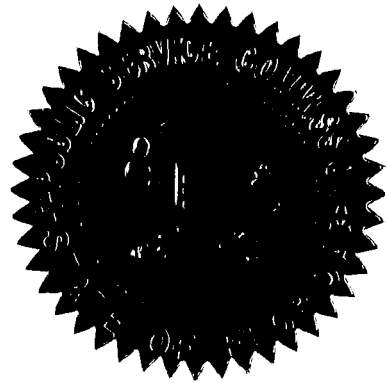


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 070408-TP

In the Matter of:

PETITION BY NEUTRAL TANDEM, INC.
AND NEUTRAL TANDEM-FLORIDA, LLC FOR
RESOLUTION OF INTERCONNECTION DISPUTE
WITH LEVEL 3 COMMUNICATIONS, LLC, AND
REQUEST FOR EXPEDITED RESOLUTION.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 3

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

DATE: Tuesday, January 8, 2008

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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CHAIRMAN CARTER: We are now on Item 3.

MR. TEITZMAN: Thank you, Chairman.

CHAIRMAN CARTER: One moment. Let's kind of get situated here.

You're recognized.

MR. TEITZMAN: Thank you. Adam Teitzman on behalf of Commission staff.

Commissioners, Item 3 addresses the legal issues that result from a motion to dismiss filed by Level 3 in Docket 070408-TP.

CHAIRMAN CARTER: Can you hear? Could you check his mike. I'm sorry, Mr. Teitzman, I'm going to ask you if you would start over, please.

MR. TEITZMAN: Certainly. Adam Teitzman on behalf of Commission staff.

Commissioners, Item 3 addresses the legal issues that result from a motion to dismiss filed by Level 3 in Docket 070408-TP. Staff's recommendation was previously deferred from the December 4th, 2007, agenda conference. Subsequent to the deferral, Neutral Tandem filed a request for oral argument and notice of appearance of Christopher Kise as additional counsel of record for Neutral Tandem. As a result, staff has added Issue A to address Neutral Tandem's request for oral argument.

In Issue A, staff is recommending the Commission deny

1 the request because it was not timely filed pursuant to the
2 Commission's oral argument rule. However, staff does note in
3 its recommendation that the rule provides the Commission with
4 discretion to entertain oral argument on its own motion. If
5 the Commission should choose to allow oral argument, staff
6 recommends ten minutes per party as requested by Neutral
7 Tandem.

8 Staff is available to answer any questions regarding
9 Issue A as well as the remaining issues in the recommendation.

10 CHAIRMAN CARTER: Commissioners, let's just kind of
11 get started and get a feeling here on oral arguments.

12 According to Mr. Teitzman, we can on our own motion allow for
13 oral arguments. What's the wish of the Commission?

14 Commissioner Edgar.

15 COMMISSIONER EDGAR: Chairman Carter, we have had, as
16 pointed out in the discussion, I think two rounds of briefs and
17 oral argument. I'm fairly comfortable with the issues that are
18 before us and would be ready to move forward. But if, indeed,
19 any of my colleagues think that some additional discussion or
20 hearing from the parties would be appropriate, then I would be
21 comfortable with that, as well.

22 CHAIRMAN CARTER: Commissioner Skop.

23 COMMISSIONER SKOP: Thank you, Mr. Chair. Again, we
24 have vetted the issue. If my colleagues would support it, I
25 would entertain oral argument just to fully vet the issues,

1 but, again, I do support the staff recommendation. But, again,
2 if it's the will of the Commission to hear a little bit more
3 discussion on these issues, I'm happy to make a motion.

4 CHAIRMAN CARTER: Okay. Commissioner McMurrin.

5 COMMISSIONER McMURRIAN: Thank you.

6 Chairman, I believe it would help to go over some of
7 these issues again. I realize that we will have the benefit of
8 the parties for any questions we have as we go through it, but,
9 frankly, I think it would be helpful to hear oral argument. I
10 do think that it has been fully briefed and vetted, but I
11 frankly would like to go over some of those things again.

12 CHAIRMAN CARTER: Okay. Commissioner Argenziano.

13 COMMISSIONER ARGENZIANO: More information is never a
14 bad idea.

15 CHAIRMAN CARTER: Okay. With that, Commissioners, a
16 motion?

17 COMMISSIONER EDGAR: Chairman Carter, if I may,
18 recognizing Commissioner Skop's interest in oral argument, I
19 would like to make the motion that on our volition we request
20 the parties to come forward for oral argument of ten minutes
21 apiece.

22 COMMISSIONER SKOP: Second.

23 CHAIRMAN CARTER: It has been moved and properly
24 seconded. All in favor let it be known by the sign of aye.

25 (Unanimous affirmative vote.)

1 CHAIRMAN CARTER: Okay. In that motion we will grant
2 oral arguments for ten minutes per side. Why don't we deal
3 with the oral arguments and we will deal with the issues after
4 we hear from the parties.

5 Would the parties approach the bench and -- Mr.
6 Teitzman, any order in terms of preference of who goes first?

7 MR. TEITZMAN: I believe it's appropriate for Level 3
8 to begin because it is their motion to dismiss.

9 CHAIRMAN CARTER: Okay. Mr. Hoffman, are you going
10 first? You're recognized.

11 MR. HOFFMAN: Good morning, Mr. Chairman,
12 Commissioners.

13 CHAIRMAN CARTER: Before you begin, how do you want
14 to do your time? Are you going to take all ten minutes, or are
15 you going to split it with your colleagues, or how are you
16 going to do that?

17 MR. HOFFMAN: I will be presenting on behalf of Level
18 3, Mr. Chairman.

19 CHAIRMAN CARTER: You're recognized.

20 MR. HOFFMAN: Before I begin, Mr. Chairman, let me
21 introduce Marty McDonnell to my right, Gregg Strumberger, to my
22 left, who are counsel for Level 3. We have a couple of
23 handouts that we would like to provide the Commissioners and
24 the parties and the staff before we begin.

25 CHAIRMAN CARTER: Okay.

1 Mr. Hoffman, you're recognized.

2 MR. HOFFMAN: Thank you, Mr. Chairman.

3 As I said, I'm Ken Hoffman. With me is Marty
4 McDonald and Gregg Strumberger on behalf of Level 3.

5 Level 3 does not concur with the staff's analysis on
6 the issue of the Commission's jurisdiction, but we certainly
7 agree with and support the staff recommendation on the issue of
8 standing and that the Commission should dismiss Neutral
9 Tandem's petition as a final agency action.

10 This proceeding began back in February of 2007. In
11 March of 2007, Level 3 made a commitment to Neutral Tandem and
12 to the Commission that we would maintain the existing direct
13 interconnection in place until June 26th of 2007 to allow the
14 Commission sufficient time to rule on our motion to dismiss.
15 Needless to say, we are now some six months down the road
16 beyond that date, and we are 11 months into this proceeding. I
17 want to emphasize we have maintained our commitment to ensure
18 the stability of the public switched network and to ensure that
19 calls directed to Level 3's customers are completed.

20 That's an important fact to remember throughout this
21 discussion. The traffic that we are talking about here is
22 ultimately destined strictly to Level 3's customers. I also
23 want to point out that in the summer of 2007, Neutral Tandem
24 terminated -- Neutral Tandem terminated the contract through
25 which Level 3's affiliate, Broadwing Communications, was

1 sending traffic to other carriers. So as a result, Level 3 and
2 our affiliates no longer send any traffic to Neutral Tandem.

3 Let me begin with Issue 1 on jurisdiction. I have
4 given you a copy of the applicable statutes, and the first page
5 is Section 364.16(2), which says that each CLEC shall provide
6 access and interconnection with its telecommunications services
7 to any other -- and then you get to the key phrase -- provider
8 of local exchange telecommunications services. We have
9 maintained from the beginning, and your staff agrees, that
10 Neutral Tandem is not a provider of local exchange
11 telecommunications services and, therefore, they lack standing
12 to request interconnection under this statute.

13 What I would like you to do is assume hypothetically
14 that Neutral Tandem actually has standing, because if you do,
15 that will bring you to the crux of our jurisdictional argument.
16 If you look further down in this same subsection, you will see
17 that it states that if negotiations are not successful, either
18 party may petition this Commission for a state arbitration
19 under Section 364.162.

20 Now, there is no dispute that that section is limited
21 to arbitrations between CLECs and ILECs. Neutral Tandem
22 acknowledges this in their response to our motion to dismiss.
23 Since only CLECs and ILECs can request arbitration under state
24 law, we believe that the only logical and harmonious and
25 symmetrical interpretation of this statute is that Commission

1 jurisdiction is triggered only when a petition for
2 interconnection is filed by an ILEC against a CLEC. Otherwise,
3 the arbitration remedy that's promised toward the end of this
4 subsection is not available.

5 Now, Neutral Tandem throughout this proceeding has
6 attempted to avoid the absence of jurisdiction by sort of
7 pounding the drum of competition and customer protection. And
8 as we said when we were before you in May of last year, those
9 assertions are pure red herrings. Neutral Tandem has no retail
10 consumer customers. Their customers are other telephone
11 companies, other wireless carriers, and Voice over IP service
12 providers.

13 Secondly, Neutral Tandem is touting itself through
14 its pleadings as a competitive alternative, but if you think
15 about it, they are actually trying to use a regulatory mandate
16 to enhance their business goals, to enhance their profits, to
17 enhance their competitive position. What they want is to
18 essentially replace the commercial negotiations that have
19 historically formed the arrangements in the marketplace, and
20 that's completely antithetical to the deregulation paradigm
21 that the legislature in Florida established in 1995 and that
22 this Commission has implemented over the last 12 years.

23 With respect to Issue 2, the issue of standing, we
24 obviously agree with the staff. We agree with their conclusion
25 that Neutral Tandem lacks standing to seek relief under this

1 statute, either directly or as a supposed agent for their
2 third-party carrier customers. The staff points out and
3 Neutral Tandem acknowledges that they do not provide basic
4 local telecommunications services, which is the mandatory
5 service contemplated by the applicable statutes which you have
6 a copy of, 364.337, and the Commission's rules for CLECs.

7 Neutral Tandem admits they do not provide any service
8 to retail end user customers, they do not provide telephone
9 numbers to their customers or carriers, nor do they provide
10 access to operator services, 911, or relay services for the
11 hearing impaired. We think your staff has correctly concluded
12 that Neutral Tandem does not provide local exchange services to
13 the public, and, therefore, they are not a provider of local
14 exchange telecommunications services for the purposes of
15 Section 364.16. And, therefore, they lack standing to file a
16 petition and seek relief under that statute.

17 Finally, there is this notion of a principal agent
18 relationship. We believe, and we agree with the staff, that
19 there is no principal agent relationship between the
20 third-party carriers and Neutral Tandem as defined and
21 permitted by Florida law. If you recall, back in June of last
22 year, the staff filed a recommendation that advocated that
23 Neutral Tandem's petition be dismissed because Neutral Tandem
24 lacked standing. The staff also suggested that Neutral Tandem
25 may have standing if it could demonstrate the authority to act

1 on behalf of those third-party carriers.

2 Up to that point, that whole argument had never
3 occurred to Neutral Tandem and was not in their pleadings. So
4 what they did is they went out, they reacted to this by
5 drafting a form letter for their carrier customers to sign
6 which would give Neutral Tandem the right to establish
7 technical and operational aspects of interconnection with Level
8 3. They were able to get six of those letters signed. You
9 have them in front of you. They are all the same, and they
10 filed them with this Commission in an attempt to salvage their
11 standing. But as I said, we agree with the staff that that is
12 not enough. There is no principal agent relationship as
13 defined by law.

14 I want to first point out that this Commission, as
15 you have heard in the past, only has the authority that is
16 granted by the Legislature, and there is nothing in
17 Section 364.16 that would authorize a true provider of local
18 exchange telecommunications services to seek interconnection
19 with a CLEC through an agent. So the statutory authority to
20 even entertain this notion is not there.

21 Second, our position has always been that if the
22 Commission were to determine that it has jurisdiction, and that
23 Neutral Tandem has standing, that Neutral Tandem is required to
24 compensate Level 3 for the costs that we incur for the
25 interconnection. Neutral Tandem has always said, no, no, no,

1 that's the obligation of the third-party carrier customers. So
2 there is a direct conflict between the third-party carrier
3 customers and Neutral Tandem when it comes to the issue of
4 compensation. And Florida law, as we have said in our
5 pleadings, strictly prohibits this type of conflict between
6 principals and agents.

7 Third, as the staff points out, the case law is
8 consistent in the state of Florida that in order for there to
9 be a legally recognized principal agent relationship, the
10 principal has to have the right to exercise operational control
11 over the internal affairs of the agent on a daily basis. Now,
12 let's think about that. Neutral Tandem is a large publicly
13 traded company, traded on the NASDAQ. They are a party to
14 arm's-length contract and tariff arrangements with these
15 third-party carrier customers. It would be ludicrous to
16 suggest and they have never suggested in their pleadings and
17 could not suggest that these third-party carriers have
18 operational control or the right of operational control over
19 their internal operating affairs.

