



**FILED**

AUG 27 2007

EXECUTIVE SECRETARY  
G.P.S.C.

DEBORAH K. FLANNAGAN  
EXECUTIVE DIRECTOR

REECE McALISTER  
EXECUTIVE SECRETARY

**COMMISSIONERS:**

ROBERT B. BAKER, JR., CHAIRMAN  
CHUCK EATON  
H. DOUG EVERETT  
ANGELA E. SPEIR  
STAN WISE

**Georgia Public Service Commission**

(404) 656-4501  
(800) 282-5813

244 WASHINGTON STREET, S.W.  
ATLANTA, GEORGIA 30334-5701

FAX: (404) 656-2341  
www.psc.state.ga.us

Docket No. 24844-U

**In Re: Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications  
and Request for Emergency Relief**

**DOCKET#** 24844  
**DOCUMENT#** 105168

**ORDER MANDATING DIRECT INTERCONNECTION**

**I. Statement of Proceedings**

On March 2, 2007, Neutral Tandem, Inc. ("Neutral Tandem") petitioned the Georgia Public Service Commission ("Commission") to: " (1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 Communications, Inc. and its subsidiaries (collectively "Level 3"); and (2) issue an interim order on an expedited basis directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while this Petition is pending, so as to avoid disrupting the delivery of calls."<sup>1</sup>

The April 9, 2007 Procedural and Scheduling Order provided that any disconnection of customers that may be appropriate pending the Commission resolution of the merits shall not take place prior to 30 days from such Commission order. (Procedural and Scheduling Order, p. 3). Consistent with the Procedural and Scheduling Order, Level 3 filed its Response to Petition, Motion to Dismiss Petition and Motion for Migration Plan ("Response") on April 6, 2007. On April 13, 2007, the parties simultaneously pre-filed direct testimony. Neutral Tandem sponsored the testimony of Rian J. Wren and Surendra Saboo. Level 3 sponsored the testimony of Timothy Gates and Sara Baack. Neutral Tandem filed its Response to Level 3's Motion to Dismiss on April 16, 2007. On May 3, 2007, the Commission held a hearing on the Petition, and received testimony and evidence from expert witnesses sponsored by both Neutral Tandem and Level 3. On May 15, 2007, the parties filed simultaneous briefs.

<sup>1</sup> Petition of Neutral Tandem, Inc.. for Interconnection with Level 3 Communications and Request for Emergency Relief ("Petition"), p. 1. (footnotes omitted)

## II. Statement of the Issues

Neutral Tandem provides “tandem transit services.” Ms. Saboo defines this term to mean “the intermediary switching of local and other non-access traffic that originates and terminates on the networks of different telecommunications providers within a local calling area or MTA.” (Petition, Exhibit A, p. 2). In its Petition, Neutral Tandem discusses three contracts that provide for the interconnection relationship between Neutral Tandem and Level 3. Pursuant to a contract between Neutral Tandem and Level 3, dated July 6, 2004, Neutral Tandem delivers tandem transit traffic to Level 3 that has been originated by third party carriers, and accepts certain traffic originated by Level 3 for delivery to third party carriers (“Contract No. 1”). (Neutral Tandem Petition, p. 7). Pursuant to a February 2, 2004 contract, Neutral Tandem delivers third party traffic to Level 3’s subsidiary, Broadwing Communications (“Broadwing”), and accepts traffic from Broadwing for transiting to third party carriers (“Contract No. 2”). *Id.* Finally, under an August 18, 2005 contract, Neutral Tandem accepts traffic originated by Level 3 for transiting to other carriers (“Contract No. 3”).

