutes of traffic a month doesn't warrant direct
4 interconnection. In fact, the direct physical connections
5 between Neutral Tandem and Level (3) that allow this to be
6 delivered are very significant.

7 Let me address some of the legal issues that Mr.
8 Hoffman has raised. We too have briefed these issues, and I
9 think our arguments are principally set forth in our brief and
10 I won't repeat those. But let me just point out a couple of
11 things that Mr. Hoffman has indicated on Level (3)'s behalf.

12 Under Section 364.162, the Florida Legislature
13 specifically required competitive local exchange carriers in
14 this state, and there is no dispute that Level (3) is a CLEC in
15 this state, to offer access to an interconnection with their
16 telecommunications services to any other provider of local
17 exchange services in this state. The legislature specifically
18 did not limit that obligation on Level (3)'s part and on all
19 other CLECs part to providers of basic local telecommunications
20 services. If the legislature had sought to do that it easily
21 could have included that specific statutory phrase in
22 Section 364.162. The fact that the legislature didn't do it is
23 indicative of the legislature's intent.

24 On a plain language reading of this statute, Neutral
25 Tandem plainly provides local telecommunications services in

1 this state. There is nothing in the language of the statute
2 that restricts the applicability of Section 364.162 in the way
3 Mr. Hoffman has suggested and Level (3) has argued. We
4 respectfully believe that the references to Section 337 and to
5 the other aspects of the Florida Act and the Commission's rules
6 do not support Level (3)'s position. Again, on a plain
7 language reading of the statute, the interconnection
8 obligations are clear.

9 And with respect to this issue regarding facilities
10 versus services that Mr. Hoffman alluded to, I would
11 respectfully point the Commission to Level (3)'s initial motion
12 to dismiss in this case. Before Level (3) articulated in its
13 most recent brief the argument that this interconnection
14 obligation was limited to facilities, Level (3) itself
15 described what is at issue in this case as the provisioning by
16 it of so-called transit termination service. That's how Level
17 (3) characterized the issue in this case and the facilities and
18 services to which access is being sought.

19 After all, if you think about it, unless you are
20 talking about resale, where there is absolutely no physical
21 facilities at issue, services are provided using facilities.
22 So the language, the facilities language in the provision of
23 Section 364.16 related to facilities certainly doesn't mean
24 that the reference to services in 364.162 has no application to
25 any services that are provided by facilities. All services are

1 provided by facilities so long as carriers are themselves
2 facilities based, which Level (3) and Neutral Tandem both are.

3 Even if you had any concern about your authority
4 under the specific provisions of 364.162, Neutral Tandem also
5 has cited this Commission's broad and exclusive authority to
6 regulate the interconnection duties of alternative LECs,
7 competitive LECs in this state, and we respectfully believe
8 that the Jacobs decision does inform the determination of that
9 issue, and it is not because the facts were 100 percent the
10 same. Of course, as we both have said today, this is a new
11 issue.

12 It is because the argument that Level (3) made in
13 that case was substantially similar to the argument that it
14 made here, namely that this Commission have very limited, if
15 any jurisdiction with respect to any service that doesn't meet
16 this narrow definition of basic local telecommunications
17 services. This Commission, as we have pointed out in our
18 brief, argued forcefully to the Florida Supreme Court that it
19 has the authority to regulate the means and manner of
20 interconnection between CLECs. That is exactly what is at
21 issue here. And the Florida Supreme Court specifically
22 affirmed this Commission's authority and jurisdiction to
23 address interconnection among competitive carriers.

24 This Commission has extremely broad authority and has
25 been specifically charged, as I said, by the Florida

1 legislature to regulate in order to promote competition, to
2 develop innovative telecommunications services, and to promote
3 network investment. All Neutral Tandem is looking for here is
4 a level playing field. This is not about establishing some
5 new, per se, rule of CLEC-to-CLEC interconnection.

6 If this case is allowed to proceed on the merits,
7 Neutral Tandem will show that in addition to the 75 million
8 minutes of traffic it delivers to Level (3) a month, Neutral
9 Tandem pays all the costs to deliver that traffic to Level (3).
10 In other words, with the establishment of the direct physical
11 link between the companies that is already in place, frankly,
12 unlike the arrangement between Level (3) and the incumbents
13 where those are shared, AT&T isn't providing those services to
14 Level (3) for free, Neutral Tandem, as part of its innovative
15 business plan, is paying all the costs to deliver traffic to
16 Level (3)'s network that Level (3) has an obligation to receive
17 anyway.

18 This is exactly the kind of service that the Florida
19 Legislature envisioned. Of course it didn't envision a
20 specific type of service nine or ten years ago, but it
21 certainly envisioned the development of new and innovative
22 telecommunications services as a result of the passage of the
23 Florida Act in 1995. This is a direct outgrowth of this
24 state's commitment to promote competition and innovation in the
25 telecommunications infrastructure.

1 All of the calls at issue here are local calls. They
2 are squarely within this Commission's jurisdiction. And asking
3 this Commission to cede jurisdiction or to find that Neutral
4 Tandem lacks standing in some way is a request that this
5 Commission cede jurisdiction or find that it has no role to
6 play in an ever growing percentage of the local
7 telecommunications traffic in this state. It is estimated that
8 up to half of the local telecommunications traffic in any given
9 market is now originated on nonincumbent switches. If this
10 Commission has no role to play where an incumbent is not
11 involved, it has no role to play in an ever increasing part of
12 the traffic that is switched and delivered over the public
13 switched telephone network in this state.