20 Actually, to the contrary, if you recall, it's matter
21 of record, a few months ago, Neutral Tandem abandoned similar
22 efforts in other states to secure the same type of direct
23 interconnection. And when they did that, it was Neutral Tandem
24 who unilaterally notified their third-party carrier customers
25 that calls would no longer be terminated to Level 3 through

1 Neutral Tandem.

2 The last point on this issue is that if you look at
3 these letters, by their own terms they are limited to the
4 establishment of technical and operational aspects of making
5 arrangements for terminating transit traffic. They don't even
6 address the issue of compensation, which would be an issue that
7 Level 3 would be entitled to place before the Commission if
8 there were a state arbitration.

9 So to wrap it up, Mr. Chairman, we disagree with the
10 staff on the issue of jurisdiction. As I said, we support the
11 staff on the issue of standing. We request that the Commission
12 dismiss Neutral Tandem's petition once and for all as a final
13 and adverse agencies action. As Neutral Tandem's conduct in a
14 number of other states now confirms, these calls can be
15 rerouted without disrupting the public network when Neutral
16 Tandem notifies their carrier customer so that they can work
17 together.

18 We would ask that you order Neutral Tandem to notify
19 their customers within three days of this agenda conference
20 that they can no longer route traffic directly from Neutral
21 Tandem to Level 3 after January 22, 2008, and that you are
22 requiring Neutral Tandem's senior management to submit an
23 affidavit to this Commission confirming their compliance with
24 that requirement.

25 CHAIRMAN CARTER: Thank you, Mr. Hoffman.

1 For Neutral Tandem, Mr. Kise, how do you want to
2 divide your time?

3 MR. KISE: Thank you, Mr. Chairman.

4 I'd like to speak for seven minutes. Ms. Keating
5 will speak for a couple of minutes, and then if I could reserve
6 one minute for rebuttal, if that is not objectionable.

7 CHAIRMAN CARTER: Why don't we -- you do seven, she
8 does three, because we are just doing opening arguments. I
9 don't know if we want to do rebuttal, and here is the reason.
10 I am thinking aloud with you, and it is not just for one party
11 or the other, because I believe there may be some discussion
12 from the Commissioners they may want to have with you, and you
13 may be able to make your points that way.

14 MR. KISE: Fair enough. Yes, sir, thank you.

15 And before I begin, I know I did it privately, but I
16 do want to congratulate you publicly on ascending the chair.
17 Having worked with you for a number of years and having that
18 privilege, I think this is a tremendous honor, and I know you
19 are going to do a tremendous job, as did Chairman Edgar. So I
20 congratulate you, but I will also say I have never seen
21 Chairman Edgar, former Chairman Edgar so happy.

22 CHAIRMAN CARTER: I'm inclined to agree with you.

23 MR. KISE: And with that I will try and limit myself
24 to the time frame, although that will be a challenge.

25 CHAIRMAN CARTER: What we will do is on the

1 seven minutes, and to kind of help you, I may just put this cup
2 up there that way.

3 MR. KISE: Or throw it at me if I don't stop.

4 CHAIRMAN CARTER: Well, I thought about that, but
5 I've got water in it.

6 MR. KISE: And thank you all for providing this
7 opportunity to be heard. It is meaningful and appreciated.

8 And I want to take you in just a brief bit of
9 different direction to respond, in some respects, to what Level
10 3's position is, but just to look at this from a different
11 perspective, which I think I do bring here.

12 We're here to ensure competition, and to borrow a
13 page from your opening this morning, Mr. Chairman,
14 affordability and reliability. And this is a unique situation
15 where the two are not in conflict, affordability and
16 reliability, because here the development of redundancy in the
17 tandem switch is actually beneficial from a reliability
18 standpoint. It has been established that it is both from a
19 national disaster standpoint and homeland security. Also,
20 because it promotes competition, also results in potentially
21 increased cost to the consumer.

22 And to the notion that business-to-business
23 arrangements are not the subject matter for this Commission to
24 take up, I would respectfully take great issue with that. And
25 this may be too simplistic, but, you know, I pick up my phone,

1 I dial a number, somebody answers on the other line, and I pay
2 a bill at the end of the month. I don't know what happens in
3 between, other than now involvement in this case, but there are
4 a number of business-to-business interconnections that take
5 place every second of every day with millions of phone calls.

6 And if there is anticompetitive activity, if there is
7 something that is hindering competition in the PSTN, or any
8 other acronym you want to use, quite frankly, then, that's the
9 subject matter of this Commission. And I would agree with
10 Level 3 that, in fact, the Legislature does define your role
11 and you don't have to listen to us. The staff says, and I
12 think quite accurately, that 364.01 charges this Commission
13 with the responsibility of fostering a competitive environment
14 for the provisioning of telecommunications services.

15 And so B-to-B relationships -- I mean, if Microsoft
16 was doing something with its relation with AOL, and that is a
17 business-to-business arrangement, it still affects the end
18 consumer. I mean, everything affects the end consumer. In
19 most industries in this modern age it's a pass-through, and so
20 if cost goes up between the competitive business-to-business
21 providers, or if there is some anticompetitive angle here, then
22 it is worthy, I would respectfully submit to you, of frankly a
23 look.

24 And I would also say that this proceeding, you can
25 look at this two ways. You can look at this as the relentless

1 debate of fine legal points, and we can argue back and forth
2 about standing, and who, you know, has the right argument,
3 wrong argument. There is a lot of very qualified lawyers here,
4 including Mr. Cooke and Mr. Hoffman -- I'll exclude myself from
5 that category -- but, quite honestly, we can dance around all
6 day about the legal arguments, but at the end of the day, and I
7 frankly think obviously from my review that we are right, but
8 those fine debates of legal points are more the subject matter,
9 frankly, of appellate courts than they are of a Commission
10 charged with the responsibility of assuring competition.

11 And, like many situations I faced when I was in
12 public life, although I have to say that I'm awkward sitting in
13 this chair, this is a weird end for me to be at. The last time
14 I was here someone else was here and I was down that way
15 representing -- a different color hat on. But, frankly, you
16 can do this on your own, just like you did with the oral
17 argument. I mean, the staff is absolutely correct.

18 Set aside all the legalese, set aside all of this
19 debate. Again, I think we are right. Mr. Hoffman obviously
20 thinks that they are right, and I respect that position. But
21 at the end of the day, the Legislature has given you the
22 authority and the responsibility to look at these competitive
23 arrangements. And since you have the authority to review it on
24 your own, you have the ability to review it, and you have a set
25 of circumstances that cries out for review.

1 Dismissal, first of all, is a drastic remedy. We are
2 talking about impacting potentially a million calls per day.
3 Whether they be blocked or not, I mean, quite honestly, we have
4 been told by Level 3 that they wouldn't block these calls, and
5 maybe they would and maybe they wouldn't, but if the Commission
6 under their assumption doesn't even have the jurisdiction to
7 look at that, then how is that policed?

8 I think at the last hearing in May, then Chairman
9 Edgar raised a question that I don't think was answered
10 sufficiently about, well, if we can't look at it, who can? Who
11 actually can look at this? If we don't have jurisdiction, who
12 does? And, frankly, this goes, again, in hand with what staff
13 has said. Staff believes that if providers of local exchange
14 telecommunications services are unable to reach mutually
15 acceptable prices, terms, and conditions for interconnection,
16 the Commission can arbitrate those terms to ensure these
17 requirements are met. And if you can't, then who can? Who can
18 ensure that there is not anticompetitive behavior going on in
19 the business-to-business relationship which ultimately affects
20 the end user?

21 Your own staff says you have jurisdiction to review
22 this. We obviously wholeheartedly, frankly, agree with them
23 for the reasons stated. And, obviously, again, just based on
24 the answer to Commissioner Edgar's question, if no one has
25 jurisdiction, where does this go? Who looks at this? And as

1 your own staff has concluded, if Level 3 is allowed to refuse
2 direct interconnection they're jeopardizing the efficient and
3 reliable exchange of traffic over the PSTN. Their refusal --
4 and I'm quoting from the staff recommendation, "Hinders the
5 further development of a competitive telecommunications market
6 in Florida." If that is not what the Legislature had in mind
7 in 364.01, as noted by Staff on Page 11, I don't know what is.

8 The entry of Neutral Tandem into the market as an
9 alternate transit service provider is an important step in the
10 building of a competitive PSTN. Redundancy, affordability.
11 It's not, Commissioner Carter -- Chairman Carter -- to answer a
12 question that you raised before, it isn't just about the money.
13 Of course, everything in a business-to-business relationship is
14 about money, but it's also about ensuring fair competition and
15 ensuring that citizens have access to choices. And those
16 choices get made every day by these businesses.

17 Again, when I dial my phone and I make a phone call,
18 I don't choose how it gets routed, somebody else is doing that.
19 But if in those interrelationships there is anticompetitive
20 behavior going on, and your own staff seems to indicate at
21 least it is worth a look, it could be happening. And as
22 Commissioner Argenziano pointed out a few moments ago, more
23 information is not a bad thing.

24 We're talking about holding a full hearing to
25 determine if, in fact, there is something worthwhile for this

1 Commission to take action. Every other state to be asked to
2 look at this, seven other states have held a full hearing.
3 Five have found in favor of Neutral Tandem and there are two
4 others pending, but everyone has at least taken a look, and
5 that is really what this is about here. And so you can agree
6 with us on jurisdiction, you can agree with us on standing, and
7 deny the motion to dismiss and look at it that way; or you can
8 simply agree with your own staff and say, hey, you know, we
9 have the ability, we have the authority, we have been given the
10 mandate to do so.

11 Thirty more seconds. And I don't mean to intrude on
12 Ms. Keating's time. There is no downside to holding a hearing.
13 It is a day of your time, and another I'm sure, eventful day
14 that we will be out here. There's tremendous potential
15 downside to not holding a hearing, both to the competitive
16 marketplace and to the public. Potentially anticompetitive
17 activity goes unchecked, hinder development -- and this is all
18 your staff's conclusions, not me, and not us -- hinder
19 development of a competitive telecom market in Florida, risk a
20 number of blocked calls, potentially increase the cost of those
21 calls, risk future wasteful expenditure.

22 Again, if AT&T came in here and filed their petition,
23 I would have to assume that Level 3 would say that's okay.
24 They have standing, they have jurisdiction. So then, what they
25 are asking is that you dismiss this petition when all the facts

1 are before you, wait until somebody else comes along and files
2 the exact same complaint and then start all over again in a
3 budget challenge year where we have to redo the entire amount
4 of work. And so all we are saying is one way or the other you
5 have the ability to take a look at it. And I see Commissioner
6 Argenziano is picking her cup up now, so I'll stop talking.

7 Thank you.

8 MS. KEATING: Mr. Chairman, Commissioners, thank you
9 for your indulgence. And I'm not sure that I can speak quite
10 as quickly as Mr. Kise can, so I may jump around just a little
11 bit in order to cover my points.

12 Let me first start out by emphasizing that we agree
13 with the bulk of your staff's recommendations. The sole point
14 that we disagree with your staff on is on the conclusion that
15 Neutral Tandem does not meet the second prong of the Agrico
16 test for standing. And as you can see from the pleadings,
17 which I think fully set forth our position on the statutory
18 interpretation, we disagree with their conclusions as to what
19 that interconnection statute says. I won't go into that. I
20 think that is fully set forth in the pleadings, but there are a
21 couple of things that I would like to point out that I think
22 need to be emphasized.

23 First, if you approve this statutory analysis here,
24 it actually flies in the face of your decisions regarding
25 AT&T's transit service in the TDS Telecom case. It is

1 impossible to distinguish this case, because when AT&T provides
2 transit service, it is performing the exact same service that
3 Neutral Tandem provides. It is not providing any service to
4 any AT&T end use customer.

5 But regardless of whatever conclusions you might draw
6 with regard to the appropriate interpretation and application
7 of the interconnection statute, you do have jurisdiction to
8 remedy this anticompetitive activity under 364.01(4), as
9 specifically outlined in Neutral Tandem's petition in this
10 docket. Staff does not address whether Neutral Tandem has
11 standing under that provision. But, as Mr. Kise has pointed
12 out, your analysis, your staff's analysis does recognize that
13 Level 3's threatened actions will jeopardize the exchange of
14 traffic and the development of competition.

15 You have broad authority under 364.01 to address
16 Level 3's conduct. And as a participant in the market, Neutral
17 Tandem has standing to participate in any proceeding to address
18 that conduct. Moreover, regardless of Neutral Tandem's
19 participation, this is a dispute over which the Commission has
20 clear subject matter jurisdiction. Thus, we urge you to move
21 forward to receive further evidence and arguments at to the
22 appropriate resolution.

23 Finally, Commissioners, let me just emphasize that
24 you are here on a motion to dismiss, and the standard of review
25 for a motion to dismiss requires you to assume the allegations

1 in the complaint are true, and you have to view them in the
2 light most favorable to the petitioner, which in this case is
3 Neutral Tandem.

4 To that point, the analysis before you contains
5 several assumptions that do not comply with that standard. To
6 the contrary, the analysis assumes that Neutral Tandem doesn't
7 have 911 connectivity, doesn't have access to local numbering
8 resources, and isn't capable of porting numbers.

9 With regard to the agency letters, there is also an
10 assumption that because the agency letters are silent on the
11 issue of on-going communication and control by the originating
12 carriers, then there must be no such on-going interaction. On
13 this point, that assumption is key, because staff suggests that
14 the LOAs are otherwise sufficient to establish standing.

15 Commissioners, we can show control if given the
16 opportunity. All of these assumptions are integral to the
17 staff's conclusions that this complaint must be dismissed, but
18 they are simply that, assumptions that aren't based on any
19 evidence in the record. They might be entirely incorrect, and
20 I know at least in one circumstance that they are, and these
21 assumptions most certainly don't construe the allegations in
22 this matter in the light that's most favorable to the
23 petitioner.

