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August 10, 2007

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COMMISSION CLERK

HAND DELIVERY

Ms. Ann Cole, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

Re: Docket No. 070408-TP

Dear Ms. Cole:

Enclosed for filing in the above-referenced docket on behalf of Level 3 Communications, LLC ("Level 3") are the original and fifteen copies of Level 3's Notice of Supplemental Filing.

Please acknowledge receipt of these documents by stamping the extra copy of this letter filed and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

KAH/rl
Enclosures
cc: All Parties of Record
level3\neutraltandem\cole.august 10 07 ltr

CMP ___
COM ___
CTR ___
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SEC ___
OTH ___

DOCUMENT NUMBER-DATE
07049 AUG 10 07
FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for Resolution of Interconnection Dispute with Level 3 Communications, LLC, and Request for Expedited Resolution.	))))))	Docket No. 070408-TP Filed: August 10, 2007

LEVEL 3 COMMUNICATIONS, LLC'S NOTICE OF SUPPLEMENTAL FILING

Level 3 Communications, LLC ("Level 3"), by and through its undersigned counsel, hereby files a series of pleadings filed by Neutral Tandem, Inc. with other state commissions requesting dismissal and closure of those cases on the single, uniform ground that as of on or about August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in that particular state via the parties' existing interconnections. The pleadings filed by Neutral Tandem attached to this Notice of Filing are as follows:

1. **Exhibit A** - - Neutral Tandem's Motion to Dismiss Level 3's Complaint as Moot filed before the Public Utilities Commission of Ohio on or about August 3, 2007.
2. **Exhibit B** - - Neutral Tandem's Motion to Dismiss Level 3's Petition as Moot filed before the Maryland Public Service Commission on or about August 3, 2007.
3. **Exhibit C** - - Neutral Tandem's Motion to Dismiss Level 3's Petition as Moot and Amended and Supplemental Response to Petition filed with the Public Service Commission of Wisconsin on August 3, 2007.
4. **Exhibit D** - - Neutral Tandem's for Voluntary Dismissal filed with the Indiana Utility Regulatory Commission on August 2, 2007.

DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

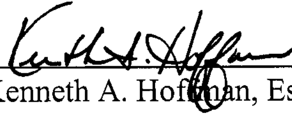
5. **Exhibit E** - - Neutral Tandem's Motion to Dismiss Level 3's Petition as Moot filed with the Massachusetts Department of Telecommunications and Cable on August 3, 2007.

These pleadings confirm that Neutral Tandem is able to either reroute traffic itself or has notified its customers that a specific route would no longer be available by a certain date. These steps were taken by Neutral Tandem and does not appear to have resulted in any call blocking. Neutral Tandem's action undermine its continued contentions that direct connections are required to terminate its transit traffic and debunking Neutral Tandem's allegations and threats of harm to the public switched network if indirect interconnections are implemented.

In addition to the motions filed in the other states, Level 3 is filing as **Exhibit F** a copy of a letter from Neutral Tandem Chief Executive Officer Rian Wren to Sureel Choksi, President of Level 3's Wholesale Markets Division, in which Neutral Tandem notifies Level 3 that it has "resumed moving forward with its initial public offering and will be filing an amended S-1 with the SEC shortly". In his prefiled direct testimony filed in this docket, Mr. Wren makes numerous unsubstantiated allegations against Level 3 regarding Neutral Tandem's Initial Public Offering. Mr. Wren has yet to offer any proof to support his accusations and it is telling that no state commission has found any basis for his accusations.

Exhibits A through F confirm that Neutral Tandem's claims of irreparable harm to its business operations have always been false. Neutral Tandem's conduct shows that it can reroute traffic with no impact to its end users when it needs to, that its originating customers can only terminate traffic to networks where Neutral Tandem has a business relationship and that the Level 3 proceedings never had any impact on Neutral Tandem's Initial Public Offering.

Respectfully submitted,



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- - and - -

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720-888-1780 (Telephone)
720-888-5134 (Telecopier)

Attorneys for Level 3 Communications, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Hand Delivery(*) and U. S. Mail on August 10, 2007 to the following:

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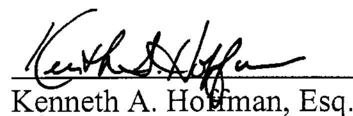


Kenneth A. Hoffman, Esq.

Level3/revisednotice of filing 080607.doc

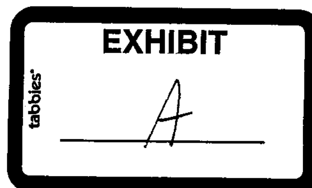
BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

NEUTRAL TANDEM'S MOTION TO DISMISS LEVEL 3'S COMPLAINT AS MOOT

Pursuant to Rule 4901-1-12(A), Ohio Administrative Code ("O.A.C."), and any other statutes and regulations deemed applicable, Neutral Tandem-Michigan, LLC and Neutral Tandem, Inc. (collectively, "Neutral Tandem"), by and through undersigned counsel, move the Commission to dismiss as moot the complaint of Level 3 Communications LLC and Broadwing Communications, LLC (collectively, "Level 3") for the reasons more fully set forth in the accompanying memorandum. Upon dismissal of the complaint, the Commission may deem the counterclaim against Level 3 filed in conjunction with Neutral Tandem's answer to be voluntarily withdrawn. .

WHEREFORE, Neutral Tandem respectfully requests that its motion to dismiss be granted.



Respectfully submitted,

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Attorneys for
Neutral Tandem-Michigan LLC and
Neutral Tandem, Inc.

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM IN SUPPORT OF NEUTRAL TANDEM'S MOTION TO DISMISS LEVEL 3'S COMPLAINT AS MOOT

In support of the foregoing motion to dismiss, Neutral Tandem states as follows:

1. Level 3 filed the above-captioned complaint with the Commission on May 31, 2007. The complaint stated that Level 3 intended to terminate its existing interconnections with Neutral Tandem as of June 25, 2007. [Complaint, ¶¶ ¶¶ 21, 23(b), (c), and (d)] Level 3 requested that the Commission direct Neutral Tandem to stop routing traffic through the parties' existing interconnections as of that date and to provide notice to Neutral Tandem's carrier customers of such impending service migration. (*Id.*) Level 3 also requested that the Commission order Neutral Tandem to pay Level 3 a $.001/minute usage charge for any traffic delivered over the parties' existing interconnections after June 25, 2007. [Complaint, ¶ 23(e), (f)]

2. On June 20, 2007, Neutral Tandem filed its answer and counterclaim against Level 3. Neutral Tandem's counterclaim requested that the Commission order Level 3 to continue receiving traffic via the parties' existing interconnections after June 25, 2007 on nondiscriminatory terms and conditions. (Counterclaim, ¶¶ 68-70.) On July 13, 2007, Level 3 filed its answer to Neutral Tandem's counterclaim, and, on July 26, 2007, filed a motion to dismiss the counterclaim. On August 1, 2007, Neutral Tandem filed a motion to extend the deadline for its response to Level 3's motion to dismiss the counterclaim to August 15, 2007.

3. To date, the Commission has not issued a ruling on Level 3's motion to dismiss Neutral Tandem's counterclaim or any other substantive rulings, and no formal procedural schedule has been established.

4. As averred in the affidavit of Dr. Surendra Saboo attached hereto as Exhibit 1, as of August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in Ohio via the parties' existing interconnections. (Exhibit 1, Saboo Aff. ¶ 3.) Accordingly, there no longer is any basis for Level 3 to continue to pursue its requests that the Commission order Neutral Tandem to stop routing traffic over the parties' existing interconnections and order Neutral Tandem to provide notice to its carrier customers. Accordingly, Level 3's complaint should be dismissed as moot.[1]

5. Similarly, there no longer is any basis for Neutral Tandem to pursue its counterclaim against Level 3, and, upon the Commission's dismissal of the complaint, Neutral Tandem's counterclaim may be deemed to be withdrawn.

6. Level 3 may contend that its request that the Commission order Neutral Tandem to pay Level 3's unilateral $.001/minute charge is not moot. [Complaint, ¶ 23(e), (f)] There is

[1] *See, e.g.*, Docket No. 91-169-TP-CSS, *In the Matter of the Complaint of Wayne R. Lundberg, v. The Ohio Bell Telephone Company*, 1992 Ohio PUC LEXIS 201, *6 (Mar. 12, 1992).

no basis whatsoever for the Commission to issue an order requiring Neutral Tandem to pay any such charge. There is no contract between Neutral Tandem and Level 3 providing for the payment of any such charge, nor, to Neutral Tandem's knowledge, has Level 3 tariffed any such charge.

7. To the contrary, the $.001/minute charge literally was made up out of thin air by Level 3. Level 3 has admitted in other proceedings that the $.001/minute charge is not based on any costs Level 3 claims to incur to receive traffic from Neutral Tandem.[2]

8. Other state commissions have rejected Level 3's attempt to unilaterally impose this unsupported and excessive $.001/minute charge. The Illinois Commerce Commission found that Level 3's attempt to impose this charge as an offer of compromise was "illusory"[3] and violated that state's laws forbidding carriers from "knowingly impeding the development of competition" in Illinois. The Illinois commission also described Level 3's attempts to impose this charge as "impermissible," and noted that Level 3's efforts were:

> little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT [Neutral Tandem] under a different label. . . . We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label.[4]

9. The New York Public Service Commission rejected a similar request by Level 3 that Neutral Tandem pay Level 3 a $.0007/minute charge after June 25 – less than the charge Level 3 demands here – concluding that the charge was "avowedly designed to encourage Neutral Tandem to stop offering tandem switching service" and would be "inconsistent with the

---

[2] *See* Docket No. 07-03-008, *Neutral Tandem California, LLC. v. Level 3 Communications, LLC*, Cal. Pub. Util. Comm'n, 06/05/07 Evidentiary Hearing Transcript, at 257. (Exhibit 2.)

[3] Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, adopting June 25, 2007 Order of ALJ Brodsky, at 9 (July 10, 2007) (Exhibit 3). The June 25, 2007 Order of ALJ Brodsky (hereafter "Brodsky Order") is attached hereto as Exhibit 4.

[4] Brodsky Order, at 10. Level 3's conduct in that proceeding was found so egregious that Level 3 was ordered to pay nearly all of Neutral Tandem's attorneys' fees. (*Id.* at 13, 15.)

objectives" that the New York commission cited in granting Neutral Tandem's petition for relief in that state.[5]

10. In sum, there is no basis in law, contract, or otherwise for the excessive, non cost-based charge Level 3 seeks to impose for the brief period from June 25, 2007 until traffic to Level 3 ceased on August 3, 2007, and this Commission has no authority to order the payment of such charge. Thus, with the cessation of the traffic, Level 3's complaint is moot and should be dismissed. Upon dismissal of the Level 3 complaint by the Commission, the Commission may deem Neutral Tandem's counterclaim to be withdrawn.

Respectfully submitted,

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Attorneys for
Neutral Tandem-Michigan LLC and Neutral Tandem, Inc.

[5] Docket No. 07-C-0233, *In re Petition of Neutral Tandem-New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption*, New York Public Service Commission, Order Preventing Service Disruption and Requiring Continuation of Interim Interconnection, at 13 (June 22, 2007) (Ex. 5).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served on each of the following persons or parties by electronic mail and first class US mail, postage prepaid, this 3rd day of August 2007.

Barth E. Royer

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Gregg Strumberger
Regulatory Counsel
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FAX: 301.664.6323

August 3, 2007

Via Hand Delivery

O. Ray Bourland
Executive Secretary
Maryland Public Service Commission
William Donald Schaefer Tower
6 St. Paul Street, 16th Floor
Baltimore, MD 21202

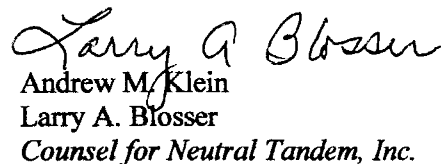
Re: Petition of Level 3 Communications, LLC To Direct Neutral Tandem-Maryland, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements

Dear Secretary Bourland:

Enclosed for filing on behalf of Neutral Tandem, Inc. and Neutral Tandem-Maryland, LLC in the above docket please find the original and fourteen (14) copies of *Neutral Tandem's Motion To Dismiss Level 3's Petition as Moot.*

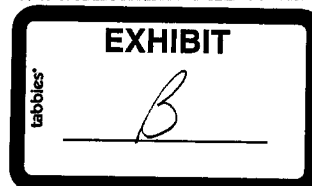
Should you have any questions or concerns regarding the foregoing, please do not hesitate to contact the undersigned.

Respectfully submitted,



Andrew M. Klein
Larry A. Blosser
Counsel for Neutral Tandem, Inc.

cc: Michael P. Donahue, Esq., *Counsel for Level 3 Communications*
Michael W. Fleming, Esq., *Counsel for Level 3 Communications*
Bill Hunt, Esq., *Level 3 Communications*
Ron Gavillet, Esq., *Neutral Tandem*
John R. Harrington, Esq., *Jenner & Block LLP*



BEFORE THE MARYLAND PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC To Direct Neutral Tandem-Maryland, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements	)))))))	Docket No. ____________

NEUTRAL TANDEM'S MOTION TO DISMISS LEVEL 3'S PETITION AS MOOT

Neutral Tandem, Inc. and Neutral Tandem-Maryland, LLC (collectively "Neutral Tandem"), by and through undersigned counsel, move the Commission to dismiss as moot the Petition of Level 3 Communications LLC to Direct Neutral Tandem-Maryland, LLC to Provide Notice to its Customers of the Termination of Certain Contract Arrangements ("Petition"). In support of this Motion, Neutral Tandem states as follows:

1. Level 3 filed its Petition with the Commission on May 18, 2007. Level 3's Petition stated that Level 3 intended to terminate its existing interconnections with Neutral Tandem as of June 25, 2007. (Pet. ¶¶ 7-8.) Level 3 requested that the Commission direct Neutral Tandem to stop routing traffic through the parties' existing interconnections as of that date. (*Id.*) Level 3 also requested that the Commission order Neutral Tandem to pay Level 3 an exorbitant $0.001/minute usage charge for any traffic delivered over the parties' existing interconnections after June 25, 2007. (*Id.* ¶ 9.) The only basis cited by Level 3 for the Commission to impose this $0.001/minute charge was a May 8 letter from Level 3 to Neutral Tandem, in which Level 3 unilaterally announced that it would begin imposing such a charge after June 25. (*Id.*)

2. To date, the Commission has not yet determined whether any response to Level 3's Petition is required, and thus Neutral Tandem has not filed a responsive pleading.[1] The Commission has not issued any substantive rulings on the merits of Level 3's Petition or issued any procedural schedule.