14 We don't believe that that is supported by law,
15 policy, or any of the facts that will be developed if this case
16 is allowed to proceed to the merits, and we respectfully
17 request that the Commission allow Neutral Tandem's petition to
18 proceed. Thank you.

19 CHAIRMAN EDGAR: Thank you, Mr. Harrington.

20 And I am showing that you five minutes remaining.

21 Commissioners, are there questions for Mr. Hoffman
22 before he begins to use the remainder of his time? No.

23 Mr. Hoffman, I would like you to speak briefly during
24 the remainder of your time in response to the point, and I'm
25 going to simplify here, but if jurisdiction does not reside

1 with this Commission then where. And you're recognized.

2 MR. HOFFMAN: To respond to that question, Madam
3 Chairman, we believe jurisdiction does not rest with the
4 Commission. And if jurisdiction does not rest with the
5 Commission, then the only possible venue that I can think of
6 would be perhaps Neutral Tandem could go to civil court. But
7 as a matter of law, the Commission's jurisdiction is only that
8 which the legislature has expressly granted to the Commission
9 within the statutes. It never has been and is not there for
10 CLEC-to-CLEC arbitrations. So if it is not with the
11 Commission, I frankly am not sure if they have a place to go,
12 but perhaps they could go to court.

13 Mr. Harrington spent most of his time not talking
14 about jurisdictional issue or standing issues, but primarily
15 touting their service. And one thing that I want to emphasize
16 with respect to their service is that Neutral Tandem is able to
17 obtain connection with Level (3) via commercial negotiations.
18 That is how they have done it in the past.

19 Their service which they tout is available if they
20 are able to reach a commercially negotiated agreement. But
21 what they have done here is they obviously are unhappy with the
22 state of negotiations and they are trying to obtain a
23 regulatory resolution to a commercial negotiation under these
24 particular circumstances because they don't want to pay for the
25 use of Level (3)'s network.

1 Now, Mr. Harrington spent a lot of time talking about
2 the notion of calling party pays. And I tried to, I guess,
3 state preemptively up front that is not that we are here on
4 today, okay. If the Commission were to deny Level (3)'s motion
5 to dismiss, both parties are, of course, free to take up that
6 issue. But as far as the TDS Telecom case goes, the holding in
7 that case which applied that principle after a full hearing,
8 was that the originating carrier is the cost-causer and,
9 therefore, the originating carrier was to pay BellSouth for the
10 use of BellSouth's network for providing that transit service.
11 And that's all that that case held with respect to that
12 particular principle, which, again, I would submit is not what
13 we are about this morning.

14 We also talked about -- Mr. Harrington also talked
15 about the notion of the terminating carrier being obligated to
16 receive traffic, and I think he's right. He's right. Now it
17 is not their traffic, it is not Neutral Tandem's traffic, it is
18 the traffic of the originating carrier. But this is not about
19 Level (3) trying to establish a new paradigm for call routing.
20 Level (3) is obligated to receive that traffic, but they can do
21 it directly or indirectly.

22 This is not about -- the issues before you this
23 morning are not about reciprocal compensation. I talked about
24 that up front. It is not about how much Level (3) gets paid or
25 who pays Level (3). These are strictly jurisdictional issues.

1 Mr. Harrington has leapfrogged into the hearing phase of this
2 by accusing Level (3) of discrimination. That's not what we
3 are about this morning.

4 The truth of the matter is Level (3) does have
5 arrangements with the ILECs. There are transit provisions, but
6 those transit provisions and those agreements are part and
7 parcel of a much more comprehensive business arrangement where
8 there are a lot of things going back and forth between the ILEC
9 and Level (3). With Neutral Tandem, there is nothing going
10 back and forth other than this limited service that they
11 provide.

12 Which brings me to another point. Mr. Harrington
13 said that under 364.16, Neutral Tandem plainly provides local
14 telecommunications service. I don't think so. I don't know
15 how he reaches that conclusion. I think if you think to
16 yourself who is my local telecommunications service provider,
17 you are probably not going to think of a company that limits
18 itself to providing as an alternative one piece, one element of
19 the chain of a call. They are not out there providing retail
20 service, so I don't think it's that clear that they provide
21 local telecommunications service, and that's why I think under
22 proper principles of statutory interpretation you look to what
23 the legislature says a CLEC does, and a CLEC only gets that
24 certificate because it is to provide basic local
25 telecommunications services, including 911 service and relay

1 service for the hearing impaired.

2 Mr. Harrington talked about how we describe our
3 transit termination services. That's right, that's what we
4 provide. But the point for this morning, which again is
5 strictly a legal issue, is we provide that transit termination
6 service and are entitled to provide it either through a direct
7 or indirect interconnection.

8 Mr. Harrington talked about the Level (3) case, and I
9 just don't think no matter how good of an argument he makes he
10 can bring that case into the four corners of what this case is
11 about. If you look at that case and you look at the four
12 corners of that case you won't find the two statutes that they
13 rely upon in the first paragraph of their petition. The issues
14 in this case this morning were not at issue in the Level (3)
15 case.