24 One more thing I just want to point out,
25 Commissioners, is that in moving to hearing, there will be no

1 detrimental impact on Level 3 or on the market. Level 3 will
2 still have an opportunity to present evidence and arguments as
3 to why it should not have to allow Neutral Tandem to direct
4 connect. On the other hand, denying a hearing will clearly
5 have a profound and widely felt detrimental impact. It's clear
6 that we have identified a problem in the market and we would
7 just ask that you move forward to consider facts and evidence
8 on that issue.

9 CHAIRMAN CARTER: Thank you, Ms. Keating.

10 And we will no longer use the cup method, because
11 obviously that's not effective. We'll have to be a little bit
12 more direct.

13 MS. KEATING: Commissioner, I didn't see a cup.

14 CHAIRMAN CARTER: Okay. So let's do this,
15 Commissioners, to kind of get ourselves in the posture here.
16 The way we have this case lined out is issues-by-issues. We
17 can have staff to introduce the issues and go issue-by-issue,
18 or it's at your pleasure, Commissioners, whatever you deem the
19 most appropriate way to do it. I am open for suggestions.

20 COMMISSIONER ARGENZIANO: Mr. Chair, my concern --
21 there are several. One is we are statutorily required to make
22 sure that we foster competition, but the thing that has
23 bothered me from the beginning on this where I need some staff
24 direction, and maybe our counsel could tell me, under 364.337,
25 you have to be a CLEC in order to do this. And under 364.337,

1 the specifications for being a CLEC are pretty well written out
2 in statute.

3 So my concern is that it appears to me that in order
4 for Neutral Tandem to become an alternative transit provider,
5 thus fostering more competition and possibly reducing cost to
6 the consumer, which we are charged to do, they would have to
7 meet the requirements of 364.337. And I don't understand how
8 it can even be considered if they are not meeting that
9 requirement. Now, maybe Neutral Tandem has a different take,
10 but that's where I need some help is understanding how we get
11 past are they a CLEC or are they not.

12 MR. COOKE: Commissioners, I probably should defer to
13 Mr. Teitzman with that. I think that is the gist of our
14 analysis is that they may be certificated as a CLEC, but they
15 are not literally carrying out functions such as are described
16 in that section.

17 COMMISSIONER ARGENZIANO: Mr. Chair, are we then
18 saying -- because we do have an obligation to foster
19 competition and possibly reduce costs to the consumer, and
20 that's a very important function of the PSC. But at the same
21 time we are statutorily bound by the words in the statute under
22 the definition of a CLEC. And I'm just having a hard time
23 understanding how we do one or the other if we don't have a
24 statutory change come forward by the policymakers.

25 I don't know how we can change the policy in the

1 statute. And that's where I guess I'm having the most
2 heartburn is trying to figure it out -- and maybe Neutral
3 Tandem can better explain how they fit in as a CLEC.

4 CHAIRMAN CARTER: Let's do this, let's hear from
5 Neutral Tandem, then we will ask Mr. Teitzman to follow up.

6 MR. KISE: Thank you, Mr. Chairman.

7 Commissioner Argenziano, I think, and I'm sure my
8 colleagues here will jump on me if I'm wrong, I think we are
9 combining the concepts of standing and jurisdiction. Perhaps,
10 perhaps under that meaning of Subsection 337, there is a
11 question as to standing. We don't think so, obviously, but
12 perhaps there is. And you get into this whole acronym debate,
13 CLECs, ILECs, et cetera. But that's a very separate question
14 from jurisdiction.

15 You still have, and I think the staff recognizes
16 this, the jurisdiction to take a look at these
17 business-to-business combinations, and it is within the mandate
18 of what the Legislature has asked the Commission to do. And,
19 frankly, this Commission has always, in the recent past
20 certainly, but even longer, acted and erred on the side -- and
21 there was even a question, erred on the side of let's take a
22 look in the public interest. Let's not decide that we can't
23 take a look. Let's take a looks.

24 And, you know, frequently and this has happened to me
25 unfortunately more times than I care to recall in the Florida

1 Supreme Court, you are deciding today. You don't have to
2 decide today even fully and finally on the jurisdiction or
3 standing questions. You could conduct a hearing, develop more
4 of a record, understand exactly what is taking place here, and
5 then if you feel that there is a problem with your
6 jurisdiction, then, again, as I have faced many times in the
7 Florida Supreme Court, oops, sorry, jurisdiction is improperly
8 granted and you get a one line opinion and off you go.

9 But what is at stake here is frankly taking a closer
10 look. And so, Commissioner Argenziano, I hope I'm answering
11 your question by saying that perhaps you are onto a point, and
12 I understand your concerns about the precise statutory
13 language, but that is really relative, I would say, to standing
14 and not to jurisdiction.

15 So if you want to engage, which you can in a
16 decisional point on the standing issue, then that's one thing.
17 But if you want to simply skip over that and do what your own
18 staff, not us, is saying, take a look, because they have
19 flagged potential issues, and it is rare, frankly, that issues
20 of this magnitude get flagged in this unequivocal way. The
21 staff recommendation, those unequivocal statements about
22 potential impact on the market, potential impact on
23 competition, those aren't related to any particular argument.
24 They are unequivocal statements about the operation and effect
25 of what has happened and what could happen.

1 And we don't know. We obviously say that this is
2 what is taking place. Level 3, I'm sure, is going to say no,
3 it's not. But, the Commission has the ability and the
4 authority, and I would respectfully submit frankly duty to look
5 and see if this is actually taking place and redetermine. So
6 on standing, yes, you may have a point, Commissioner
7 Argenziano, but it still doesn't relate to the jurisdiction of
8 the Commission, the overriding authority of the Commission to
9 take a look on its own.

10 CHAIRMAN CARTER: Staff.

11 MR. TEITZMAN: Commissioners, I would actually agree
12 with both Mr. Cooke and Mr. Kise. With regard to .337,
13 basically what that sets forth is if you are operating as a
14 CLEC providing CLEC services, this is what you are required to
15 do. And then I would also agree, like I said, with Mr. Kise,
16 that I think that moves more into the question of standing.

17 With regard to jurisdiction, I think the Commission's
18 jurisdiction is found in 364.162, where it requires a CLEC to
19 provide access to an interconnection with its
20 telecommunications services to any other provider of local
21 exchange telecommunications services. So basically what you
22 need to look for there is is this company, which we do not
23 believe is this case, Neutral Tandem, providing local exchange
24 telecommunications services.

25 CHAIRMAN CARTER: Do you want to comment on this?

1 MR. COOKE: I think maybe we are getting bogged down
2 in the difference between jurisdiction and standing. Frankly,
3 if there is no standing, then it answers the question in
4 itself, and we really don't have the opportunity to visit the
5 substantive issues.

6 CHAIRMAN CARTER: Let's do this. Let's take one
7 issue at a time. Let's do that. I think that may be more
8 helpful, and we can go through it that way. And,
9 Commissioners, I recognize Commissioner Argenziano, but any
10 Commissioner at any point in time, if you have a question,
11 either for staff or the parties, they are available for
12 questions.

13 So let's do this. Mr. Teitzman, would you introduce
14 Issue 1, and, Commissioners, with your approval we will just do
15 it that way, and that may help us to kind of get through this.

16 Mr. Teitzman.

17 MR. TEITZMAN: Sure, Chairman. To some extent I am
18 about to repeat myself, but, Commissioners, Issue 1 addresses
19 whether the Commission has jurisdiction over Neutral Tandem's
20 petition; and, if so, what is the source of the Commission's
21 authority.

22 Staff believes that pursuant to Section 364.16(2),
23 Florida Statutes, the Commission has authority to ensure that a
24 CLEC provides access to and interconnection with its
25 telecommunications services to any other provider of local

1 exchange telecommunications services, and that any other
2 provider does include other CLECs.

3 CHAIRMAN CARTER: Commissioners, on the issue of
4 jurisdiction, we are open for discussion or questions. If you
5 have any questions for staff or any discussion, let's go from
6 that perspective, or if you have any question for either of the
7 parties. So we are dealing with Issue 1 on the question of
8 whether or not does the Commission have jurisdiction and under
9 what authority. Mr. Teitzman has answered that question in the
10 affirmative for the Commission. Commissioners?

11 Commissioner McMurrin.

12 COMMISSIONER McMURRIAN: Thank you. This is for
13 Mr. Teitzman.

14 Mr. Teitzman, you just said that when you read that
15 part of the statute, 364.16(2), with respect to the any other
16 provider, you said that includes CLECs, but it doesn't
17 necessarily include -- and maybe I'm jumping into the standing
18 again. Mr. Cooke is nodding his head. But it definitely
19 includes CLECs, but just because a CLEC is certificated as a
20 CLEC doesn't mean they are providing that local exchange
21 service. But I guess we would talk more about that
22 appropriately in the standing issue. Am I getting that
23 straight?

24 MR. TEITZMAN: You are. That's correct,
25 Commissioner. The reason I included that statement is because

1 it is Level 3's position that the Commission would not have
2 authority regarding interconnection between two CLECs, only an
3 ILEC and a CLEC. So I wanted to stress the point that we
4 believe that the Commission would have authority regarding
5 interconnection of two CLECs.

6 MR. COOKE: Mr. Chairman, and I think just to put, if
7 I may, put another point on that. I think what we are seeing
8 in Issue 1 is that we interpret our statute to give us
9 jurisdiction over CLEC-to-CLEC. Then when we move on to the
10 standing issue, we, I think, are suggesting that there is not
11 standing here, because this particular company based on the
12 pleadings and the materials before us is not acting in a
13 fashion of a CLEC as we understand the statute to be set forth.

14 COMMISSIONER ARGENZIANO: That's the only thing --
15 the problem I have. Coming from the legislative branch, the
16 statutes mean a lot to me. Although in the statute also we are
17 bound to foster competition and get the best price for the
18 consumer. So we have like competing statutory language, but I
19 still come down to the fact that if you are not a CLEC, then --
20 I don't know how. If you are not providing the services that
21 it says under 364.337 that must be provided, I don't know how
22 you consider yourself a CLEC. Perhaps, maybe, that could be
23 better answered.

24 MS. KEATING: May I respond to that, Mr. Chairman?

25 CHAIRMAN CARTER: You're recognized.

1 MS. KEATING: Commissioner, thank you for your
2 question. Without really getting back into the statutory
3 interpretation question, I think, you know, you are aware from
4 the pleadings that we don't agree that we have to be providing
5 basic local exchange telecommunications services in order to be
6 contemplated as an entity having a right to interconnect under
7 the interconnection statute.

8 But, moving beyond that, even assuming that 364.337
9 applies to this company, you're having to assume certain facts
10 regarding the nature of the service that Neutral Tandem
11 provides in order to reach the conclusion that they don't
12 provide this type of service.

13 It is true that this company, as we have
14 acknowledged, does not provide service to end use residential
15 customers, but this company does have enterprise customers and
16 this company does have -- have to have 911 connectivity. I
17 mean, that is something that I am aware of. They have to have
18 911 connectivity in order to enter into an interconnection
19 agreement with BellSouth.

20 So there are certain assumptions that aren't in the
21 record you really haven't had an opportunity to examine and
22 debate, and yet you have to accept those assumptions in order
23 to conclude that this company doesn't have standing.

24 COMMISSIONER ARGENZIANO: I believe the last time I
25 had asked if you provided 911 services, and the reason you got

1 the outcome you did from me was because I think you said no.
2 And that made me understand that the statute says you must
3 provide a 911 services. So if you are telling me differently
4 now, then that makes a difference. If you are providing what
5 the statute indicates you must, then I'm bound by supporting.
6 That is what I need to know.

7 MS. KEATING: Commissioner, let me -- yes, I went
8 back and looked at that transcript, because I had a concern
9 about what it was we said on that point. And I think we were
10 very careful to say that we are not obligated to provide 911
11 service. I personally was not sure of that. It's a factual
12 issue that really at that point had not arisen in the case.

13 I have since learned that the company is required by
14 BellSouth before it will enter into an interconnection
15 agreement to have 911 connectivity. So if an end use
16 residential customer were to get onto Neutral Tandem's network
17 directly right now, they could make a 911 call.

18 COMMISSIONER ARGENZIANO: To staff or to counsel,
19 doesn't that meet the definition of a CLEC?

20 MR. TEITZMAN: Well, I think that takes us outside
21 the context of what the dispute here is about.

22 COMMISSIONER ARGENZIANO: Don't confuse me, please.
23 I'm trying to stick with that one statute, because my main
24 problem was if you are not a CLEC, meaning that you must
25 provide what the statute says in order to be a CLEC. So if it

1 says the basic local telecommunications service provided by a
2 competitive local exchange telecommunications company must
3 include access to operate 911 services, and they are and they
4 do have that to the end user, that is being supplied, then they
5 may meet the definition. That's what I'm asking you. Do you
6 see that that is possible?

7 MR. TEITZMAN: Certainly. I think what's the crux of
8 staff's position, though, is that the transit service that is
9 the subject of this proceeding is not the provisioning of local
10 exchange telecommunications services. And they need to be
11 providing local exchange telecommunications services and
12 interconnecting with Level 3 for the purposes of providing
13 local exchange telecommunications services. And the subject
14 matter in this docket is transit traffic, and we're saying that
15 does not qualify as local exchange telecommunications services
16 pursuant to Florida Statutes.