On January 31, 2007, Neutral Tandem and Level 3 entered into an amendment of Contract No. 3, which continued the arrangement where Neutral Tandem transited Level 3’s originated traffic to other carriers. (Petition, p. 7). Hours after this amendment was signed, Level 3 notified Neutral Tandem via facsimile that it was terminating Contract No. 1. *Id.* On February 14, 2007, Level 3 notified Neutral Tandem that it was terminating Contract No. 2, and that both Contract Nos. 1 and 2 would be terminated effective March 23, 2007. *Id.* at 8. In summary, Level 3 terminated the contracts pursuant to which Neutral Tandem would transit traffic to Level 3, but the contract under which Neutral Tandem would deliver traffic originated on Level 3’s network to other providers remained in effect.

Neutral Tandem’s position is that Level 3 is obligated to interconnect with its network directly, and that it would be unreasonably discriminatory for Level 3 to impose costs or conditions upon Neutral Tandem as a transit provider that Level 3 did not impose on BellSouth Telecommunications, Inc. d/b/a AT&T Georgia (“AT&T”). Level 3’s position is that it meets its obligations under the law by interconnecting directly or indirectly with Neutral Tandem. Further, Level 3 argues that it has a reasonable basis for treating Neutral Tandem and AT&T differently with respect to the provision of tandem transit service. Even if the discrimination is reasonable, Level 3 argues that the state law relied upon by Neutral Tandem is inapplicable to the services at issue in this dispute. Finally, Level 3 contends that Neutral Tandem’s demands would impose costs upon Level 3 that it should not be obligated to incur.

## III. Jurisdiction

Pursuant to Section 252 of the Federal Telecommunications Act of 1996, the Commission has jurisdiction to arbitrate, approve or reject interconnection agreements between incumbent local exchange carriers and competitive local exchange carriers as well as resolving disputes that arise from such agreements. The Commission has general jurisdiction over telephone and telecommunications companies under O.C.G.A. § 46-1-1 *et seq.*, 46-2-20 and 46-

2-23. In addition the Commission administers Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. § 46-5-160 *et seq.*

Neutral Tandem filed its Petition pursuant to O.C.G.A. § 46-2-20 and the Georgia Act. The Commission has general supervision over telephone companies as well as the authority to require all companies under its supervision to establish and maintain such public services and facilities as may be reasonable and just." O.C.G.A. § 46-2-20(a) and (c). Neutral Tandem alleged that Level 3 violated O.C.G.A. § 46-5-164(a) and (b) of the Georgia Act by denying its request for reasonable interconnection and unreasonably discriminating against it. (Neutral Tandem Petition, p. 10, 15). O.C.G.A. § 46-5-164(a) provides as follows:

All local exchange companies shall permit reasonable interconnection with other certificated local exchange companies. This subsection includes all or portions of such services as needed to provide local exchange services.

O.C.G.A. § 46-5-164(b) states:

The rates, terms, and conditions for such interconnection services shall not unreasonably discriminate between providers and shall be negotiated in good faith between the providers and filed with the commission.

Level 3 argued that the Commission is preempted from ordering the relief sought by Neutral Tandem in this proceeding. (Neutral Tandem Post-Hearing Brief, p. 8) Specifically, Level 3 argues that construing the Georgia Act to require direct interconnection would conflict with Section 251(a)(1) of the Federal Telecom Act. Section 251(a)(1) obligates all telecommunications companies "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." The Commission disagrees with Level 3.

The Eleventh Circuit recently explained the preemption standard:

[T]he Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. "Express preemption" occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute. If Congress does not explicitly preempt state law, however, preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it – this is known as "field preemption" or "occupying the field." And even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. "Conflict preemption," as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law.

Cliff v. Payco General American Credits, Inc., 363 F.3d 1113, 1122 (11<sup>th</sup> Cir. 2004) (citations omitted). The fundamental question is the intent of Congress, as revealed in the language of the statute as well as the structure and purpose of the statute. *Id.* See also United Parcel Service, Inc. v. Flores-Galarza, 318 F.3d 323, 334 (1<sup>st</sup> Cir. 2003).