3. As of August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in Maryland via the parties' existing interconnections. (Ex. 1, Saboo Aff. ¶ 3.) Thus, there no longer is any basis for Level 3 to continue pursuing its request that the Commission order Neutral Tandem to stop routing traffic over the parties' existing interconnections. Accordingly, Level 3's Petition should be dismissed as moot.[2]

4. While Level 3 may contend that its request that the Commission order Neutral Tandem to pay Level 3's unilateral $0.001/minute charge is not moot, there is no basis whatsoever for the Commission to issue an order requiring Neutral Tandem to pay any such charge. There is no contract between Neutral Tandem and Level 3 providing for the payment of any such charge; nor (to Neutral Tandem's knowledge) has Level 3 tariffed any such charge.

5. To the contrary, the $0.001/minute charge was literally conjured up with no basis whatsoever, and Level 3 has already admitted in other proceedings that the $0.001/minute charge is not based on any costs Level 3 claims to incur to receive traffic from Neutral Tandem.[3]

6. Significantly, other state commissions have rejected Level 3's arbitrary and unsupported attempt to unilaterally impose this $0.001/minute charge. The Illinois Commerce

[1] Md. Code Ann., Pub. Util. Cos. § 3-102; Md. Regs. Code title 20, § 07.03.03. Neutral Tandem believes that the lack of Commission action on the Petition is entirely appropriate, since the Level 3 Petition fails to meet the minimum requirements established by these Maryland statutes and regulations, and as such would warrant no further action even if it was not now moot.

[2] *See, e.g.*, Docket No. 8594, *In the Matter of the Complaint of Annie Campbell v. Baltimore Gas & Elec. Co.*, 1994 Md. PSC LEXIS 237, at *6-7 (Nov. 10 1994).

[3] *See* Docket No. 07-03-008, *Neutral Tandem California, LLC. v. Level 3 Communications, LLC*, Cal. Pub. Util. Comm'n, 06/05/07 Evidentiary Hearing Transcript, at 257. (Ex. 2.)

Commission found that Level 3's attempt to impose this charge as an offer of compromise was "illusory," and violated that state's laws forbidding carriers from "knowingly impeding the development of competition."[4] The Illinois Commission also described Level 3's attempts to impose this charge as "impermissible," and noted that Level 3's efforts were:

> little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT [Neutral Tandem] under a different label. . . . We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label.[5]

9. The New York Public Service Commission rejected a similar request by Level 3 that Neutral Tandem pay Level 3 a $0.0007/minute charge after June 25 -- less than the charge Level 3 demands here -- concluding that the charge was "avowedly designed to encourage Neutral Tandem to stop offering tandem switching service" and would be "inconsistent with the objectives" that commission cited in granting Neutral Tandem's petition.[6]

10. In sum, there is no basis, in law, contract, or otherwise, for the Commission to order Neutral Tandem to pay Level 3's arbitrary, non cost-based, unilaterally imposed charge.

---

[4] Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, adopting June 25, 2007 Order of ALJ Brodsky, at 9 (July 10, 2007) (Ex. 3). The June 25, 2007 Order of ALJ Brodsky (hereafter "Brodsky Order") is attached hereto as Ex. 4.

[5] Brodsky Order, at 10. Level 3's conduct in that proceeding was found so egregious, that Level 3 was ordered to pay nearly all of Neutral Tandem's attorneys' fees. (*Id.* at 13, 15.)

[6] Docket No. 07-C-0233, *In re Petition of Neutral Tandem-New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption*, New York Public Service Commission, Order Preventing Service Disruption and Requiring Continuation of Interim Interconnection, at 13 (June 22, 2007) (Ex. 5).

WHEREFORE, in light of the foregoing, Neutral Tandem respectfully requests that the Commission dismiss Level 3's Petition as moot.

Respectfully submitted,

NEUTRAL TANDEM, INC. and NEUTRAL TANDEM-MARYLAND, LLC

By: ______________________

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Attorneys for Neutral Tandem, Inc. and Neutral Tandem-Maryland, LLC

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Dated: August 3, 2007

EXHIBIT 1

BEFORE THE MARYLAND PUBLIC SERVICE COMMISSION

In the Matter of the Petition of Level 3 Communications, LLC To Direct Neutral Tandem-Maryland, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements	)))))))	Docket No. ___________

AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Maryland, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiaries (collectively "Level 3"), in Maryland via existing direct interconnections between Neutral Tandem and Level 3.

3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in Maryland through the parties' existing direct interconnections.

AFFIANT FURTHER SAYETH NOT.

Surendra Saboo

Dr. Surendra Saboo

Sworn to and subscribed before me

this 2 day of August, 2007

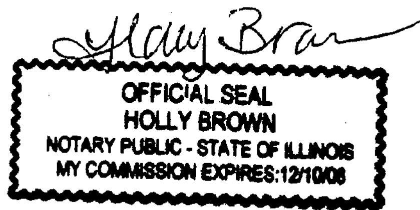

EXHIBIT 2

1 SAN FRANCISCO, CALIFORNIA, JUNE 5, 2007 - 12:30 P.M.
2 * * * * *
3 ADMINISTRATIVE LAW JUDGE REED: We are on the
4 record.
5 This is the time and place for the
6 continuation of the evidentiary hearing for Case
7 07-03-008, Neutral Tandem California, LLC, versus Level
8 3 Communications and its Subsidiaries.
9 Good afternoon. Yesterday we had the first
10 part of this proceeding, which was Neutral Tandem's
11 case, and this afternoon we will have Level 3's case.
12 And are there any preliminary matters?
13 MR. BLOOMFIELD: No, your Honor.
14 MR. ROGERS: Level 3 does not have any.
15 ALJ REED: Okay. Mr. Levin, Mr. Rogers, do you
16 want to call your first witness.
17 MR. ROGERS: Yes, your Honor. Thank you. We will
18 call Ms. Sara Baack as our first witness.
19 ALJ REED: Ms. Baack, how are you?
20 THE WITNESS: I'm fine. Thank you.
21 SARA BAACK, called as a witness by
Level 3 Communications, having been
22 sworn, testified as follows:
23
24 ALJ REED: Okay. Would you have a seat. Would
25 you state your full name and your business address.
26 THE WITNESS: Yes.
27 ALJ REED: Spelling your full name for the record.
28 THE WITNESS: My name is Sara, S-a-r-a, Baack,

1 Thank you.
2 Q Ms. Baack, let me direct your attention to
3 Exhibit 1.1 to your direct testimony, which was a May
4 8th letter from you --
5 A Yes.
6 Q -- to Rian Wren and Surendra Saboo of Neutral
7 Tandem.
8 A Mm-mm.
9 Q And it's -- I believe in the third paragraph
10 of that letter you indicate that if Neutral Tandem sends
11 traffic to Level 3 beyond June 25th, 2007, Level 3 will
12 charge Neutral Tandem a rate of $0.001 per minute
13 terminated. Do you see that?
14 A Yes.
15 Q Is that rate a cost-based rate for Level 3?
16 A No.
17 Q Let me direct your attention to page 24 of
18 your testimony. And I want to ask you just one or two
19 questions about the network issues that you've testified
20 about. Are you on page 24?
21 A Yes.
22 Q Do you see, you're asked a question regarding
23 Mr. Saboo's estimate of the time it would take to
24 rearrange traffic, and you say, "Mr. Saboo's six-month
25 estimate is unreliable and self-contradicted"?
26 A Yes, I do.
27 Q Do you see that?
28 A Yes.

EXHIBIT 3

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

July 10, 2007

Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC -vs- Level 3 Communications, LLC Verified Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.	: : : : : : : : :	07-0277

CERTIFICATE OF COMMISSION ACTION

TO ALL PARTIES OF INTEREST:

This is to certify that the Commission in conference on July 10, 2007, took the following action:

DENIED Neutral Tandem's Response to Level 3's Motion Requesting Oral Argument, filed on July 6, 2007;

DENIED Neutral Tandem's Response to Level 3's Petition for Review, filed on July 6, 2007;

GRANTED the adoption of the Administrative Law Judge's Order dated June 25, 2007.

Related memoranda will be available on our web site (www.icc.illinois.gov/e-docket) in the docket number referenced above.

Elizabeth A. Rolando
Chief Clerk

EAR:ml
Administrative Law Judge Brodsky

Service List – 07-0277

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EXHIBIT 4

and delivers it to its point of interconnection with the terminating LEC. The terminating LEC accepts the traffic and completes the call to the end user.

Interconnection, as a general matter, is an obligation of LECs pursuant to federal and Illinois law.[1] The parties to this matter disagree on which *manner* of interconnection complies with federal and state law.

NT states that it is the only independent tandem services provider; all other providers of tandem services are ILECs. NT's competitor for this service in Illinois is none other than AT&T.[2] NT also states that it delivers 492 million minutes of traffic per month on behalf of the nineteen CLECs that utilize NT's services. NT avers that these nineteen CLECs are among the largest facilities-based CLECs in Illinois. NT's volume represents 50% of the local tandem transit traffic in Illinois, and includes 56 million minutes per month delivered to Level 3 for termination to its subscribers. NT notes that, if Level 3 is allowed to block traffic from NT, all of these third-party CLECs will be denied their chosen method of delivering this traffic to Level 3.

NT's network provides an alternate path for traffic to the AT&T tandems. NT asserts that this benefits the public and the strength of the public switched telephone network (PSTN) by decreasing the likelihood of tandem exhaust, call blocking, and, during an emergency, network-wide failure due to a disruption at a particular point.

Pursuant to various contracts, NT and Level 3 exchanged traffic since 2004. Under one contract, NT delivered to Level 3 traffic originated by third-party CLECs and bound for Level 3. Under a second, NT similarly delivered traffic to Level 3's subsidiary Broadwing Communications. Under a third contract, Level 3 delivers to NT traffic originated by Level 3 and bound for third-party CLECs. Pursuant to this contract, NT transits the traffic originated on the Level 3 network.

NT notes that it pays 100% of the cost of the transport facilities and electronics between NT and Level 3 that are used to terminate traffic to Level 3's network. NT also provides to Level 3 all of the billing information that Level 3 needs to collect reciprocal compensation from the originating carriers, including all of the signaling information NT receives from the originating carrier.

On January 31, 2007, the parties executed a contract[3] extending the term for Level 3 to deliver traffic to NT for transiting to third-party CLECs. Later that same day, Level 3 sent notice terminating the agreement by which third-party CLECs can deliver traffic to Level 3 via NT's tandems. Termination of the agreement was designated to

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[1] *See* 47 U.S.C. 251; 220 ILCS 5/13-514(1).

[2] Both NT and Level 3 refer to the ILEC by its brand name of "AT&T" rather than its legal name of Illinois Bell Telephone Company. For consistency, this Order will do the same.

[3] NT calls it an amendment to the prior contract; Level 3 explicitly denies that it is an amendment, and insists that it is a new contract. Its label is immaterial to the chronology of events leading to this proceeding.

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Neutral Tandem, Inc. and	:	
Neutral Tandem-Illinois, LLC	:	
-vs-	:	
Level 3 Communications, LLC	:	
	:	**07-0277**
Verified Complaint and Request for	:	
Declaratory Ruling pursuant to	:	
Sections 13-515 and 10-108 of the	:	
Illinois Public Utilities Act.	:	

ORDER

This matter concerns an interconnection dispute between Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (collectively "NT") and Level 3 Communications, LLC ("Level 3"). NT alleges that Level 3 refuses to accept delivery of transit traffic without NT paying charges for which it is not properly responsible, and that Level 3 has threatened to disconnect NT if it does not accept Level 3's terms. NT states that it seeks interconnection at reasonable and non-discriminatory terms for the delivery of traffic bound for Level 3 subscribers, but that it does not seek to force Level 3 to be a customer of NT. Level 3 maintains that the prior agreement under which NT delivers traffic to Level 3 has expired. Level 3 avers that it is free to terminate the agreement pursuant to the provisions contained therein. For the reasons that follow, we find in favor of NT, with the relief sought granted in part and denied in part.

BACKGROUND

NT and Level 3 are both telecommunications carriers in Illinois. Level 3 is a competitive local exchange carrier (CLEC) with end user customers. Traffic is originated by or terminated to customers on the Level 3 network. NT does not have such end-user customers; no traffic originates from or terminates to NT's network. NT's customers use NT to deliver traffic to the networks of other CLECs with which they are not directly interconnected. NT "transits" such traffic over its tandems, and delivers it to the recipient CLEC for termination to its end user.

To achieve this, NT is interconnected with various local exchange carriers (LECs), both incumbent (ILEC) as well as CLEC. NT receives traffic from the originating LEC at their point of interconnection, transits the traffic over its own network,

occur on March 2, 2007. The same executive at Level 3 who signed the contract with NT also signed the notice of termination.[4]

Letters were exchanged between NT and Level 3 throughout February, 2007. The termination date was moved back to March 23, 2007, and at some subsequent time, to June 25, 2007.

On April 24, 2007, Level 3 sent a letter stating that, pursuant to 83 Ill. Adm. Code 731.905, it was giving notice that the expiration was set for June 25, 2007, after which Level 3 would disconnect NT.

On April 25, 2007, NT filed with the Illinois Commerce Commission (the "Commission") its Verified Complaint and Request for Declaratory Ruling (the "Complaint"), in which it alleges violations by Level 3 of Section 13-514, subsections (1), (2), and (6), as well as Sections 13-702 and 9-250, of the Public Utilities Act[5] (the "Act").

Respondent filed its Answer on May 2, 2007, in accordance with Section 13-515(d)(4) of the Act.

Consistent with Section 13-515(d)(6) of the Act and pursuant to due notice, a status hearing was convened on May 8, 2007. Also on May 8, 2007, Level 3 sent a letter to NT stating 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 Neutral Tandem's behalf, Level 3 will charge Neutral Tandem at a rate of $0.001 per minute terminated. Level 3 reserves ... the right to terminate the acceptance and delivery of Neutral Tandem's transit traffic. * * * * By continuing to send traffic to Level 3 for termination from and after June 25, 2007, Neutral Tandem will be evidencing its acceptance of these financial terms.[6]

Notwithstanding the foregoing, Level 3 has stated in this proceeding that it does not collect reciprocal compensation from originating carriers for traffic terminated to the Level 3 network, and does not proactively pay reciprocal compensation to other CLECs for traffic it originates and terminates on their networks.

The case was tried on May 22 and May 23, 2007. NT, Level 3, and the Staff of the Commission ("Staff") all appeared by counsel. NT offered testimony from Mr. Rian Wren, its President and Chief Executive Officer, as well as from Mr. Surendra Saboo, its

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[4] In its Answer, Level 3 generally admits this allegation and, in any event, did not deny it (*See* Complaint and Answer ¶25). Accordingly, Level 3 is deemed to have admitted it. 735 ILCS 5/2-610(b) ("Every allegation, except allegations of damages, not explicitly denied is admitted...").

[5] *See generally* 220 ILCS 5/1-101 *et seq.*

[6] Level 3 ex. 1.1.

