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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| **Level 3 Communications, LLC and Broadwing Communications, LLC,** | ) | |
| **Complainants,** | ) | **Case No. 07-668-TP-CSS** |
| **v.** | ) | |
| **Neutral Tandem-Michigan, LLC** | ) | |
| **Respondent.** | ) | |

**COMPLAINANTS' MOTION TO DISMISS COUNTERCLAIM**

Come now Complainants, Level 3 Communications, LLC and Broadwing Communications, LLC (collectively, "Level 3"), by and through their counsel, and respectfully submit their Motion to Dismiss the Counterclaim of Respondents, Neutral Tandem-Michigan, LLC and Neutral Tandem, Inc. (collectively, "Neutral Tandem"), pursuant to Rule 4901-1-12, O.A.C. Since the Counterclaim fails to demonstrate "reasonable grounds" to support a claim against Level 3, dismissal is required pursuant to Section 4905.26, O.R.C. The basis for Level 3's position is set forth in the accompanying Memorandum in Support.

Respectfully submitted,

LEVEL 3 COMMUNICATIONS, LLC

By: _____

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## MEMORANDUM IN SUPPORT

## I. NATURE OF THE PROCEEDINGS

On May 31, 2007, Level 3 filed its Complaint under Section 4905.26, O.R.C., requesting that the Commission, among other things, direct Neutral Tandem to notify its Ohio carrier-customers that Neutral Tandem's traffic exchange agreements with Level 3 had been terminated so that those carrier-customers could take appropriate steps to route their traffic to Level 3 via other means. On June 20, 2007, Neutral Tandem filed its Answer to the Complaint denying that Level 3 is entitled to the relief sought, and requesting dismissal of the Complaint. Neutral Tandem included in its Answer a Counterclaim against Level 3, by which it asks the Commission to order Level 3 to remain directly connected with Neutral Tandem. On July 13, 2007, Level 3 filed its Answer to the Counterclaim asserting that Neutral Tandem is not entitled to the relief requested, and urging dismissal for failure to state reasonable grounds upon which to proceed.

By this pleading, filed pursuant to Rule 4901-1-12, O.A.C., Level 3 moves for immediate dismissal of the Counterclaim based on the failure of Neutral Tandem to sustain its initial burden under Section 4905.26, O.R.C., of demonstrating that "reasonable grounds" exist to proceed.

## II. LAW AND ARGUMENT

### A. The Relief Requested by the Counterclaim is not Available under Federal or State Law.

By its Counterclaim, Neutral Tandem requests relief that the Commission does not have the authority to grant. Neutral Tandem claims rights to perpetual interconnection (*state mandated* direct interconnection between two CLECs) that neither exist, nor are available under federal or state law. Absent the statutory authority to award the relief sought, dismissal of the Counterclaim is the only course available to this Commission.

Level 3 and Neutral Tandem are certificated as CLECs in Ohio (Neutral Tandem Answer, ¶¶ 2, 4, and 6). Neither Level 3 nor Neutral Tandem is an ILEC and neither is subject to the specific negotiation and arbitration provisions of the federal Telecommunications Act of 1996 (the "Telecom Act")[Pub. LA. No. 104-104, 110 Stat. 56 (1996)] that apply when a carrier is seeking to interconnect with an ILEC.

The federal interconnection agreement process is set forth in Section 252 of the Telecom Act. Section 252(a)(1) states in part, "Upon receiving a request for interconnection, services, or network elements pursuant to Section 251, *an incumbent local exchange carrier* may negotiate and enter into a binding agreement with the requesting telecommunications carrier..." Further, mediation under Section 252(a)(2) is available only to "[a]ny party negotiating an agreement under this section," which is limited to the ILEC and the party requesting interconnection with the ILEC.

The provisions relating to compulsory arbitration under Section 252(b) are also limited to interconnection with an ILEC. Section 252(b)(1) establishes "an arbitration window" and refers to "the date on which *an incumbent local exchange carrier* receives a request for negotiation[.]" There is no statutory arbitration window for requests for interconnection between two non-ILEC carriers. The remainder of Section 252(b) refers to the "party that petitions . . . under paragraph (1)," which necessarily is limited to the ILEC and the party negotiating with the ILEC [47 U.S.C. §252(b)(2)(A), (2)(B)]. State commission action under the statute is limited to consideration of "any petition under paragraph (1)" - - again which does not apply to two non-ILEC parties [47 U.S.C. §252(b)(4)(A)].

Non-incumbent carriers are explicitly allowed under federal law to interconnect indirectly without a negotiated interconnection agreement [47 U.S.C. §251(a)]. Section 251(a) commands

that "Each telecommunications carrier has the duty . . . to interconnect directly or *indirectly* with the facilities and equipment of other telecommunications carriers" (emphasis added). In fact, the primary form of interconnection among competitive local exchange carriers is indirect interconnection. Therefore, the negotiation, mediation, and arbitration process available under Section 252 is not applicable to negotiations between CLECs. As a result, for interconnection between Level 3 and Neutral Tandem, the Telecom Act interconnection processes are unavailable and inapplicable.