17 COMMISSIONER ARGENZIANO: If I can have one more. So
18 in 364.337 I don't see any mention about transit, and maybe I'm
19 just not getting it. I don't see any mention about the transit
20 services requirement.

21 MR. TEITZMAN: They may be a CLEC, okay, but the
22 standing does not fall on whether or not they are a CLEC. It
23 falls on whether or not they are providing local exchange
24 telecommunications services. We do not believe that they are,
25 nor have they alleged that they are in their pleadings.

1 COMMISSIONER ARGENZIANO: Okay.

2 CHAIRMAN CARTER: Commissioner Argenziano, we'll come
3 back to you in a minute.

4 First, Commissioner McMurrian, then Commissioner
5 Edgar.

6 COMMISSIONER McMURRIAN: Thank you.

7 I was going to try to follow up on that point because
8 I probably muddled it up to begin with with my questions, so I
9 apologize for that.

10 Commissioner Argenziano, in trying to help figure
11 this one out, on Page 7 of the rec where it quotes Section
12 364.16(2), in that second line at the end where it says,
13 "Services to any other provider of local exchange telecom
14 services." In my reading of that, because it doesn't say a
15 CLEC instead of to any other provider of local exchange
16 service, it doesn't necessarily have to be a CLEC. But a CLEC
17 could be -- and, again, this is just my reading of it -- a CLEC
18 could be any other provider of local exchange service.

19 So for the purposes of jurisdiction, I think what
20 staff is trying to say is that it just hinges on whether or not
21 they are a provider of local exchange service. Well, for
22 jurisdiction, actually, it doesn't even -- I think in standing,
23 we have to figure out if Neutral Tandem qualifies as any other
24 provider of local exchange service. For purposes of
25 jurisdiction, I think we have jurisdiction over that section of

1 the statute, and it looks like it could be an interconnection
2 agreement between a CLEC and a CLEC, or a CLEC and perhaps
3 another provider of local exchange service that perhaps doesn't
4 meet all the requirements of being a CLEC. That's how I read
5 it.

6 So, I guess in my reading of it, and I have studied
7 Mr. Hoffman's arguments carefully about the other, 364.162, and
8 how he believes that that provision pertains only to CLEC/ILEC
9 negotiations, I have to say I disagree with that. Because I
10 believe that when you pair this statute together with that
11 other statute, that you do have jurisdiction over the subject
12 matter, at least, of what we are dealing with here. And then,
13 of course, the standing on whether or not the party that has
14 come to us is a provider of local exchange service would be
15 dealt with in that separate issue. I don't know if that helped
16 or hurt, but it's my attempt to help.

17 CHAIRMAN CARTER: Commissioner Edgar.

18 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

19 I just wanted to ask if I could ask Level 3 to
20 respond to some of the points that have been raised.

21 MR. HOFFMAN: Thank you, Commissioner Edgar.

22 Very briefly. We are dealing with sort of a moving
23 target here. The positions do seem to change from the last
24 oral argument to this morning. But what I can say is, for
25 example, Ms. Keating mentioned we do have enterprise customers.

1 What that means is they provide service to VoIP providers.
2 Those are other carriers. They are not end user consumers,
3 which is the target, the focus, the subject matter of Chapter
4 364.

5 Now, they have testified in all the other states --
6 they mentioned the proceedings in other states -- that they
7 don't provide 911. They do not provide 911 to retail consumer
8 end users, because they are not in that business, okay? And
9 they should freely acknowledge that. And that's what Chapter
10 364 is about. If you are going to be a true local exchange
11 service provider, then you have got to be providing 911 to the
12 people out there on the street and in their homes and in their
13 businesses on the street. You have got to be providing
14 operator assistance. You have got to be providing relay
15 services for the hearing impaired.

16 What they're saying is the fact that we haven't said
17 that doesn't mean we don't do that. But, you know, we have
18 been going at this stuff for close to 11 months now. They win,
19 they win if we get another postponement of this. They have had
20 multiple opportunities to state their case in their pleading.
21 They haven't done it.

22 All you would have to do is look in the public record
23 and you will see and they acknowledge what kind of business
24 they are in. And these folks provide facilities that connect
25 to other phone companies, that's basically what they do. You

1 know, they have talked a lot about competition,
2 business-to-business competition, but the truth is if you look
3 at what has gone on across the country, competition rises as a
4 priority to Neutral Tandem depending on the amount of profit at
5 stake. New Jersey, Pennsylvania, Wisconsin, the District of
6 Columbia, Maryland, Indiana, Ohio, Massachusetts, they are
7 gone. They are gone. So competition must not be as important
8 there.

9 So we think you have heard a lot today. If you focus
10 on the statutes, we are talking about purely legal issues
11 there. You have heard my argument on jurisdiction. As far as
12 standing goes, they clearly don't meet the standing argument.
13 They are essentially trying to use this Commission to force us
14 into a unilateral business relationship that enhances their
15 competitive standing. And we don't think -- there is a reason,
16 we think there is a reason you have never heard a CLEC/CLEC
17 arbitration since 1995, and that is because those arrangements
18 have traditionally been made and should continue to be made in
19 the marketplace.

20 COMMISSIONER EDGAR: Mr. Chairman.

21 Thank you, Mr. Hoffman.

22 Mr. Kise, I'm tending at this point, from what I have
23 heard, to agree with the staff recommendation as to the
24 jurisdiction issue. The standing issue, I think, sometimes the
25 more I hear, perhaps, not completely more clear it becomes, but

1 could you speak to that point in particular again on the
2 standing, and if there is anything else briefly that you seem
3 to believe is relevant, as well.

4 MR. KISE: And I may defer on the arcane, I will call
5 them, sadly, particulars, of this debate, because, frankly, I
6 still think if you have jurisdiction you can look at it. And I
7 think the argument that is taking place here demonstrates all
8 the more reason that you should take a look at it. And the
9 Commission has done this sometimes in the past where you have
10 seen that the issues are very complicated and there is an awful
11 lot of wrangling between the parties. And it seems, I mean, it
12 certainly seems to us abundantly clear, it just doesn't make
13 any sense that the Legislature would not give you jurisdiction
14 over these relationships when it charges you with the
15 responsibility of fostering a competitive environment for
16 provisioning of telecommunications services.

17 It doesn't say ILECs, CLECs, PSTN; it doesn't use
18 specific acronyms. And in 364.162, that as staff correctly
19 points out, it uses much looser language when it talks about
20 any other provider. It doesn't pin it down to a specific kind
21 of one. So it is worthy of a look.

22 Again, with respect to standing, I think in order to
23 determine whether or not we, in fact, have standing, the
24 Commission needs to engage in actual factual findings which
25 really procedurally aren't in front of you on a motion to

1 dismiss. It's all the more reason, again, to go forward and
2 take a further look.

3 And without agreeing or disagreeing with Level 3's
4 position, and what Mr. Hoffman has said about whether we are in
5 favor of competition depending on the state or not, that is
6 something -- take a look. Find out if that's an accurate
7 representation. And test our representations. Again, as
8 Commissioner Argenziano pointed out, more information is not a
9 bad thing especially -- I think the reason you haven't, at
10 least in this context, seen a CLEC-to-CLEC arbitration request
11 is because Neutral Tandem is the only provider of this service.
12 There is only one other than the carriers themselves. And if
13 you push them off the table, you guarantee, it is not even a
14 question, you guarantee that there won't be anybody else. And
15 so a storm comes and hits, an 18-piece switch goes down, guess
16 what, there is no redundancy. There is no chance that anybody
17 else is going to switch those calls.

18 If they, in fact, block the calls -- I don't know if
19 they will or won't, taking them at their word, they won't, but
20 if they do, who polices that? What happens? I mean, the
21 50,000 people, or a million people, or however many calls a day
22 get blocked, they won't be able to call you and complain
23 because their calls are blocked. So it is worthy of a look
24 when you have a case of first impression of this magnitude
25 where there are significant issues that may affect the future

1 in ways that we can't even foresee, then it is, respectfully, I
2 think, worthy of a look.

3 On standing, I do think we fall within the confines
4 of any other provider, but I just don't think that -- you can
5 see how complicated it is. That everyone in this room who has
6 got a great deal more experience than I do with
7 telecommunications issues is all wound up in knots over what
8 this really means and how it means. And so the thrust of what
9 I'm saying is don't -- let's set the legalese over here, let's
10 take a look at the issues. It is clear that you have the
11 jurisdiction.

12 I mean, I just don't see any way that anyone -- and
13 with all respect to Level 3, I just don't see any way anyone
14 can tell this Commission that this statute does not have in
15 mind these exact sort of competitive arrangements, and the
16 Legislature did not intend for you to look at this, that we
17 need to go back and ask the Legislature to clarify loose
18 language when they have already done it. They have said
19 anybody else. It doesn't narrow it down to a specific one.
20 And I would agree with Commissioner McMurrian on that point,
21 that it is there. So let's not get caught up in the standing
22 argument.

23 It's probably not the answer you wanted to directly
24 address your question as to the specifics of standing, but I
25 just don't think -- my colleagues may knock me over the head, I

1 just don't think it matters for purposes of this Commission's
2 fundamental review of activity that its own staff says is
3 worthy of a look.

4 CHAIRMAN CARTER: Commissioner Argenziano.

5 COMMISSIONER ARGENZIANO: And with all due respect,
6 and I understand what Mr. Kise is saying, but standing is very
7 important here because what you are asking me to do is
8 disregard the other part of the statute, which is not possible.

9 What I need from Neutral Tandem is to show me where
10 your standing is. That's what I need. And I have heard 911
11 services. I don't agree that simply that you're not offering
12 it gives you no standing. As long as there is access to it is
13 what I'm concerned with, and I am hearing -- that's what I need
14 more of, because then I feel like I have complied with the
15 statutes not only on competition but also on that you meet the
16 requirements of providing that access to be a CLEC.

17 CHAIRMAN CARTER: Commissioners, let's see if we can
18 cut across this. Yes, ma'am, you're recognized.

19 MS. KEATING: Thank you, Mr. Chairman, Commissioners.

20 Commissioner Argenziano, you have hit the nail on the
21 head. The statute specifically says must include access to.
22 It doesn't say actually providing to an end use customer, it
23 says access to. And I believe that Neutral Tandem can show
24 that it provides access to those services.

25 CHAIRMAN CARTER: Are you comfortable?

1 Commissioners, what I was going to say is that it
2 seemed like we have kind of glossed over jurisdiction and
3 jumped on the standing. Let's do this, if possible. Is it
4 possible that we can deal with Issue 1, and then -- probably I
5 know there may be some further discussion on Issue 2 in terms
6 of the standing. It seemed like we just kind of glossed over
7 that issue of jurisdiction. We have heard from Mr. Teitzman,
8 we have heard from the parties. Is there any further
9 discussion on Issue 1?

10 I think it would be -- because it looks like there
11 may be some further discussion on standing in terms of what the
12 parameters for standing is, what those parameters are. So, if
13 any other Commissioner wants to be heard on jurisdiction, let's
14 do that now so we can go ahead on and deal with the standing
15 issue.

16 Commissioner Skop, you're recognized.

17 COMMISSIONER SKOP: Thank you, Mr. Chair.

18 At this time I would move the staff recommendation on
19 Issue 1.

20 COMMISSIONER EDGAR: Second.

21 CHAIRMAN CARTER: It has been moved and properly
22 seconded on Issue 1. Commissioners, are there any other
23 questions or comments on Issue 1 as relates to does the
24 Commission have jurisdiction? Hearing none, are you ready for
25 the vote? All in favor, let it be known by the sign of aye.

1 (Unanimous affirmative vote.)

2 CHAIRMAN CARTER: All those opposed? Okay.

3 Now, we are on Issue 2. Mr. Teitzman, I'm going to
4 ask you -- redundancy is sometimes better than repetitiveness.
5 So Issue 2, please.

6 MR. TEITZMAN: Yes, Chairman.

7 Issue 2 addresses whether Neutral Tandem has standing
8 to seek relief under Sections 364.16 and 364.162, Florida
9 Statutes. Staff does not believe Neutral Tandem's delivery of
10 transit traffic constitutes the provision of local exchange
11 telecommunications services for the purposes of
12 Section 364.16(2).

13 Furthermore, staff does not believe that under
14 Florida law, Neutral Tandem qualifies as an agent for
15 originating carriers. Accordingly, staff believes that Neutral
16 Tandem lacks standing to seek relief under Sections 364.16 and
17 .16(2), Florida Statutes.

18 CHAIRMAN CARTER: Commissioners, we are now open for
19 discussion, or if you have any questions for the parties or
20 staff, or any discussion.

21 Commissioner McMurrin, you're recognized.

22 COMMISSIONER McMURRIAN: Thank you.

23 I don't really know where to start, but I will just
24 start with this to staff. I mean, Mr. Teitzman, you have heard
25 Ms. Keating's arguments about access to 911. I guess I just

1 want to get your reaction to those arguments. And there are
2 other -- what are the other services that must be provided as
3 part of being a local exchange provider that, you know, we have
4 to check off those boxes to make sure someone is providing
5 local exchange service? Can you sort of go through those and
6 react to Ms. Keating's arguments about access to 911, as well?