Chief Operating Officer and Executive Vice President. Level 3 offered testimony from Ms. Sara Baack, the Senior Vice President of its Wholesale Markets Group, as well as from Mr. Timothy J. Gates, Senior Vice President of QSI Consulting, located in Highlands Ranch, Colorado. Staff offered testimony from Mr. Jeffrey Hoagg, Principal Policy Advisor in the Telecommunications Division of the Commission.

ANALYSIS

The Public Utilities Act

NT asserts that Level 3's actions violate Section 13-514 of the Act. That Section states:

> A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:
>
> (1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;
>
> (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; * * * *
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers[.][7]

NT also alleges a violation of Section 13-702, which states:

> Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations, messages or other transmissions of every other telecommunications carrier with which a joint rate has been established or with whose line a physical connection may have been made.[8]

Finally, NT relies upon Section 9-250 of the Act, which states that, where the Commission, upon complaint or its own motion, finds that a rate, charge, ... contract, or other utility practice:

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[7] 220 ILCS 5/13-514, 13-514(1), 13-514(2), 13-514(6).

[8] 220 ILCS 5/13-702.

> [is] unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, ... the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.[9]

The Complaint does not seek relief pursuant to the federal Telecommunications Act of 1996.

Interconnection; Section 13-514

It is undisputed that Section 251 of the federal Telecommunications Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[10] The parties appear to agree that the fundamental purpose of interconnection is the exchange of traffic. At issue in this proceeding is the manner in which such interconnection may occur.

NT seeks to maintain its existing direct interconnection with Level 3. NT's CLEC customers, via NT, are indirectly interconnected with Level 3 under this arrangement. Because NT is a transit provider rather than a LEC, the preferred arrangements of both NT and Level 3 feature "indirect interconnection" but for different entities. For the purpose of this Order, this direct/indirect interconnection arrangement will be labeled "Type N" interconnection after its proponent.

Level 3 asserts that all that is required of it is indirect interconnection with NT. It argues that Section 251(a) requires all carriers to directly or indirectly interconnect, but does not mandate direct interconnection between carriers.[11] Level 3 relies on this choice offered by Section 251(a)(1) to justify its termination of the existing direct interconnection.

After Level 3 disconnects NT to prevent it from delivering traffic to Level 3, NT would be indirectly interconnected with Level 3 via AT&T. As Staff points out, NT's CLEC customers then would only have a doubly-indirect interconnection with Level 3, via NT *and* AT&T. This indirect/doubly-indirect interconnection arrangement will be labeled "Type L" interconnection for the purpose of this Order.

The difference between a "Type L" and "Type N" interconnection is that the "Type L" involves a second transit provider, i.e., a more intricate call path and a second set of transit costs for the originating CLEC. Furthermore, as Staff witness Hoagg explains, the "Type L" interconnection forces originating CLECs to utilize a call path other than

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[9] 220 ILCS 5/9-250. (This authority is explicitly extended to single rates or other charges, classifications, etc. *Id.*) *Cf.* 220 ILCS 5/13-101 (applying Section 9-250, *inter alia*, to competitive telecommunications rates and services).

[10] 47 U.S.C. 251(a)(1).

[11] *See id.*

the one they apparently prefer, as evident from their present subscriptions with NT. Accordingly, where a "Type N" interconnection is possible, forcing the use of a "Type L" interconnection violates Section 13-514(1) of the Act, which prohibits the provision of inferior connections to another carrier.[12] Requiring NT or an originating CLEC to incur a second set of transit costs is the hallmark of the inferiority of this type of interconnection. It also violates Section 13-514(2) of the Act, which prohibits a telecommunications carrier from inhibiting the speed, quality, or efficiency of services used by another carrier.[13]

Level 3 has secured a "Type N" interconnection for its own use, i.e., it is directly interconnected with NT for the purpose of having traffic originated on the Level 3 network transited by NT to other CLECs. The instant dispute concerns, in part, an attempt by Level 3 to force upon NT and its 18 other CLEC customers a "Type L" interconnection. By disconnecting NT and forcing it to route traffic bound for Level 3 via AT&T, Level 3 would simultaneously impose a substantial adverse effect on NT's ability to serve its customers, and foreclose from competing CLECs the very arrangement that Level 3 uses for itself. Both of these effects violate Section 13-514(6).[14]

In addition, Staff explains that, if Level 3 disconnects NT, it prevents other CLECs from using NT to transit their traffic to Level 3. The CLECs then will face the choice of paying either (i) the AT&T price, which is 130% of that charged by NT, or (ii) the price of both NT and AT&T (230% of NT's price[15]), and will invariably return to AT&T at the expense of NT. This scenario will degrade the ability of NT to do business, and will impede the development of competition in Illinois. Therefore, the position advocated by Level 3 violates Illinois law.[16] Also, NT accurately characterizes Level 3's scheme, with two transit providers, two sets of costs, and mandatory routing of traffic through the ILEC, as functionally equivalent of a refusal by Level 3 to interconnect with NT. This violates the requirement of Section 251(a) of the Telecommunications Act to interconnect directly or indirectly. Notwithstanding Level 3's arguments that it is shielded by Section 251(a), that Section does not explicitly authorize doubly-indirect interconnection or preempt enforcement of State law claims.[17]

Finally, NT points out that the FCC previously determined that direct interconnection[18] is appropriate when more than 200,000 minutes of traffic are delivered

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[12] *See* 220 ILCS 5/13-514(1).

[13] *See* 220 ILCS 5/13-514(2).

[14] *See* 220 ILCS 5/13-514(6).

[15] Setting NT's price as the base price, this figure represents the sum of the proportions of NT's price (100%) and AT&T's price (130%).

[16] *See* 220 ILCS 5/13-514 (prohibiting a telecommunications carrier from "imped[ing] the development of competition in any telecommunications service market").

[17] *See* 47 U.S.C. 251(a)(1).

[18] This corresponds to that labeled as "Type N" interconnection in this matter, and favors a direct rather than indirect interconnection between NT and Level 3.

per month.[19] NT states it delivers approximately 56 million minutes of traffic per month to Level 3—many times the threshold level of traffic. Therefore, the position advocated by Level 3 also is not consistent with the federal law on point.

Level 3 does argue that it should be free to end the existing relationship based on the termination clause in the contract. Nevertheless, Level 3 is still certified under the Act to operate as a telecommunications carrier in Illinois, and as such, it must comply with Illinois law. Section 13-406 of the Act, concerning discontinuation or abandonment of telecommunications service, directly addresses Level 3's argument. Section 13-406 provides, in relevant part, that:

> No telecommunications carrier offering or providing competitive telecommunications service shall discontinue or abandon such service once initiated except upon 30 days notice to the Commission and affected customers. The Commission may, upon its own motion or upon complaint, investigate the proposed discontinuance or abandonment of a competitive telecommunications service and may, after notice and hearing, *prohibit such proposed discontinuance or abandonment if the Commission finds that it would be contrary to the public interest.*[20]

By proposing to disconnect[21] NT, Level 3 would impose upon NT, its 18 other CLEC customers, and all of their subscribers a discontinuation of service, as well as the *per se* impediments to competition complained of pursuant to Section 13-514. These impacts, along with the scheme of disparate treatment that would cause them, are contrary to the public interest.

Both the unreasonableness and the knowing intent elements of NT's Section 13-514 claims[22] are apparent from the nature and timing of Level 3's actions. In seeking to impose its uneven arrangement, it signed the contract related to traffic originated by Level 3, and that same day gave notice to terminate the contract related to traffic to be terminated to Level 3. Level 3 also fails to reconcile its own interpretation of federal Section 251(a)—that either a direct or an indirect interconnection is required—with the FCC's requirement of a direct interconnection above a 200,000 minute per month threshold.[23] Furthermore, the impact of Level 3's threats on third-party CLECs not involved in the instant dispute, as well as their customers, amplifies the unreasonableness of Level 3's position.

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[19] *In the Matter of Interconnection Disputes with Verizon Virginia, Inc.*, DA 02-1731, CC 00-218, 00-249, 00-251, Memorandum Opinion and Order, ¶¶ 115-16 (rel. July 17, 2002).

[20] 220 ILCS 5/13-406 (emphasis added).

[21] Under the facts of this case, we find no material distinction between the labels of "discontinuation" of service and "disconnection" of an existing interconnection point.

[22] *See* 220 ILCS 5/13-514 *et seq.*

[23] For citations and discussion, *see supra* nn. 11 and 19.

Level 3 repeatedly complains that it is being made to provide a direct physical interconnection in perpetuity. Staff notes that, given the amount of traffic that NT transits to Level 3 for termination, direct physical interconnection is required as a matter of federal law,[24] and, as a practical matter, is simply a condition of doing business in the market. We agree, although our holding is not that Level 3 must permanently maintain the exact status quo, but rather that Level 3 must comply with the law. This includes, but is not limited to, refraining from actions that discriminate against other telecommunications carriers or the public. Therefore, to the extent that Level 3 seeks to redefine its relationship with NT, it must do so without violating Section 13-514 or any other section of the Act, and without taking actions that are detrimental to the public interest. As applied to the facts of the instant case, this means that the direct interconnection between NT and Level 3 must remain intact.

Section 13-702

Section 13-702 prohibits discrimination or delay in receiving, transmitting, and delivering traffic with telecommunications carriers with whom "a physical connection may have been made."[25] NT and Level 3 were and still are directly, physically interconnected for the exchange of traffic, so the condition upon the applicability of Section 13-702 is satisfied.

NT complains that Level 3's threat to block traffic from NT violates this Section. NT also avers that the *per se* impediments to competition complained of pursuant to Section 13-514 are sufficient to establish "discrimination or delay" under Section 13-702. We agree.[26]

Level 3 argues that Section 13-702 merely "requires Level 3 to receive traffic where there is an ongoing agreement for the exchange of traffic."[27] The scope of 13-702 is more broad than that advocated by Level 3, however. As discussed *supra*, Level 3's position would simultaneously impact NT adversely in its ability to serve its customers, and would foreclose from others the very arrangement that Level 3 uses for itself. The intent of this Section of the Act is the prohibition of discrimination or delay. Although Level 3 protests that there is no duty to maintain interconnection imposed by this Section, the discrimination flowing from Level 3's leveraging of the interconnection with NT is prohibited.

Finally, Level 3 advances the letter dated May 8, 2007, from Level 3 witness Baack to NT witnesses Wren and Saboo, to indicate the possibility of continued direct

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[24] *See id.*

[25] *See* 220 ILCS 5/13-702.

[26] *Compare id.* ("discrimination or delay") *with* 220 ILCS 5/13-514(1) ("unreasonably refusing or delaying interconnections" ... "providing inferior connections"); 5/13-514(2) ("unreasonably impairing the speed, quality, or efficiency"); 5/13-514(6) ("unreasonably [imposing] a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.")

[27] Level 3 Init. Br. at 14.

interconnection conditioned upon payment by NT per minute of traffic terminated. To the extent that Level 3 asserts that the letter comprises an offer, it contains language that violates Section 13-702 and, as a general matter, is illusory. The letter states that, if NT delivers traffic to Level 3, "and *if Level 3 elects to terminate such traffic* on [NT]'s behalf.... Level 3 reserves ... the right *to terminate the acceptance and delivery of [NT]'s transit traffic*."[28] Level 3, however, does not get to choose whether or not it will terminate traffic bound for its subscribers.[29] Level 3's position also is inconsistent with the law concerning reciprocal compensation, as discussed *infra*.

Reciprocal Compensation

Reciprocal compensation is a principle recognized in federal law. The Telecommunications Act of 1996 mandates that "[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[30] This is a requirement of all LECs, not just ILECs.[31] The FCC rules further clarify that:

> a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.[32]

The evidence establishes that NT does not originate traffic. Furthermore, the rule does not impose reciprocal compensation obligations with respect to transiting the traffic.[33] In addition, this Commission previously has rejected attempts to impose reciprocal

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[28] Level 3 ex. 1.1, ¶3 (emphasis added).

[29] *See* 220 ILCS 5/13-702 ("Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, [such traffic]." Level 3's letter dated May 8, 2007, implies the maintenance of the direct physical interconnection between NT and Level 3, thereby satisfying the condition for this Section of the Act to apply.); *see also MCI Tel. Corp.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ill. Bell Tel. Co.*, Docket 96-AB-006, 1996 Ill. PUC Lexis 706, at *38 (Dec. 17, 1996) ("The very essence of interconnection is the establishment of a seamless network of networks, and to develop fine distinctions between types of traffic, as Ameritech Illinois would have us do, will merely create inefficiencies, raise costs and erect barriers to competition.") In 1996, Illinois Bell Telephone Company was the only provider of transit service (*see id.* at *31), and the record of the instant case indicates that NT is the only independent provider of such service today. [*See supra* n.2 regarding Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T"), f/k/a SBC Illinois, f/k/a Ameritech Illinois.]

[30] 47 U.S.C. 251(b)(5).

[31] *Id.*

[32] 47 C.F.R. 51.701(e).

[33] *See id.*

compensation on transit providers.[34] Therefore, NT is not obligated to pay reciprocal compensation to Level 3.

Level 3 argues that the use of a transit provider enables the CLEC originating the call "to hide behind the transit provider to avoid compensating the terminating carriers."[35] This argument is both logically flawed and contrary to the evidence. The fallacy in Level 3's argument is that the doubly-indirect "Type L" interconnection that it seeks, which features *two* transit providers (NT and AT&T), would exacerbate rather than ameliorate the problem that Level 3 alleges. Furthermore, NT asserts, both in its Complaint and in testimony, that it provides all signaling information and call detail necessary for Level 3 to bill the originating CLECs. Level 3 offered nothing to rebut NT's claim. Accordingly, NT demonstrated that Level 3 has the ability to collect reciprocal compensation from the originating CLECs, but apparently chooses not to do so. Level 3 may choose not to use the information to collect reciprocal compensation, but it then waives the reciprocal compensation otherwise due, and may not require NT to collect the same on its behalf.

Finally, the per-minute surcharge proposed by Level 3 in its letter dated May 8, 2007, also is impermissible. It is little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label. Such charges have been disallowed in previous decisions.[36] We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label. In addition, the evidence of record demonstrates that NT pays 100% of the cost of the facilities of the interconnection, leaving no room for Level 3 to argue that there is any unrecovered or additional cost per minute for transited calls terminated on the Level 3 network.[37]

Section 9-250

NT has requested that it be awarded interconnection on terms no less favorable than the terms upon which Level 3 and AT&T interconnect. Despite several repetitions of that refrain, the Level 3-AT&T interconnection agreement is not of record. It appears from NT's presentation throughout the case that what it seeks is direct interconnection with no liability to Level 3 for per-minute termination charges and no obligation to bill or collect reciprocal compensation from the originating carriers. NT states it already pays for 100% of the costs of the direct, physical interconnection, and there is nothing to

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[34] *In re Verizon Wireless Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996*, 01-0007 ("...when one carrier transits traffic to another, the transiting carrier, by law, has no reciprocal compensation obligation (and no other payment obligation) to the termination carrier") (May 1, 2001) at 35; *see also* 04-0040 at 7-8.