Congress did not establish a mandatory arbitration process for interconnection between non-ILECs and intentionally left that process to commercial negotiations. When Congress enacted the Telecom Act, it "unquestionably...t[ook] the regulation of local telecommunications competition away from the States."[1] The Court in *AT&T Corp. v. Iowa Utilities Bd.* explained that even though "it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements and granting exemptions to rural LECs," state regulators are subject to *federal* control in the performance of those functions.[2]

Sections 251 and 252 "replace[d] a state-regulated system with a market-driven system that is self-regulated by binding interconnection agreements."[3] In that system, Congress placed a duty on ILECs, but not other telecommunications carriers, to negotiate formal interconnection agreements and provided for arbitration of all disputes by state public utility commissions which arose in the formation of such ILEC agreements [47 U.S.C. §251(c)(1) and 252]. Congress created no similar mechanism for state intervention in interconnection disputes between non-ILECs.

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[1] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378, n. 6 (D.C. Cir. 1999).
[2] *Id.* at 385 (citations omitted). *See also MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343 (7th Cir. 2000) (explaining that in the 1996 Act, Congress "invit [ed] ... the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market" but precluded the States from regulating except on Congress's terms).
[3] *Pacific Bell v. Pac-West Telecomm.*, 325 F.3d 1114, 1128 (9th Cir. 2003) ("*Pacific Bell*").

The legislative history of the Telecom Act is clear that this was a deliberate choice. In the Senate version of the bill that became the Telecom Act, the Senate required only "a local exchange carrier, or class of local exchange carriers, determined by the Commission to have market power in providing telephone exchange service or exchange access service" to negotiate in good faith and provide interconnection on reasonable and nondiscriminatory rates and terms.[4] Consistent with its "inten[t] to encourage private negotiation of interconnection agreements," the Senate created no similar duties or remedies for interconnection negotiations between non-ILECs.[5]

That vision was carried over into the Telecom Act. Section 251 establishes three groups of duties. Section 251(a) duties apply to all telecommunications carriers. Section 251(b) applies to local exchange carriers, including new entrants. Sections 251(c) and 252, by contrast, apply only to ILECs. Like the Senate, the Congress as a whole created no duty on CLECs to negotiate interconnection except when they are negotiating with an ILEC and made no provision for the arbitration of CLEC-to-CLEC interconnection disputes [47 U.S.C. §252(b)(5)].

In summary, Congress recognized there is no need for intrusive government oversight of the interconnection relationship between two CLECs at any government level. Unlike an ILEC, neither Level 3 nor Neutral Tandem possesses significant market power. There is no need to "neutraliz[e] the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunications services."[6] Voluntary negotiation is the mechanism Congress chose to establish for interconnection and traffic exchange duties as between CLECs. This Commission has no choice but to follow that command.

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[4] S. 652, 104th Cong., 1st Sess. (as reported in the Senate) (1995). *See also* S. Rep. 104-23, 104th Cong., 1st Sess. (1995).
[5] Id.
[6] *Pacific Bell*, 325 F.3d at 1118.

Neutral Tandem has no legal basis to request that Level 3 be ordered to maintain direct interconnection with Neutral Tandem for the purpose of receiving tandem transit traffic originated by Neutral Tandem's third-party carrier-customers and delivered to Level 3's network by Neutral Tandem. Nor does Neutral Tandem have any legal basis to assert that the terms which apply to ILEC interconnection should apply in this case, including for example, that interconnection between Level 3 and Neutral Tandem should be no less favorable than the terms in place between Level 3 and the ILECs and that Neutral Tandem not be required to make any payments to Level 3 for the delivery of tandem transit traffic originated by third-party carriers (*Counterclaim*, ¶59).

Neutral Tandem alleges that it is one of many CLECs in Ohio although it does not originate or terminate any traffic. Level 3 also operates in Ohio as a CLEC. Both Level 3 and Neutral Tandem are subject to the Telecom Act, which provides that CLEC-to-CLEC interconnection be accomplished by voluntary negotiation. Nothing in the nature of the services Neutral Tandem provides or the authorizations held by either party therefore subject either entity to the interconnection obligations imposed by the Telecom Act on incumbent carriers.

Yet Neutral Tandem asserts that its decision to voluntarily provide transit service in Ohio subjects Level 3, and presumably every other competitive provider, to ILEC interconnection regulation. Specifically, with respect to arbitration rights, Neutral Tandem argues that because the parties' "efforts to negotiate new agreements have been unsuccessful," this Commission should order Level 3 to maintain its existing interconnection with Neutral Tandem, and to accept terminating traffic on terms and conditions which the Commission finds to be just, reasonable and nondiscriminatory (Counterclaim, pp 11-12; ¶68). However, nothing in the Telecom Act or

Ohio law grants Neutral Tandem the statutory right to demand the terms of interconnection requested in its Counterclaim.