Every preemption analysis “start[s] with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.” Cliff v. Payco, 363 F.3d at 1122 *citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This presumption also requires that any preemptive effect that is found to exist must be given a narrow application. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The power to pre-empt state law is “an extraordinary power...that we must assume Congress does not exercise lightly.” *Id.*; Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). The presumption against preemption is particularly appropriate where Congress has legislated in a field that has traditionally been regulated by the States, such as local telephone service. Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355 (1986).

Level 3 did not allege that the Commission is expressly preempted from granting the relief requested by Neutral Tandem, and the Commission is not aware of any provision in the Federal Act that provides that states are so preempted. The second type of preemption is field preemption, which as explained above, exists when federal regulation is so pervasive that Congress left no room for states to supplement it. Again, Level 3 did not assert that field preemption exists. The Federal Act expressly preserves state authority to implement and enforce state regulations that are not inconsistent with federal regulations and to impose additional requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, provided that the additional requirements are not inconsistent with the Federal Act or the Federal Communication Commission’s regulations to implement the Federal Act. 47 U.S.C. § 261(b), 47 U.S.C. § 261(c).

Level 3 does assert “conflict” preemption in this case. Specifically, Level 3 claims that construing O.C.G.A. § 46-5-164 to require it to interconnect directly with Neutral Tandem would conflict with its obligations under the Federal Act to interconnect directly or indirectly. (Level 3 Brief, pp. 9-10). In other words, Level 3’s position is that the Federal Act provides local exchange carriers with the option of interconnecting directly or indirectly, and an order by a state commission requiring it to interconnect directly would take away this choice. As such, Level 3 characterizes Neutral Tandem’s Petition as “an impermissible attempt to circumvent the federally-mandated interconnection process . . .” *Id.*

Level 3 also argues that the Federal Act indicates Congressional intent to displace state regulatory authority to allow state commissions to mandate competitive local exchange carrier (“CLEC”) to CLEC direct interconnection. (Level 3 Brief, p. 13). Level 3 argues that the premise of the Federal Act is to leave CLEC to CLEC interconnection to the market. *Id.* at 14. Neutral Tandem argues that Section 251(a)(1) does not specify which party has the choice of direct or indirect interconnection or the circumstances of the interconnection. (Neutral Tandem Brief, p. 11). Neutral Tandem also argues that state authority to impose requirements that foster local interconnection and local competition is preserved by Section 261 of the Federal Act. *Id.* at 17,

citing to Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc., 323 F.3d 348 (6<sup>th</sup> Cir. 2003). Neutral Tandem contends that its infrastructure investment provides valuable redundancy and resiliency to the Georgia telecommunications network. *Id.* at 21. Neutral Tandem also states its position would honor the cost causation principle of the “calling party” pays.” *Id.* at 22. In addition, Neutral Tandem argues that its presence provides a competitive alternative to AT&T as the transit traffic provider. *Id.* at 24.

The Commission does not agree with Level 3’s position that a decision that required it to directly interconnect with Neutral Tandem would conflict with the Federal Act.<sup>2</sup> The first step in the analysis is to determine the obligations of CLECs under the Federal Act to interconnect. Section 251(a)(1) requires all local exchange carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” Level 3’s apparent position is that this statutory provision is satisfied if a LEC agrees to do either. However, the statute does not say that the party from whom interconnection is being requested is permitted to demand its preferred form of interconnection and limit the type of interconnection to which the requesting party is entitled.

Further, as discussed above, Section 261(b) preserves state authority to enforce regulations prescribed prior to the enactment of the Federal Act if such regulations are not inconsistent with the Federal Act. In addition, Section 261(c) preserves state authority to impose additional requirements on telecommunication carriers that are necessary to further competition, provided the requirement is not inconsistent with the Federal Act or FCC regulations to implement the Act. At issue in this proceeding are the obligation of LECs to provide reasonable interconnection and the prohibition on unreasonable discrimination in the provision of interconnection services. O.C.G.A. § 46-5-164. As part of the Georgia Act, these regulations existed at the time that the Federal Act was enacted. However, even if these requirements had not been in existence at that time, the Commission would still not be preempted from imposing them because they meet the standard set forth in Section 261(c).