16 Madam Chairman, how time do I have left?

17 CHAIRMAN EDGAR: Excuse me. You have three minutes.

18 MR. HOFFMAN: Okay. I want to talk briefly about the
19 notion of an interim order, because that was surfaced as
20 something that might come up again, that we be required to stay
21 directly connected.

22 I want to emphasize that Commissioner McMurrian has
23 already denied that request and they did not seek
24 reconsideration. And the facts have not changed, and Neutral
25 Tandem has steadfastly refused to make contingency plans to

1 direct the traffic through the respective connections that
2 Neutral Tandem has and that Level (3) has with the ILECs. So
3 we think they need to move expeditiously on this in the event
4 their petition is dismissed or denied.

5 The Commission lacks the authority to grant this
6 relief, and while they have argued in their brief that Level
7 (3) will not be harmed, that's not true. Level (3) has had and
8 maintains existing network connections with the ILECs. And the
9 fact of the matter is it is more costly for Level (3) to
10 maintain additional separate network architecture with Neutral
11 Tandem.

12 As I have mentioned before and I will say it again,
13 the Commission cannot stray outside of the authority granted by
14 the legislature. If the Commission acts within its statutory
15 authority, Neutral Tandem will have to send the traffic they
16 receive from the originating carriers through the ILEC or
17 negotiate an agreement that is mutually acceptable to Level (3)
18 and Neutral Tandem if their petition is dismissed.

19 If the Commission reverses the prehearing officer's
20 order, the Commission is essentially allowing an alternative
21 provider to leverage Level (3) in this negotiation process, and
22 that, in fact, is harm to Level (3).

23 I'm just looking through my notes, Madam Chairman.
24 The only other thing that I would say before wrapping up is
25 that while this case is not this morning in its bifurcated

1 stage about the number of minutes that we have been
2 terminating, or about the calling party pays principle, or
3 about the benefits that Neutral Tandem believes it brings to
4 the market, which it can still bring through a commercially
5 negotiated process, keep in mind that the level of traffic that
6 Neutral Tandem exchanges in Florida is roughly about a little
7 less than two percent of the total transit traffic in this
8 state.

9 That's all I have this morning, Madam Chairman. We
10 are asking the Commission after you have had a opportunity to
11 consider our briefs again and the staff recommendation to grant
12 our motion to dismiss Neutral Tandem's petition with prejudice.

13 CHAIRMAN EDGAR: Thank you, Mr. Hoffman.

14 Commissioners, before I recognize Mr. Harrington, are
15 there any questions that you would like him to address? And I
16 am seeing two, so we will go ahead and ask those and then I
17 will recognize you. So, hold on.

18 Commissioner McMurrin.

19 COMMISSIONER McMURRIAN: I actually had one for Mr.
20 Hoffman if that is okay.

21 CHAIRMAN EDGAR: Okay.

22 COMMISSIONER McMURRIAN: Mr. Hoffman, you were
23 talking about the requirements for a CLEC certificate with
24 regard to Neutral Tandem. Do you believe that the Commission
25 incorrectly granted a CLEC certificate to Neutral Tandem?

1 MR. HOFFMAN: No, I do not. I think if Neutral
2 Tandem files the appropriate documentation showing that they
3 have the managerial and financial and technical capability to
4 provide basic local exchange telecommunications services, then
5 they are entitled to have a placeholder like a number of other
6 companies with certificates at the Commission.

7 My only point, Commissioner McMurrian, is that to
8 trigger the operation of this interconnection statute they have
9 to be a real CLEC; and a real CLEC, according to the
10 legislature, provides local basic service.

11 CHAIRMAN EDGAR: Commissioner Argenziano.

12 COMMISSIONER ARGENZIANO: That goes to my point. In
13 looking at the statutes under the certification language it
14 does say that -- and I wasn't sure that it was issued, the
15 certificate, wrongly or in error. But it does say to me that
16 the basic local telecommunications service provided by a
17 competitive local exchange telecommunications company must
18 include access to operator services, 911 services, and relay
19 services for the hearing impaired.

20 Do you provide those services?

21 MR. HARRINGTON: Neutral Tandem does not provide the
22 services that a CLEC serving end users provides to those end
23 users. We respectfully believe that the definitions have a
24 different application in this context. And Ms. Keating
25 actually will address that issue, Commissioner and Madam Chair,

1 if that's appropriate.

2 CHAIRMAN EDGAR: Yes.

3 MS. KEATING: Madam Chair, Commissioner, if I could
4 just follow up on that a little bit. If you look at the two
5 statutes, 364.16 and 364.337, the actual phrasing, the terms
6 that are used therein are different. But even if Level (3) is
7 correct that basic local telecommunications service is what the
8 legislature was contemplating when it wrote 364.16, if you look
9 in 364.337(5), there is also a reference to basic local
10 telecommunications service and the Commission's jurisdiction
11 over that in the context of not just CLECs, but alternative
12 access vendors.

13 Now, if you look at the definition of what an
14 alternative access vendor is you will see that they do not
15 provide basic local telecommunications service as that term is
16 defined earlier in the statutes in 364.02 under the broader
17 definition that Level (3) appears to be relying on.