Instead, the Counterclaim is a misplaced attempt by Neutral Tandem to claim CLEC-to-ILEC rights by virtue of the type of service it has chosen to offer. Neutral Tandem is not entitled to special or unique status or treatment because it has elected to provide only competitive transit services. Neutral Tandem offers no support for its contention that the nature of the service Neutral Tandem offers should somehow expand the company's right to force interconnection with unaffiliated third parties or to unilaterally dictate the terms of interconnection with other CLECs. Neutral Tandem is legally required to follow the existing interconnection processes, as do all other CLECs.

Further, Neutral Tandem's arguments, if accepted by the Commission, would dramatically expand the Commission's own obligations to regulate the terms of interconnection between the myriad of competitive carriers operating in Ohio. Indeed, Neutral Tandem's proposed state regulation of CLEC-to-CLEC arrangements would massively increase the scope and extent of the Commission's obligations, and would do so in a manner that is well outside the boundaries of existing law. Such a substantial increase in Commission jurisdiction should only be accomplished through enacting legislation.

The Telecom Act establishes commercial negotiations as the process by which CLECs are to establish the terms, conditions and prices for CLEC-to-CLEC interconnection. That process has been utilized consistently and successfully by all CLECs in Ohio for more than ten years. There has been no change in law or fact justifying changing that policy now. Neutral Tandem - like all CLECs - has up to this point utilized voluntary commercial negotiations to establish its traffic exchange arrangements with other competitive carriers. Neutral Tandem did

not file these commercially negotiated traffic exchange agreements with the Commission in the manner that an ILEC would file a regulated interconnection agreement. Yet now Neutral Tandem contends that such CLEC-to-CLEC relationships are somehow subject to Commission jurisdiction. Having availed itself of the non-regulated, commercial CLEC-to-CLEC negotiation process for years, Neutral Tandem should not now be heard that the process does not apply simply because it wants to force economically unfavorable terms on Level 3 for Neutral Tandem's own economic gain.

The interconnection obligations and rights of CLECs and ILECs are spelled out in the Telecom Act. Yet Neutral Tandem studiously avoids pleading – or even mentioning – the Telecom Act. This is not surprising since it is well-established federal law that Neutral Tandem is not entitled to compel direct interconnection upon Level 3. Instead, CLECs are expressly allowed to utilize indirect interconnection under Section 251(a)(1) of the Telecom Act, which states that telecommunications carriers may "interconnect directly or indirectly" to meet their interconnection obligations.

Neutral Tandem cannot avoid the fact that Level 3 has in the past and continues today to offer Neutral Tandem and its carrier-customers indirect interconnection for the termination of traffic. Absent a commercially negotiated traffic exchange agreement, Neutral Tandem may still indirectly interconnection with Level 3 – just like any other CLEC in Ohio.

Neutral Tandem cites not a single state statute, nor Commission regulation, that would specifically support its claim of entitlement to direct interconnection with Level 3. The explanation for that silence is the simple fact that there is none. While a rule-making proceeding is pending at Case No. 06-1344-TP-ORD, *Matter of the Establishment of Carrier-to-Carrier Rules*, Entry opening docket entered November 21, 2006, the fact is that there have been no

approved carrier-to-carrier rules codified in the Ohio Administrative Code since local interconnection began in 1996. The statutes relied upon by Neutral Tandem to support its Counterclaim relate only to utility services that would be covered under the jurisdictional umbrella of the Commission. The relief sought by Neutral Tandem's Counterclaim is beyond the shelter of that umbrella. Neutral Tandem is not entitled, under either state or federal law, to compel direct interconnection with Level 3 or the network of any other CLEC.

### B. Neutral Tandem's Public Policy Claims and Forecast of Grim Consequences Sound Hollow.

If Neutral Tandem's Counterclaim were granted, the public interest would be harmed. Level 3, and presumably all CLECs, would face an obligation to set up separate networks in order to directly interconnect with Neutral Tandem. That precedent would apply to every other CLEC or transit provider that elected to compete with Neutral Tandem in Ohio, and each one of those competitors would be entitled to compel direct interconnection from all other CLECs in Ohio regardless of cost or whether such direct connections made sound business sense for both parties. CLECs would be forced to maintain a multitude of interconnection networks, which would substantially increase costs and decrease efficient network operations to the detriment of Ohio consumers. In addition, CLECs would face an extraordinary increase in legal costs for the arbitration of agreement after agreement with other carriers seeking mandatory direct interconnection – even where the traffic volumes do not economically justify such arrangements.

Neutral Tandem alleges a "parade of horribles", including traffic blocking, if the Commission does not grant Neutral Tandem "continued interconnection." Of course, what Neutral Tandem means by "continued interconnection" is a mandatory continuation, in perpetuity, of free traffic termination on a carrier's network. Given that Level 3 operates in a competitive environment, Neutral Tandem asks that the Commission to force Level 3 to absorb

extra costs, at the detriment of consumers and competition, in order to support Neutral Tandem's arbitrage-centered business model whereby it seeks to force Level 3 to provide free termination service which Neutral Tandem then resells to its carrier-customers at a hefty markup.