[35] Level 3 Init. Br. at 30.

[36] *See* 01-0007 at 35, *supra* n. 34.

[37] While NT's payment of the entire cost of the facilities and electronics is evidence in its favor in the instant case, this should not be construed as a threshold or test *requiring* 100% payment by a similarly-situated complainant.

indicate that NT seeks a change thereto. As noted *supra*, NT has prevailed on the issues of interconnection and reciprocal compensation.

Level 3 disagrees that Section 9-250 allows the relief NT seeks. It notes that NT is barred from opting-in to particular clauses from an existing interconnection agreement, particularly one that is significantly different in scope and purpose.[38] Level 3 also argues that what NT really seeks is arbitration, but that the federal Telecommunications Act only has such procedures for disputes between a CLEC and an ILEC.[39] Staff generally agrees with the characterizations of Level 3 on this point.

At the outset, we concur with Level 3 and Staff that this case is not an arbitration within the meaning of Section 252 of the federal Telecommunications Act.[40] Furthermore, the "opt-in" provision for such interconnection agreements is similarly inapplicable.[41] Section 9-250 does apply to the State law claims brought in this matter, however, and requires abatement of the violations.[42]

NT argues that Section 9-250 is a basis for the Commission to impose its preferred agreement on Level 3, and it suggests that its Traffic Termination Agreement with Time Warner is a useful template. This approach is problematic for three reasons: it resembles a Section 252 arbitration; it is substantially similar to the opt-in approach just rejected; and, even if legally permissible, there is insufficient information of record to weigh whether such terms are genuinely appropriate to the relationship between NT and Level 3.

Instead, this Order imposes several mandates to abate the underlying violations, but ultimately leaves certain elements for further negotiation by the parties. These mandates are intended to confine the scope of the negotiation to just and reasonable charges and practices, thereby addressing the requirements of Section 9-250, without transforming the instant case into a federal Section 252 arbitration. By remaining limited, this approach also recognizes that the parties are in a better position than the Commission to craft the details of their business relationship, and it accords them some flexibility to do the same.

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[38] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Second Report and Order, FCC 04-164, ¶12 (rel. July 13, 2004). Level 3 also argues that NT reached a different arrangement with another ILEC, but that argument is, in essence, *Level 3* attempting to opt in to a single payment term of an outside agreement. As such, that argument also must be rejected.

[39] *See* 47 U.S.C. 252(b).

[40] *See generally* 47 U.S.C. 252(b).

[41] *See* 47 U.S.C. 252(i)

[42] 220 ILCS 5/9-250. ("Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges ... or that the rules, regulations, contracts, or practices ... are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law ... the Commission shall determine the just, reasonable or sufficient rates [etc.] and shall fix the same by order").

Therefore, NT and Level 3 shall observe the following provisions in their business relationship. First, as discussed *supra*, Level 3 shall continue to accept a direct physical interconnection by which NT delivers traffic to Level 3 for termination until a further order from the Commission, and for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to NT for transiting.

Second, Level 3 shall not require NT to pay or collect reciprocal compensation for traffic not originated by NT.

Third, Level 3 shall not require NT to pay any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3 for termination on the Level 3 network.

Fourth, NT shall continue to provide to Level 3 sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes.

Fifth, if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship, the interconnection shall continue based upon the status quo in effect between the parties on January 30, 2007.[43]

Remedies

NT seeks the following remedies: a declaration that Level 3 has violated Sections 13-514, 13-702, and 9-250 of the Act; an order requiring Level 3 to interconnect with NT on just, reasonable, and non-discriminatory terms and conditions no less favorable than those by which Level 3 accepts transit traffic from AT&T; attorneys fees and costs; and all further relief available under the Act.

Section 13-516 of the Act provides certain remedies for violations of Section 13-514,[44] including a cease-and-desist order,[45] damages,[46] and attorney's fees and costs.[47] Section 13-515(g) mandates an assessment of the Commission's own costs related to the case.[48]

[43] Level 3 argues that Commission regulation of CLEC-to-CLEC interconnection is inconsistent with Section 252 of the federal Telecommunications Act. Separately, Level 3 argues that Section 252 does not apply to this proceeding—a point that no party contests. All of the alleged violations are of state statutes. Furthermore, interconnection was not an issue until Level 3 pursued an arrangement that was discriminatory against NT, 18 other CLECs, and their customers. It is Level 3's behavior, which is anti-competitive and contrary to the public interest, that is the primary interest of the Commission in this case.

[44] *See generally* 220 ILCS 5/13-516.

[45] 220 ILCS 5/13-516(a)(1).

[46] 220 ILCS 5/13-516(a)(3).

[47] *Id.*

[48] 220 ILCS 5/13-515(g).

By a preponderance of the evidence, NT has established that the conduct of Level 3 at issue in this dispute violates Sections 13-514(1), 13-514(2), 13-514(6), and 13-702, and, as such, is an impediment to competition and contrary to the public interest. There is no separately discernable violation of Section 9-250; instead, that Section requires certain attributes in the ongoing business relationship. The cease-and-desist order will be included, consistent with the findings herein, and will reflect the mandates set forth under Section 9-250. There will be no award of monetary damages at this time.[49]

The remaining issue concerns the assessment of fees and costs. Illinois courts have stated that "it is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary powers.'"[50] As noted, violations of Section 13-514 have occurred. NT therefore is entitled to an award of attorney's fees and costs[51] based upon its litigation success.[52]

NT did indeed establish violations by Level 3 of Sections 13-514(1), 13-514(2), and 13-514(6), as well as 13-702. NT was less clear in its arguments and evidence for its Section 9-250 claim, and ultimately the remedies sought by NT under this Section were denied in part. Following the model used most recently in the *Cbeyond* case,[53] the relative litigation success (for the sole purpose of assessing fees and costs) of NT is determined to be 80%, heavily weighted upon NT's prosecution of Sections 13-514(1), 13-514(2), 13-514(6), and 13-702.[54] Accordingly, Level 3 is assessed 80% of NT's attorney's fees and costs. Level 3 also is assessed 90% of the Commission's costs, consisting of all of its own half, and 80% of NT's half. NT is assessed the 10% balance of the Commission's costs, consisting of the remaining 20% of its half of the costs.

CONCLUSION

Based on the foregoing, we find that:

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[49] This is included for completeness pursuant to Section 13-516(a)(3). No damages were quantified in the Complaint. From the record, it appears that any such damages only would accrue if Level 3 were to actually disconnect NT, which it has not done to date.

[50] *Globalcom, Inc. v. Ill. Commerce Comm'n*, 347 Ill.App.3d 592, 618 (1st Dist. 2004).

[51] 220 ILCS 5/13-516(a)(3) (the Commission "shall award" such fees and costs).

[52] *See Globalcom, Inc. v. Ill. Commerce Comm'n*, 347 Ill.App.3d 592, 618 (1st Dist. 2004); *Cbeyond Commun's, LLP v. Ill. Bell Tel. Co.*, Dockets 05-0154/05-0156/05-05-0174 (cons.) (June 2, 2005), at 43-44; *Globalcom, Inc., v. Ill. Bell Tel. Co.*, Docket 02-0365 (Order on Rehearing, Dec. 11, 2002), at 50-51.

[53] *See Cbeyond Commun's, LLP v. Ill. Bell Tel. Co.*, Dockets 05-0154/05-0156/05-05-0174 (cons.) (June 2, 2005), at 43-45.

[54] *See id.* at 45. (Such award is an approximation of NT's litigation success. "Absolute precision regarding this quantification is simply not practicable.")

(1) Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC own, control, operate, or manage, for public use, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of Section 13-202 of the Act;

(2) Level 3 Communications, LLC owns, controls, operates, or manages, for public use, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Act;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law; and

(5) the remedies set forth above should be adopted to address the violations of Section 13-514 and 13-702 of the Public Utilities Act.

IT IS THEREFORE ORDERED that Level 3 Communications, LLC cease and desist from its threat to disconnect or otherwise disrupt the direct physical interconnection with Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, by which Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC deliver traffic to Level 3 Communications, LLC.

IT IS FURTHER ORDERED that Level 3 Communications, LLC cease and desist from requiring Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC to pay or collect reciprocal compensation for traffic not originated by Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, or to pay any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3 Communications, LLC for termination on its network.

IT IS FURTHER ORDERED that Level 3 Communications, LLC cease and desist from any act discussed and found herein to violate Sections 13-514 or 13-702 of the Public Utilities Act.

IT IS FURTHER ORDERED that Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC shall continue to provide to Level 3 Communications, LLC sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes.

IT IS FURTHER ORDERED that, if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship,

that the exchange of traffic shall continue based upon the status quo in effect between the parties on January 30, 2007.

IT IS FURTHER ORDERED that Level 3 Communications, LLC pay 80% of the attorney's fees and costs of Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, as well as 90% of the Commission's costs incurred in this proceeding as prescribed by Sections 13-515 and 13-516 of the Public Utilities Act.

IT IS FURTHER ORDERED that Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC pay the remaining 10% of the Commission's costs incurred in this proceeding as prescribed by Section 13-515 of the Public Utilities Act.

IT IS FURTHER ORDERED that, subject to the provisions of Sections 10-113 and 13-515(d)(8) of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

So ordered this 25th day of June, 2007.

Ian Brodsky,
Administrative Law Judge

EXHIBIT 5

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 20, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-C-0233 - Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption.

ORDER PREVENTING SERVICE DISRUPTION AND REQUIRING CONTINUATION OF INTERIM INTERCONNECTION

(Issued and Effective June 22, 2007)

BY THE COMMISSION:

INTRODUCTION AND SUMMARY

We initiated this proceeding to consider a complaint in which Neutral Tandem, Inc. - New York LLC (Neutral Tandem) asks that we require Level 3 Communications LLC (Level 3) to continue direct interconnection with Neutral Tandem, while Level 3 asks us to require a migration plan for orderly divestiture of Neutral Tandem's customers in anticipation that we will allow Level 3 to discontinue the interconnection. The two firms established their present direct interconnection pursuant to a transport agreement and two termination agreements. Level 3 unilaterally has canceled the termination agreements, after fulfilling the notice requirements prescribed in the agreements.

In today's order we grant Neutral Tandem's requested relief provisionally by directing the parties to continue performing their respective obligations as if the canceled termination agreements remained in effect, pending the completion of a proceeding pursuant to Public Service Law (PSL) §97 if necessary to investigate the rates, charges, rules and

regulations under which the parties provide call transport and termination services to one another. We shall initiate the rate proceeding at our first regularly scheduled session after 90 days have elapsed from the date of this order, unless the parties execute a new termination agreement in the interim.

FACTUAL AND PROCEDURAL BACKGROUND

In New York and other states, Neutral Tandem maintains tandem switches which competitive local exchange carriers (CLECs) can use as an alternative to tandem switches owned by incumbent local exchange carriers (ILECs) such as Verizon New York Inc. Neutral Tandem provides this service to about 23 CLECs in New York. Level 3 or its affiliates likewise operate in New York and other states, as CLECs that transport local calls originated by their end-user customers and terminate local calls to those customers. Among telecommunications providers in the New York market, Neutral Tandem is unique in offering a competitive alternative to the ILEC's tandem switch, and in providing transport and termination services only to CLECs without having end-user customers of its own.

Until the controversy that led to this proceeding, Neutral Tandem and Level 3 had been handling local calls in New York pursuant to three interconnection agreements between them. Under the first, which may be described as a "transport agreement," local calls that are originated by Level 3's end-user customers and routed through Level 3 can be directed to Neutral Tandem's tandem switch (instead of Verizon's) and thence to a CLEC. An economic incentive for Level 3 to use this arrangement is that Neutral Tandem offers Level 3 the transport service at a lower price than Verizon's.

The other two interconnection agreements, initially executed in 2004, are described herein as "termination agreements" and govern calls in the opposite direction. That is,

the termination agreements specify terms whereby calls originating from a CLEC[1] and routed to Neutral Tandem's tandem switch can be directed to Level 3 (here again, bypassing the Verizon tandem switch) and thence to Level 3's end-user customers. One of the termination agreements with Neutral Tandem was executed by Level 3; the other was executed by Broadwing Communications LLC, and was inherited by Level 3 when it acquired Broadwing. For Level 3, the economic attraction of the termination agreements has been that Neutral Tandem pays Level 3 compensation for calls governed by the agreements. Verizon, in contrast, would be under no similar obligation to Level 3 if the calls in question were handled by Verizon rather than Neutral Tandem; instead, under that scenario, Level 3 would be compensated only if it made the effort to collect reciprocal compensation from the originating CLECs.

On January 31, 2007, the parties executed a newly negotiated transport agreement. Later that day, Level 3 notified Neutral Tandem that Level 3 intended to discontinue negotiations on a new termination agreement and cancel one of the two preexisting termination agreements, viz., the one executed by Level 3. Shortly thereafter, Level 3 gave notice that it also would cancel the termination agreement executed by Broadwing. Without examining any negotiating positions undisclosed by the parties, the record is clear that a primary obstacle to negotiation of a new termination agreement has been the issue whether Level 3 should continue to receive compensation directly from Neutral Tandem (as Level 3 contends) or should be relegated to its right of reciprocal compensation from the CLECs (as Neutral Tandem contends).

In accordance with the cancellation provisions in each of the termination agreements, Level 3 gave Neutral Tandem 30 days' notice of its intent to cancel. The later of the two

[1] For the present discussion, a CLEC in the situation governed by the termination agreement can be said to "originate" the calls in question--in the sense that the call originates on that CLEC's network--although of course the call initially originates from an end user.

resulting expiration dates was March 23, 2007, which Level 3 then extended voluntarily (as to both termination agreements) through June 25, 2007 to allow time for a hearing and decision in this expedited proceeding. Meanwhile, both parties have continued to operate in accordance with the terms of the newly executed transport agreement and the preexisting, but canceled, termination agreements.

The parties' numerous filings to the Commission or the assigned Administrative Law Judge have included, most notably, Neutral Tandem's complaint and petition in which it seeks an order requiring interconnection and preventing service disruption; Level 3's motions to dismiss the complaint and compel Neutral Tandem to prepare a migration plan in anticipation of dismissal;[2] and prefiled testimony by both parties, which was examined in an evidentiary hearing.

ARGUMENTS AND CONCLUSIONS

Jurisdiction

The threshold question, broadly stated, is whether we have jurisdiction to grant Neutral Tandem's request for direct interconnection with Level 3. If not, then our obligation to ensure the continuity of safe and adequate service would require that we direct Neutral Tandem to implement an orderly migration plan as Level 3 proposes. For the following reasons, however, we conclude that the requisite jurisdiction to grant Neutral Tandem's requested relief is established by the PSL and is not preempted by the Telecommunications Act of 1996.