18 So, our argument is even if they are right that that
19 is the correct term, the legislature actually contemplated four
20 competitive carriers because they envisioned that as the market
21 expanded, they knew that new providers would come to the
22 market, that it could not be contemplated what types of
23 different service offerings might be made available, what types
24 of carriers might be out there. That the definition of basic
25 local telecommunications services for competitive providers is

1 different than that for incumbent local exchange providers.

2 COMMISSIONER ARGENZIANO: Madam Chair.

3 CHAIRMAN EDGAR: Commissioner Argenziano.

4 COMMISSIONER ARGENZIANO: That may be true of the
5 legislature's intent, but statutorily it reads, to me, that in
6 order to be considered a competitive local exchange
7 telecommunications service you must have those services that
8 were mentioned before.

9 Now, when you get down to Paragraph 5, it does talk
10 about alternative services, but not in the same context, and it
11 may even be conflicting. But my problem that I'm having is
12 that you may have gotten a certificate, but I don't see you as
13 providing the must have included services. So I'm not sure you
14 are a CLEC.

15 MS. KEATING: Madam Chair, may I?

16 CHAIRMAN EDGAR: You may.

17 MS. KEATING: Commissioner, I think the issue goes
18 back to again, I'm afraid, 364.16. It says each competitive
19 local exchange telecommunications company, i.e., Level (3),
20 shall provide access to and interconnection with its
21 telecommunications services, not to another competitive local
22 exchange provider. The phrase the legislature uses there is
23 they must provide access to any other provider of local
24 exchange telecommunications services. And it would be our
25 argument that that broader term contemplated more than just,

1 you know, a CLEC, but anybody that is any telecommunications
2 company that is providing local telecommunications service.
3 And we think Neutral Tandem fits the bill.

4 CHAIRMAN EDGAR: Commissioner Carter, did you have a
5 question?

6 COMMISSIONER CARTER: Thank you, Madam Chair.

7 It seems to me from what we have heard and what has
8 been presented as -- and, I mean, this is kind of glaring by
9 looking at this chart here, it seems to me that Neutral Tandem
10 wants to be an ILEC without calling itself an ILEC. Is that
11 what you guys are trying to do? You want to be an ILEC without
12 calling yourself an ILEC? Because if we were to -- Madam
13 Chairman, if we were to go to this process of dealing
14 CLEC-to-CLEC and, you know, they say -- if I may just be heard
15 for a moment, Madam Chairman, is that we are talking about this
16 case of first impression, but really it is all about the money.
17 It is really -- we are not really talking about whether or not
18 the citizens have access to a telephone service, it's really
19 all about the money. Two companies fighting over what to me is
20 clearly a contractual matter. It's really all about the money.

21 If Neutral Tandem wants to compete with AT&T as an
22 ILEC, then go be an ILEC. That's really what it is. I just
23 don't see -- if we get into renegotiating bad business deals,
24 then this Commission won't be able to do anything else. That's
25 just the way I see it, Madam Chairman, based upon what is in

1 the pleadings, what we have heard. And like I said, this chart
2 is a glaring example. And you go back to the statute,
3 Commissioner Argenziano is right, the basic services are not
4 covered. This says must have. It doesn't say may have. It's
5 like if it walks like a duck, and quacks like a duck, and looks
6 like a duck, it's probably a duck. Either you are an ILEC or
7 you are not, clothed -- in CLEC clothing. I'm not feeling you
8 on this one.

9 CHAIRMAN EDGAR: Ms. Keating.

10 MS. KEATING: May I beg your indulgence and approach
11 the chart in response, Commission Carter, if that is all right
12 with you?

13 CHAIRMAN EDGAR: Yes.

14 MS. KEATING: Commissioner, I can certainly
15 understand your concerns, but first off let me just point out,
16 Neutral Tandem is not contemplating being an incumbent local
17 exchange provider. For one thing, that has a real specific
18 definition under the statute and contemplates a carrier that
19 was certificated before 1995.

20 COMMISSIONER CARTER: (Inaudible. Microphone off.)

21 MS. KEATING: Yes, sir.

22 COMMISSIONER CARTER: So, I mean, you know, make your
23 point, but if you want to lecture then that is something
24 totally different. I'm saying that basically what you guys are
25 saying is that you want to be an ILEC, but you don't want to

1 call yourself an ILEC. And the Commission, this perspective of
2 CLEC-to-CLEC we will be here forever dealing with nothing but
3 CLEC-to-CLEC issues that have to deal primarily with business
4 and contractual matters. Help me understand that. That is
5 what I'm trying to find.

6 MS. KEATING: If I may, Commissioner, I will just
7 make one very quick point, and then I will defer to Mr.
8 Harrington, if that is all right, to address the concern about
9 a slippery slope, I suppose, of CLEC-to-CLEC arbitrations.