Neutral Tandem must not be allowed to manufacture a crisis. If Neutral Tandem truly wishes to avoid blocking of the originating traffic associated with its transit service, it may either negotiate a *mutually* beneficial commercial agreement with Level 3 or it can provide notice to its customers and cooperate with Level 3 in developing a plan to migrate that originating traffic to ILEC tandems for indirect interconnection with Level 3. Neutral Tandem has done neither. Neutral Tandem must not be allowed to "play chicken" with its customers in order to extract below market prices or free service from its suppliers.

Neutral Tandem has intentionally overstated the threat of network harm to improperly bolster its argument. Given reasonable efforts by Neutral Tandem, none of which it has taken to date, blocking will not result from denial of Neutral Tandem's request for relief. Given the flexibility of networks to accommodate changes in traffic, Neutral Tandem should have no trouble migrating the traffic from direct connection to an indirect connection, especially considering the available time to add capacity to existing facilities or even to add facilities where necessary. Neutral Tandem ignores that throughout this entire process, Level 3 has offered to Neutral Tandem that Level 3 would provide additional time depending upon the specific needs of Neutral Tandem's customers.

In order to manufacture its crisis, Neutral Tandem suggests here and has alleged in other state proceedings that Level 3 represents a bottleneck when it comes to terminating calls to Level 3's end users. This is far from accurate and, in fact, Neutral Tandem argued the opposite position to the FCC prior to the initiation of these proceedings. In a letter to the FCC, Neutral

Tandem pronounced that no such bottleneck existed in the local transit market. Neutral Tandem expressly stated that: "No such bottleneck situation exists here, because any carrier that is able to use Neutral Tandem's transit service can also use an ILEC's transit service, or can establish a direct connection to the terminating carrier."[7] No credibility should be given to Neutral Tandem's conflicting argument in this proceeding.

In addition, Neutral Tandem's arguments about network reliability are misleading and unpersuasive. Neutral Tandem's claim to be the "sole alternative to the tandem transit services offered by ILECs in Ohio" is false (Counterclaim, ¶52). There is nothing unique about Neutral Tandem that enhances reliability. Indeed, competitive carriers enter and exit the competitive telecommunications market on a regular basis without causing significant service disruptions. Traffic between CLECs flowed well before Neutral Tandem set itself up as a middleman for hire, and that traffic bound for Level 3 will continue to terminate successfully with or without a direct connection between Level 3 and Neutral Tandem. The absence of a commercially negotiated agreement between Neutral Tandem and Level 3 will not harm the public switched telephone network.[8]

Neutral Tandem's allegation that the only way to avoid service disruption is to grant it the relief it seeks is simply not true. In fact, the Commission's jurisdiction over service disconnection and quality issues constitutes a sufficient safeguard over the exact concerns Neutral Tandem identifies. Neutral Tandem has not explained why the Commission's

[7] *In the Matter of Developing a Unified Intercarrier Compensation Regime CC Docket No. 01-92, Reply Comments of* Neutral Tandem at 3.

[8] Level 3 emphasizes to the Commission its commitment to conduct an orderly transition and migration to allow for disconnection of its transit termination services without service disruptions for the end-user customers of the third-party carriers that utilize Neutral Tandem's tandem transit service. Level 3 has advised Neutral Tandem that commencing on June 25, 2007, if and to the extent that Neutral Tandem elects to deliver transit traffic to Level 3 for termination, and if Level 3 elects to terminate such traffic on behalf of Neutral Tandem, Level 3 will charge Neutral Tandem at a rate of $0.001 per minute terminated. This letter was in response to the actual and apparent failure of Neutral Tandem to take any actions to migrate traffic or otherwise to perform steps to prepare its customers of the discontinuance of traffic routing to Level 3 via Neutral Tandem effective June 25, 2007 (See Exhibit 1 attached to Level 3's Answer to Counterclaim).

continuing oversight over utility services will not continue to be sufficient to ensure that Ohio residents will not receive the services they need.

### C. Neutral Tandem's Reference to Other Pending and Prior Proceedings is Distorted by its Bias.

Finally, Neutral Tandem has repeatedly mischaracterized or misstated statements made by Level 3 and other regulators in an attempt show support for its position. First, Neutral Tandem relies on selective out-of-context comments filed by the supporters of the "Missoula Plan," which includes Level 3, in a vain attempt to find some contradiction with Level 3's positions in this proceeding (Counterclaim, ¶¶ 38, 39). No contradiction exists. In fact, if one reads beyond Neutral Tandem's excerpt, the Missoula Plan actually establishes a national rule that an originating carrier pays the terminating carrier, and provides practical rules for implementation that follows from that rule. The need for such a rule highlights the fact that, without a direct agreement in place, CLECs have no incentive to pay third-party carriers for terminating their traffic. The Missoula Plan is a large, complex, and comprehensive proposed restructuring of the entire intercarrier compensation regime. It addresses a litany of critical issues in the telecommunications industry, including interconnection, universal service reform, and traffic management issues. Level 3's comments regarding the package of compromises made by various Missoula Plan supporters in order to resolve multiple industry-wide issues have no relevance here.