According to Neutral Tandem, its role as a transiting provider entitles it to direct interconnection with a CLEC such as Level 3 by operation of 16 NYCRR 605.2(a)(2), which provides that "interconnection into the networks of telephone corporations shall be provided for other public or private networks." In

[2] Consistently with the determinations in today's order, we formally deny Level 3's dismissal motion, which the Administrative Law Judge previously denied by informal ruling.

response, Level 3 correctly observes that Rule 605.2(a)(2) never has been relied upon to require that a CLEC offer direct interconnection to an entity such as Neutral Tandem (as distinguished from an end user). Level 3 emphasizes that, if it ended the termination agreements at issue and ended Neutral Tandem's direct interconnection under those agreements, Neutral Tandem nevertheless would remain interconnected to Level 3 indirectly via the Verizon tandem. Therefore, Level 3 argues, the interconnection requirement in Rule 605.2(a)(2) would continue to be satisfied.

As Neutral Tandem points out, however, we unquestionably have the authority to interpret our rules in a manner that "is not irrational or unreasonable."[3] Thus, Level 3's objection that Neutral Tandem's proposed interpretation is novel begs the question whether Rule 605.2(a)(2) may reasonably be read to require direct interconnection between Level 3 and Neutral Tandem, should we determine that direct interconnection would be a "just, reasonable, adequate, efficient and proper" practice within the meaning of PSL §97(2) and a "suitable" connection method as required by §97(3). The question must be answered affirmatively. Under Level 3's theory, the regulation's silence regarding "direct" interconnection would implicitly prevent our requiring anything more than indirect interconnection through the Verizon tandem, even though the regulation does not expressly preclude our requiring a direct interconnection. Thus, instead of construing Rule 605.2(a)(2) conventionally, i.e., as an implementation of statutory authority, Level 3's interpretation perversely would transform the rule into a constraint on our statutory authority to require direct interconnection in any instance where Level 3 refuses to offer it.

Moreover, given Level 3's theory that Rule 605.2(a)(2) requires interconnections only indirectly and only between a CLEC and the originating end users, Neutral Tandem is correct that it is self-contradictory for Level 3 to reject the notion of a

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[3] Ass'n of Cable Access Producers v. PSC, 1 AD3d 761, 763, 767 NYS2d 166, 168 (3d Dept. 2003).

mandatory direct interconnection between Neutral Tandem and Level 3, as that is precisely the configuration that creates, between Level 3 and originating end users, the "indirect interconnection" supposedly prescribed (according to Level 3) by Rule 605.2(a)(2).

The argument over Rule 605.2(a)(2) points to a more basic consideration, namely the scope of our authority pursuant to the statute from which any rule or ratemaking decision must be derived. Neutral Tandem properly invokes several relevant PSL provisions applicable to Level 3 as a telephone corporation (a characterization undisputed by Level 3). Thus, Neutral Tandem says, it must be granted direct interconnection with Level 3 pursuant to the requirement in PSL §91 that a telephone corporation provide such "facilities as shall be adequate and in all respects just and reasonable." Neutral Tandem cites also our responsibility to exercise "general supervision" over all telephone companies and facilities (PSL §94(2)); to ensure that rates are not "unjust, unreasonable or unjustly discriminatory or unduly preferential or in anywise in violation of law" (PSL §97(1)); to require just and reasonable rules, regulations, and practices, and adequate, efficient, proper, and sufficient equipment and service (PSL §97(2)); and to require suitable connections or transfers at just and reasonable rates (PSL §97(3)).

Assuming for the moment that nothing in the Telecommunications Act of 1996 preempts us from granting the relief sought by Neutral Tandem, and that direct interconnection between Neutral Tandem and Level 3 is shown to be necessary for the effective provision of telephone service (as contemplated in, e.g., the cited provisions of PSL §§ 91, 97(2), and 97(3)), Level 3 has provided no plausible basis for its claim that the requested relief would exceed our statutory authority. On the contrary, the PSL provisions cited above are designed to vest us with plenary jurisdiction comprehensive enough to include supervision of the terms and conditions of interconnection for

transport and termination services, to the extent consistent with federal law.[4]

As noted, Level 3 misinterprets Rule 605.2(a)(2) as an implied prohibition against our requiring that Level 3 provide Neutral Tandem direct connection, as distinguished from indirect interconnection through the Verizon tandem. In a related argument, Level 3 says the Telecommunications Act of 1996 preempts any state statute or regulation that otherwise might authorize us to order Level 3 to offer direct interconnection. Level 3 argues that the 1996 Act, like Rule 605.2, bars us from requiring direct interconnection because the Act, in 47 USC §251(a)(1), provides that every carrier has a duty to "interconnect directly or indirectly with other carriers" (emphasis added). Accordingly, says Level 3, the Federal Communications Commission (FCC) has described indirect interconnection as "a form of interconnection explicitly recognized and supported by" the 1996 Act.[5] Level 3 further notes that Rule 605.2(a)(2) antedates the 1996 Act, as if to imply that the rule cannot be reconciled with the 1996 regulatory framework.

That the 1996 Act recognizes indirect interconnection does not imply that the Act forecloses direct interconnection when the latter is more appropriate. The network configuration contemplated in the Act is one that provides the originating CLEC and its end users the opportunity to choose their preferred routing based on consideration of all relevant factors such as cost, reliability, and efficiency. As Level 3 itself, has argued to the Federal Communications Commission (FCC), "it is always the option of the carrier with the financial duty for transport [i.e., the originating CLEC] to choose how to transport its

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[4] As an illustration of our exercise of such jurisdiction, Neutral Tandem cites Case 00-C-0789, Omnibus Interconnection Proceeding, Order Establishing requirements for the Exchange of Local Traffic (issued December 22, 2000).

[5] In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 (¶125)(rel. March 3, 2005).

traffic," as among "direct interconnection . . . via its own facilities, [via] the terminating carrier's facilities, or via the facilities of a third party."[6]

In this proceeding, however, as we have noted regarding Level 3's interpretation of Rule 605.2(a)(2), Level 3's interpretation of the 1996 Act would perversely transform the options assured the originating CLEC under 47 USC §251(a)(1) into a supposed power on Level 3's part to dictate that the originating CLEC cannot choose direct interconnection with Level 3. And, just as in its mistakenly restrictive interpretation of Rule 605.2(a)(2), Level 3 would read out of the 1996 Act the option of direct interconnection between Neutral Tandem and Level 3 even though such direct interconnection results in "indirect interconnection," which Level 3 says the Act requires, between Level 3 and originating CLECs' end users. Because Level 3's reading of §251(a)(1) would enable Level 3 to compel these results in disregard of the principle that originating CLECs may choose how to route their traffic, Level 3 errs in asserting that §251(a)(1), properly construed, preempts our requiring direct interconnection between by Neutral Tandem and Level 3 pursuant to the PSL and Rule 605.2(a)(2).

Indeed, the 1996 Act not only allows us to require direct interconnection, as discussed; the Act also affirmatively preserves our obligation to do so, when effective provision of service requires it, as part of our role in supervising interconnection arrangements under PSL §§ 91, 94, and 97. According to 47 USC §251(d)(3)(A), federal regulation must not prevent a state commission from establishing interconnection requirements otherwise consistent with the Act. Thus, even though indirect interconnection may, in the proper circumstances, satisfy a general duty of interconnection established in §251(a)(1), the Act does not preclude our requiring direct interconnection when that option is more reasonable and therefore is necessary for the discharge of our obligations under state

[6] Reply Comments of the Missoula Plan Supporters, CC Docket No. 01-92 (February 1, 2007), p. 26.

law.[7] Similarly, to the extent consistent with the Act, 47 USC §261(b) authorizes the enforcement of preexisting state regulations (such as Rule 605.2(a)(2), insofar as applicable); and §261(c) authorizes us to impose new requirements for furtherance of competition in the provision of exchange access. As noted below, a major benefit of direct interconnection between Neutral Tandem and Level 3 is that it promotes such competition. Thus, 47 USC §§ 251 and 261 provide further assurance that we can act consistently with federal law in requiring the parties to maintain their present interconnection.

Network Design and Public Policy Objectives

Having determined that 47 USC §251(a)(1) does not limit our statutory authority to require that Level 3 continue providing Neutral Tandem direct interconnection, the next issue is whether such a requirement would serve the interests entrusted to us under the PSL. In other proceedings, the Commission or our staff already has answered that question in the affirmative, and Level 3 has not persuasively demonstrated the contrary in this case.

Direct interconnection between Neutral Tandem and Level 3 enables Neutral Tandem to maintain its independent tandem switch as a viable alternative to Verizon's. The availability of an independent tandem in turn furthers the development of facilities-based competition among wireless, cable, and landline telephony, by offering the providers of all such services an economically advantageous alternative to the Verizon tandem. According to Level 3, the volume of traffic it receives from Neutral Tandem is insufficient to make direct interconnection with Neutral Tandem a more cost-effective configuration, as

[7] The 1996 Act recognizes that we may need to decide how interconnections should be structured in the course of rate arbitration between an ILEC and a CLEC. 47 USC §§ 252(c),(d). Although this case does not involve an ILEC, it involves a similarly inseparable interrelationship between the reasonableness of interconnection methods and the reasonableness of the rates charged for those interconnections.

compared with receiving the same traffic indirectly from Neutral Tandem through the Verizon tandem. However, the record shows that Neutral Tandem sends Level 3 a volume of traffic about 180 times greater than the DS-1 level, and we have found the latter sufficient to justify maintenance of dedicated transport capacity on the part of a terminating CLEC such as Level 3.[8]

For originating CLECs, the ability to choose the more cost effective tandem service, as between Neutral Tandem's and Verizon's competing services, creates an opportunity for cost savings and optimum efficiency. The resulting mitigation of the CLECs' cost of service tends to enhance competition among CLECs, minimize the costs recovered through end users' rates, and encourage additional investment in facilities-based services, consistently with the similar objectives we have cited in supporting the principles of open network architecture and comparably efficient interconnection.[9]

In addition, the redundancy resulting from alternative tandem switching options enhances the diversity and reliability of the public switched telephone network. These objectives have consistently been recognized on several occasions, particularly as a response to lessons of the September 11, 2001 attacks and Hurricane Katrina.[10] While Level 3 disputes the benefits of redundancy on the basis that Neutral Tandem's tandem switch is just as vulnerable as other CLECs' facilities sharing the same physical location with Neutral Tandem's, even an arrangement where Neutral Tandem and CLECs collocate provides clear diversity

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[8] Case 00-C-0789, supra, Order Establishing Requirements for the Exchange of Local Traffic (issued December 22, 2000).

[9] See, e.g., Case 88-C-004, Interconnection Arrangements, Open Network Architecture, and Comparably Efficient Interconnection, Opinion No. 89-28 (issued September 11, 1989), at pp. 7-8.

[10] Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, WC Docket No. 06-159, Reply Comments of NYSDPS (filed September 25, 2006); Case 03-C-0922, Telephone Network Reliability, Order Instituting Proceeding (issued July 21, 2003); DPS Staff White Paper (issued November 2, 2002).

and reliability advantages as compared with relying only on an ILEC's tandem switch maintained solely at the ILEC's location.

Conversely, denial of the relief sought by Neutral Tandem would create potential impediments to competition, by enhancing Level 3's capacity to act as a bottleneck between its end users and CLECs if the CLEC chooses Neutral Tandem's tandem switch over Verizon's. While Level 3 argues that any interference with originating CLECs' access through Neutral Tandem to Level 3's end users would violate Level 3's own business interests, Neutral Tandem has shown that Level 3 has allowed incoming traffic to be disrupted in analogous situations in the past. Level 3's potential bottleneck function becomes an ever greater concern insofar as Level 3 may seek to provide tandem switch service in competition with Neutral Tandem.

Remedies

The final question--albeit the primary one, evidently, in the parties' negotiations--is whether to credit Level 3's argument that, even if the public policy benefits of the present network configuration are more substantial than Level 3 concedes, they cannot justify an order compelling Level 3 to offer Neutral Tandem a termination agreement under which Level 3 serves Neutral Tandem free of charge. A corollary issue is Neutral Tandem's claim that Level 3, by insisting on payment, is attempting to extract terms that would be discriminatory or potentially anticompetitive. We view these claims as arguments that address neither the scope of our jurisdiction nor the merits, from a policy standpoint, of requiring direct interconnection pursuant to our authority under PSL §§ 97(2) and (3). Rather, they implicate only the question of just and reasonable pricing under §97, which is a conventional ratemaking issue to be resolved through the ratemaking process prescribed in PSL §97(1). It is for that reason that we will initiate a rate proceeding if the parties do not negotiate a new agreement.

In a rate case, as in negotiations, relevant considerations might include (among other things) whether

Level 3's access to reciprocal compensation from CLECs is an adequate substitute for direct payments from Neutral Tandem; whether the parties' transport and termination agreements should be considered independently or in combination when assessing the reasonableness of the rates they establish relative to the obligations and benefits they confer on each party; and, if the agreements are to be considered in combination, whether the terms established in the present transport agreement should be modified so that the agreements collectively will yield results that are just and reasonable overall.[11] As long as such considerations have yet to be examined in a future phase of this proceeding, it would be premature to determine whether any particular level of compensation (or the absence of compensation) renders a termination agreement unreasonable as Level 3 claims.

The parties have offered conflicting testimony regarding the extent, if any, to which cancellation of the present direct interconnection would disrupt traffic currently routed to Level 3 through Neutral Tandem. According to Neutral Tandem, an orderly transition would require six months. Level 3 seems to assert that a nearly instantaneous transition could be managed through the use of emergency facilities that link the Verizon tandem to Level 3, and adds that any disruption would be the product of Neutral Tandem's own failure to anticipate an adverse decision in this proceeding.

We find that the risk of disruption has been demonstrated sufficiently that an order requiring immediate cancellation of the present interconnection would not be consistent with the sound exercise of our supervisory authority under the PSL. Moreover, cancellation would be unreasonably disruptive under the best of circumstances because our objective at this stage of the proceeding is to initiate further

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[11] A full rate proceeding, if any, also would be the more appropriate forum in which to consider (if necessary) the allegations that certain rates and practices are discriminatory or otherwise improper, as the parties have discussed in a series of late, unauthorized pleadings filed May 23, 2007 and subsequently.

negotiations and thus obviate a contested rate proceeding. It would make little sense to suspend the present interconnection in anticipation that it will be reinstituted as soon as the terms and conditions of a new termination agreement have been established.

Accordingly, we are directing the parties to continue operating in accordance with their preexisting transport and termination agreements, provided however that payments pursuant to those agreements after the date of this order will be subject to adjustment, by reparation, credit, or refund,[12] should we find at the conclusion of a rate proceeding that such payments were insufficient or excessive. By postponing the commencement of a rate proceeding until our first session 90 days after issuance of today's order, we intend to provide the parties a reasonable opportunity to negotiate new rates and thus avoid the resource expenditure that would result from a litigated rate case.