10 Neutral Tandem carries the traffic of competitive
11 local exchange providers. These are all local calls. The big
12 difference between Neutral Tandem and the transit provider that
13 is the ILEC, Neutral Tandem pays this. Level (3) pays this.
14 The Commission has already determined --

15 COMMISSIONER CARTER: It's all about the money.

16 MS. KEATING: The Commission has already determined
17 in the transit traffic order that AT&T/BellSouth have the right
18 to terminate this traffic. If Neutral Tandem, who is paying
19 this part of the transport, if Neutral Tandem doesn't have that
20 same right, then the only carriers that will be able to enter
21 this market are, in fact, the ILECs. It will eliminate an
22 entire opportunity for competitive providers in the local
23 exchange market.

24 I appreciate your indulgence, Madam Chair. That's
25 the only thing I wanted to point out. And now if I can defer

1 to Mr. Harrington.

2 CHAIRMAN EDGAR: Just a moment, if you would.
3 Commissioner McMurrian also had a question, so let's go ahead
4 and get that out. And in the interest of fairness, because we
5 have -- let me just say this and then I will come back to you.
6 Recognize that we have gone beyond time; however, while we are
7 all here together I do want to allow the opportunity for
8 Commissioners to ask additional questions if questions have
9 come to mind. And so, Mr. Hoffman, so that we will try to do
10 this as evenly as we can, realizing I don't have a stop watch,
11 I will allow time for you to give some response, as well.

12 Commissioner McMurrian.

13 COMMISSIONER McMURRIAN: Yes. And actually it wasn't
14 a question on top of the rebuttal time. I guess I would ask
15 that Neutral Tandem try to address Issues 1, 2, and 3A, because
16 I have to agree with Mr. Hoffman that a lot of your comments,
17 while I think it was helpful to explain to us how the traffic
18 flows, I feel like I really didn't get some of these issues
19 addressed. And that does seem to the purpose of why we are
20 here today is to address those three things. So at least for
21 my part, I'm not trying to speak on behalf of the others, but I
22 don't feel like the standing issue in particular and the
23 jurisdiction question, while you addressed it at the end, I
24 could use a little more direct rebuttal to the points Mr.
25 Hoffman made regarding the statutes.

1 Thank you.

2 CHAIRMAN EDGAR: Thank you, Commissioner McMurrian.

3 Before we do that, Commissioners, are there any other
4 questions that we would like to take advantage of the
5 opportunity to pose or to ask the parties to use their
6 remaining time to respond to? Any others that have come to
7 mind? Okay.

8 Then, Mr. Harrington, I'm going to give you -- I'm
9 going to give you five minutes, and, Mr. Hoffman, then I will
10 give you five minutes. Okay, sir.

11 MR. HARRINGTON: Thank you, Madam Chair.

12 If I may remove the microphone back. Thank you,
13 Madam Chair, and Commissioner McMurrian.

14 With respect to Issue 1, I will address that and
15 Ms. Keating also may address issues regarding the specific
16 reading of the statutes. But the position as we have attempted
17 to articulate this is that the Florida legislature made a
18 deliberate choice in its wording and used very plain language
19 in Section 364.162, and it did not restrict this Commission's
20 jurisdiction to addressing interconnection issues between one
21 competitive local exchange carrier and a provider of basic
22 local telecommunications services.

23 It specifically chose language that was on a plain
24 reading broader in nature, and we believe that that broader
25 language, "any other provider of local exchange

1 telecommunications services," does encompass the services that
2 Neutral Tandem provides. We believe if the legislature had
3 desired to restrict that statutory provision in the way that
4 Level (3) has suggested, it could have simply employed that
5 language to do so.

6 And so our position is that this Commission does have
7 jurisdiction under that specific provision, and that it also
8 has jurisdiction pursuant to the very broad grants of statutory
9 authority that this Commission has been given by the Florida
10 legislature. And I don't know if Ms. Keating wishes to add to
11 that.

12 I would just add that, just to reiterate what
13 Ms. Keating said, there are other provisions with respect to
14 Section 337 that suggest that in the competitive context, and I
15 would ask the Commission to bear in mind that this statute was
16 passed in 1995, and this is 12 years later, they did not
17 necessarily envision each and every type of service that the
18 unleashing of a competitive market might bring to the
19 competitive table.

20 But there is language in Section 337, particularly
21 with respect to the AAVs, that suggests that the basic local
22 telecommunications service language can be read more broadly in
23 the context of the competitive context than it is with respect
24 to incumbent carriers. And so that is our position with
25 respect to the Florida statutory jurisdiction.

1 Commissioner McMurrian, with respect to the
2 preemption issues that Mr. Hoffman has raised that I think are
3 encompassed within the jurisdictional questions, we have
4 addressed these in our brief, but in a nutshell, federal law
5 only preempts state law if Congress intended to preclude the
6 states from doing more. And the language in Section 251(a) of
7 the Federal Telecommunication Act we think very clearly
8 illustrates that Congress intended to set a floor for
9 interconnection, a baseline minimum level of interconnection
10 that all carriers had to satisfy.

11 And that doesn't mean that Congress intended to
12 prevent states from addressing issues between competitive
13 carriers. In fact, just the opposite. It is amply clear in
14 the language and history of the act that what Congress was
15 concerned about there was ending the historical regulated
16 monopolies in the provision of local telecommunications
17 services. That was their goal, that was their aim, and they
18 set up specific procedures and rights and obligations to do
19 that.

