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May 17, 2007

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

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

Dear Ms. Cole:

Enclosed for filing on behalf of Neutral Tandem, Inc., please find the original and 15 copies of Neutral Tandem, Inc.'s Brief Regarding Issues 1 – 3a, filed in accordance with Order No. PSC-07-0392-PCO-TX.

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

Sincerely,

Beth Keating

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 070127-TX

Filed: May 17, 2007

NEUTRAL TANDEM'S
BRIEF REGARDING ISSUES 1-3a
ON THE PROPOSED ISSUES LIST

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FPSC-COMMISSION CLERK

Pursuant to the May 3, 2007 First Order on Procedure (“Order”), petitioner Neutral Tandem, Inc. (“Neutral Tandem”) respectfully submits its brief addressing Issues 1-3a on the Proposed Issues List.

INTRODUCTION

Issues 1-3a present three questions: (1) whether, and upon what basis, the Commission has jurisdiction over Neutral Tandem’s Petition; (2) whether Neutral Tandem has standing to seek relief under Sections 364.16 and 364.162, Florida Statutes; and (3) whether the Commission can require direct interconnection between Level 3 and Neutral Tandem, for the purpose of allowing Neutral Tandem to deliver traffic from carriers that have chosen to use Neutral Tandem’s tandem transit services to deliver their originating traffic to end-users served by Level 3. Black-letter Florida law dictates that the Commission should answer each of these questions in the affirmative.

First, Section 364.16(2), Florida Statutes, provides this Commission with clear jurisdiction over Neutral Tandem’s Petition. Section 364.16(2) specifically requires competitive carriers such as Level 3 to provide “access to, and interconnection with, its telecommunications services to **any other provider** of local exchange telecommunications services requesting such access and interconnection on nondiscriminatory prices, terms, and conditions.” Section 364.16(2) further provides that, if competitive carriers are unable to “negotiate mutually acceptable prices, terms, and conditions” for interconnection, this Commission *shall* “make a determination after proceeding as required by s 364.162(2) pertaining to interconnection services.” In turn, Section 364.162(2) requires the Commission to “set nondiscriminatory rates, terms, and conditions” for interconnection within 120 days after a carrier files an interconnection petition.

This Commission already has found, in the *TDS Telecom Order*,¹ that it has jurisdiction to address the terms and conditions for interconnection regarding transiting services. Although Level 3 tries to distinguish the *TDS Telecom Order* on the ground that the transiting services at issue there were provided by ILECs, Level 3's own witnesses have admitted in other proceedings that the transiting service provided by Neutral Tandem is functionally identical to the ILECs' transiting services. Moreover, the Florida Supreme Court has found, in rejecting arguments made by Level 3 in another proceeding, that this Commission has "authority over the interconnection duties" of competitive carriers in Florida.² The plain language of the statute is directly applicable to this matter, and this Commission's jurisdiction over the interconnection issues raised in Neutral Tandem's Petition could not be any clearer under Florida law.

Second, Neutral Tandem plainly has standing to seek relief under Section 364.16(2) and 364.162, Florida Statutes. Neutral Tandem has been a certificated provider of competitive local exchange telecommunications services in Florida since October 2004.³ Section 364.16(2) specifically provides such carriers with standing to invoke the Commission's jurisdiction over interconnection disputes such as this one.

Neutral Tandem also has standing because, absent Commission intervention, Neutral Tandem will suffer significant and immediate harm of the type which Section 364.16(2) is designed to prevent. Neutral Tandem currently provides tandem transit services to 18 different carriers in Florida, and transits more than 500 million minutes of traffic per month in this State. Traffic bound for Level 3 represents approximately 75 million of that 500 million monthly

¹ See *In re Joint Petition by TDS Telecomm.*, Docket Nos. 050119-TP, 050125-TP; Order No. PSC-06-0776-FOF-TP, 2006 Fla. PUC LEXIS 543, at *36-37 (Sept. 18, 2006) ("*TDS Telecom Order*").

² *Level 3 v. Jacobs*, 841 So.2d 447, 454 (Fla. 2003).

³ *Application for certificate to provide competitive local exchange telecommunications service by Neutral Tandem-Florida, LLC*, order granting certification to provide CLEC service, Docket No. 040831; Order No. 11298 (Oct. 20, 2004).

minutes. Absent intervention by the Commission, Neutral Tandem will be unable to interconnect with Level 3 to deliver those 75 million of minutes of traffic per month after June 25, 2007. Given that Sections 364.16(2) and 364.162 specifically require interconnection on nondiscriminatory terms and conditions, the harm Neutral Tandem faces is precisely the type of harm which those provisions are designed to address.

Third, this Commission can establish nondiscriminatory terms and conditions for direct interconnection between Neutral Tandem and Level 3. In addition to Section 364.16(2), this Commission has the authority to require direct interconnection pursuant to its broad authority to regulate local telecommunications services in Florida in a manner designed to promote competition and consumer choice. Moreover, contrary to Level 3's claims in its Motion to Dismiss, nothing in the federal Telecommunications Act of 1996 ("1996 Act") prevents the Commission from ordering direct interconnection for the delivery of transited traffic. Indeed, Level 3 itself has argued that requiring direct interconnection for the purpose of receiving transited traffic is entirely consistent with the 1996 Act.⁴

Finally, the Order noted that, if the Commission finds that it should address the merits of Neutral Tandem's Petition, "it may be necessary at that time to revisit whether an Order requiring Level 3 not to disconnect the parties' existing interconnections is appropriate pending the Commission's final resolution of the factual and policy issues."⁵ Neutral Tandem respectfully submits that the Commission should order Level 3 not to disconnect the parties' existing interconnections pending final resolution of Neutral Tandem's Petition. It is undisputed that Level 3 will not receive additional payments if the ILECs begin transiting the traffic

⁴See *Reply Comments of the Missoula Plan Supporters in Support of the Missoula Plan*, at 22, CC Docket No. 01-92 (Feb. 1, 2007). Neutral Tandem is aware that this Commission filed comments opposing the Missoula Plan, but does not interpret the Commission's FCC comments as taking a contrary position.