Similarly, Level 3's support for the rights of CLECs to provide wholesale service in the FCC case brought by Time Warner Cable does not diminish Level 3's position here (Counterclaim, ¶ 40). In that case, the FCC was responding to state commission decisions that had denied wholesale CLECs all rights to interconnect with ILECs unless they were providing retail service to end users. Level 3 strongly supports the rights of companies like Neutral

Tandem to have direct interconnection with the ILEC networks because such interconnection is required under the Telecom Act. Extension of those obligations to compel *direct* interconnection between CLECs was not before the FCC nor was it decided. CLECs are granted the right under the Telecom Act to either choose indirect interconnection or to negotiate direct interconnection between their networks, and Level 3 is willing to negotiate a direct interconnection arrangement with Neutral Tandem – but only on terms that are mutually agreeable.

Ignoring the obvious that this proceeding will be determined under either federal or Ohio law, Neutral Tandem adds to the discussion a number of decisions from other states commissions where Level 3 and Neutral Tandem are pursuing similar actions. While the results are not uniform, certain themes are developing. Chief among them are two areas that Neutral Tandem prefers to ignore. First, Neutral Tandem must pay Level 3 the reasonable costs of interconnection. This represents a complete rejection of Neutral Tandem's litigation position. Second, the state commissions are rejecting, with the exception of Georgia, Neutral Tandem's argument that it is entitled to the same terms and conditions that an incumbent local exchange carrier receives when it provides transit services to competitive carriers.

At best, Neutral Tandem can only claim that the result of litigation today has been that state commissions are finding some form of limited jurisdiction over interconnection between competitive providers. Such authority has generally been found pursuant to state acts adopted to introduce competition in the local exchange markets in the years leading up to the adoption of the federal Telecom Act. And it is worth noting that no such state act exists in Ohio.

More specifically:

1. Connecticut: The Department of Public Utility Control *declined to rule* on Neutral Tandem's Petition.[9] It ordered the parties to continue negotiating and required that they report back by November 1, 2007. When evaluating Neutral Tandem's Petition, the Commission rejected Neutral Tandem's interpretation of the commission's previous transit orders. Specifically, the DPUC said: "The January 15, 2003 Decision did not prohibit the offering of a clearinghouse function nor did it address direct or indirect interconnection or the issues from which Neutral Tandem seeks relief."[10] When considering Neutral Tandem's arguments with respect to any obligation by Level 3 to provide "reasonably nondiscriminatory access and pricing to all telecommunication services...", the DPUC ruled that the statutes relied upon by Neutral Tandem did not apply to Level 3 since the statute had always been interpreted to apply to the incumbent local exchange carrier.[11] The DPUC also found that other statutory arguments proposed by Neutral Tandem did not "provide for the regulatory or interconnection relief sought by the Petition."[12]
2. Florida: The day before final action on Staff's recommendation by the Florida Public Service Commission on its complaint against Level 3, Neutral Tandem withdrew its Petition.[13] Neutral Tandem did so in order to avoid consideration of Staff's recommendation to deny the relief sought by Neutral Tandem. Staff found that Neutral Tandem's sole provision of transit services does not constitute "provision of

[9] Petition of Neutral Tandem Inc. for an Interconnection Agreement with Level 3 Communications and Request for Interim Order., Docket No. 07-02-29, Interim Decision, rel. June 20, 2007.
[10] Id at. 4.
[11] Id.
[12] Id.
[13] Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Expedited Resolution, by Neutral Tandem, Inc., Florida Public Service Commission, Docket No.070127-TX.

'local exchange telecommunications services.' "[14] Neutral Tandem has subsequently refiled that petition.

3. Georgia: Neutral Tandem is fond of waiving in support of their case the staff recommendation of the Georgia Public Service Commission.[15] It is worth noting that a final order has not been released, so Neutral Tandem's comments are predicated upon a staff recommendation. After finding jurisdiction under the state's telecommunications act, the GPSC staff rejected Neutral Tandem's basic contention that it did not have to pay Level 3 for the costs of interconnection. Staff expressly stated: "Staff recommends that *Neutral Tandem be required to pay* for all reasonable costs of the direct interconnection."[16] In fact, the requirement to "pay all of Level 3's reasonable costs of interconnection" is a condition of the requirement to interconnect.[17] With respect to reciprocal compensation, the recommendation states that Neutral Tandem should not be required to pay or pass on reciprocal compensation payments to Level 3. While Level 3 disagrees with this part of the recommendation and intends to appeal when the Order is released, the GPSC was clear that Neutral Tandem is not entitled to the free interconnection that it has demanded throughout the negotiations and these proceedings.
4. Illinois: While finding in Neutral Tandem's favor on a number of issues, the Illinois Commerce Commission rejected two arguments that Neutral Tandem raises in all the