20 Our position is, and this is really a principal
21 reason that we brought these petitions under state law
22 throughout the country, is that the Federal Telecommunications
23 Act deals with ILEC/CLEC relationships and doesn't really say
24 anything one way or the other about the relationships between
25 and among competitive carriers when they are providing local

1 service subject historically to the jurisdiction of commissions
2 exactly like this one.

3 So we believe that Congress specifically left that
4 issue to be decided by state commissions such as this one
5 pursuant to the state interconnection statutes and to the
6 policy, preferences, and choices of each individual commission.
7 So we don't believe there is any federal preemption either.

8 With respect to standing, to some extent that
9 probably bleeds into our jurisdictional argument to some
10 extent. We believe that the statute specifically confers
11 standing on any local -- any provider of local
12 telecommunications services in Florida to invoke the provisions
13 of 364.162.

14 Now, Level (3) has articulated the position that
15 because 364.162 makes reference to a separate statutory
16 provision, 364.162, Paren 2, I believe, that somehow that
17 intended to incorporate or limit the reach of the substantive
18 obligations of Section 364.162. But read together, what's
19 clear is that it was incorporating the procedural requirements
20 of 364.162. There is simply no indication that we see in the
21 plain language of that statute that suggests that they somehow,
22 the legislature somehow intended to limit the substantive reach
23 of 364.16. So the question, in our view, is whether Neutral
24 Tandem provides local exchange telecommunications service from
25 a standing perspective. And if it does, then we believe that

1 standing is expressly conferred. We also believe -- I'm sorry.

2 CHAIRMAN EDGAR: Thank you.

3 MR. HARRINGTON: I'm sorry, Madam Chair.

4 CHAIRMAN EDGAR: Commissioner Argenziano.

5 COMMISSIONER ARGENZIANO: Just one more to that
6 point, because while you are saying that you provide
7 alternative services, where do you see that you are exempt from
8 the must have provisions under certification, because that's
9 what I'm not seeing? As an alternative local service it seems
10 to me you are still subject to the must have provisions under
11 that statute.

12 MR. HARRINGTON: I understand. And thank you, Madam
13 Chair and Commissioner, Ms. Keating will address that issue.
14 Thank you.

15 MS. KEATING: I think this gets actually --
16 Commissioner, Madam Chairman --

17 CHAIRMAN EDGAR: Yes.

18 MS. KEATING: I think this actually gets to the
19 question that Mr. Hoffman responded to, and I think he
20 responded entirely correctly. Neutral Tandem is certificated
21 as a competitive local exchange provider. They do not provide
22 service to end use customers, and that is a fact. The
23 providers of competitive local exchange service are the ones
24 that are required to provide access to relay and access to 911.
25 We are not saying that we do that.

1 What we are saying is that we are a provider of local
2 exchange telecommunications services as it is set forth in
3 364.16. And I know it sounds like a matter of semantics and
4 slightly different terms here and slightly different terms
5 there, but under statutory interpretation the use by the
6 legislature of different phrases and difference terms is
7 intended to be given some level of meaning. And what we are
8 saying is, yes, while we are certificated as a CLEC, we do not
9 currently provide competitive local exchange services to end
10 users which would then require us to provide 911 and relay. Is
11 that responsive?

12 COMMISSIONER ARGENZIANO: I know what you're saying,
13 but it doesn't make sense to me statutorily. If I have to
14 adhere to the statutes, what I see is that in order -- in my
15 opinion, and I don't mean to be derogatory, for the
16 certification you don't fit the certification requirements. So
17 it's hard for me to look at you as, you know, as being
18 certified without having the must haves as everybody else who
19 has to be certified, even given the alternative services that
20 you provide and the legislature has intended to accommodate
21 those. But I don't see an exemption from the must have
22 provisions in the statute, so I'm just having a real difficult
23 time. Thank you.

24 CHAIRMAN EDGAR: Commissioner Carter.

25 COMMISSIONER CARTER: Thank you, Madam Chairman. I

1 beg your indulgence. As Commissioner Argenziano, I'm still
2 having some problem with this. I noticed that in your comments
3 you said that you were a redundant transit system like AT&T.
4 But it seems to me from what we have heard and as we were going
5 through the statute, and I was just rereading it again, it
6 seems like this company is cherry picking portions of the
7 statute, not to provide phone services for the people and
8 individuals, but to provide business services to companies.
9 And I think when you are providing business services to
10 companies, that's a business to business decision. That's not
11 the jurisdiction of the Commission. That's a business
12 decision.

13 If we do this, we are going to spend all of our time
14 dealing with nothing but CLEC-to-CLEC, you know, negotiating
15 business -- if you made a bad business deal, hey, the world is
16 tough. That's not our decision. And the statute is clear
17 about what a CLEC does and does not do. It is fairly clear
18 about what an ILEC does. But you can't go and say, well, we
19 will take this from Section .012, this from Section .02, this
20 from Section .015, and craft it in such a way that where we
21 would be so specific where we don't fall within the purviews of
22 anything, but we are generally in the generic aspect of a
23 universe that may be classified as a CLEC. And I'm having real
24 trouble getting beyond the business-to-business on here. This
25 is a business decision that two companies made, and for

1 whatever reason they are bringing it to the Public Service
2 Commission for us to resolve a business decision. That's not
3 our jurisdiction.