Although Level 3 proposes that we direct Neutral Tandem to pay an interim rate of $0.0007 per minute of use for termination service, that rate would be inconsistent with the objectives of today's order because it avowedly is designed to encourage Neutral Tandem to stop offering tandem switching service. Instead, by letting interim rates remain at the same level that the parties themselves negotiated at arms' length in the preexisting agreements, we ensure that the rates will be sufficiently reasonable as a proxy, subject to retrospective adjustment, for permanent rates subsequently established in a rate case. As should be obvious from the foregoing discussion, we have not thereby determined that a permanent termination agreement would be inherently unreasonable either if it exempted Neutral Tandem from any payment, or if it required that Neutral Tandem pay a rate different from the amount payable under the preexisting agreements.

[12] See PSL §113(1).

The Commission orders:

1. Neutral Tandem, Inc. - New York LLC (Neutral Tandem) and Level 3 Communications LLC (Level 3) are directed to maintain their current interconnections with each other in accordance with the transport agreement and the termination agreements described in this order.

2. Order Clause 1 above will remain in effect, and the rates prescribed therein will remain in effect subject to adjustment for the period from the date of this order until the later of (a) the execution of a termination agreement to replace the canceled agreements under which Neutral Tandem and Level 3 currently operate, or (b) completion of a rate proceeding to consider the parties' rates for transport and termination services.

3. This proceeding is continued but, upon completion, shall be closed in the Secretary's discretion.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

August 3, 2007

Sandra J. Paske, Secretary
Wisconsin Public Service Commission
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

Dear Ms. Paske:

Re: Level 3 Communications, LLC v. Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC

Enclosed for filing is Neutral Tandem's Motion to Dismiss Level 3's Petition as Moot and Amended and Supplemental Response to Petition. By cover of this letter, counsel of record has been served electronically with a copy of this document.

If you have any questions concerning this matter, please feel free to contact me.

Yours very truly,

/s/ Peter L. Gardon

Peter L. Gardon

MADISON\186225PLG:MEG

Encs.

cc Mr. Henry T. Kelley (w/ encs.)
Mr. Wiliam P. Hunt, III (w/ encs.)
Mr. Ronald Gavillet (w/encs.)
Mr. John R. Harrington (w/encs.)
Ms. Erin R. Schrantz (w/encs.)

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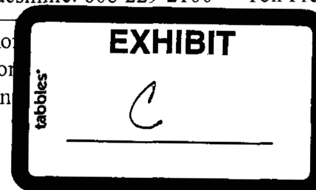

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

LEVEL 3 COMMUNICATIONS, LLC Petitioner, v. NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-ILLINOIS, LLC, Respondents.	))))))))))))	Case No. ____________

NEUTRAL TANDEM'S MOTION TO DISMISS LEVEL 3'S PETITION AS MOOT AND AMENDED AND SUPPLEMENTAL RESPONSE TO PETITION

Pursuant to PSC § 2.23 and § 2.07(4), Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (collectively "Neutral Tandem") hereby move the Commission to dismiss as moot the Petition for Declaratory Ruling ("Petition") filed by Level 3 Communications, LLC ("Level 3"), and file their Amended and Supplemental Response to Level 3's Petition. In support of this Motion and Amended and Supplemental Response, Neutral Tandem states as follows:

1. Level 3 filed its Petition with the Commission on June 21, 2007. Level 3's Petition stated that Level 3 intended to terminate its existing direct interconnections with Neutral Tandem as of June 25, 2007, and to use "alternative paths to direct interconnection" for receipt of traffic from Neutral Tandem's carrier customers. (Pet. at 2-3.) Level 3 requested that the Commission direct Neutral Tandem to notify its customers that direct transport to Level 3 will no longer be available after June 25, 2007, or on a date set by the Commission. (Pet. at 11, Prayer for Relief, (a).) Level 3 also requested that the Commission declare the Level 3 may discontinue the direct exchange of traffic with Neutral Tandem on five days notice. (*Id.*, Prayer for Relief, (b).)

2. On July 11, 2007, Neutral Tandem filed its Request to Stay Opening of Docket and Response to Level 3's Petition for Declaratory Ruling ("Response").[1] To date, the Commission has not opened a docket in this proceeding, issued any substantive rulings on the merits of Level 3's Petition, or issued any procedural schedule.

3. As of August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in Wisconsin via the parties' existing interconnections. (Ex. 1, Saboo Aff. ¶ 3.) Thus, there no longer is any basis for Level 3 to continue pursuing its request that the Commission order Neutral Tandem to stop routing traffic over the parties' existing interconnections, and Level 3's Petition should be dismissed as moot.[2]

4. Accordingly, Neutral Tandem respectfully requests that the Commission dismiss Level 3's Petition as moot and terminate this proceeding.

[1] On July 30, 2007, Level 3 filed its opposition to Neutral Tandem's request to stay the opening of a docket in this proceeding ("Opposition"). For the reasons set forth in this Motion, Level 3's Petition should be dismissed as moot, and accordingly there is no reason to open a docket in this proceeding. Pursuant to PSC § 2.23(2), this Motion also serves as Neutral Tandem's reply to Level 3's Opposition.

[2] *See, e.g.*, Docket No. 3355-NC-103, 05-TI-322, *Application of Charter Fiberlink for Authority to Further Extend Service Territory for Local Exchange Services*, 2001 Wisc. PUC LEXIS 565, at *3-4 (Jan. 5, 2001).

Respectfully submitted,

NEUTRAL TANDEM, INC. and NEUTRAL TANDEM-ILLINOIS, LLC

By: */s/ Peter L. Gardon*

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Attorneys for Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC

Dated: August 3, 2007

EXHIBIT 1

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

LEVEL 3 COMMUNICATIONS, LLC	)	
Petitioner,	)	
v.	)	Case No. ________
NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-ILLINOIS, LLC,	)	
Respondents.	)	

AFFIDAVIT OF DR. SURENDRA SABOO

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiaries (collectively "Level 3"), in Wisconsin via existing direct interconnections between Neutral Tandem and Level 3.

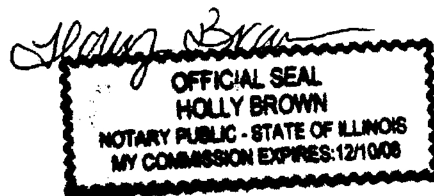
3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in Wisconsin through the parties' existing direct interconnections.

AFFIANT FURTHER SAYETH NOT.

Dr. Surendra Saboo

Sworn to and subscribed before me

this 2 day of August, 2007



STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

FILED
AUG 0 2 2007
INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-INDIANA, LLC AGAINST LEVEL 3 COMMUNICATIONS, LLC CONCERNING INTERCONNECTION WITH LEVEL 3 COMMUNICATIONS, LLC	)	Cause No. 43299

NEUTRAL TANDEM'S MOTION FOR VOLUNTARY DISMISSAL

Complainant Neutral Tandem, Inc. and Neutral Tandem-Indiana, LLC (collectively "Neutral Tandem"), pursuant to Rule 12(a)(4) of the Commission's Rules of Practice and Procedure, 170 I.A.C. 1-1.1-12(a)(4), and Indiana Trial Rule 41(A)(2), respectfully submits this Motion for Voluntary Dismissal of Neutral Tandem's complaint against Level 3 Communications, LLC and its subsidiary Broadwing (collectively "Level 3"). In support of this Motion, Neutral Tandem states as follows:

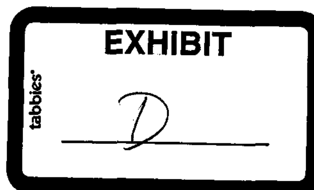
1. On May 15, 2007, Level 3 sent a letter, pursuant to 170 IAC 7-6-3, purporting to notify the Indiana Utility Regulatory Commission ("Commission") of Level 3's intention to terminate its existing interconnections with Neutral Tandem in Indiana as of June 25, 2007.

2. On May 22, 2007, Neutral Tandem filed its complaint in this proceeding ("Complaint") requesting that the Commission order Level 3 to continue receiving traffic via the parties' existing interconnections after June 25, 2007. (Compl. ¶¶ 81-83.)[1]

3. On June 11, 2007, Level 3 filed an Answer and Affirmative Defenses of Level 3 Communications, LLC to Neutral Tandem, Inc.'s Complaint ("Answer"). Level 3's Answer does not assert any claims against Neutral Tandem.

---

[1] Neutral Tandem's Complaint also requested that, to the extent Level 3 ordered services from Neutral Tandem's tariffs after June 25, 2007, the Commission direct Level 3 to comply with the terms of Neutral Tandem's tariffs. (*Id.* ¶¶ 75-80.) However, as of August 2, 2007, Level 3 no longer orders services from Neutral Tandem's tariffs in Indiana. (Ex. 1, Saboo Aff. ¶ 4.)



4. Pursuant to the expedited procedural schedule agreed to by the parties at the June 25, 2007, prehearing conference and preliminary hearing, Neutral Tandem was to file its case-in-chief by July 9th.

5. On Friday, July 6, 2007, Neutral Tandem moved to vacate the procedural schedule in light of recent developments in other states involving a substantially similar dispute between affiliates of the same parties to this Complaint, and asked the Commission to take administrative notice of the rulings in those other jurisdictions. The presiding officers denied that motion by docket entry the following Friday and ordered Neutral Tandem to file its case-in-chief the next business day, Monday, July 16, 2007, which Neutral Tandem did.

6. Level 3 filed its responsive testimony on July 23, 2007. There are no intervenors, and counsel for the only other party, the Indiana Office of Utility Consumer Counselor, has indicated that she made no testimonial or other filing by that state agency's July 30, 2007, deadline, nor does she intend to offer any testimony in this proceeding. Accordingly, the only remaining filing deadline is for Neutral Tandem's rebuttal case and for the parties' dispositive motions, all of which are currently due on August 9, 2007.

7. Under the current procedural schedule, an evidentiary hearing is scheduled for August 13. No substantive rulings relating to the merits of Neutral Tandem's Complaint have been issued to date.

8. As of August 2, 2007, Neutral Tandem no longer delivers traffic to Level 3 via the parties' existing interconnections in Indiana. (Ex. 1, Saboo Aff. ¶ 3.) Accordingly, there no longer is a basis for Neutral Tandem to continue pursuing its Complaint against Level 3.

9. Under Trial Rule 41(A)(2), voluntary dismissal "should be allowed unless the defendant will suffer some plain legal prejudice, other than the mere prospect of a second

lawsuit." *Levin & Sons, Inc. v. Mathys*, 409 N.E.2d 1195, 1198 (Ind. Ct. App. 1980); *see also Principal Life Ins. Co. v. Needler*, 816 N.E.2d 499, 503 (Ind. Ct. App. 2004). Such legal prejudice" generally exists only when the defendant's "actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable . . . ." *Principal Life Ins. Co.*, 816 N.E.2d at 503 (citation omitted).

10. Applying these principles, Neutral Tandem's Motion should be granted expeditiously. Because Neutral Tandem no longer delivers any traffic to Level 3 via the parties' existing interconnections in Indiana, there is no basis for the continued pursuit of Neutral Tandem's Complaint. Simply put, the subject matter of Neutral Tandem's Complaint is moot.

11. Level 3 will not suffer any prejudice to its legal rights, nor will it suffer any burden of any sort, by the dismissal of Neutral Tandem's Complaint. Level 3 has not asserted any claims against Neutral Tandem. In fact, Level 3 has taken the position that this Commission lacks jurisdiction to hear Neutral Tandem's Complaint. (*See* Level 3's Affirmative Defenses.) Additionally, this proceeding is in its earliest stage, and the Commission has not issued any substantive rulings on the merits of Neutral Tandem's claims that Level 3 might allege Neutral Tandem is trying to avoid.

12. Counsel for Neutral Tandem discussed this motion with Level 3's local counsel, who indicated that he would check with his client to determine their position, but he did not expect to have an answer prior to filing.

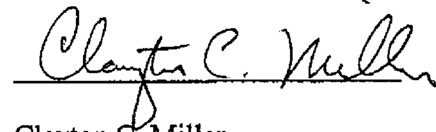
13. Because of the pending August 9 filing deadline and the August 13-14 evidentiary hearing dates, Neutral Tandem respectfully requests expedited consideration of this Motion. Given that Neutral Tandem seeks to dismiss its Complaint, there is no reason to require Neutral Tandem to file rebuttal testimony or any other dispositive motion by August 9th, or to hold an

evidentiary hearing aimed at developing a record for the resolution of that Complaint on the merits. If the Commission cannot issue an order dismissing Neutral Tandem's Complaint prior to the hearing, August 9, Neutral Tandem respectfully requests that, at a minimum, the Commission extend indefinitely the rebuttal and dispositive motion filing deadline and vacate the August 13-14 hearing dates pending resolution of this Motion.

WHEREFORE, because its Complaint is now moot, Neutral Tandem respectfully requests that the Commission grant this Motion, dismiss Neutral Tandem's Complaint, and vacate the remainder of the parties' procedural schedule, including the August 9, 2007, filing deadline and the August 13, 2007, hearing date.

Respectfully submitted,

NEUTRAL TANDEM, INC. and NEUTRAL TANDEM-INDIANA LLC

By: 

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jharrington@jenner.com

Dated: August 2, 2007

CERTIFICATE OF SERVICE

The undersigned certifies that on August 2, 2007, Neutral Tandem's motion to dismiss its complaint was hand-delivered to the Indiana Office of Utility Consumer Counselor and was served by electronic mail and by U.S. mail, first-class postage prepaid, upon Level 3's local and other counsel as indicated below:

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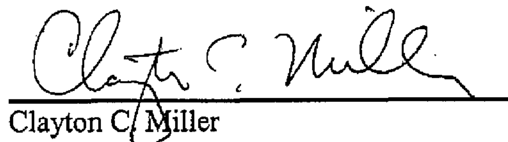

Clayton C. Miller

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Exhibit 1

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

COMPLAINT OF NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-INDIANA, LLC AGAINST LEVEL 3 COMMUNICATIONS, LLC CONCERNING INTERCONNECTION WITH LEVEL 3 COMMUNICATIONS, LLC	)))))))	**Cause No. 43299**

AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Indiana, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiary, Broadwing, (collectively "Level 3") in the State of Indiana via a direct interconnection between Neutral Tandem and Level 3.

3. As of August 2, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in the State of Indiana through the parties' direct interconnection.

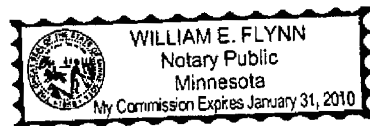
4. As of August 2, 2007, Level 3 no longer orders services from Neutral Tandem's tariffs in Indiana.

AFFIANT FURTHER SAYETH NOT.