7 MR. TEITZMAN: Well, certainly. While I do think
8 that the provision of local exchange telecommunications
9 services is broader than just access to 911, I think we
10 discussed in the recommendation it's making those services
11 available to the public for hire, which that is not -- it is my
12 understanding is not what Neutral Tandem is doing. That's not
13 their business. Their business, as Mr. Hoffman discussed, is
14 basically connecting two carriers. They're the middle man.

15 With regards to what else needs to be provided, as we
16 have discussed, access to 911 service. I believe number
17 portability would be included in that, as well.

18 MS. LEE: Relay services, as well, Commissioners --
19 Pat Lee on behalf of staff -- as well as 911. I think one
20 thing that you need to remember is there is no statutory
21 requirement that requires a certificated CLEC to provide local
22 exchange telecommunications service. But, if they do, then
23 they must provide access to all these other services like
24 relay, 911, operator services, and the like.

25 In the context of the issue as framed here, transit

1 service, staff does not believe that transit service is a local
2 telecommunications exchange service. That's what separates it.

3 CHAIRMAN CARTER: Commissioner Argenziano.

4 COMMISSIONER ARGENZIANO: But I still have to go back
5 to the statute, and what it says is that the CLEC must include
6 access to operator services, 911 services, and relay services
7 for the hearing impaired. It doesn't include anything else in
8 there. So, if I call up on the phone and I get through Neutral
9 Tandem 911 services, or access to the hearing impaired relay
10 services, then I think they meet the requirement of providing
11 the access. And that's where I'm having a hard time
12 understanding where that doesn't fit into your recommendation.

13 MR. TEITZMAN: Well, our recommendation is they don't
14 have standing because they are not providing -- it's not
15 because they are not a CLEC, it is because they are not
16 providing local basic exchange telecommunications services.

17 MR. COOKE: Commissioner, 911 is one example of what
18 we are interpreting the statute to include in local exchange
19 services. There is no pure definition of that term in the
20 statute. Some of the things that are included in that are
21 ability to provide number portability, the relay service, as
22 you heard about. 911 is one example of what we think would
23 fall into that requirement to provide those types of services
24 to be local exchange service, and 364.162, where you just
25 decided jurisdiction, we believe that a CLEC could be a

1 provider of local exchange services. But in this case, and I
2 may be oversimplifying this, we understand that this is
3 strictly a transit provider from one business to another that
4 doesn't provide how we interpret it in the statute local
5 exchange services.

6 COMMISSIONER ARGENZIANO: That's where I'm having a
7 disagreement. I once thought you were correct in that
8 definition, because if you did not have the access to 911, I
9 actually thought if they didn't provide it then they were
10 not -- then they didn't have standing. But the way I'm reading
11 it now is as long as there is access to it then they do have
12 standing. And I think we are arguing the same thing over and
13 over again. But if they have 911 services and they have -- and
14 then on the bottom of that statute it does say that a
15 certificated competitive -- I can't see without my glasses and
16 they are right here. I just had another birthday; they're are
17 getting worse. A competitive local exchange telecommunications
18 company may petition the Commission for a waiver of some or all
19 of the requirements. So they could possibly do that and still
20 provide access to some, not all of those requirements and still
21 have standing is the way I read it.

22 MR. COOKE: I think that's possible, but based on the
23 pleadings we have seen there is no waiver that we are aware of.
24 The other thing I think I want to be careful about is it is not
25 the access that I think we are having trouble with, it's basic

1 local exchange telecommunications services. That is, I think,
2 a subset of local exchange telecommunications services.

3 COMMISSIONER EDGAR: And where is our definition of
4 basic local telecommunications?

5 MR. COOKE: It's in the section you're referring to,
6 364.337. In Sub 2 where it talks about the 911 service, it's
7 saying basic local telecommunications service provided by a
8 CLEC must include 911.

9 COMMISSIONER ARGENZIANO: Mr. Chair.

10 CHAIRMAN CARTER: Commissioner Argenziano.

11 COMMISSIONER ARGENZIANO: Is there a definition in
12 the statute of basic local telecommunications service?

13 MR. COOKE: I don't believe there is.

14 MR. HOFFMAN: Commissioner Argenziano, it's in
15 364.02, Subsection 1.

16 COMMISSIONER ARGENZIANO: If we could have staff --

17 MR. COOKE: But I just want to be clear, when we
18 looked at 364.162, we interpreted that provision as saying any
19 other provider of local exchange telecommunications. Let me
20 get to the language itself. To any other provider of local
21 exchange telecommunications services. That was our starting
22 point when we decided that there could be jurisdiction here, if
23 a CLEC was any other provider of local exchange
24 telecommunications services. We believe that that is possible.
25 Then we had to go and look and decide, well, what's

1 the meaning of local exchange telecommunications services. And
2 I don't believe there is a definition of that anywhere in the
3 statute. We looked at what we believed to be examples of the
4 types of things that are necessary to fall into a provider of
5 local exchange telecommunications services. One of those might
6 be 911, relay service, number portability. I'm not the best
7 expert on the telecommunications statute, but there are several
8 things that we looked at to determine whether it was compatible
9 with being a local exchange telecommunications service, and
10 concluded it was not.

11 MR. HOFFMAN: Mr. Chairman.

12 CHAIRMAN CARTER: One moment and I will be right back
13 with you.

14 Commissioner Argenziano, did you want to hear from
15 Mr. Hoffman before you ask the question?

16 COMMISSIONER ARGENZIANO: Okay.

17 CHAIRMAN CARTER: Okay. Mr. Hoffman, you're
18 recognized.

19 MR. HOFFMAN: Thank you, Mr. Chairman. I think I can
20 help on this.

21 I will reiterate what Mr. Cooke had to say, which is
22 that this whole notion of Neutral Tandem providing access to
23 911 is not in their petition. And that is their third
24 petition, so this is something new that we are hearing today.

25 But more importantly, even if they had put it in

1 there, what we are talking about, Commissioner Argenziano, is
2 providing access to 911 to basic telecommunications services
3 customers. Not to other carriers. Now how do I know that? If
4 you look at Page 4 of the statutes that I gave you, the
5 handout, you will see how the Commission has implemented the
6 statute through their rule.

7 The Commission has a Rule 25-24.840. In Subsection
8 1 it says each provider of competitive local exchange
9 telecommunications service -- which, of course, they don't even
10 do that -- shall make access to 911 emergency services
11 available to who, to each of its basic telecommunications
12 services customers. That's what this is all about.

13 This rule implements the statute in a way that has
14 been recognized by the Commission for the last 12 years. It's
15 about what services are provided by a carrier to a basic
16 telecommunications services end user customer.

17 CHAIRMAN CARTER: Commissioner Argenziano.

18 COMMISSIONER ARGENZIANO: And I have great respect
19 for the rules, but I have greater respect for the statutes, and
20 that is what I'm really trying to get to. And this may have
21 been used for years, and I understand precedent, but the
22 statute is what I'm trying to get at to figure out -- the way I
23 am reading the statute right now, Mr. Hoffman is that if they
24 provide the access that's all that's necessary.

25 MR. HOFFMAN: But, Commissioner Argenziano, I would

1 say -- and I understand your respect for the statutes, but that
2 would be like saying I manufacture ABC switches that are used
3 by public safety answering points in providing 911 service. I
4 have my own company that does that. I'm providing access to
5 911. You don't have jurisdiction over my manufacturing
6 company, but I am involved in providing access to 911. The
7 point is that this statutory scheme, I would respectfully
8 submit, and Commission precedent supports, is about the
9 relationship and the services provided by carriers to end user
10 consumers.

11 CHAIRMAN CARTER: Commissioner McMurrin.

12 COMMISSIONER McMURRIAN: Okay. It seems to me the
13 problem that we have is we don't have an exact definition of
14 what local exchange telecommunications service is, and that it
15 looks like the staff's analysis is referring back to the
16 definition of basic local telecom service, and that is when we
17 bring in the 911 and the other things in that definition,
18 number one, and I'm just thinking out loud.

19 I'm trying to get to a question here. I guess this
20 will be to staff about how -- in fact, let me just ask this,
21 are we correct in assuming that you have used the definition of
22 basic local telecom service in trying to determine whether or
23 not Neutral Tandem is considered a provider of local exchange
24 telecom service as we are just talking about here? Is it the
25 first definition in the statute that we are referring to for

1 determining that, or is it in 364.337?

2 MR. TEITZMAN: I think if you look at Page 17 of the
3 recommendation -- yes. I'm sorry, I'll repeat that. I think
4 if you look at Page 17 of the recommendation, it would be the
5 second full paragraph that starts off with, "As both parties
6 note." We didn't refer to the definition of basic, we were
7 looking at, okay, is there a definition of local exchange
8 telecommunications services. There is not in the statutes. So
9 then I looked for, well, where else is local exchange
10 telecommunications services referenced in the statutes.

11 And as you can see the footnote on the bottom of the
12 page, 364.16(4) references local exchange services a couple of
13 times, and as you read through this section, it seems to
14 contemplate providing these services to the public for hire.
15 That is not what Neutral Tandem's service is, nor is it what
16 they have alleged it to be specifically of transit service. So
17 that is basically how in drafting the recommendation I came up
18 with what I thought was an appropriate understanding -- maybe
19 not a definition, but an understanding of local exchange
20 telecommunications services.

21 MS. KEATING: Thank you, Chairman.

22 COMMISSIONER EDGAR: Mr. Chairman, I think Ms.
23 Keating would like to respond.

24 CHAIRMAN CARTER: You're recognized.

25 MS. KEATING: If I may, mr. Chairman. Thank you,

1 Commissioners.

2 I think this analysis gets back to sort of our
3 essential problem with the statutory interpretation that has
4 been applied here. You have to do an awful lot of work and
5 make an awful lot of assumptions in order to conclude that we
6 don't have standing. It is a whole lot easier to look at the
7 plain language in the statute and reach the conclusion that we
8 do have standing.

9 364.162, and this is to a point that you reached
10 earlier, Commissioner McMurrian, contemplates interconnection
11 with any other provider of local exchange telecommunications
12 services. You have to make a leap to assume that that equates
13 to a provider providing basic local exchange services, which is
14 a term that is specifically defined in the statute. The
15 Legislature made the point of defining what basic is. They
16 made the point of defining what nonbasic is. And essentially
17 somebody providing that has to be a traditional CLEC. We don't
18 think that is what the Legislature contemplated. They
19 referenced CLECs in the statutes, they referenced ILECs in the
20 statute, and they referenced a third entity, any other provider
21 of local exchange telecommunications services. If the traffic
22 that Neutral Tandem is carrying isn't local exchange traffic,
23 what is it? I don't know what it is. And if so, what happens
24 to these calls? We are a provider of local exchange
25 telecommunications services, and as such, we have standing to

1 at least move forward and have your day in court.

2 CHAIRMAN CARTER: Commissioners, let me -- you're
3 recognized, Commissioner McMurrin.

4 COMMISSIONER McMURRIAN: Let me try it this way to
5 staff. And perhaps I need to ask some questions of Level 3 to
6 go down this road. But I guess what I am getting at is what
7 can be done. If the Commission were to view the allegations as
8 a problem, and I know there has been some allegations that
9 there is anticompetitive conduct and things, and maybe I need
10 to ask Level 3 some questions about exactly how the traffic is
11 flowing and how the compensation works. And I know we are here
12 on jurisdiction and standing, but this is where I find myself
13 in trying to determine the standing issue.

14 In fact, let me jump in and just ask Mr. Hoffman if
15 that's okay? Mr. Hoffman, you have an originating carrier that
16 uses Neutral Tandem to deliver traffic to you as a terminating
17 carrier. As I understand it, the originating carrier would pay
18 for terminating access -- would pay terminating access to Level
19 3. Is that correct?

20 MR. HOFFMAN: Commissioner McMurrin, that issue
21 isn't quite as simple as you have stated it, because certainly
22 there are precedents out there that say that when it comes to
23 what is characterized as reciprocal compensation those monies
24 are to flow from the originating carrier. But then in the real
25 world, and from Level 3's perspective, there is a practical

1 problem with collecting that compensation from the originating
2 carriers.

3 COMMISSIONER McMURRIAN: Okay. So in this case with
4 respect to Neutral Tandem, am I correct in understanding that
5 you are charging -- Level 3, at least, is charging, I guess
6 under the past agreement is charging Neutral Tandem for the
7 service it's providing, as well?

8 MR. HOFFMAN: Commissioner McMurrrian, let me
9 introduce Bill Hunt. He is with Level 3. He is the Vice
10 President of Regulatory Policy, and he can probably more
11 accurately respond than I could.

12 CHAIRMAN CARTER: Let's do this, Commissioner
13 McMurrrian, because I know that Commissioner Argenziano has some
14 questions and all like that. Let's kind of just -- let's take
15 five. Hold your places. Let's just take five and let the
16 Commissioners kind of gather our thoughts and get our questions
17 together and then we will be back.

18 COMMISSIONER EDGAR: Can we make it ten?

19 CHAIRMAN CARTER: We will take ten minutes by the
20 clock on the wall.

21 (Recess.)

22 CHAIRMAN CARTER: We are back on the record. And as
23 we left, Commissioner McMurrrian had asked a question and Mr.
24 Hoffman was getting ready to answer.