[14] Id at. 11.
[15] Petition of Neutral Tandem Inc for Interconnection with Level 3 Communications and Request for Emergency Relief. Consideration of Staff's Recommendation. Georgia Public Service Commission, Docket No. 24844-U.
[16] Id at.6.
[17] Id at 2.

state proceedings.[18] The Commission rejected Neutral Tandem's argument that it was entitled to the same treatment the ILEC receives in its interconnection agreement with Level 3. The ICC noted that agreements between an ILEC and a CLEC cannot be opted into by a CLEC as against another CLEC.[19] Second, the ICC disagreed with Level 3's argument that Neutral Tandem must pay it for the costs of interconnection.[20] Oddly, however, the ICC ordered the parties to maintain the physical interconnection connection and stated that if Level 3 and Neutral Tandem could not reach agreement, then the previously terminated agreement would control. Under that agreement, *Neutral Tandem paid Level 3* for traffic it terminated to the Level 3 network. In addition, that agreement is terminable on 30 days notice at any time. While Level 3 will comply with the decision, it believes that many of the other findings are seriously flawed and will appeal those findings.

5. New York: In its decision, the New York Public Service Commission ("NYPSC") ordered the parties to maintain the existing traffic exchange agreement. If the parties are not able to reach new terms within 90 days, the NYPSC intends to open a ratemaking proceeding.[21]

As each of these decisions points out, the respective commissions have chosen to move ahead under state statutes that were precursors to the federal Telecom Act in 1996. No similar statutory authority exists under Ohio law and the Commission should reject Neutral Tandem's invitation to create a new regime through a complaint proceeding. In fact, the Public Service Commission

[18] Neutral Tandem, Inc. and Neutral Tandem-Illinois LLC vs. Level 3 Communications LLC, Verified Complaint and Request for Declaratory Ruling pursuant to Section 13-515 and 10-108 of the Illinois Public Utilities Act. Illinois Commerce Commission, Docket No. 07-277. rel. July 25, 2007.
[19] Id at 11
[20] Id. At 14.
[21] Petition of Neutral Tandem – New York LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption, State of New York Public Service Commission, Case 07-C-0233, Issued and Effective June 22, 2007.

of the District of Columbia, by its Order entered earlier this week, has done exactly that by dismissing Neutral Tandem's Cross-Complaint and Level 3's Complaint on procedural and jurisdictional grounds (Public Service Commission of the District of Columbia, Order No. 14386, dated July 24, 2007, copy attached as Exhibit 1).

## III. CONCLUSION

Neutral Tandem asserts its Counterclaim relying on the provisions of Section 4905.26, O.R.C. That statute provides that the Commission must first decide, on the basis of the initial pleadings, whether "reasonable grounds" have been stated to proceed. For the reasons stated above, Neutral Tandem has failed to sustain this initial burden. As a result, the Commission should now act to grant this motion and dismiss the Counterclaim.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following counsel electronically and by first-class U.S. mail, postage prepaid, this 26th day of July, 2007:

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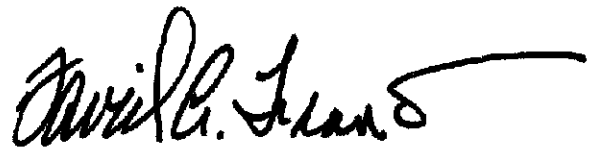

David A. Turano (0025819)

Case No. 07-668-TP-CSS
Complainants' Motion to
Dismiss Counterclaim

# Exhibit 1

892-T-3661 TA-05-14-21

**PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA**
**1333 H STREET, N.W., SUITE 200, WEST TOWER**
**WASHINGTON, DC 20005**

**ORDER**

**July 24, 2007**

**FORMAL CASE NO. 892, IN THE MATTER OF THE APPLICATION TO PROVIDE LOCAL TELECOMMUNICATIONS SERVICE IN THE DISTRICT OF COLUMBIA OF LEVEL 3 COMMUNICATIONS, LLC.,**

**and**

**FORMAL CASE NO. TA 05-14, IN THE MATTER OF THE APPLICATION OF NEUTRAL TANDEM-WASHINGTON, D.C., LLC. TO PROVIDE LOCAL TELECOMMUNICATIONS SERVICES IN THE DISTRICT OF COLUMBIA, Order No. 14386**

## I. INTRODUCTION

1. This matter is before the Public Service Commission of the District of Columbia ("Commission") based on Level 3 Communications LLC's ("Level 3") complaint against Neutral Tandem Inc. and Neutral Tandem-Washington, D.C. LLC's (collectively "Neutral Tandem") and Neutral Tandem's cross complaint against Level 3. By this Order, the Commission dismisses both complaints.