[signature]
Dr. Surendra Saboo

Sworn to and subscribed before me
this 1st day of August, 2007

William E. Flynn



STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Petition of	)	
	)	
Level 3 Communications, LLC To Direct	)	
Neutral Tandem-New Jersey, LLC To	)	BPU Docket No. TD07050334
Provide Notice To Its Customers Of The	)	
Termination Of Certain Contract	)	
Arrangements	)	

NEUTRAL TANDEM'S MOTION TO DISMISS LEVEL 3'S PETITION AS MOOT

TO THE HONORABLE COMMISSIONERS OF THE BOARD OF PUBLIC UTILITIES:

Pursuant to N.J.A.C. 1:1-12.1, and any other statutes and regulations deemed applicable, Neutral Tandem, Inc. and Neutral Tandem-New Jersey, LLC (collectively "Neutral Tandem"), by and through undersigned counsel, move the Board to dismiss as moot the Petition of Level 3 Communications LLC ("Petition"). Upon the dismissal of the Petition, Neutral Tandem will voluntarily withdraw its Counterclaim against Level 3 Communications, Inc. and its subsidiaries, including Broadwing Communications, LLC (collectively "Level 3") ("Counterclaim") pursuant to N.J.A.C. 1:1-19.2. In support of this Motion, Neutral Tandem relies on the attached affidavit of Dr. Surendra Saboo, its Chief Operating Officer and Executive Vice President, and states further as follows:

1. Level 3 filed its Petition with the Board on May 17, 2007. Level 3's Petition stated that Level 3 intended to terminate its existing interconnections with Neutral Tandem as of June 25, 2007. (Pet. ¶¶ 6-7.) Level 3 requested that the Board direct Neutral Tandem to stop routing traffic through the parties' existing interconnections as of that date. (*Id.*) Level 3 also requested that the Board order Neutral Tandem pay Level 3 an exorbitant $.001/minute usage charge for any traffic delivered over the parties' existing interconnections after June 25, 2007. (*Id.* ¶ 8.) The only basis cited by Level 3 for the Board to impose this $.001/minute charge was a

May 8 letter from Level 3 to Neutral Tandem, in which Level 3 unilaterally announced that it would begin imposing such a charge after June 25. (*Id.*)

2. On June 6, 2007, Neutral Tandem filed its Answer and Counterclaim against Level 3. Neutral Tandem's Counterclaim requested that the Board order Level 3 to continue receiving traffic via the parties' existing interconnections after June 25, 2007 on nondiscriminatory terms and conditions. (Counterclaim, ¶¶ 77-79.)[1] Level 3 filed its answer to Neutral Tandem's Counterclaim on June 26, 2007.

3. To date, the Board has not issued any substantive rulings on the merits of Level 3's Petition or Neutral Tandem's Counterclaim, and no procedural schedule has been set.

4. As of August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in New Jersey via the parties' existing interconnections. (Ex. 1, Saboo Aff. ¶ 3.) Accordingly, there no longer is any basis for Neutral Tandem to pursue its Counterclaim against Level 3.

5. Similarly, there no longer is any basis for Level 3 to continue pursuing its request that the Board order Neutral Tandem to stop routing traffic over the parties' existing interconnections. Accordingly, Level 3's Petition should be dismissed as moot.[2]

6. Level 3 may contend that its request that the Board order Neutral Tandem to pay Level 3's unilateral $.001/minute charge is not moot. (Pet. ¶ 8.) There is no basis whatsoever for the Board to issue an order requiring Neutral Tandem to pay any such charge. There is no

---

[1] Neutral Tandem's Counterclaim also requested that, to the extent Level 3 ordered services from Neutral Tandem's tariffs after June 25, 2007, the Board direct Level 3 to comply with the terms of Neutral Tandem's tariffs. (*Id.* ¶¶ 72-76.) However, as of August 3, 2007, Level 3 no longer orders services from Neutral Tandem's tariffs in New Jersey. (Ex. 1, Saboo Aff. ¶ 4.)

[2] *See, e.g., Drummond v. Vineland Developmental Ctr.*, OAL Docket No. CSV 6845-05, Agency Docket No. 2006-335-I, 2006 N.J. Agency LEXIS 325, at *9 (N.J. OAL April 26, 2006); *Anderson v. Sills*, 143 N.J. Super. 432, 437 (Ch. Div. 1976).

contract between Neutral Tandem and Level 3 providing for the payment of any such charge; nor (to Neutral Tandem's knowledge) has Level 3 tariffed any such charge.

7. To the contrary, the \$.001/minute charge literally was conjured up out of thin air by Level 3. Level 3 has admitted in other proceedings that the \$.001/minute charge is not based on any costs Level 3 claims to incur to receive traffic from Neutral Tandem.[3]

8. Other state commissions have rejected Level 3's arbitrary and unsupported attempt to unilaterally impose this \$.001/minute charge. The Illinois Commerce Commission found that Level 3's attempt to impose this charge as an offer of compromise was "illusory,"[4] and violated that state's laws forbidding carriers from "knowingly impeding the development of competition" in Illinois. The Illinois Commission also described Level 3's attempts to impose this charge as "impermissible," and noted that Level 3's efforts were:

> little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT [Neutral Tandem] under a different label. . . . We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label.[5]

9. The New York Public Service Commission rejected a similar request by Level 3 that Neutral Tandem pay Level 3 a \$.0007/minute charge after June 25 -- less than the charge Level 3 demands here -- concluding that the charge was "avowedly designed to encourage

---

[3] *See* Docket No. 07-03-008, *Neutral Tandem California, LLC. v. Level 3 Communications, LLC*, Cal. Pub. Util. Comm'n, 06/05/07 Evidentiary Hearing Transcript, at 257. (Ex. 2.)

[4] Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, adopting June 25, 2007 Order of ALJ Brodsky, at 9 (July 10, 2007) (Ex. 3). The June 25, 2007 Order of ALJ Brodsky (hereafter "Brodsky Order") is attached hereto as Exhibit 4.

[5] Brodsky Order, at 10. Level 3's conduct in that proceeding was found so egregious that Level 3 was ordered to pay nearly all of Neutral Tandem's attorneys' fees. (*Id.* at 13, 15.)

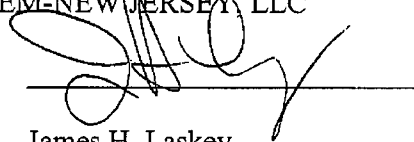
Neutral Tandem to stop offering tandem switching service" and would be "inconsistent with the objectives" that commission cited in granting Neutral Tandem's petition.[6]

10. In sum, there is no basis, in law, contract, or otherwise, for the Board to order Neutral Tandem to pay Level 3's arbitrary, non cost-based, unilaterally imposed charge.

WHEREFORE, for the reasons set forth herein, Neutral Tandem respectfully requests that the Board dismiss Level 3's Petition as moot, at which time Neutral Tandem will voluntarily withdraw its Counterclaim.

Respectfully submitted,

NEUTRAL TANDEM, INC. and NEUTRAL TANDEM-NEW JERSEY, LLC

By: 

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jharrington@jenner.com

Dated: August 3, 2007

[6] Docket No. 07-C-0233, *In re Petition of Neutral Tandem-New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption*, New York Public Service Commission, Order Preventing Service Disruption and Requiring Continuation of Interim Interconnection, at 13 (June 22, 2007) (Ex. 5).

EXHIBIT 1

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

In the Matter of the Petition of	)	
	)	
Level 3 Communications, LLC To Direct	)	
Neutral Tandem-New Jersey, LLC To	)	BPU Docket No. TD07050334
Provide Notice To Its Customers Of The	)	
Termination Of Certain Contract	)	
Arrangements	)	

AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

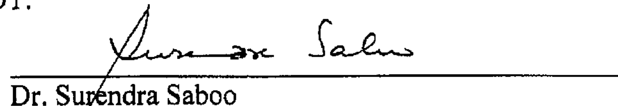
1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-New Jersey, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiary, Broadwing Communications, LLC, (collectively "Level 3"), in the State of New Jersey via existing direct interconnections between Neutral Tandem and Level 3.

3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in the State of New Jersey through the parties' existing direct interconnections.

4. As of August 3, 2007, Level 3 no longer orders services from Neutral Tandem's tariffs in New Jersey.

AFFIANT FURTHER SAYETH NOT.



Dr. Surendra Saboo

Sworn to and subscribed before me

this 3 day of August, 2007

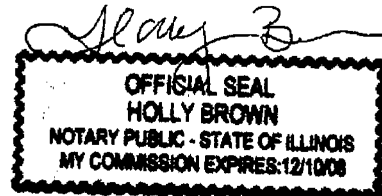


EXHIBIT 2

1 SAN FRANCISCO, CALIFORNIA, JUNE 5, 2007 - 12:30 P.M.
2 * * * * *
3 ADMINISTRATIVE LAW JUDGE REED: We are on the
4 record.
5 This is the time and place for the
6 continuation of the evidentiary hearing for Case
7 07-03-008, Neutral Tandem California, LLC, versus Level
8 3 Communications and its Subsidiaries.
9 Good afternoon. Yesterday we had the first
10 part of this proceeding, which was Neutral Tandem's
11 case, and this afternoon we will have Level 3's case.
12 And are there any preliminary matters?
13 MR. BLOOMFIELD: No, your Honor.
14 MR. ROGERS: Level 3 does not have any.
15 ALJ REED: Okay. Mr. Levin, Mr. Rogers, do you
16 want to call your first witness.
17 MR. ROGERS: Yes, your Honor. Thank you. We will
18 call Ms. Sara Baack as our first witness.
19 ALJ REED: Ms. Baack, how are you?
20 THE WITNESS: I'm fine. Thank you.
21 SARA BAACK, called as a witness by
Level 3 Communications, having been
22 sworn, testified as follows:
23
24 ALJ REED: Okay. Would you have a seat. Would
25 you state your full name and your business address.
26 THE WITNESS: Yes.
27 ALJ REED: Spelling your full name for the record.
28 THE WITNESS: My name is Sara, S-a-r-a, Baack,

1 Thank you.
2 Q Ms. Baack, let me direct your attention to
3 Exhibit 1.1 to your direct testimony, which was a May
4 8th letter from you --
5 A Yes.
6 Q -- to Rian Wren and Surendra Saboo of Neutral
7 Tandem.
8 A Mm-mm.
9 Q And it's -- I believe in the third paragraph
10 of that letter you indicate that if Neutral Tandem sends
11 traffic to Level 3 beyond June 25th, 2007, Level 3 will
12 charge Neutral Tandem a rate of $0.001 per minute
13 terminated. Do you see that?
14 A Yes.
15 Q Is that rate a cost-based rate for Level 3?
16 A No.
17 Q Let me direct your attention to page 24 of
18 your testimony. And I want to ask you just one or two
19 questions about the network issues that you've testified
20 about. Are you on page 24?
21 A Yes.
22 Q Do you see, you're asked a question regarding
23 Mr. Saboo's estimate of the time it would take to
24 rearrange traffic, and you say, "Mr. Saboo's six-month
25 estimate is unreliable and self-contradicted"?
26 A Yes, I do.
27 Q Do you see that?
28 A Yes.

EXHIBIT 3

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

July 10, 2007

Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC -vs- Level 3 Communications, LLC	:	
Verified Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.	:	07-0277

CERTIFICATE OF COMMISSION ACTION

TO ALL PARTIES OF INTEREST:

This is to certify that the Commission in conference on July 10, 2007, took the following action:

DENIED Neutral Tandem's Response to Level 3's Motion Requesting Oral Argument, filed on July 6, 2007;

DENIED Neutral Tandem's Response to Level 3's Petition for Review, filed on July 6, 2007;

GRANTED the adoption of the Administrative Law Judge's Order dated June 25, 2007.

Related memoranda will be available on our web site (www.icc.illinois.gov/e-docket) in the docket number referenced above.

Elizabeth A. Rolando
Chief Clerk

EAR:ml
Administrative Law Judge Brodsky

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EXHIBIT 4

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC -vs- Level 3 Communications, LLC	:	
	:	**07-0277**
Verified Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.	:	

ORDER

This matter concerns an interconnection dispute between Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (collectively "NT") and Level 3 Communications, LLC ("Level 3"). NT alleges that Level 3 refuses to accept delivery of transit traffic without NT paying charges for which it is not properly responsible, and that Level 3 has threatened to disconnect NT if it does not accept Level 3's terms. NT states that it seeks interconnection at reasonable and non-discriminatory terms for the delivery of traffic bound for Level 3 subscribers, but that it does not seek to force Level 3 to be a customer of NT. Level 3 maintains that the prior agreement under which NT delivers traffic to Level 3 has expired. Level 3 avers that it is free to terminate the agreement pursuant to the provisions contained therein. For the reasons that follow, we find in favor of NT, with the relief sought granted in part and denied in part.

BACKGROUND

NT and Level 3 are both telecommunications carriers in Illinois. Level 3 is a competitive local exchange carrier (CLEC) with end user customers. Traffic is originated by or terminated to customers on the Level 3 network. NT does not have such end-user customers; no traffic originates from or terminates to NT's network. NT's customers use NT to deliver traffic to the networks of other CLECs with which they are not directly interconnected. NT "transits" such traffic over its tandems, and delivers it to the recipient CLEC for termination to its end user.

To achieve this, NT is interconnected with various local exchange carriers (LECs), both incumbent (ILEC) as well as CLEC. NT receives traffic from the originating LEC at their point of interconnection, transits the traffic over its own network,

and delivers it to its point of interconnection with the terminating LEC. The terminating LEC accepts the traffic and completes the call to the end user.

Interconnection, as a general matter, is an obligation of LECs pursuant to federal and Illinois law.[1] The parties to this matter disagree on which *manner* of interconnection complies with federal and state law.

NT states that it is the only independent tandem services provider; all other providers of tandem services are ILECs. NT's competitor for this service in Illinois is none other than AT&T.[2] NT also states that it delivers 492 million minutes of traffic per month on behalf of the nineteen CLECs that utilize NT's services. NT avers that these nineteen CLECs are among the largest facilities-based CLECs in Illinois. NT's volume represents 50% of the local tandem transit traffic in Illinois, and includes 56 million minutes per month delivered to Level 3 for termination to its subscribers. NT notes that, if Level 3 is allowed to block traffic from NT, all of these third-party CLECs will be denied their chosen method of delivering this traffic to Level 3.

NT's network provides an alternate path for traffic to the AT&T tandems. NT asserts that this benefits the public and the strength of the public switched telephone network (PSTN) by decreasing the likelihood of tandem exhaust, call blocking, and, during an emergency, network-wide failure due to a disruption at a particular point.

Pursuant to various contracts, NT and Level 3 exchanged traffic since 2004. Under one contract, NT delivered to Level 3 traffic originated by third-party CLECs and bound for Level 3. Under a second, NT similarly delivered traffic to Level 3's subsidiary Broadwing Communications. Under a third contract, Level 3 delivers to NT traffic originated by Level 3 and bound for third-party CLECs. Pursuant to this contract, NT transits the traffic originated on the Level 3 network.