25 Mr. Hoffman, you're recognized.

1 MR. HOFFMAN: Thank you, Mr. Chairman. A lot of
2 discussion before we took our break. I just want to very
3 briefly go back to the most simplest of points to make sure
4 that it's clear on the record, and it's this: Neutral Tandem
5 carries local calls between two carriers, an originating
6 carrier and a terminating carrier. That's the business they
7 are in. Neutral Tandem does not provide local exchange
8 telecommunications services, that's not the business they are
9 in.

10 Now, Commissioner McMurrin, you had asked a
11 question, and Mr. Bill Hunt with Level 3 had come up to respond
12 to that. So, Mr. Chairman, with your permission I would like
13 to turn it over to Mr. Hunt.

14 CHAIRMAN CARTER: You're recognized.

15 MR. KISE: Mr. Chairman, might I make a point of
16 order? It relates to this presentation.

17 CHAIRMAN CARTER: Okay. Let's hear it.

18 MR. KISE: I just want to place on the record, I
19 understand that we are in the question and answer mode, but it
20 appears that we are moving into sort of the quasi-testimonial
21 mode, and I want to place that objection on the record. This
22 is a motion to dismiss. Obviously, the Commission is free to
23 ask questions; but Mr. Hunt, I believe, he hasn't been sworn.
24 If he is going to start offering what is really going to amount
25 to testimony now and answer the question, then certainly an

1 opportunity to cross-examine him might be -- and, frankly, it's
2 all the more reason that we really should have a hearing so we
3 can get into these issues. But I just respectfully wanted to
4 place that objection onto the record, Mr. Chairman, because I
5 do think we are moving in the direction of taking testimony on
6 a motion to dismiss.

7 CHAIRMAN CARTER: Okay. Let's do this. Let's cut
8 across the field. Let's do this. I won't recognize your
9 objection, and I won't recognize the comments right now. Let's
10 hold up. Because where we are right now, as Commissioners, we
11 are allowing you guys to participate in our deliberations.
12 That's the phase that we are in now. And it's incumbent upon
13 us, and it's my goal to make sure that the Commissioners have
14 all the questions answered that they need in order to come to a
15 conclusion.

16 Where we are now is we are on Issue 2. That issue is
17 does Neutral Tandem have standing -- am I correct? Is that
18 right? Are we on the issue of standing? Does Neutral Tandem
19 have standing to seek relief under Section 364.16 and 364.162.

20 Mr. Teitzman, is that correct?

21 MR. TEITZMAN: That is correct, Chairman.

22 CHAIRMAN CARTER: Okay. So what we need to do,
23 Commissioners, is we allowed oral arguments to give us an
24 opportunity to hear some things that will help us to foster a
25 decision. And where we are now is that we have heard from the

1 parties, we have heard from staff, and I wanted to give
2 Commissioners an opportunity so we can fully discuss the issues
3 and come to a conclusion on resolving the issues.

4 So, Mr. Kise, I appreciate what you had to say, but I
5 really don't want to go there right now, because I want to put
6 this in the proper context. Right now what we are doing is we
7 are discussing it as Commissioners, and parties may or may not
8 participate at our discretion. And so what I would like to do
9 rather than getting to a "he say, she say" is, Commissioners, I
10 would like for us to focus on Issue 2, and I want us to be able
11 to get the questions answered that we need to have to make sure
12 that we can come to a conclusion here.

13 Commissioner McMurrian, you're recognized.

14 COMMISSIONER McMURRIAN: Thank you. And perhaps
15 there is easier way I can do this, because I can see as I
16 started asking these questions earlier that I'm getting into
17 something more complicated than necessary probably. And let me
18 just ask what I really want to ask, and that is to staff.

19 Staff, is there something that we should be looking
20 at on our own with respect to what we understand is going on
21 between these parties? I realize we don't have all the
22 testimony on the details of the docket because we sort of
23 bifurcated to take jurisdiction and standing first. And, of
24 course, we have a motion to dismiss, as well. But with the
25 information we have now, is there some way we could get

1 comfort? Is there something that we should be looking at going
2 forward to determine if there is a problem in the marketplace
3 with respect to this kind of traffic?

4 MR. TEITZMAN: There is the potential, and I think
5 this is what staff was discussing in its recommendation, there
6 is the potential that there is anticompetitive behavior. Not
7 so much in regards to Neutral Tandem, but to other originating
8 carriers. By not allowing Neutral Tandem to terminate traffic
9 on Level 3's network, Level 3, in essence, is unilaterally
10 deciding for the originating carrier how they can transit their
11 traffic.

12 This Commission has held in the past that the
13 originating carrier makes that determination, but if they can't
14 use Neutral Tandem to deliver their traffic to Level 3, there
15 is only one option, and that's the ILEC. So by de facto they
16 are making that choice. So that is the concern that staff has,
17 not so much that it is on anticompetitive behavior with regards
18 to Neutral Tandem's rights, but to the rights of the
19 originating carriers.

20 COMMISSIONER McMURRIAN: Mr. Chairman, could I have a
21 follow up?

22 CHAIRMAN CARTER: Sure.

23 COMMISSIONER McMURRIAN: Thank you.

24 So one follow up to that, regardless of what we do
25 with respect to standing on Issue 2, the Commission can decide

1 on its own to look into a particular issue?

2 MR. TEITZMAN: That is correct. On that point, I
3 would certainly agree with the direction that Mr. Kise was
4 discussing. I disagree, I think the Commission should dismiss
5 Neutral Tandem's petition, but I do believe the Commission has
6 the authority to -- and it can be handled through opening a
7 generic docket, it could be called an investigation into
8 anticompetitive behavior, or the Commission could direct staff
9 today to hold a workshop and invite originating carriers to
10 come in. Any of those options are available, but I think the
11 Commission does have the authority to take a look at this
12 because it is a public policy concern.

13 And as we have discussed earlier today, this idea
14 that having an additional transit provider or a competitive
15 provisioning of transit services is a good thing for the state
16 of Florida and, most importantly, to the consumers of the state
17 of Florida.

18 COMMISSIONER McMURRIAN: Thank you, Chairman.

19 CHAIRMAN CARTER: Commissioner Skop.

20 COMMISSIONER SKOP: Thank you, Mr. Chairman.

21 And, again, I would like to jump in on Commissioner
22 McMurrian's comments, and maybe some of my colleagues have
23 probably had some similar thoughts. Again, I don't want to get
24 distracted from the issue before us, but I do think in touching
25 upon what Commissioner McMurrian has mentioned, and also some

1 points that Mr. Kise has raised concerning redundancy and the
2 appropriateness of having that anticompetitive behavior
3 promoting competition and options for originating carriers that
4 perhaps getting into a generic proceeding may offer some forums
5 to redress some of the issues that are being raised here today.

6 But with respect to the issue before us, I do think
7 it turns squarely on statutory construction principles with
8 respect to standing. And hopefully legal staff can elaborate
9 on that issue a little bit more as we get into Issue 2. I
10 recognize that they are applying statutory construction
11 principles lacking a definition, and hopefully you guys can
12 give a little bit of clarity to that.

13 I am generally in favor of staff's recommendation
14 with respect to the conclusions they have made on standing;
15 but, again, I want to make sure that we have legal sufficiency
16 in place if we are willing to go forward with the motion to
17 dismiss. Also, I think a related tangential issue that I just
18 wanted to kind of throw out there with respect to the
19 proceeding before us, and I guess Commissioner McMurrian has
20 raised the specter of having a generic proceeding, which I
21 think staff also has on their mind, if we do go forward, I
22 think the question is also inequity, whether we leave in place
23 a status quo with respect to the existing arrangement until
24 such time as the generic proceeding could be conducted. But
25 I'm not really -- I just wanted to mention that in passing.

1 I'm not really committed to that.

2 I do think that, based on the staff recommendation,
3 if we would move forward with that, the traffic would have to
4 be rerouted elsewhere. But concerns in equity might allow the
5 status quo to be maintained to address some of the other issues
6 that have been properly raised. So I just want to put in my
7 two cents. And if staff could, again, elaborate a little bit
8 more on the statutory construction principles that are being
9 applied, not that they haven't briefed those properly, but I
10 think that this turns particularly with standing on Issue 2 on
11 those principles. Thank you.

12 MR. TEITZMAN: Okay, Commissioner. Well, to start
13 off again, I would just reiterate that the discussion is
14 basically on Page 17. But, yes, there is this idea that local
15 exchange telecommunications services is not defined in Chapter
16 364. So, basically, using the principles of statutory
17 construction, the next thing that, like I said, I did in
18 drafting the recommendation is to say, okay, well, where is
19 that term used in Chapter 346 and how is it used. And, for
20 example, you have 364.16(4). And as you read through that
21 section, it seems to contemplate that -- well, voice grade
22 exchange service available to the public for hire. So, I think
23 the one thing that probably hasn't been said that maybe will
24 simplify is what does that mean? And basically what that means
25 is that for my home, I can't call Neutral Tandem, and say I

1 would like you to be my local service provider. That is not
2 the service that they offer. And we believe that as the issue
3 asks with regard to 364.16(2) and .162, that that is the
4 service that they would need to provide to have standing.

5 CHAIRMAN CARTER: Thank you.

6 Commissioner Argenziano, we started off this whole
7 thing about standing, and you had some specific questions, and
8 I want to make sure that all the Commissioners have ample
9 opportunity to get their questions answered to their
10 satisfaction. I do believe that there are some questions that
11 we had here that we have asked of staff and asked of the
12 parties and all like that, but the bottom line is that I want
13 to make sure that the Commissioners' have their questions
14 answered before we move forward. So, you're recognized.

15 COMMISSIONER ARGENZIANO: Thank you, Mr. Chairman.

16 I appreciate that, because I have asked a few
17 questions, and I may have a differing opinion of what staff has
18 on local exchange telecommunications service, since it's not
19 statutorily defined. And you are kind of reaching into the
20 statutes to see or choose, and I understand that. And there
21 are some people, I guess, who seem to think that I may not have
22 an understanding of the transit services versus the local basic
23 telecom services. And I believe that staff is saying that
24 because Neutral Tandem provides transit services they are not
25 the basic local telecom provider as you point out on Page 17

1 for those specific reasons.

2 However, because it's not statutorily defined, what
3 my concern is at this point is that I don't know that I am
4 willing to throw out -- dismiss the whole thing before
5 acquiring more information, because then I feel what is written
6 in the statutes I may be disregarding as far as competition,
7 and providing lower services, or more competition to the
8 consumer out there. So at this point I'm not sure that my
9 questions -- I haven't answered my own questions. I'm not sure
10 at this point I would be willing to dismiss because of lack of
11 information, and particularly finding out that the bone of
12 contention I had originally was that it seemed that they did
13 not provide access. And what I'm hearing today is they do
14 provide access to some of those services that are mandated in
15 the statutes. And then there is also the possibility of
16 acquiring a waiver or whatever the company may decide to do
17 down the road.

18 I think I want more information at this point. I
19 understand staff's concern, but I'm not just totally wed to
20 that. I have a hard time not seeing it in the statute, and I
21 don't want to disregard that possibility. So I think that's
22 where I'm kind of leaning now, Mr. Chairman, is just wanting
23 more information.

24 CHAIRMAN CARTER: Thank you.

25 Commissioner Skop.

1 COMMISSIONER SKOP: Thank you, Mr. Chairman.

2 That's also a point that Commissioner Argenziano
3 raised. I spoke to legal staff over the break. Again, noting
4 that this turns on statutory construction and noting that there
5 is not a definition, and noting that legal statutory
6 construction principles have been applied by staff to infer
7 what the statute meant given the ambiguity that Commissioner
8 Argenziano raised, noting that it also says provide access to,
9 I believe, is the frame of the wording of the statute.

10 My question, again, turns on the legal sufficiency,
11 because there is a genuine issue of material fact with respect
12 to what the statute means and applies, would that defeat the
13 motion to dismiss, and I would like to get some input from
14 legal staff with respect to that. I know that we are free to
15 interpret the statute as we apply those construction
16 principles, but, again, I am concerned about due process, and
17 also the points that Commissioner Argenziano raised.

18 Thank you.

19 CHAIRMAN CARTER: Mr. Cooke.

20 MR. COOKE: If I understand the question, you know, I
21 agree with Mr. Teitzman. I think what we are interpreting is
22 the definition of local exchange telecommunications services.
23 We are trying to use principles of statutory construction to
24 find examples of what that is, because it is not defined by
25 itself in the statute.

1 But our reading of the statute suggests that it
2 includes providing telecommunications services, essentially, to
3 the end user, to the public for hire. I mean, for example, if
4 you look at the definition of basic telephone communications
5 services, it talks about voice grade service that a person can
6 call up to use. If you look at the footnote that Mr. Teitzman
7 cited or included in the recommendation, it refers to local
8 exchange as including number portability. 911 is another
9 example of what is included in it.

10 So we are, based on fairly common principles of
11 statutory construction, concluding that a transit service which
12 never provides end user, that type of service, can never be
13 what we are defining to be local exchange telecommunications
14 services. So there are no material facts that could be plead,
15 and, therefore, there is no standing here. That's the gist of
16 our analysis.

17 CHAIRMAN CARTER: Commissioner Skop.

18 COMMISSIONER SKOP: Thank you. Just real quick as a
19 follow up. So if I correctly understand staff's position is
20 that they have squarely applied legal statutory construction
21 principles, and that in staff's mind that there is a distinct
22 difference between being a provider of services as opposed to
23 merely being a conduit through which services flow, is that
24 correct?

25 MR. COOKE: I think that is correct. I mean, I'm not

1 going to sit here and guarantee that our interpretation is
2 going to withstand scrutiny, but that is our best effort on
3 this.