## II. BACKGROUND

2. The relevant facts are undisputed. On July 6, 2004, Level 3 and Neutral Tandem entered into a commercially negotiated, traffic exchange agreement pursuant to which Neutral Tandem delivers tandem transit traffic from third party carriers to Level 3 for termination to Level 3 customers ("Agreement").[1] The Agreement was never submitted to the Commission for approval.

3. Although the Agreement is not part of the record, Level 3 alleges that it allows either party to terminate the Agreement after providing 30 days advance notice. According to Level 3, it notified Neutral Tandem that it was terminating the Agreement on January 30, 2007, but later extended the date to June 25, 2007.[2] Level 3 requests, *inter alia*, that the Commission direct Neutral Tandem:

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[1] *Formal Case No. 892, In the Matter of the Application to Provide Local Telecommunications Service in the District of Columbia of Level 3 Communications, LLC., ("F.C. 892") & Formal Case No. TA 05-14, In the Matter of the Application of Neutral Tandem-Washington, D.C., LLC. To Provide Local Telecommunications Services in the District of Columbia, ("TA 05-14")*, Petition, filed May 21, 2007.

[2] *F.C. 892 & TA 05-14*, Petition at 3. Level 3 states that it also has a second contract with Neutral Tandem involving its subsidiary, Broadwing Communications ("Broadwing"). On February 14, 2007,

a. To notify its District customers of Level 3's decision to terminate its agreement with Neutral Tandem;

b. To route its customers through trunks that do not use the Level 3 network or compensate Level 3 for use of Level 3's network; and

c. To pay Level 3 $0.001 per minute of use if Neutral Tandem terminates traffic to Level 3 after June 25, 2007.

Level 3 asserts that the Commission has jurisdiction pursuant to D.C. Official Code §§ 34-917 and 34-2002.

4. On May 30, 2007, Neutral Tandem filed its Response to Level 3's complaint as well as its own cross complaint.[3] Neutral Tandem argues that District law imposes a clear obligation on telephone carriers to interconnect their networks and that Level 3's actions violate D.C. Official Code §§ 34-702, 34-908, 34-914, and 34-2002 (h). Neutral Tandem asserts that the Commission has jurisdiction to hear its Cross Complaint pursuant to D.C. Official Code §§ 34-702, 34-908, 34-914, and 34-2002.[4]

5. On June 11, 2007, Level 3 moved to dismiss Neutral Tandem's cross complaint arguing that: 1) the federal provisions governing interconnection between incumbent local exchange carriers ("ILECs") and competitive local exchange carriers ("CLECs") are not applicable to interconnection between CLECs, regardless of the nature of service; 2) Neutral Tandem has no right to direct interconnection under either federal or District law; and 3) under District law, Neutral Tandem is not entitled to anything other than the indirect interconnection arrangement offered by Level 3.[5] *Assuming Arguendo* that the Commission finds jurisdiction, Level 3 argues that Neutral Tandem's cross complaint should be denied because it improperly asks the Commission to change the long-standing framework for CLEC to CLEC interconnection and impose terms on Level 3 that it would not accept in commercial negotiations.[6]

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Level 3 avers that it sent a letter terminating the Broadwing/Neutral Tandem contract. Level 3 states that it ultimately extended the termination date to June 25, 2007.

3 *F.C. 892 & TA 05-14*, Neutral Tandem's Response to Level 3's Petition and Neutral Tandem's Cross Petition, ("Neutral Tandem Response and Cross Petition"), filed May 30, 2007; *see also TA 05-14*, Order No. 13855, rel. January 13, 2006 (authorizing Neutral Tandem to provide resold and facilities based local exchange telecommunications services in the District).

4 15 D.C.M.R. 105.7 (1998).

5 *F.C. 892 & TA 05-14*, Level 3 Communications, LLC's Response to Cross Petition and Motion to Dismiss, ("Level 3 Response and Motion to Dismiss"), filed June 11, 2007.

6 *Id.* at 2.

6. On June 21, 2007, Neutral Tandem opposed Level 3's motion to dismiss arguing, *inter alia*, that D.C. Official Code § 34-2002 (h) confers jurisdiction on the Commission to determine whether the terms of an interconnection agreement are "reasonable and efficient."[7] Neutral Tandem further argues that federal law does not preempt state jurisdiction to review interconnection arrangements between CLECs and, even if it did, Level 3 would be effectively arguing against Commission jurisdiction over its own complaint.