4 CHAIRMAN EDGAR: Commissioner Skop.

5 COMMISSIONER SKOP: Thank you, Madam Chair.

6 And just as a follow up to Commissioner Carter's
7 comment, and notwithstanding the jurisdiction issues at hand
8 before us, the comment was made, I believe, by -- the comment
9 was made by counsel representing Tandem that, I believe, the
10 ILEC that provides the tandem switching service doesn't want to
11 be in the business in the first place, and it is a nuisance to
12 them.

13 So to that regard, and if, in fact, Tandem provides a
14 valuable service, then why is simply not an appropriate remedy
15 to work with the ILEC to provide the services for them, or can
16 somebody respond to that.

17 CHAIRMAN EDGAR: Mr. Harrington.

18 MR. HARRINGTON: Madam Chair, thank you very much.

19 And, Commissioner, thank you for the question. The reason that
20 we believe it is not an appropriate remedy stems from the
21 obligations of carriers -- from two things. First, the
22 obligations of carriers to receive traffic on the terms and in
23 the manner that the originating carriers determine. This
24 Commission specifically found in the TDS order, if I may, that
25 terminating carrier has no control over how a call is sent to

1 its network and thus should not be required to bear the cost of
2 transporting the call to its network.

3 We respectfully believe that that in many ways sums
4 up this case in a nutshell. This Commission has established
5 fairly clear rules of the road for which carriers pay and which
6 carriers determine how a call should be delivered. And this
7 Commission and commissions throughout the country have found
8 that originating carriers pay and originating carriers,
9 therefore, dictate how those calls should be routed. And we
10 respectfully believe that Level (3) is attempting to dictate to
11 the detriment not only in our opinion of the originating
12 carries, but ultimately in the form of higher prices to those
13 carriers' end users in Florida how they deliver traffic. The
14 reason a rerouting of that traffic would not be appropriate is
15 because it would destroy the benefits that those carriers
16 sought to obtain in the first place by using Neutral Tandem's
17 services.

18 And, Madam Chair, I actually may have misunderstood
19 Commissioner Skop's question. I wasn't sure if he was asking
20 whether the traffic should be rerouted from Neutral Tandem
21 through AT&T or back to AT&T, and I apologize for not --

22 COMMISSIONER SKOP: No, I believe a clarification of
23 the question is the point was made that the incumbent, the
24 ILEC, it's a nuisance for them to provide that tandem
25 switching. If, in fact, Tandem provides a valuable service,

1 then simply why doesn't it fulfill the role that the ILEC
2 doesn't want to do itself?

3 MR. HARRINGTON: I'm sorry, why doesn't the -- Madam
4 Chairman, if I may respond.

5 CHAIRMAN EDGAR: You may.

6 MR. HARRINGTON: And I apologize again. Do you
7 mean -- when you say why doesn't the ILEC fulfill that role?

8 COMMISSIONER SKOP: No, why doesn't Tandem --

9 CHAIRMAN EDGAR: Neutral Tandem.

10 COMMISSIONER SKOP: -- simply provide the services
11 for the ILEC.

12 MR. HARRINGTON: Oh, provide services for the ILEC.

13 COMMISSIONER SKOP: Right.

14 MR. HARRINGTON: And I apologize for not having
15 following that earlier, Madam Chairman. If I may, I think the
16 answer is that Neutral Tandem would be happy to provide tandem
17 services in replacement of the incumbent carriers. But the
18 decision -- from Neutral Tandem's perspective, the key decision
19 from a commercial perspective, from an originating carrier's
20 perspective is what they will do and which carriers they will
21 use. And so we would not suggest that Neutral Tandem should be
22 able to force any carriers to originate traffic through Neutral
23 Tandem. We believe the originating carriers have the choice of
24 how they route that traffic.

25 COMMISSIONER SKOP: Thank you.

1 CHAIRMAN EDGAR: Okay. Mr. Hoffman, as I discussed a
2 few minutes ago, in the interest of trying to give each party
3 the same opportunity, Mr. Hoffman, I'm going to give you five
4 additional minutes to use as you deem most useful. And if from
5 that there are other questions or comments, then you will also
6 be given the opportunity to those, and then we will come it a
7 morning.

8 Mr. Hoffman.

9 MR. HOFFMAN: Thank you, Madam Chairman. I don't
10 think I will take that long.

11 First, the issue of standing. You have heard quite a
12 bit about this morning. Again, our position is that they have
13 got to be a real CLEC that provides the type of services that
14 the legislature requires of a CLEC if it wants to get in the
15 business once it gets its certificate.

16 Now, they gave an explanation that they actually do
17 have standing. It was somewhat circuitous. I just want to
18 read you their response to Level (3)'s motion to dismiss. They
19 say on Page 10, "Level (3) cannot in good faith argue that
20 Neutral Tandem did not allege that it provides, 'local exchange
21 telecommunications services,' when Neutral Tandem has alleged
22 that it is a certified competitive local exchange
23 telecommunications company in Florida. Such an entity by
24 definition provides local exchange telecommunications services,
25 and Neutral Tandem has, in fact, been certified to provide

1 local exchange telecommunications services in Florida."