⁵ Order, at 2.

currently being delivered to Level 3's network through Neutral Tandem. Thus, Level 3 is not foregoing any revenue as a result of maintaining the interconnections with Neutral Tandem. In addition, Neutral Tandem has committed to make the terms and conditions for interconnection established by this Commission applicable on a retroactive basis to June 25, 2007.

Thus, Level 3 will suffer no harm whatsoever by maintaining the parties' existing interconnections until the Commission issues a final decision on Neutral Tandem's Petition. By contrast, allowing Level 3 to disconnect the parties' existing interconnections, only to have those interconnections reestablished if and when the Commission grants Neutral Tandem's Petition on the merits, would harm not only Neutral Tandem, but also the carriers that have chosen to utilize Neutral Tandem to deliver their originated traffic to Level 3.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION OVER THE TERMS AND CONDITIONS OF INTERCONNECTION BETWEEN NEUTRAL TANDEM AND LEVEL 3 PURSUANT TO SECTION 364.16(2), FLORIDA STATUTES.

As discussed in Neutral Tandem's Petition, this Commission has jurisdiction over Neutral Tandem's Petition, pursuant to its authority under FL. STAT. ANN. § 364.16(2) to require competitive local exchange carriers such as Level 3 to interconnect on "nondiscriminatory rates, terms and conditions." (Pet., at 3-4, 9-15.) Moreover, contrary to Level 3's claim, the relief sought in Neutral Tandem's Petition would not undermine commercial negotiations between non-incumbent carriers. Finally, the Commission should be mindful that Level 3's restrictive view of the Commission's jurisdiction over interconnection between non-incumbent carriers could severely restrict the Commission's oversight of the PSTN.

A. The Commission’s Authority to Address Neutral Tandem’s Petition is Grounded in Florida Statutes, this Commission’s Prior Orders, and Applicable Precedent from the Florida Supreme Court.

This Commission’s statutory authority to address the terms and conditions of interconnection between Level 3 and Neutral Tandem could not be clearer. Section 364.16(2) requires every “competitive local telecommunications company,” including Level 3, to “provide access to, *and interconnection with*, its telecommunications services” to any other local carrier that requests interconnection, “at nondiscriminatory prices, terms, and conditions.” Section 364.16(2) requires the carriers to attempt to arrive at the terms and conditions of interconnection through negotiation in the first instance. However, it also allows “either party” to petition the Commission if the parties cannot reach terms and conditions through negotiation, and it requires the Commission to “make a determination after proceeding as required by s. 364.162(2) pertaining to interconnection services.” In turn, Section 364.162(2) *requires* the Commission to “set nondiscriminatory rates, terms, and conditions” for such interconnection within 120 days.⁶ It is difficult to imagine how the Florida Legislature could have provided a clearer statement of this Commission’s statutory authority to address Neutral Tandem’s Petition.

Indeed, this Commission already has found, in the *TDS Telecom Order*, that Chapter 364 grants it jurisdiction over interconnection for transiting purposes. The Commission found that “[t]ransit service is clearly an interconnection agreement under Section 364.16, Florida

⁶ Level 3 argues that Neutral Tandem cannot “bring an action to compel interconnection under Section 364.162,” because Neutral Tandem and Level 3 are not incumbent local carriers. (Mot. to Dismiss, at 10.) Neutral Tandem has never claimed that Section 364.162 provided the interconnection obligation applicable to Level 3. Rather, as Neutral Tandem has noted, Section 364.16(2) explicitly adopts certain aspects Section 364.162(2), which is why Neutral Tandem has cited Section 364.162 in its Petition.

Statutes.”⁷ Based on that finding, the Commission held that it would “use our authority under state law . . . to require the parties to establish rates, terms, and conditions for transit service[.]”⁸

Level 3 has sought to distinguish the *TDS Telecom Order* by noting that it “arose out of petitions challenging a transit traffic service filed by an ILEC[.]” (Mot. to Dismiss, at 12.) This is a distinction without a difference under Florida law. As noted above, the interconnection obligations of Section 364.16(2) plainly apply to *competitive* local carriers such as Level 3, and the Commission squarely relied on Section 364.16(2) in finding that it had authority to require interconnection for transiting purposes.⁹

Moreover, Level 3’s own witnesses have admitted, in evidentiary hearings held on Neutral Tandem’s similar petitions in other states, that the transiting service provided by Neutral Tandem is functionally indistinguishable from the transiting services provided by ILECs such as BellSouth.¹⁰ Thus, there is no principled basis for Level 3 to claim that the Commission’s finding that transiting service “is clearly an interconnection arrangement under Section 364.16, Florida Statutes,” does not apply equally to the transiting services provided by Neutral Tandem.

Level 3 also has noted that, in the *TDS Telecom Order*, the Commission left the establishment of specific terms and conditions of interconnection for transiting to negotiation in the first instance. (Mot. to Dismiss, at 12.) However, as Level 3 has conceded, the Commission found that “in the event negotiations failed,” the terms of interconnection “would be established

⁷ *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *22.

⁸ *Id.* at *21.

⁹ *Id.*

¹⁰ See Docket No. 24844-U, *In re Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Commc’ns*, Ga. Pub. Serv. Comm’n, Tr. of 05/03/07 Evidentiary Hearing at 275, 285-86 (“Ga Tr.”); Docket No. 07-02-29, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc’ns*, Conn. Dep’t of Pub. Util. Control, Tr. of 05/07/07 Evidentiary Hearing at 227-28 (“Conn. Tr.”).

by the Commission.” (*Id.*)¹¹ That is exactly what has happened in this case -- Neutral Tandem and Level 3 have been unable to arrive at terms and conditions for interconnection through negotiation. This Commission therefore can, and should, establish those terms and conditions based upon Neutral Tandem’s Petition.