4 COMMISSIONER SKOP: And I respect that. Thank you.

5 CHAIRMAN CARTER: Commissioner Argenziano.

6 COMMISSIONER ARGENZIANO: And to that point, again,
7 that is where I think I differ. I see the word access,
8 providing access too many times in the statutes. And I think
9 that interpreting it the way that staff has, with all due
10 respect, and I understand why they have, that that flies in the
11 face of newer legislation and newer policy that we are mandated
12 to follow, which means competition. And I think since it is
13 not statutorily prohibited, because it's not defined, then I
14 would not be willing, as I said before, to throw out the
15 possibility of increased competition and reduced prices to the
16 consumer without getting more information.

17 And, again, my real sticking point was I always felt
18 we had jurisdiction. I thought staff was right on target with
19 that, but I felt that the problem of providing those services
20 was stuck in my mind until I reread the statute and realized it
21 was access. Until it was clarified today, and Mr. Hoffman is
22 right, it has not been mentioned before, which I had a hard
23 time the last time because that is what made my decision.
24 Well, if you weren't providing or haven't giving access to
25 those services then I didn't think you had standing at all, and

1 it changes things for me today in moving forward not to
2 dismiss.

3 Thank you for giving me the opportunity, Mr.
4 Chairman.

5 CHAIRMAN CARTER: Thank you, Commissioner Argenziano.

6 And what my goal was to do is to let each
7 Commissioner have an opportunity to be heard on this issue, and
8 what I was trying to do today is to kind of keep us from -- you
9 know, I noticed some of the questions went all the way to Issue
10 4, but I want us to back up to Issue 2 and deal with the issue
11 of standing. And I think that's a different issue. I think
12 there were a couple of questions that you asked earlier about
13 was it a distinction without a difference in terms of the
14 services that were provided, and your question about access.
15 And I can see where your concern would be there.

16 Commissioner McMurrin, you had some questions in the
17 context of whether or not we have had an opportunity look at
18 these matters, and the question of how do you look at these
19 matters, and I think that is where your heartburn is coming in
20 there. But I do want to make sure I give the Commissioners an
21 opportunity, and I want us to stay on issue of standing so we
22 can resolve this issue and then we can go forward with the
23 remainder.

24 Commissioner Skop, you're recognized.

25 COMMISSIONER SKOP: Thank you, Mr. Chair.

1 And, like I say, briefly, I would like to move
2 forward with standing also, but just to address your concern, I
3 think since we have established that we have jurisdiction that,
4 you know, if we wanted to address the concern that Commissioner
5 McMurrian raised as well as I brought up, that we would have at
6 our discretion the ability to open a generic proceeding as
7 staff has also pointed out, so I think that would help answer
8 the concern that you just may have expressed. Thank you.

9 CHAIRMAN CARTER: Commissioner McMurrian, do you want
10 to be heard on this?

11 COMMISSIONER McMURRIAN: I will jump in and try.

12 CHAIRMAN CARTER: Yes, jump in and try.

13 COMMISSIONER McMURRIAN: I appreciate what
14 Commissioner Skop has said with respect to that. I'm not sure
15 I was saying a generic proceeding, but I guess it would be.
16 I'm not sure.

17 I guess I was trying to get staff to tell me whether
18 they thought there was enough information for us to have a
19 basis to know whether we should look at this further even if
20 standing were denied. And I know we are not at that point yet,
21 but given the staff recommendation, if the staff recommendation
22 were carried and Neutral Tandem was found not to have standing,
23 then should we think about the issue in general? And, you
24 know, there has been some allegations made, and perhaps Neutral
25 Tandem doesn't have standing to bring it exactly in the way

1 that they have brought it, but perhaps there is another way to
2 look into the issue and satisfy ourselves because of our broad
3 jurisdiction with respect to the competitive market and because
4 of the allegations that have been raised to satisfy ourselves.

5 But I'm not sure exactly what the scope of a generic
6 proceeding would be, how broad it would be, what all parties it
7 would involve. And so that is my only hesitation about the
8 generic proceeding part. But I do think that perhaps we at
9 least should think more about that as we go forward. But I
10 appreciate that you have brought up, too, what happens with the
11 existing agreement. Because I think as Mr. Hoffman said
12 earlier, if the motion to dismiss carries that at least he
13 brought up talking about when we actually are looking at
14 traffic being blocked. So I think we would have to address
15 that, too. So I know it gets more and more complicated as we
16 try to throw out other issues, so I'm not sure how to proceed,
17 quite frankly, Chairman.

18 CHAIRMAN CARTER: Well, I was just trying to find
19 where my colleagues are on this issue, and obviously give as
20 much time as possible to the discussion, but eventually, you
21 know, we have to cut the Gordian knot, so I want to make sure.

22 Commissioner Argenziano, you are recognized.

23 COMMISSIONER ARGENZIANO: Well, I think you want to
24 get to the heart of the standing issue, and I think there is
25 standing. I think we should move forward. And if the rest of

1 Commissioners agree, I think that Neutral Tandem has standing
2 at this point because of that access issue.

3 CHAIRMAN CARTER: Commissioner Edgar.

4 COMMISSIONER EDGAR: Thank you, Chairman Carter.

5 I would say that I think that I have heard three of
6 my colleagues express a desire for additional information, and
7 I would make the very friendly suggestion that perhaps we have
8 a panel. And with that in mind, if it's appropriate, I would
9 go ahead and make a motion for discussion, of course, and
10 consideration that we deny the motion to dismiss and that the
11 staff then work on scheduling the next procedural steps.

12 CHAIRMAN CARTER: Let me, before I entertain
13 questions from my colleagues, could you just elaborate a little
14 further? I see Commissioner McMurrian reaching for the button
15 so --

16 COMMISSIONER EDGAR: Again, what I think I have been
17 hearing, we have had a lot of discussion, and a lot of good
18 discussion, of course. I cite back also to the briefs that
19 were filed previously, and the oral argument that we had some
20 months ago, and so, you know, we have had a lot of discussion.
21 And I agree, I think Commissioner Argenziano pointed it out
22 that some additional information has been shared with us today
23 that was not a part, to my knowledge, of some of our
24 discussions before. And since I think I have heard at least
25 three of my colleagues, and, Chairman Carter, I think you and I

1 have been more listening than talking, but Commissioner
2 Argenziano and Commissioner Skop and Commissioner McMurrian, I
3 think I have heard them express an interest to hear more
4 information about these two parties in particular, and also
5 maybe some of the issues related.

6 And, therefore, in order to move us forward with what
7 I think I was hearing, and I hope I heard correctly, would be
8 that we deny the motion to dismiss which is before us, and that
9 then our staff would work with the Chairman's Office to
10 schedule the next steps in this docket.

11 CHAIRMAN CARTER: Commissioner McMurrian.

12 COMMISSIONER McMURRIAN: I thank Commissioner Edgar
13 for that, and I probably should confess that because of the way
14 we set up this docket, I think that is sort of why we are in
15 this posture, and that was to take up the jurisdiction and
16 standing issues first. And I have to say I think that was more
17 my idea than anyone elses, and thought it would work, and
18 frankly thought it was a way that if either of those questions
19 were answered in the negative that we wouldn't need to spend
20 Commission time and resources on going further into the
21 details. But I do find that it is harder to make a decision
22 about some of the jurisdiction and standing without knowing
23 more of the details. And staff and I had a long briefing
24 yesterday to go through some of the details. That was some of
25 the questions that I was trying to look to Level 3 to, but I

1 think it is just a little complicated to try to get through in
2 this kind of a forum. So I do think it would be good to find
3 some way to proceed and look at the technical issues, as well.
4 So I second Commissioner Edgar's motion.

5 CHAIRMAN CARTER: Commissioner Skop.

6 We have a motion and a second. We are in discussion.
7 Commissioner Skop.

8 COMMISSIONER SKOP: Thank you, Mr. Chair.

9 Yes, I tend to agree that we need to -- as
10 Commissioner Edgar used to say, we need bring this into landing
11 and try to find the right way to go about addressing the
12 concerns that have been raised. Just as a point of
13 information, maybe Legal might be able to jump in on this.
14 Since we've established that we do have jurisdiction, and there
15 have been collateral issues raised that we all want to seek
16 some additional information on, on our own motion can we just
17 deny the motion to dismiss without rendering a decision on
18 standing, or do we need to get to the standing issue?

19 CHAIRMAN CARTER: Mr. Cooke.

20 MR. COOKE: I think you are essentially by default
21 denying standing by denying the motion to dismiss, because I
22 think you have articulated that there is jurisdiction. But for
23 the standing issue, I don't think you literally have to sit
24 here and say we find standing, per se. Certainly by doing this
25 you are not denying that there is standing, so I am comfortable

1 with simply denying the motion to dismiss, and the motion to
2 dismiss included the standing issue.

3 One other thing I think would be helpful if this is
4 the direction the Commission goes is whether it might be
5 appropriate, and this is in one of our issues, there is ongoing
6 interconnection and whether the Commission believes that's
7 appropriate to continue while this case proceeds. To continue
8 while this case proceeds. In other words, if you deny the
9 motion to dismiss, we will go to some form of hearing on this.
10 There is interconnection between Level 3 and Neutral Tandem
11 that has been essentially done so far at the discretion of
12 Level 3. So I think that's an issue we probably should give
13 some direction on. Whether you would express a desire for that
14 to continue or not while this case proceeds.

15 CHAIRMAN CARTER: Commissioner Skop.

16 COMMISSIONER SKOP: Yes, thank you. And, Mr. Cooke,
17 I think that's the maintaining the status quo issue that I kind
18 of threw out there collaterally. If we are going to move
19 forward, maybe we need to address that. And I think our
20 General Counsel has also stated that maybe we need to consider
21 that a little bit. Thank you.

22 CHAIRMAN CARTER: Commissioner Argenziano.

23 COMMISSIONER ARGENZIANO: (Inaudible. Microphone
24 off.)

25 CHAIRMAN CARTER: Mr. Cooke, you may have to help us

1 fashion. I think that the will of the Commission would be
2 something that we would -- and I'm going to ask my colleague,
3 Commissioner Edgar, if she would restate the motion probably
4 far more succinctly than I can, and with the understanding of
5 the maintaining the status quo. I think that was incumbent in
6 our discussion here today, but if it were not it would make it
7 clear.

8 Commissioner Edgar.

9 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

10 And let me first put to our Mike Cooke, or our
11 General Counsel, sorry, because I could not hear the very last
12 -- I mean, I understand what we are talking about, but the way
13 you phrased it right there at the end, and that would be
14 helpful to me.

15 MR. COOKE: Well, I raised it because I think we
16 should discuss it. I'm a little uncomfortable saying that we
17 need to absolutely give direction on this, but this will be an
18 issue. I don't know if we have looked that thoroughly at
19 authority to require them to continue providing this service,
20 although my gut is if this Commission determines that Level 3
21 is in the category of provider of local exchange services, then
22 perhaps we can do this. I just think they have voluntarily
23 continued to provide interconnection, and I suspect that they
24 may or may not choose to do that in the future. So I'm almost
25 sorry I brought it up, because I'm not sure I can give you

1 precise guidance as to whether to go ahead and quote, order
2 this to keep going on, but I think it will be an issue. And
3 maybe the better course is to let it play itself out and then
4 we can address it.

5 CHAIRMAN CARTER: When you say let it play itself
6 out, Mr. Cooke, what exactly does that mean?

7 MR. COOKE: It means that Level 3 may choose to
8 continue doing it voluntarily or they may not. They may appeal
9 this or they may not.

10 CHAIRMAN CARTER: Okay. Commissioner Argenziano.

11 COMMISSIONER ARGENZIANO: I just wanted to make one
12 correction. I said before that I believed that Neutral Tandem
13 had standing. I would like to say they may have standing, and
14 that is why with the additional information I wanted to
15 dismiss. So I just wanted to make that correction.

16 MR. COOKE: Mr. Chairman, could we supplement that on
17 my response? Mr. Teitzman has some potential authority.

18 CHAIRMAN CARTER: While you are thinking about
19 supplementing that, be thinking about some language so we can
20 bring this in for a landing.

21 Mr. Teitzman.

22 MR. TEITZMAN: I was just going to add that at the
23 very least there are some allegations that if Level 3 was to
24 cut off Neutral Tandem, there could be some problems with
25 connection of calls. And under just those allegations I think

1 that the Commission could certainly look to 364.014, and this
2 idea that the Commission has to protect the public health,
3 safety, and welfare. And that this jeopardizes public health,
4 safety, and welfare, and, therefore, you would have authority
5 to require them to maintain the status quo.

6 COMMISSIONER EDGAR: Mr. Cooke.

7 MR. COOKE: I think given that we have got some
8 colorable authority, that I would be comfortable with us
9 directing as part of the order that the interconnection
10 continue. You can probably guess that we were hoping that you
11 would go with our staff recommendation, so we really didn't
12 look at this issue ahead of time.

13 CHAIRMAN CARTER: Commissioner Argenziano.

14 COMMISSIONER ARGENZIANO: If I could hear what Mr.
15 Hoffman wants to say.

16 CHAIRMAN CARTER: Mr. Hoffman, you are recognized,
17 sir.

18 MR. HOFFMAN: Thank you, Mr. Chairman.

19 Obviously this has just come up, and that's fine. I
20 think that we would obviously abide by any order of this
21 Commission. We respect the authority of the Commission. I
22 think if the Commission views it to be appropriate to require
23 us to maintain this interconnection, then we, in turn, in the
24 meantime, would ask the Commission to also order Neutral Tandem
25 to pay us for that interconnection. And what we would suggest

1 would be a rate basically in line with the contract, the prior
2 contract between the parties.