2 So what is their argument? Their argument is they
3 have a certificate and, therefore, by operation of law they
4 somehow believe they have standing when, in fact, they have not
5 alleged in their petition that they provide basic local
6 telecommunications services.

7 Secondly, Mr. Harrington mentioned the 364.16(2)
8 issue, and how that statute ought to apply. And I just want to
9 come back and emphasize that, as Commissioner Carter said, you
10 know, you can't pick and choose your statutes, and this
11 particular provision, which is on Page 3 of your handout,
12 specifically incorporates the arbitration statute. And no
13 party here disagrees that the state arbitration statute is
14 limited to ILECs and CLECs, CLECs and ILECs, but it is not --
15 does not include CLEC-to-CLEC. So the only way 364.16,
16 Subsection 2 can make any sense and have any consistency would
17 be because it has that fallback arbitration provision is that
18 it requires a CLEC to provide access to its telecommunications
19 services to an ILEC.

20 Finally, the issue of preemption, which Mr.
21 Harrington touched on. On Page 8 of your handout, that's a
22 copy of the pertinent federal law. It says each
23 telecommunications carrier has the duty to interconnect
24 directly or indirectly with the facilities and equipment of
25 other telecommunications carriers. That is what it says. A

1 ruling by this Commission taking away that option and requiring
2 a direct interconnection would expressly conflict with that
3 provision of federal law. So we think that there is a
4 preemption problem.

5 And that concludes my remarks, Madam Chairman. Thank
6 you.

7 CHAIRMAN EDGAR: Thank you.

8 Commissioners, any further comments or questions for
9 Mr. Hoffman?

10 Commissioner Carter.

11 COMMISSIONER CARTER: I just wanted to -- I don't
12 know if it is permitted or not, Madam Chairman, but I just
13 wanted to read a section of statute here, if that's okay.

14 CHAIRMAN EDGAR: You may. Are you reading to me?

15 COMMISSIONER CARTER: I am going to read it into the
16 record is what I want to do.

17 CHAIRMAN EDGAR: You may.

18 COMMISSIONER CARTER: Is that appropriate?

19 CHAIRMAN EDGAR: You may.

20 COMMISSIONER CARTER: Section 364.337, and it's under
21 the heading competitive local exchange telecommunications
22 companies, interstate interexchange telecommunications company
23 services certification. It says under Paren 1, "A competitive
24 local exchange telecommunications company may not offer basic
25 telecommunications services within the territory of another

1 one." But it then goes on, and in Paren 2 it says, "The basic
2 local telecommunications services provided by a competitive
3 local exchange telecommunications company must include access
4 to operator services, 911 services, and relay services for the
5 hearing impaired." And it goes further on to say other kinds
6 of things, but -- excuse me, Madam Chairman, but I come right
7 back to the same perspective is CLEC-to-CLEC is not within the
8 confines of what we should be dealing with here.

9 This matter, in reading the statute, is ILEC-to-CLEC,
10 and that is because the problems were the ILECs were in a
11 superior position to preclude the CLECs from participating in
12 the exchange, and that was the whole perspective in the
13 legislature opening this process up. It is not to where a CLEC
14 can go and say, well, I see nobody is really zeroing in on this
15 little piece of services for one of the phone companies. What
16 the legislature created was an opportunity for people to have
17 phone services, for individuals to have competition in phone
18 service, so I don't have to have this company or that company.

19 The legislature didn't set this statute up so that
20 companies that provide services to phone companies can cherry
21 pick whatever business processes that they want to provide
22 services to and use their terminology -- anyway it just seems
23 to me, Madam Chairman, that I have listened to the issues,
24 jurisdiction, standing for relief, direct interconnection
25 required, and I have heard nothing to cause me to disagree with

1 the perspective that we are kind of whistling past the
2 graveyard on this one.

3 CHAIRMAN EDGAR: Thank you, Commissioner.

4 I note that we are not scheduled for a bench decision
5 on this one, but that we will have -- the transcript will be
6 coming to us -- my date show the 25th through the 28th.

7 MR. TEITZMAN: That's correct.

8 CHAIRMAN EDGAR: Okay. The staff recommendation is
9 scheduled for June 7th, and we are scheduled as of now for that
10 recommendation to be discussed and considered by this full
11 Commission on June 19th.

12 Mr. Teitzman, any other matters?

13 MR. TEITZMAN: I believe we may conclude.

14 CHAIRMAN EDGAR: Any other matters?

15 Seeing none. All right. Thank you to the parties.
16 Thank you for the robust argument and discussion. Thank you to
17 our staff. And we are adjourned for the morning.

18 MR. HOFFMAN: Thank you, Commissioners.

19 MS. KEATING: Thank you, Madam Chair, Commissioners.

20 (The oral argument concluded at 11:22 a.m.)

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

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5 I, JANE FAUROT, RPR, Chief, Hearing Reporter Services
6 Section, FPSC Division of Commission Clerk, do hereby certify
7 that the foregoing proceeding was heard at the time and place
8 herein stated.

9 IT IS FURTHER CERTIFIED that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript constitutes a true transcription of my notes of said
13 proceedings.

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a relative
16 or employee of any of the parties' attorney or counsel
17 connected with the action, nor am I financially interested in
18 the action.

19 DATED THIS 25th day of May, 2007.

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JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732

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