Finally, Level 3 has asserted that the Commission lacks jurisdiction to order interconnection because neither Neutral Tandem nor Level 3 is an incumbent carrier. (Mot. to Dismiss, at 10, 16.) That assertion is contrary to Florida Supreme Court precedent. In *Level 3 v. Jacobs*, the Florida Supreme Court rejected a similar challenge by Level 3 to this Commission’s jurisdiction.¹² As it has done here, Level 3 had made a sweeping argument aimed at severely limiting this Commission’s jurisdiction; namely that the Commission lacks jurisdiction over any services that do “not involve the provision of basic local telecommunications service.”¹³

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

As described above, the Commission retains authority over a wide variety of activities of all local telecommunications providers in Florida, including the interconnection duties of both ILECs and [competitive carriers] and the means and manner of interconnection. Interconnection is a fundamental duty of all local telecommunications providers in both Florida law and Federal Law.¹⁴

The Florida Supreme Court agreed with the Commission and rejected Level 3’s jurisdictional attack. The Supreme Court found that “Level 3’s argument that the PSC has

¹¹ *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *21.

¹² *Level 3*, 841 So.2d at 450-54.

¹³ *Id.* at 453.

¹⁴ Amended Answer Brief of the Florida Public Service Commission, *Level 3 v. Jacobs*, No. SC01-2050, at 19 (Fla. Dec. 27, 2001).

limited authority over [competitive local carriers] ignores the numerous statutes which give the PSC authority over a variety of activities of all local telecommunications providers.”¹⁵ The Supreme Court specifically determined that Chapter 364 “gives the PSC authority over interconnection duties of both ILECs and [competitive local carriers].”¹⁶ The Supreme Court’s decision in *Level 3* underscores the breadth of this Commission’s jurisdiction over the interconnection duties of competitive carriers such as Level 3.

B. Granting The Relief Sought In Neutral Tandem’s Petition Would Not Supplant Commercial Negotiations.

Unable to find support in Florida law for its restrictive view of this Commission’s jurisdiction, Level 3 instead has raised the specter that Neutral Tandem’s Petition would supplant commercial negotiations between competitive carriers, and result in a flood of interconnection arbitrations being brought before the Commission. (Mot. to Dismiss, at 15-16.) Level 3 is wrong for several reasons.

First, Level 3’s position mischaracterizes or misinterprets Neutral Tandem’s Petition and the relief Neutral Tandem seeks. Neutral Tandem does not seek this Commission’s involvement in the imposition of a commercial contract between the parties. Neutral Tandem has made clear that it is *not* asking this Commission to require Level 3 to become a customer of Neutral Tandem’s tandem transit service, to originate any traffic through Neutral Tandem, or to pay Neutral Tandem a dime. (Pet., at 14.) All Neutral Tandem seeks is enforcement of Level 3’s interconnection obligations under Florida law to *receive* traffic that other carriers have chosen to

¹⁵ *Level 3*, 841 So.2d at 454.

¹⁶ *Id.*; see also *Fla. Pub. Telecomm. Ass’n v. City of Miami Beach*, 321 F.3d 1046, 1049-50 (11th Cir. 2003) (holding that “[t]he language of the statute leaves no doubt about the broad and exclusive powers granted to the FPSC to regulate telecommunications companies including their services and facilities” and finding it “unpersuasive to argue that the Florida Legislature should have itemized the powers of the FPSC when it gave it such broad and exclusive authority over telecommunications companies.”).

deliver to Level 3 through Neutral Tandem and to do so on a non-discriminatory basis.¹⁷ Neutral Tandem also orders, monitors, maintains, and pays for 100% of the transport facilities used to deliver the traffic to Level 3's network, and given that Neutral Tandem is delivering 75 million minutes of traffic to Level 3 per month, there plainly is sufficient traffic to justify direct interconnection. Neutral Tandem is unaware of *any* other carrier in Florida that would seek interconnection with Level 3, or with any other carrier in Florida, solely for the purpose of delivering transited traffic.

Second, Level 3's assertion that granting Neutral Tandem's Petition would usurp commercial negotiations between competitive carriers is a red herring. With almost no exception, Neutral Tandem has been able to arrive at interconnection arrangements through negotiation with every other carrier with which it has sought interconnection in Florida. It is only because of Level 3's refusal to acknowledge the applicability of this Commission's adoption of the well-established principle that terminating carriers should seek recovery of their termination costs from *originating* carriers, rather than transiting carriers,¹⁸ that Commission intervention is necessary in this matter.

Specifically, facts developed in hearings on Neutral Tandem's petitions in other states underscore the fundamentally unfair and self-serving nature of Level 3's position. Level 3 has admitted in other states that it already recovers reciprocal compensation payments from originating carriers for some of the traffic transited to Level 3's network by Neutral Tandem.¹⁹

¹⁷ Thus, the Supreme Court case on which Level 3 has relied is inapposite, as in that case the court merely held that the Commission lacked authority to modify certain private contractual agreements. *United Tel. Co. of Fla. v. Pub. Serv. Comm'n*, 496 So.2d 116 (Fla. 1986). (Mot. to Dismiss, at 11.) Neutral Tandem's Petition does not seek modification or imposition of any private contractual arrangements.

¹⁸ *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *35-*45.

¹⁹ Conn. Tr., at 42-43; *In re Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Commc'ns*, Tr. of 4/12/07 Evidentiary Hearing, at 184, 193 ("N.Y. Tr.").

Thus, not only are Level 3's attempts to recover additional reciprocal compensation payments from Neutral Tandem contrary to well-established compensation principles, they amount to an improper attempt to obtain double recovery for terminating the same traffic.