For the public policy goals cited to in Neutral Tandem’s brief and discussed herein, requiring Level 3 to interconnect directly with Neutral Tandem is necessary to further competition. Neutral Tandem sponsored testimony that there were three benefits to the service that it offered. First, the transit service offered by Neutral Tandem offers a competitive option to the incumbent local exchange company (“ILEC”) for other carriers. (Tr. 62). Second, Neutral Tandem’s service improves the reliability of the system by providing redundancy. (Tr. 63). Third, the investment that Neutral Tandem has made in Georgia enhances economic development within the state. (Tr. 63). The Commission finds that these benefits are necessary to further competition and are not inconsistent with the Federal Act or the federal regulations promulgated to implement the Federal Act. In Michigan Bell, the Sixth Circuit found that as long as state regulations do not prevent carriers from taking advantage of Sections 251 and 252 of the Federal Act, state regulations are not preempted. 323 F.3d at 358-59. For the reasons discussed

---

<sup>2</sup> In fact, in Docket No. 16772-U, the Commission ordered parties to interconnect directly once a threshold number of minutes was reached. *See*, Order on Transit Traffic Involving Competitive Local Exchange Carriers and Independent Telephone Companies (March 24, 2005)

above, the Commission does not believe that requiring Level 3 to interconnect directly with Neutral Tandem would prevent a carrier from taking advantage of Section 251 or 252.

The case law relied upon by Level 3 in support of its preemption argument does not apply to the relief sought in this case. For example, in Wisconsin Bell v. Bie, 340 F.3d 441 (7<sup>th</sup> Cir. 2003), the Seventh Circuit found preemption where a state tariff required the ILEC to state a reservation price. The Court concluded that the Federal Act's arbitration procedure was interfered with by the state requirement that effectively mandated that negotiations begin at the reservation price listed in the tariff. 340 F.3d at 445. The Court also found that the tariff would result in appeals being filed in state court as opposed to federal court as required in the Federal Act for appeals of state commission decisions under Section 252. *Id.* at 445. Neither of those circumstances is present in this dispute. The Federal Act neither sets forth the detailed process for CLEC to CLEC arbitrations that it does for ILEC to CLEC arbitrations, nor does it require state commission decisions on CLEC to CLEC interconnection be appealed to federal court.

In Pacific Bell v. Pac-West Telecomm., 325 F.3d 1114 (9<sup>th</sup> Cir. 2003), the Ninth Circuit found a general rulemaking inconsistent with the Federal Act because it changed the terms of "applicable interconnection agreements" and contravened the provision that agreements have the force of law. 325 F.3d at 1127. An order requiring Level 3 to interconnect directly with Neutral Tandem under the terms set forth in Staff's recommendation would not change the terms of applicable interconnection agreements or contravene the Federal Act's provision that agreements have the force of law.

Level 3 also relies upon the decision in MCI v. Illinois Bell, 222 F.3d 323 (7<sup>th</sup> Cir. 2000). Level 3 states that the Court concluded that "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 such issues except on Congress's terms." (Level 3 Brief, p.11, citing to 222 F.3d at 343) However, this portion of the Court's decision involves a discussion of whether the state has waived its Eleventh Amendment immunity by participating in the Federal Act's scheme. It is not discussing the issue of preemption. The question of state regulations that are necessary to further telecommunications competition and are not inconsistent with the Federal Act were not before the Court so there is no analysis of what type of state regulation would survive preemption.

For the foregoing reasons, the Commission concludes that it is not preempted from granting the relief requested by Neutral Tandem.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### **A. Positions of the Parties**

Neutral Tandem complains that Level 3 refuses to interconnect directly with it unless Neutral Tandem pays Level 3 reciprocal compensation, or some other fee in addition to its costs, for traffic that originates on the networks of a carrier customer of Neutral Tandem and terminates