7. Along with it's opposition to Level 3's motion to dismiss, Neutral Tandem filed a copy of the Michigan Public Service Commission's Mediator's Recommendation with the Commission. On June 22, 2007, Level 3 filed a Motion to Strike the Michigan Mediator's Recommendation. On July 2, 2007, Neutral Tandem filed its response to Level 3's Motion to Strike. Finally, on July 11, 2007, Level 3 filed its reply to Neutral Tandem's response.[8]

## III. DECISION

8. D.C. Official Code §§ 34-702, 34-908, 34-914 and 34-917 state as follows:

> § 34-702: If any public utility or any agent or officer thereof shall, directly or indirectly, by any device whatsoever, or otherwise, charge, demand, collect, or receive from any person, firm, or corporation a greater or less compensation for any service rendered or to be rendered by it...than it receives from any other person, firm, or corporation...such public utility shall be deemed guilty of unjust discrimination...and upon conviction shall forfeit and pay to the District of Columbia not less than $100 nor more than $1,000 for each offense;[9]

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[7] *F.C. 892 & TA 05-14*, Neutral Tandem's Response to Level 3's Motion to Dismiss, filed June 21, 2007.

[8] *F.C. 892 & TA 05-14*, Neutral Tandem's Submission of the Michigan Public Service Commission's Mediator's Recommendation, filed June 21, 2007; Level 3 Communications, LLC and Broadwing Communications, LLC's Motion to Strike, filed June 22, 2007; Response of Neutral Tandem to Level 3 Motion to Strike, filed July 2, 2007; Neutral Tandem's Request for waiver of Commission's e-filing rules, filed June 28, 2007; Level 3 Communications, LLC and Broadwing Communications, LLC's Response to Neutral Tandem's Response to Motion to Strike, filed July 11, 2007; Level 3's Request for Leave to Reply, filed July 11, 2007. The Motion to Strike and the Responses are moot in light of our decision to dismiss Level 3's complaint. *See* Decision IV.

[9] D.C. Official Code § 34-702 (Supp. 2006).

> § 34-908: Upon its own initiative or upon reasonable complaint made against any public utility that any of the rates...are in any respect unreasonable or unjustly discriminatory...the Commission may, in its discretion, proceed, with or without notice, to make such investigation as it may deem necessary or convenient of any public utility;[10]
>
> § 34-914: Whenever the Commission shall believe that any rate or charge of any public utility may be unreasonable or unjustly discriminatory...it may, on its own motion, summarily investigate the same with or without notice; and[11]
>
> § 34-917: Any public utility may make complaint as to any matter affecting is own product or service with like effect as though made by the Commission or upon reasonable complaint as hereinbefore provided.[12]

9. By their own terms, these provisions apply only to public utilities.[13] Inasmuch as neither Level 3 nor Neutral Tandem claim to be public utilities within the meaning of District law, these provisions are inapplicable to this case.

10. Interconnection between CLECs is governed by D.C. Official Code § 34-2002.[14] The statute essentially establishes a method of achieving interconnection through either voluntary negotiation or compulsory arbitration by the Commission. Pursuant to § 34-2002 (h)(2), the providers (*i.e.* CLECs) may enter into voluntary agreement for interconnection but, if they do so, they must submit it to the Commission for approval.[15] The statute, however, does not state that the agreement is ineffective until approved by the Commission, nor does it give the Commission authority to void agreements that were never submitted for approval. If the providers are unable to reach a voluntary agreement,

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10 D.C. Official Code E § 34-908 (Supp. 2006).

11 D.C. Official Code § 34-914 (2001).

12 D.C. Official Code § 34-917 (2001).

13 *See* D.C. Official Code § 34-214 (2006) defines "public utility" as, *inter alia*, a telephone corporation. A telephone corporation is defined under D.C. Official Code § 34-220 as "every corporation...owning, operating, controlling, or managing any plant, wires, poles for the reception, transmission, or communication of messages by telephone, telephonic apparatus or instruments."

14 D.C. Official Code § 34-2002 (Supp. 2006).

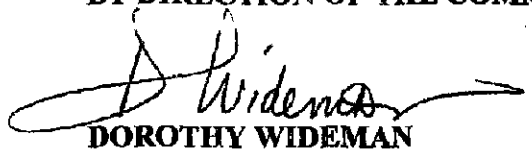
15 D.C. Official Code § 34-2002 (h)(2) (Supp. 2006).

either provider, pursuant to § 34-2002 (h)(3) may petition the Commission to "fix charges set at the economic costs, and the terms and conditions for the continued termination of local exchange service calls."[16] However, any action by the Commission under § 34-2002 (h)(3) presupposes that the providers were unable to reach a voluntary agreement under § 34-2002 (h)(2). The statute does not require or even contemplate an arbitration of a voluntary agreement like the one before us. Nor are we inclined to arbitrate agreements that were never submitted to the Commission for approval as required by § 34-2002 (h)(2).

**THEREFORE, IT IS ORDERED THAT:**

11. Level 3's Complaint and Neutral Tandem's Cross-Complaint are dismissed.

**A TRUE COPY:** **BY DIRECTION OF THE COMMISSION:**



**CHIEF CLERK** **DOROTHY WIDEMAN**
**COMMISSION SECRETARY**

[16] D.C. Official Code § 34-2002 (h)(3) (Supp. 2006).