Although Level 3 has claimed that it receives reciprocal compensation payments from originating carriers for only a small percentage of transited traffic, a Level 3 Senior Vice President has admitted that Level 3 would still seek to obtain compensation from Neutral Tandem, even if Level 3 already received reciprocal compensation from originating carriers for 100% of the transit traffic delivered by Neutral Tandem.²⁰ Moreover, Level 3's own witnesses have acknowledged that Level 3 has not even bothered to seek reciprocal compensation payments from certain originating carriers, alternatively explaining that Level 3 has not done so because it would be "hard," or "not worth their [Level 3's] time."²¹

Level 3's position is tantamount to an attempt to read a new right into Section 364.16(2); namely that terminating carriers can dictate how calls are routed. Level 3's preferred policy outcome clashes with well-established intercarrier compensation principles. As noted by this Commission in the *TDS Telecom Order*, originating carriers bear the cost to deliver traffic, and terminating carriers are entitled to recover the costs they incur to terminate traffic originated on the networks of other carriers.²² If Level 3's view that all terminating carriers could choose how to receive traffic were to prevail, terminating carriers could force originating carriers to bear the cost of inefficient interconnection arrangements, and originating carriers would have no recourse for recovering the cost of those inefficiencies other than to raise their end-user retail rates. Because originating carriers bear the cost to transport and terminate traffic, and also must

²⁰ Conn. Tr., at 45-46.

²¹ N.Y. Tr., at 245-46; Ga. Tr., at 293.

²² *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *24.

consider redundancy and reliability factors, they should be allowed to choose the methods through which their traffic will be terminated, including through the transit carrier of their choice.²³ Under Level 3's theory, it could even force originating carriers to use Level 3's own services to transport traffic to Level 3, irrespective of cost. Level 3 should not be allowed to deprive originating carriers of their preferred method of transporting their traffic to Level 3.²⁴

Level 3's position is all the more egregious given Level 3's admission that, if it gets its wish and the originating carriers are forced to deliver transit traffic through ILECs instead of Neutral Tandem, Level 3 still will not receive any compensation from the ILECs for that traffic. In other words, given that Level 3 will not receive compensation from the ILECs, and Neutral Tandem (unlike the ILECs) pays 100% of the cost to transport traffic to Level 3's network, receiving transited traffic from Neutral Tandem actually benefits Level 3 financially.

Finally, Level 3's suggestion that "neither Level 3 nor Neutral Tandem possess market power" is inapt. (Mot. to Dismiss, at 7). To the contrary, the FCC has found that non-incumbent carriers can wield market power in terms of unreasonably leveraging access to their end-user customers. For example, in the access charge context, the FCC found that, because CLECs controlled access to their end-user customers, regulation was necessary to "prevent CLECs from exploiting the market power in the rates that they tariff for switched access services."²⁵ Level 3

²³ Indeed, Level 3 advocated to the FCC in support of the Missoula Plan that "[I]t is always the option of the carrier with the financial duty for transport [*i.e.*, the originating carrier] to choose how to transport its traffic to the terminating carrier's [network]: direct interconnection to the [network] via its own facilities, use of the terminating carrier's facilities, or via the facilities of a third party." *Reply Comments of the Missoula Plan Supporters in Support of the Missoula Plan*, at 26, CC Docket No. 01-92 (Feb. 1, 2007).

²⁴ To be sure, Level 3 has the right, just like any other carrier, to "choose among transit providers" when it *originates* traffic to be sent to other carriers. But Level 3 certainly does not have the right to choose which transit providers other carriers, who have the financial obligation to pay for the termination of their traffic, will use to send traffic to Level 3. Level 3 is seeking to *deny* other originating carriers the same right it claims for itself to "choose among transit providers."

²⁵ *In re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 9923, ¶ 34 (rel. Apr. 27, 2001).

is making a similar attempt to leverage its bottleneck access to its end-user customers to extract inappropriate and unreasonable payments from Neutral Tandem as a transit provider.

C. Level 3's Restrictive Theory of This Commission's Jurisdiction Over Interconnection Between Competitive Carriers Could Significantly Impair the Commission's Authority Over the PSTN.

This Commission should be mindful of the potential implications that granting Level 3's Motion could have on the Commission's ability to oversee the flow of traffic on the PSTN. As noted in Neutral Tandem's Petition, Level 3 has a well-documented history in the internet backbone context of using the blockage of traffic (which Level 3 terms "de-peering") as a negotiating tactic, in order to obtain more favorable terms and conditions of interconnection with other carriers. (Pet., at 19-20.) For example, as Neutral Tandem's Petition demonstrated, Level 3 blocked internet users of Cogent Communications from accessing the internet for three days during October 2005 because of a compensation dispute caused by Level 3's "de-peering" of Cogent. (*Id.*) Even now, Level 3 candidly acknowledges that it views blocking traffic as "a critical part of the negotiating toolkit[.]" (Mot. to Dismiss, at 7.)

As such, this Commission should be especially wary of Level 3's attempts to unduly circumscribe the Commission's authority to regulate the terms and conditions of interconnection between carriers within Florida simply because they are not incumbent LECs. As the FCC has noted, tactics like those employed by Level 3 in the internet context have no place in the PSTN: "If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through."²⁶

The interconnection issues presented in Neutral Tandem's Petition deal directly with traffic traversing the PSTN which falls directly within the Commission's jurisdiction and within

²⁶ *In re Access Charge Reform*, 16 F.C.C.R. 9923, ¶ 24.

the Commission's plenary authority over the integrity of the telecommunications delivery system. Given that more than half of all local traffic is now originated by non-incumbent carriers, the importance of transiting to the smooth flow of traffic on the PSTN is growing. This Commission should reject Level 3's attempt to restrict its regulatory oversight of the PSTN.

II. NEUTRAL TANDEM HAS STANDING TO SEEK RELIEF UNDER SECTION 364.16, FLORIDA STATUTES.

Under Florida law, a party can establish its standing to seek relief under a statutory provision in one of two ways. First, the party can demonstrate that the statute itself has conferred the party with standing to seek relief.²⁷ Second, even if a statute has not expressly conferred standing, the party can demonstrate that it will suffer direct injury unless it is allowed to seek relief under the statute, and that the harm to be suffered is of the type that the statute was intended to address.²⁸ Neutral Tandem satisfies both of these standards.