3 CHAIRMAN CARTER: Let me ask this, and I hope Mr.
4 Cooke or Mr. Teitzman is listening, is that in the context of
5 maintaining the status quo, would that be the same as where you
6 are now, Mr. Hoffman?

7 MR. HOFFMAN: We have asked them to pay us; they have
8 not paid us. So what we are saying is if the Commission is
9 inclined to order us to maintain the existing direct
10 interconnection, we in turn would ask that the Commission also
11 order Neutral Tandem to pay us consistent with the terms of the
12 prior contract, of course, subject to true up if that issue is
13 raised as part of the arbitration.

14 CHAIRMAN CARTER: Ms. Keating.

15 MS. KEATING: Could we have one minute to confer with
16 the client?

17 CHAIRMAN CARTER: Okay. You've got one minute.

18 MR. KISE: And while they are doing that, may I just
19 ask a question of -- I know it is not appropriate, Mr.
20 Chairman, to ask directly to Mr. Hoffman, I just want to make
21 sure we understand exactly what's being proposed so that we can
22 respond appropriately.

23 CHAIRMAN CARTER: I think the question is if we are
24 going to ask Level 3 to maintain the status quo, then they are
25 saying maintain the status quo of the contract that you had

1 prior to.

2 MR. KISE: So we would be returning then to the
3 contractual arrangement that existed prior to the institution
4 of these proceedings, back to -- and I think it's March or
5 February? I mean, back to that existing contractual
6 arrangement?

7 MR. HOFFMAN: Mr. Chairman, if I may.

8 CHAIRMAN CARTER: You're recognized.

9 MR. HOFFMAN: Thank you. That is not what I was
10 suggesting. What I was suggesting is that if the Commission
11 orders us to keep this connection in place, we would ask that
12 the Commission use the term from the prior contract between the
13 parties as a fair, sort of, number for purposes of compensation
14 for interim purposes, of course, subject to true-up assuming --
15 if this proceeding reaches a point where there is a full
16 arbitration and the issue of compensation is more thoroughly
17 fleshed out before the Commission.

18 CHAIRMAN CARTER: I'm going to hear from Mr. Cooke,
19 and then, Commissioner Argenziano, I will come back to you.
20 Did I miss someone? Ms. Keating, I'm sorry. I'll give you a
21 minute. You know, once you get over 50, a minute can be an
22 eternity. You're recognized.

23 MS. KEATING: Thank you, Mr. Chairman.

24 Actually, if I could introduce Mr. John Harrington of
25 the Jenner Block law firm, who has been working with Neutral

1 Tandem on these issues across the country.

2 CHAIRMAN CARTER: Now, we are talking about the
3 contract, right?

4 MS. KEATING: We are talking about the contract and
5 about Level 3's apparent request that we pay up.

6 MR. HARRINGTON: Mr. Chairman, Commissioners, good
7 afternoon, and thank you.

8 The only point that I think I would make, and it's
9 why Ms. Keating would have me make it is because of my
10 experience with the other cases around the country, I have a
11 little bit of understanding of the contract. Neutral Tandem's
12 view is that contract is a very different contract. It was a
13 two-way commercial relationship between the parties.
14 Basically, Level 3 used Neutral Tandem's services, and Neutral
15 Tandem delivered traffic.

16 Neutral Tandem's position is, and I think this has
17 been borne out in many of the other states, the orders from the
18 other states, is that contract really doesn't have any
19 application to what we are talking about here. So we
20 respectfully believe it would not at all be appropriate for the
21 Commission to incorporate the terms of a now terminated -- part
22 of the terms of a now terminated contract on an interim basis.

23 As Mr. Hoffman pointed out, if and when the
24 Commission proceeds to more of a hearing and resolves the
25 substantive issues regarding compensation, if any, between

1 Neutral Tandem and Level 3, the Commission presumably will have
2 the authority to take the steps it needs to make sure that
3 either party is made whole under the circumstances. So we do
4 believe there is no basis to incorporate selectively parts of
5 the contract, and we also think that this is something you can
6 address ultimately as part of the resolution of the case.

7 Thank you very much.

8 CHAIRMAN CARTER: You know, status quo is status quo.
9 And, I mean, we want to be fair. I'm just kind of thinking
10 aloud.

11 Mr. Hoffman.

12 MR. HOFFMAN: Just very briefly.

13 That contract was lawfully terminated, including our
14 obligation to maintain that interconnection. You know, with
15 all due respect, I don't think they should get it both ways.
16 If the Commission for interim purposes is going to require us
17 to maintain that interconnection, then I think it is fair and
18 equitable that the Commission also require them to pay us, and
19 that obviously is a rate that has been used in the past between
20 the parties, in the meantime, subject to true-up through the
21 completion of the proceeding.

22 CHAIRMAN CARTER: Mr. Cooke, I was thinking aloud,
23 and Mr. Hoffman picked up on my thinking aloud. I don't know
24 if we have the authority to require them to maintain the
25 contract without compensation, do we?

1 MR. COOKE: Well, we originally started talking about
2 maintaining the interconnection. In other words, the ability
3 to connect between the different CLECs, and I think I got
4 comfortable with authority to do that. In other words, because
5 of the public welfare aspects of it, so that would be without
6 compensation. Now, whether that is fair or not is a different
7 question.

8 CHAIRMAN CARTER: That doesn't give me warm and
9 fuzzies.

10 MR. COOKE: I am uncomfortable getting into trying to
11 write a contract with these parties in these circumstances.

12 CHAIRMAN CARTER: I understand that, but I'm
13 uncomfortable with trying to maintain authority over a company
14 to provide a service that they are not being compensated for
15 when that is what they are in the business for. That makes me
16 uncomfortable.

17 Commissioners? Commissioner Argenziano.

18 COMMISSIONER ARGENZIANO: I have the same discomfort
19 because I don't know any company that we should be forcing them
20 to provide a service without compensation, and it looks like
21 Ms. Keating is trying to chomp at the bit here to say
22 something, and maybe it is something helpful.

23 CHAIRMAN CARTER: One moment. Commissioner Skop
24 first and then Ms. Keating.

25 COMMISSIONER SKOP: Thank you, Mr. Chair.

1 And, again, I share that concern. If we are going to
2 maintain the status quo, you know, somebody should have
3 compensation, not just compensation for the service provided.
4 In the absence that we can't go in and reresurrect a dead
5 legally terminated contract, and I guess there has been like
6 bilateral allegations, perhaps some performance bond or some
7 sort of bond would be appropriate that they would post that
8 would address that issue. I don't know, but this is getting
9 messier by the moment.

10 CHAIRMAN CARTER: Ms. Keating.

11 MS. KEATING: Thank you, Mr. Chairman.

12 Commissioner Skop actually beat me to the punch.
13 That was going to be an alternative that I suggested. You
14 know, the Commission at the end of the -- if you proceed to
15 hearing, that can be one of your considerations is whether it's
16 appropriate to apply retroactive payment. And if you want to
17 secure that payment, you can ask the company to post a bond to
18 secure further provision of service for the duration of this
19 proceeding. And it is my understanding that Neutral Tandem
20 would be willing to post such a bond.

21 CHAIRMAN CARTER: Commissioner Argenziano.

22 COMMISSIONER ARGENZIANO: Let's go back for a minute
23 for my sake for learning in this instance. I don't know what
24 normally happens when a company like Neutral Tandem -- you have
25 to provide your lines for Neutral Tandem. Are they normally

1 compensated? And the argument is there is an underlying
2 argument that Neutral Tandem thinks that they shouldn't even
3 have to pay compensation, right? And then Level 3 has the
4 argument, yes, you should. So maybe I could get a little bit
5 of background from staff right now as to what normally happens.
6 I mean, how does a company provide services and not get
7 compensated for it?

8 MR. TEITZMAN: The principles set forth by this
9 Commission that I was -- I usually wouldn't ask a question of
10 one of the other parties, but the question I have is and the
11 principles set forth by the Commission is are they receiving
12 any payments from the originating carriers? I don't know the
13 answer to that, but that would be the standard protocol, like
14 we discussed, that the originating carrier pays for the transit
15 traffic.

16 CHAIRMAN CARTER: My concern, and, Commissioners,
17 when we went down this road I said it is all about the money,
18 and it seems like we are right back at that point. You know,
19 we're saying we wanted to go and look at these issues, and I
20 want to look at these issues, and I want to give the
21 Commissioners an opportunity to do that, but I really don't
22 think that we should be in the business of mandating something
23 to a company without them being compensated for it. That
24 strikes me as being inherently unfair.

25 COMMISSIONER EDGAR: Mr. Chairman.

1 CHAIRMAN CARTER: Commissioner Edgar.

2 COMMISSIONER EDGAR: Thank you.

3 I think we are getting a bit far afield, so I would
4 make the very gentle and friendly suggestion that there is a
5 motion and a second that has been laid out that has been
6 discussed, and I would reiterate that, which was my motion,
7 which was seconded by Commissioner McMurrian to deny the motion
8 for dismissal and for the staff to work with the Chairman's
9 Office to schedule a hearing, with the gentle suggestion that
10 that may be considered a panel with Commissioner McMurrian as
11 the senior member.

12 (Laughter.)

13 COMMISSIONER EDGAR: Seriously, I have made a
14 negotiation that we deny the motion to dismiss. That has been
15 seconded. We have had full discussion. I would put out there
16 that possibly it's appropriate to take up that motion, and then
17 if there are fallout issues, which is, I think, what we have
18 entered into, that that may be a separate item.

19 CHAIRMAN CARTER: That is my only problem with it,
20 Commissioner, is that once we went down this road on the motion
21 we said that with the understanding of maintaining the status
22 quo, and that is what got us off track here.

23 COMMISSIONER EDGAR: Actually, that was not part of
24 my motion. I'm not sure who suggested that.

25 CHAIRMAN CARTER: Okay. So we won't maintain the

1 status quo.

2 Commissioner Argenziano.

3 COMMISSIONER ARGENZIANO: Mr. Chairman, then do we
4 move on with the motion as is or do we want to modify and amend
5 and incorporate a solution to the problem we are discussing
6 now?

7 CHAIRMAN CARTER: Let me ask Mr. Cooke for some
8 advice here, because I think -- I started to say we are in the
9 deep waters, but we are way beyond that now.

10 MR. COOKE: Well, the motion is deny the motion to
11 dismiss, and that has been seconded, and I think that is an
12 appropriate motion. When then if that is voted upon and
13 approved, there will be ancillary issues.

14 We're having a great deal of difficulty trying to
15 figure out what to do about those issues in this setting. I
16 suspect if all we do is deny the motion to dismiss and start
17 proceeding to hearing, we will hear more from the parties and
18 maybe it is more appropriate to find another forum in which to
19 try to resolve this issue as opposed to sitting here off the
20 cuff trying to write contracts or enforce and require the
21 status quo. Let's maybe let that simmer and see if we can
22 bring it back before the Commission in an appropriate way.

23 CHAIRMAN CARTER: You did say Commissioner McMurrian
24 as chair of that panel, right?

25 COMMISSIONER EDGAR: Yes, sir.

1 CHAIRMAN CARTER: We have a motion that has been
2 property seconded that we deny the motion to dismiss. All
3 those in favor, let it be known by the sign of aye.

4 (Unanimous affirmative vote.)

5 CHAIRMAN CARTER: All those opposed?

6 Mr. Cooke, we look to you for some direction.

7 MR. COOKE: I'm sorry, Commissioner.

8 CHAIRMAN CARTER: The motion is gone.

9 MR. COOKE: Then staff will move forward with setting
10 this as expeditiously as possible for hearing, and we will, I'm
11 sure, be discussing with the parties this ancillary issue. We
12 may make it a part of the proceeding, I don't know at this
13 point.

14 CHAIRMAN CARTER: Do we need to do anything about
15 Issue 5, Mr. Teitzman?

16 MR. COOKE: We need to leave the docket open at this
17 point.

18 CHAIRMAN CARTER: Okay.

19 COMMISSIONER EDGAR: So moved.

20 COMMISSIONER SKOP: Second.

21 CHAIRMAN CARTER: All those in favor, aye.

22 (Unanimous affirmative vote.)

23 CHAIRMAN CARTER: Anything for the good of the order?

24 COMMISSIONER EDGAR: It's been a great day in the
25 State of Florida.

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CHAIRMAN CARTER: It has been a great day.
Thank you'll for the hazing. We are adjourned.

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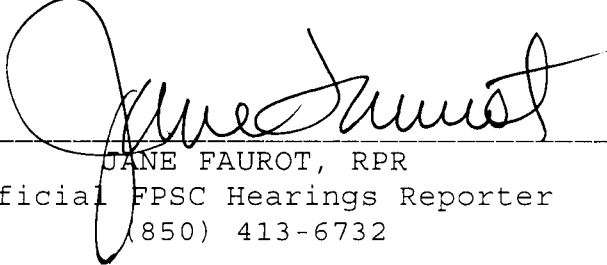
CERTIFICATE OF REPORTER

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

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

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

DATED THIS 14th day of January, 2007.



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