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

The plain language of Section 364.16(2) confers standing on Neutral Tandem to seek the relief sought in the Petition. As noted above, Section 364.16(2) requires Level 3 to provide "access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions." Section 364.16(2) further provides that, if the parties are "unable to negotiate mutually acceptable prices, terms, and conditions," then "either party may petition" the Commission to establish nondiscriminatory prices, terms, and conditions for interconnection.

²⁷ See *Maverick Media Group, Inc. v. Fla. Dep't of Transp.*, 791 So.2d 491, 492-93 (1st Dist. 2001).

²⁸ See *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478, 482 (1st Dist. 1981); *Ybor III, Ltd. v. Fla. Hous. Fin. Corp.*, 843 So.2d 344, 346 (1st Dist. 2003).

This section plainly confers standing on any “provider of local exchange telecommunications services” both to seek interconnection, and to petition the Commission to establish the terms of interconnection if they cannot arrive at mutually agreeable terms and conditions through negotiation. Neutral Tandem’s Petition demonstrated that it “is a registered competitive local exchange telecommunications company within the State of Florida.” (Pet., at 2.) This Commission specifically has certified Neutral Tandem “to provide Competitive Local Exchange Telecommunications Services” in Florida.²⁹ Neutral Tandem is a certificated provider of local exchange telecommunications services, and thus has standing to petition the Commission to establish terms and conditions for interconnection with Level 3.

Level 3 has claimed that Neutral Tandem “failed to allege” that it provides “local exchange telecommunications services.” Level 3 is wrong. Level 3 has asserted that “local exchange telecommunications services” is synonymous with another statutory term, “basic local telecommunications services,” but that claim lacks any statutory support and does not comport with a “plain language” reading. As Level 3 acknowledges, “the term ‘local exchange telecommunications services’ is not defined in Chapter 364.” (Mot. to Dismiss, at 9.) Moreover, nothing in the plain language of Chapter 364 indicates that the terms “basic local telecommunications services” and “local exchange telecommunications services” share a common meaning.³⁰ To the contrary, the Florida legislature’s election to “use different words” within Chapter 364 “is strong evidence that different meanings were intended.”³¹

²⁹ See n.3, *supra*.

³⁰ In its March 26, 2007 letter to the Commission, Level 3 cited, in support of its definition of “local exchange telecommunications services,” statutory provisions and administrative rules that do not contain that phrase. The provisions relied on, Section 364.337 and Rules 25-24.830 and 25-24.840, have no bearing on the merits of this dispute. No support exists for Level 3’s position, and Level 3 cites none. In fact, if anything, Section 364.337(5) seems to bifurcate the definition of “basic local exchange telecommunications service” so that a different definition applies in the competitive arena. As set forth in that section, the Commission has continuing regulatory oversight over “basic local exchange telecommunications service” provided by both

Moreover, this Commission already has found that transiting services should be categorized as “an interconnection arrangement under Section 364.16, Florida Statutes.”³² This Commission’s finding is consistent with the Legislature’s determination that the term “service” should “be construed in its broadest and most inclusive sense.”³³ Indeed, as noted by the Florida Supreme Court, “while the statute at issue in the instant case is not a paragon of clarity with regard to precisely describing operative service categories, it certainly is clear that the Legislature intended to draft the definition of ‘service’ contained in section 364.02(11) extremely broadly.”³⁴ Transiting services, such as those provided by Neutral Tandem, clearly are “local exchange telecommunication services” under Florida law. The traffic Neutral Tandem carries consists entirely of local calls. Neutral Tandem therefore has standing to seek relief under Section 364.16(2) under the express terms of the statute.

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

Neutral Tandem also has standing to pursue its Petition because its substantial and direct interests are at issue here. If Level 3 is allowed to follow-through on its threat to disconnect the parties’ existing interconnections and stop accepting transited traffic from Neutral Tandem, Neutral Tandem “will suffer injury in fact that is of sufficient immediacy to entitle [it] to a

CLECS *and* *AAVs*, which, based on the definition of an *AAV*, by necessity broadens the definition of “basic local exchange telecommunications service” provided by competitive carriers to include non-switched service, including point-to-point, private line service. In other words, in the competitive context, “basic local exchange telecommunications service” is something less than the service contemplated by the definition of “basic local telecommunications service” found in Section 364.02(1).

³¹ *Maddox v. State of Fla.*, 923 So.2d 442, 446 (Fla. 2006).

³² *TDS Telecom Order*, 2006 Fla. PUC LEXIS 543, at *22-*24.

³³ FLA. STAT. ANN. § 364.02(11).

³⁴ *BellSouth Telecomm., Inc. v. Jacobs*, 834 So.2d 855, 859 (Fla. 2002).

section 120.57 hearing,” and its “substantial injury is of a type or nature that the proceeding is designed to protect.”³⁵

At the outset, it is clear that Level 3’s actions will cause Neutral Tandem substantial and immediate injury in fact, including: (1) the loss of direct interconnection with Level 3; (2) immediate and substantial economic loss and harm to its reputation when customers are required to re-route traffic through the ILEC tandems; (3) immediate impairment of Neutral Tandem’s ability to provide tandem transit services for calls to Level 3’s network and to provide competitive alternatives to the ILECs’ transit services; and (4) harm to Neutral Tandem’s ability to expand its presence in the Florida market, and even its ability to continue providing tandem transit services.³⁶ These immediate and direct injuries more than meet the standard required to establish standing.³⁷ These harms are defined and assured consequences to Neutral Tandem if Level 3 prevails in this matter. As such, these injuries amount to much more than speculative or perceived future economic harm.³⁸

Neutral Tandem’s asserted injuries also are of the type Chapter 364 was designed to protect. As noted above, the very point of Section 364.16(2) is to prevent competitive carriers from discriminating with respect to the terms and conditions for interconnection they offer to other competitive providers. Chapter 364, Florida Statutes, was “designed to facilitate competition,”³⁹ and the harm to the competitive market for tandem transit services that will result

³⁵ See, e.g. *Ybor III, Ltd.*, 843 So.2d at 346.

³⁶ See Saboo Testimony, at 15.

³⁷ See *In re Petition by Verizon Fla. Inc. to Reform Intrastate Network Access and Basic Local Telecomm. Rates*, Order Granting Intervention, Docket Nos. 030868-TL, 030961-TI; Order No. PSC-03-1325, at 3-5 (November 19, 2003) (“*Petition by Verizon Fla Inc.*”); *In re: Application for Certificate to Provide Alt. Local Exch. Telecomm. Serv. by BellSouth BSE, Inc.*, Order Denying Motion to Dismiss, Docket No. 971056-TX; Order No. PSC-98-0562, at 4 (April 22, 1998).

³⁸ Cf. *Ameristeel Corp. v. Clark*, 691 So.2d 473, 477-78 (Fla. 1997).

³⁹ See *Petition by Verizon Fla. Inc.*, Docket Nos. 030868-TL, 030961-TI, Order No. PSC-03-1325, at 5.

from Level 3's discriminatory actions are the type of harm the statute was designed to address. Furthermore, it is clear that the Legislature considered the ongoing applicability of Section 364.16 to competitive carriers to be a matter of significant concern, as demonstrated by Section 364.337(2), Florida Statutes, wherein the Legislature expressly stated that competitive carriers may **not** seek a waiver of Section 364.16.

III. THE COMMISSION CAN REQUIRE DIRECT INTERCONNECTION BETWEEN LEVEL 3 AND NEUTRAL TANDEM FOR THE DELIVERY OF TANDEM TRANSIT TRAFFIC.

Neutral Tandem already has discussed how Section 364.16(2) provides the Commission with ample jurisdiction to consider Neutral Tandem's Petition. In addition to Section 364.16(2), the Commission also has authority to order direct interconnection pursuant to the Commission's broad statutory authority over telecommunications services in Florida, and its statutory mandate to exercise that authority in a manner designed to promote competition and network investment. Contrary to Level 3's claim, this Commission's authority to order direct interconnection is not pre-empted by Section 251(a) of the 1996 Act.

A. The Commission Has Authority to Require Direct Interconnection For the Delivery of Transited Traffic in Order to Promote Competition and Network Diversity Within the State of Florida.

In addition to the Commission's broad authority under Section 364.16(2), the Commission has independent authority to require direct interconnection between Level 3 and Neutral Tandem pursuant to Section 364.01, Florida Statutes.⁴⁰ Section 364.01 gives this Commission "broad regulatory powers over the telecommunications industry."⁴¹ Under Section 364.01, the Commission has been charged by the Legislature to exercise its "exclusive

⁴⁰ See, e.g. *Fla. Interexchange Carriers Ass'n v. Beard*, 624 So.2d 248, 251 (Fla. 1992).

⁴¹ *Level 3*, 841 So.2d at 450-54. See also *Fla. Pub. Telecomm. Ass'n v. City of Miami Beach*, 321 F.3d 1046, 1049-50 (11th Cir. 2003) ("[t]he language of [Section 364.01] leaves no doubt about the broad and exclusive powers granted to the FPSC to regulate telecommunications companies.")

jurisdiction” over telecommunications companies to “encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.”⁴² The Commission has the power and the duty to “[p]romote competition by encouraging innovation and investment in telecommunications markets” and “ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior.”⁴³ Notably, the matters at issue in this case are not among those identified in Section 364.011, Florida Statutes, as exempt from Commission oversight.

As discussed in more detail in Neutral Tandem’s Petition, Neutral Tandem’s tandem transit service provides carriers with a competitive alternative, resulting in more efficient and cost-effective delivery of traffic for those carriers. In a competitive telecommunications market, lower transiting costs for those carriers inherently will lead to savings for end-users in Florida.

Neutral Tandem’s services also build necessary redundancy into the telecommunications sector and infrastructure, which in turn enhances homeland security and disaster recovery. (Pet, at 10-11.) Indeed, as noted by the FCC, the impact of Hurricane Katrina illustrated the importance of building network redundancy in tandem switches as “*Katrina highlighted the need for diversity of call routing and avoiding strict reliance upon a single routing solution.*”⁴⁴ It is squarely within the power and the duty of this Commission to determine that Level 3 is required

⁴² Fla. Stat. Ann. § 364.01(4)(e).

⁴³ Fla. Stat. Ann. § 364.01(4)(d),(g).

⁴⁴ *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks Effect of Hurricane Katrina on Various Types of Communications Networks*, FCC Docket No. 06-83, at 9 (2006) (emphasis added).

to interconnect directly with Neutral Tandem for the limited purpose of receiving transited traffic to promote redundancy, competition, and efficiency in the Florida telecommunications market.⁴⁵

Level 3 has claimed in similar proceedings before other state commissions that Level 3 may comply with its obligation to interconnect with Neutral Tandem through indirect physical connection through an ILEC tandem. Level 3's position is the functional equivalent of refusing to interconnect, at least in the context of interconnection with a tandem transit provider like Neutral Tandem. In fact, what Level 3 proposes -- a situation where an originating carrier sends its traffic to one transit provider, who then sends it to another transit provider, and then to the terminating carrier -- is not a recognized form of appropriate interconnection and cannot properly be characterized as satisfying Level 3's interconnection obligations.

Additionally, Level 3's suggested "alternative routing" completely disregards the basic choice being made by Neutral Tandem's customers, i.e., their choice to use an alternative to the ILEC tandem for delivering their transited traffic, thus destroying any redundancy and efficiency the carriers sought to establish for the termination of their traffic to Level 3. The Florida Statutes are clear that the Legislature never intended for the terminating carrier to have this level of control over the routing of a call being terminated to its network. Section 364.30(1), Florida Statutes, which is applicable to "any telecommunications company operating within this state," states that ". . .the company with which the call is initiated shall be the sole judge" regarding the

⁴⁵ Level 3's suggestion that granting the relief sought in Neutral Tandem's Petition would "require arbitrated interconnections between all CLECs in the state of Florida, resulting in substantial additional work for the Commission" is wrong. (Mot. to Dismiss, at 16.) Neutral Tandem provides 100% of the transport cost to deliver traffic to Level 3's network. Where there is limited traffic exchanged between carriers, delivery via a tandem transit provider often makes the most economic sense. Indeed, the availability of Neutral Tandem's alternative tandem transit services likely *reduces* the need for carriers to engage in direct interconnections, since they can obtain transiting services more economically from Neutral Tandem. These considerations eliminate Level 3's professed concern that competitive carriers would seek to establish direct interconnections where they are not warranted.

proper facilities and routing of a call.⁴⁶ Subsection 2 provides that “[a]ny connecting telecommunications company refusing to give and make a connection with the company through which the call was initially placed, over any connecting point not in use, commits violation of this section.”

In practical terms, if Level 3 succeeds, it not only will restrict Neutral Tandem’s ability to interconnect for purposes of terminating traffic, but also will require all carriers that employ Neutral Tandem’s service to go back to the ILEC tandem service and reconfigure their networks in order to terminate traffic to Level 3. In other words, Level 3 will have the ability to drive costs up for other competing carriers, most of whom compete directly with Level 3. Level 3 does not have the right to do this under Florida law.

Clearly, Level 3’s interpretation of the interconnection requirements has a discriminatory impact. If Level 3 prevails, only ILECs will have the right to terminate transit traffic at non-discriminatory rates, terms, and conditions. Consequently, Neutral Tandem’s ability to compete in the market at all, much less effectively, will be directly, immediately, and substantially harmed, because it will be subject to a different standard for interconnection and transiting services than are the ILECs. That harm extends far beyond Neutral Tandem, and encompasses all carriers (and their customers) that use Neutral Tandem’s services.

For all the foregoing reasons, this Commission can and should exercise its broad authority under Florida law to promote tandem transit competition.

B. Direct Interconnection is Consistent with the 1996 Act.

Unable to find support for its restrictive interconnection theory in Florida law, Level 3 has made the sweeping and unfounded assertion that ordering direct interconnection would

⁴⁶ Notably, Section 364.30, Florida Statutes, is not among the list of statutory provisions from which competitive carriers are exempt, as set forth in Section 364.337(2), Florida Statutes.

“violate[] federal law.” (Mot. to Dismiss, at 7, 15.) Level 3 further suggests that the Commission’s acceptance of jurisdiction would be “in contradiction of the expressed intent of the U.S. Congress” because the 1996 Act “does not grant any right to CLEC-CLEC arbitrations under Section 251 and 252.” (*Id.* at 15.) Level 3’s arguments, however, find no support in 47 U.S.C. §§ 251, 252.

First, Level 3’s argument that Section 251(a)(1) preempts state law requiring direct interconnection finds no support in the language of that Section or in the 1996 Act in general. Section 251(a)(1) requires that telecommunications carriers “interconnect, directly or indirectly,” with other carriers’ networks. On its face, Section 251(a)(1) establishes a federal *duty* to interconnect, directly or indirectly, with other carriers. The purpose of Section 251(a)(1) is to ensure that all carriers are interconnected in some manner, and indirect interconnection is the minimum level of interconnection to achieve that objective.⁴⁷

Moreover, Level 3 cites no authority, and Neutral Tandem is aware of no authority, supporting Level 3’s novel attempt to transform the existence of a federal *duty* to interconnect either “directly or indirectly,” into a blanket *right* for Level 3 to refuse direct interconnection under state law in the context of providing transit services. The reason Level 3 cites no such authority is simple: No such authority exists, because that is not what Congress intended when it passed the 1996 Act. To the contrary, when Congress enacted the 1996 Act, “it did not expressly preempt state regulation of interconnection.”⁴⁸ Congress made clear that the 1996 Act was not to be construed to have preemptive effect unless that preemption was express:

⁴⁷ See, e.g., *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499, ¶ 997 (rel. Aug. 8, 1996).

⁴⁸ *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003).

This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.⁴⁹

Level 3's preemption argument also is irreconcilable with arguments Level 3 itself made to the FCC less than two months ago. In its reply brief at the FCC in support of the Missoula Plan, Level 3 noted that one key component of the Missoula Plan is its "affirmative obligation for *all* carriers to accept direct interconnection," which Level 3 described as "not only entirely consistent with applicable law, but fair and efficient for all carriers."⁵⁰

Second, Level 3's argument that Sections 251 and 252 of the 1996 Act preempt the Commission from addressing interconnection between non-ILECs is contradictory on its face and finds no support in the 1996 Act. As Level 3 admits, the point of the 1996 Act's interconnection agreement process was to establish a process for interconnection between incumbents and competitive carriers, not between and among competitive carriers. (Mot. to Dismiss, at 15.) Nothing in the 1996 Act provides that the negotiation or arbitration provisions of the Act relating to interconnection apply to requests for interconnection between two non-incumbent competitive carriers, because that Act was designed to address a specific federal concern – the facilitation of competition in a market otherwise dominated by incumbent providers capable of exercising overwhelming monopoly market power. The 1996 Act does not, however, preclude the application by state legislatures of interconnection requirements between and among competitive carriers.

Case law is clear that federal law only preempts state law in three situations: (1) express preemption, which is evidenced by express language revealing congressional intent to preempt

⁴⁹ 1996 Act § 601(c), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152); *see also Mich. Bell*, 323 F.3d at 358.

⁵⁰ *See* n.4, *supra* (emphasis in original).

state law; (2) field preemption, which occurs when the federal regulatory requirements are so pervasive as to leave no room for state law; and (3) conflict preemption, which occurs when implementation of the state law would thwart the full accomplishment of congressional objectives.⁵¹ Again, nothing in the 1996 Act expressly preempts the states' ability to address interconnection rights between competitive carriers. Likewise, the regulatory field of operation covered by the 1996 Act certainly leaves room for states to address competitive carriers' interconnection obligations, and implementation and enforcement of Florida's state law authority over competitive carrier interconnection obligations does not conflict with or impair the enforcement of federal interconnection obligations applicable to incumbents.

Nonetheless, Level 3 inexplicably claims that, even though the 1996 Act does not address interconnection between competitive carriers, it nonetheless preempts the Commission's authority to do so. Level 3's attempt to impute preemptive force to the 1996 Act's silence is contrary to Congress' clear directive that the 1996 Act does not preempt state law except where "expressly so provided." In brief, the Commission's authority to require direct and non-discriminatory interconnection between Level 3 and Neutral Tandem is in no way inconsistent with, or preempted by, the Act.

IV. THE COMMISSION SHOULD ENTER AN ORDER REQUIRING LEVEL 3 TO MAINTAIN THE PARTIES' EXISTING INTERCONNECTION PENDING FINAL RESOLUTION OF THE MERITS OF NEUTRAL TANDEM'S PETITION.

The May 3 Order noted that, if the Commission addresses Neutral Tandem's Petition on the merits, it may be "necessary to revisit whether an Order requiring Level 3 not to disconnect the parties' existing interconnection is appropriate." (Order, at 3.) Neutral Tandem respectfully requests that the Commission order Level 3 to maintain the parties' existing interconnections

⁵¹ See *Southwestern Bell Wireless, Inc. v. Johnson County*, 199 F. 3d 1185, 1190 (10th Cir. 1999).

pending resolution of Neutral Tandem's Petition on the merits. Such an order is appropriate for two fundamental reasons.

First, maintaining the existing interconnections would not cause Level 3 any harm whatsoever. Level 3 has admitted in several other proceedings that, if the ILECs begin transiting traffic to Level 3 that currently is being delivered through Neutral Tandem, the ILECs will not pay Level 3 any compensation for delivering that traffic.⁵² Thus, Level 3 is not foregoing any revenue opportunities by continuing to receive the traffic from Neutral Tandem while the Petition is pending. Neutral Tandem also pays for 100% of the costs of the interconnection facilities to Level 3, and provides Level 3 with all billing records required for Level 3 to bill the third party originating carriers.

Second, as discussed in more detail in Neutral Tandem's Petition, allowing Level 3 to discontinue the parties' existing interconnections while Neutral Tandem's Petition is pending would cause direct and substantial harm to Neutral Tandem's business reputation and customer relationships. (Pet., at 18-19.) It also would force the carriers that utilize Neutral Tandem's services to incur the expense and inconvenience of discontinuing those services. That essentially would effectuate the relief Level 3 has sought in this proceeding, even before the Commission has ruled on the merits of Neutral Tandem's Petition. That would be fundamentally unfair.

Notably, the Georgia Public Service Commission ("Georgia PSC") and the Minnesota Public Utilities Commission ("Minnesota PUC") already have required Level 3 to maintain the parties' existing interconnections pending resolution on the merits of Neutral Tandem's petitions in those states. Despite Level 3's threat to terminate Neutral Tandem's interconnection on June 25, 2007, the Georgia PSC ordered Level 3 to continue accepting traffic directly from Neutral

⁵² Conn. Tr., at 47-48; Ga. Tr., at 211.

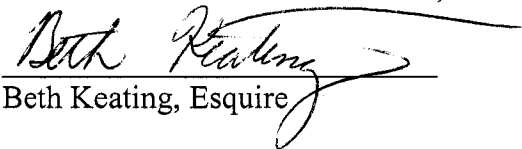
Tandem until July 9, 2007 -- thirty days after resolution of the merits of Neutral Tandem's petition before the Georgia PSC.⁵³ In addition, the Minnesota PUC has adopted a procedure that will require Level 3 to maintain direct interconnection in Minnesota until after the PUC holds an evidentiary hearing and issues a ruling on the merits.⁵⁴ Neutral Tandem respectfully requests that the Commission enter a similar interim order requiring Level 3 to maintain the parties' existing interconnection pending the Commission's final resolution of the dispute.

CONCLUSION

For the reasons set forth herein, in its Response to Level 3's Motion to Dismiss, and in its Petition for Interconnection and Request for Expedited Resolution, Neutral Tandem respectfully requests that the Commission find that: (1) it has jurisdiction over Neutral Tandem's Petition; (2) Neutral Tandem has standing to seek the relief requested in the Petition; (3) the Commission can order the relief requested in Neutral Tandem's Petition; and (4) Level 3 should not discontinue the parties' existing interconnections while Neutral Tandem's Petition is pending.

RESPECTFULLY SUBMITTED,

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⁵³ See Docket No. 24844-U, *In re Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Commc'ns*, Ga. Pub. Serv. Comm'n, Procedural and Scheduling Order, at 3 (Apr. 9, 2007).

⁵⁴ See Docket Nos. C-07-296, M-07-354, *In re Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Commc'ns*, Minn. Pub. Utils. Comm'n, at 3-4 (May 9, 2007).

CERTIFICATE OF SERVICE

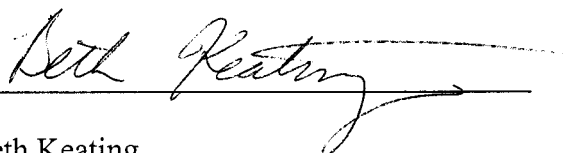
I HEREBY CERTIFY that a true and correct copy of Neutral Tandem's Brief Regarding Issues 1 – 3a has been served via Hand Delivery to Martin McDonnell, Esquire, and Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301, and that a copy has also been provided via Hand Delivery or US Mail* to the persons listed below this 17th day of May, 2007:

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