NT notes that it pays 100% of the cost of the transport facilities and electronics between NT and Level 3 that are used to terminate traffic to Level 3's network. NT also provides to Level 3 all of the billing information that Level 3 needs to collect reciprocal compensation from the originating carriers, including all of the signaling information NT receives from the originating carrier.

On January 31, 2007, the parties executed a contract[3] extending the term for Level 3 to deliver traffic to NT for transiting to third-party CLECs. Later that same day, Level 3 sent notice terminating the agreement by which third-party CLECs can deliver traffic to Level 3 via NT's tandems. Termination of the agreement was designated to

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[1] *See* 47 U.S.C. 251; 220 ILCS 5/13-514(1).

[2] Both NT and Level 3 refer to the ILEC by its brand name of "AT&T" rather than its legal name of Illinois Bell Telephone Company. For consistency, this Order will do the same.

[3] NT calls it an amendment to the prior contract; Level 3 explicitly denies that it is an amendment, and insists that it is a new contract. Its label is immaterial to the chronology of events leading to this proceeding.

occur on March 2, 2007. The same executive at Level 3 who signed the contract with NT also signed the notice of termination.[4]

Letters were exchanged between NT and Level 3 throughout February, 2007. The termination date was moved back to March 23, 2007, and at some subsequent time, to June 25, 2007.

On April 24, 2007, Level 3 sent a letter stating that, pursuant to 83 Ill. Adm. Code 731.905, it was giving notice that the expiration was set for June 25, 2007, after which Level 3 would disconnect NT.

On April 25, 2007, NT filed with the Illinois Commerce Commission (the "Commission") its Verified Complaint and Request for Declaratory Ruling (the "Complaint"), in which it alleges violations by Level 3 of Section 13-514, subsections (1), (2), and (6), as well as Sections 13-702 and 9-250, of the Public Utilities Act[5] (the "Act").

Respondent filed its Answer on May 2, 2007, in accordance with Section 13-515(d)(4) of the Act.

Consistent with Section 13-515(d)(6) of the Act and pursuant to due notice, a status hearing was convened on May 8, 2007. Also on May 8, 2007, Level 3 sent a letter to NT stating 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 Neutral Tandem's behalf, Level 3 will charge Neutral Tandem at a rate of $0.001 per minute terminated. Level 3 reserves ... the right to terminate the acceptance and delivery of Neutral Tandem's transit traffic. * * * * By continuing to send traffic to Level 3 for termination from and after June 25, 2007, Neutral Tandem will be evidencing its acceptance of these financial terms.[6]

Notwithstanding the foregoing, Level 3 has stated in this proceeding that it does not collect reciprocal compensation from originating carriers for traffic terminated to the Level 3 network, and does not proactively pay reciprocal compensation to other CLECs for traffic it originates and terminates on their networks.

The case was tried on May 22 and May 23, 2007. NT, Level 3, and the Staff of the Commission ("Staff") all appeared by counsel. NT offered testimony from Mr. Rian Wren, its President and Chief Executive Officer, as well as from Mr. Surendra Saboo, its

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[4] In its Answer, Level 3 generally admits this allegation and, in any event, did not deny it (*See* Complaint and Answer ¶25). Accordingly, Level 3 is deemed to have admitted it. 735 ILCS 5/2-610(b) ("Every allegation, except allegations of damages, not explicitly denied is admitted...").

[5] *See generally* 220 ILCS 5/1-101 *et seq.*

[6] Level 3 ex. 1.1.

Chief Operating Officer and Executive Vice President. Level 3 offered testimony from Ms. Sara Baack, the Senior Vice President of its Wholesale Markets Group, as well as from Mr. Timothy J. Gates, Senior Vice President of QSI Consulting, located in Highlands Ranch, Colorado. Staff offered testimony from Mr. Jeffrey Hoagg, Principal Policy Advisor in the Telecommunications Division of the Commission.

ANALYSIS

The Public Utilities Act

NT asserts that Level 3's actions violate Section 13-514 of the Act. That Section states:

> A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:
>
> (1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;
>
> (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; * * * *
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers[.][7]

NT also alleges a violation of Section 13-702, which states:

> Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations, messages or other transmissions of every other telecommunications carrier with which a joint rate has been established or with whose line a physical connection may have been made.[8]

Finally, NT relies upon Section 9-250 of the Act, which states that, where the Commission, upon complaint or its own motion, finds that a rate, charge, ... contract, or other utility practice:

[7] 220 ILCS 5/13-514, 13-514(1), 13-514(2), 13-514(6).

[8] 220 ILCS 5/13-702.

> [is] unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, ... the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.[9]

The Complaint does not seek relief pursuant to the federal Telecommunications Act of 1996.

Interconnection; Section 13-514

It is undisputed that Section 251 of the federal Telecommunications Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[10] The parties appear to agree that the fundamental purpose of interconnection is the exchange of traffic. At issue in this proceeding is the manner in which such interconnection may occur.

NT seeks to maintain its existing direct interconnection with Level 3. NT's CLEC customers, via NT, are indirectly interconnected with Level 3 under this arrangement. Because NT is a transit provider rather than a LEC, the preferred arrangements of both NT and Level 3 feature "indirect interconnection" but for different entities. For the purpose of this Order, this direct/indirect interconnection arrangement will be labeled "Type N" interconnection after its proponent.

Level 3 asserts that all that is required of it is indirect interconnection with NT. It argues that Section 251(a) requires all carriers to directly or indirectly interconnect, but does not mandate direct interconnection between carriers.[11] Level 3 relies on this choice offered by Section 251(a)(1) to justify its termination of the existing direct interconnection.

After Level 3 disconnects NT to prevent it from delivering traffic to Level 3, NT would be indirectly interconnected with Level 3 via AT&T. As Staff points out, NT's CLEC customers then would only have a doubly-indirect interconnection with Level 3, via NT *and* AT&T. This indirect/doubly-indirect interconnection arrangement will be labeled "Type L" interconnection for the purpose of this Order.

The difference between a "Type L" and "Type N" interconnection is that the "Type L" involves a second transit provider, i.e., a more intricate call path and a second set of transit costs for the originating CLEC. Furthermore, as Staff witness Hoagg explains, the "Type L" interconnection forces originating CLECs to utilize a call path other than

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[9] 220 ILCS 5/9-250. (This authority is explicitly extended to single rates or other charges, classifications, etc. *Id.*) *Cf.* 220 ILCS 5/13-101 (applying Section 9-250, *inter alia*, to competitive telecommunications rates and services).

[10] 47 U.S.C. 251(a)(1).

[11] *See id.*

the one they apparently prefer, as evident from their present subscriptions with NT. Accordingly, where a "Type N" interconnection is possible, forcing the use of a "Type L" interconnection violates Section 13-514(1) of the Act, which prohibits the provision of inferior connections to another carrier.[12] Requiring NT or an originating CLEC to incur a second set of transit costs is the hallmark of the inferiority of this type of interconnection. It also violates Section 13-514(2) of the Act, which prohibits a telecommunications carrier from inhibiting the speed, quality, or efficiency of services used by another carrier.[13]

Level 3 has secured a "Type N" interconnection for its own use, i.e., it is directly interconnected with NT for the purpose of having traffic originated on the Level 3 network transited by NT to other CLECs. The instant dispute concerns, in part, an attempt by Level 3 to force upon NT and its 18 other CLEC customers a "Type L" interconnection. By disconnecting NT and forcing it to route traffic bound for Level 3 via AT&T, Level 3 would simultaneously impose a substantial adverse effect on NT's ability to serve its customers, and foreclose from competing CLECs the very arrangement that Level 3 uses for itself. Both of these effects violate Section 13-514(6).[14]

In addition, Staff explains that, if Level 3 disconnects NT, it prevents other CLECs from using NT to transit their traffic to Level 3. The CLECs then will face the choice of paying either (i) the AT&T price, which is 130% of that charged by NT, or (ii) the price of both NT and AT&T (230% of NT's price[15]), and will invariably return to AT&T at the expense of NT. This scenario will degrade the ability of NT to do business, and will impede the development of competition in Illinois. Therefore, the position advocated by Level 3 violates Illinois law.[16] Also, NT accurately characterizes Level 3's scheme, with two transit providers, two sets of costs, and mandatory routing of traffic through the ILEC, as functionally equivalent of a refusal by Level 3 to interconnect with NT. This violates the requirement of Section 251(a) of the Telecommunications Act to interconnect directly or indirectly. Notwithstanding Level 3's arguments that it is shielded by Section 251(a), that Section does not explicitly authorize doubly-indirect interconnection or preempt enforcement of State law claims.[17]

Finally, NT points out that the FCC previously determined that direct interconnection[18] is appropriate when more than 200,000 minutes of traffic are delivered

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[12] *See* 220 ILCS 5/13-514(1).

[13] *See* 220 ILCS 5/13-514(2).

[14] *See* 220 ILCS 5/13-514(6).

[15] Setting NT's price as the base price, this figure represents the sum of the proportions of NT's price (100%) and AT&T's price (130%).

[16] *See* 220 ILCS 5/13-514 (prohibiting a telecommunications carrier from "imped[ing] the development of competition in any telecommunications service market").

[17] *See* 47 U.S.C. 251(a)(1).

[18] This corresponds to that labeled as "Type N" interconnection in this matter, and favors a direct rather than indirect interconnection between NT and Level 3.

per month.[19] NT states it delivers approximately 56 million minutes of traffic per month to Level 3—many times the threshold level of traffic. Therefore, the position advocated by Level 3 also is not consistent with the federal law on point.

Level 3 does argue that it should be free to end the existing relationship based on the termination clause in the contract. Nevertheless, Level 3 is still certified under the Act to operate as a telecommunications carrier in Illinois, and as such, it must comply with Illinois law. Section 13-406 of the Act, concerning discontinuation or abandonment of telecommunications service, directly addresses Level 3's argument. Section 13-406 provides, in relevant part, that:

> No telecommunications carrier offering or providing competitive telecommunications service shall discontinue or abandon such service once initiated except upon 30 days notice to the Commission and affected customers. The Commission may, upon its own motion or upon complaint, investigate the proposed discontinuance or abandonment of a competitive telecommunications service and may, after notice and hearing, *prohibit such proposed discontinuance or abandonment if the Commission finds that it would be contrary to the public interest.*[20]

By proposing to disconnect[21] NT, Level 3 would impose upon NT, its 18 other CLEC customers, and all of their subscribers a discontinuation of service, as well as the *per se* impediments to competition complained of pursuant to Section 13-514. These impacts, along with the scheme of disparate treatment that would cause them, are contrary to the public interest.

Both the unreasonableness and the knowing intent elements of NT's Section 13-514 claims[22] are apparent from the nature and timing of Level 3's actions. In seeking to impose its uneven arrangement, it signed the contract related to traffic originated by Level 3, and that same day gave notice to terminate the contract related to traffic to be terminated to Level 3. Level 3 also fails to reconcile its own interpretation of federal Section 251(a)—that either a direct or an indirect interconnection is required—with the FCC's requirement of a direct interconnection above a 200,000 minute per month threshold.[23] Furthermore, the impact of Level 3's threats on third-party CLECs not involved in the instant dispute, as well as their customers, amplifies the unreasonableness of Level 3's position.

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[19] *In the Matter of Interconnection Disputes with Verizon Virginia, Inc.*, DA 02-1731, CC 00-218, 00-249, 00-251, Memorandum Opinion and Order, ¶¶ 115-16 (rel. July 17, 2002).

[20] 220 ILCS 5/13-406 (emphasis added).

[21] Under the facts of this case, we find no material distinction between the labels of "discontinuation" of service and "disconnection" of an existing interconnection point.

[22] *See* 220 ILCS 5/13-514 *et seq.*

[23] For citations and discussion, *see supra* nn. 11 and 19.

Level 3 repeatedly complains that it is being made to provide a direct physical interconnection in perpetuity. Staff notes that, given the amount of traffic that NT transits to Level 3 for termination, direct physical interconnection is required as a matter of federal law,[24] and, as a practical matter, is simply a condition of doing business in the market. We agree, although our holding is not that Level 3 must permanently maintain the exact status quo, but rather that Level 3 must comply with the law. This includes, but is not limited to, refraining from actions that discriminate against other telecommunications carriers or the public. Therefore, to the extent that Level 3 seeks to redefine its relationship with NT, it must do so without violating Section 13-514 or any other section of the Act, and without taking actions that are detrimental to the public interest. As applied to the facts of the instant case, this means that the direct interconnection between NT and Level 3 must remain intact.

Section 13-702

Section 13-702 prohibits discrimination or delay in receiving, transmitting, and delivering traffic with telecommunications carriers with whom "a physical connection may have been made."[25] NT and Level 3 were and still are directly, physically interconnected for the exchange of traffic, so the condition upon the applicability of Section 13-702 is satisfied.

NT complains that Level 3's threat to block traffic from NT violates this Section. NT also avers that the *per se* impediments to competition complained of pursuant to Section 13-514 are sufficient to establish "discrimination or delay" under Section 13-702. We agree.[26]

Level 3 argues that Section 13-702 merely "requires Level 3 to receive traffic where there is an ongoing agreement for the exchange of traffic."[27] The scope of 13-702 is more broad than that advocated by Level 3, however. As discussed *supra*, Level 3's position would simultaneously impact NT adversely in its ability to serve its customers, and would foreclose from others the very arrangement that Level 3 uses for itself. The intent of this Section of the Act is the prohibition of discrimination or delay. Although Level 3 protests that there is no duty to maintain interconnection imposed by this Section, the discrimination flowing from Level 3's leveraging of the interconnection with NT is prohibited.

Finally, Level 3 advances the letter dated May 8, 2007, from Level 3 witness Baack to NT witnesses Wren and Saboo, to indicate the possibility of continued direct

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[24] *See id.*

[25] *See* 220 ILCS 5/13-702.

[26] *Compare id.* ("discrimination or delay") *with* 220 ILCS 5/13-514(1) ("unreasonably refusing or delaying interconnections" ... "providing inferior connections"); 5/13-514(2) ("unreasonably impairing the speed, quality, or efficiency"); 5/13-514(6) ("unreasonably [imposing] a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.")

[27] Level 3 Init. Br. at 14.

interconnection conditioned upon payment by NT per minute of traffic terminated. To the extent that Level 3 asserts that the letter comprises an offer, it contains language that violates Section 13-702 and, as a general matter, is illusory. The letter states that, if NT delivers traffic to Level 3, "and *if Level 3 elects to terminate such traffic* on [NT]'s behalf.... Level 3 reserves ... the right *to terminate the acceptance and delivery of [NT]'s transit traffic*."[28] Level 3, however, does not get to choose whether or not it will terminate traffic bound for its subscribers.[29] Level 3's position also is inconsistent with the law concerning reciprocal compensation, as discussed *infra*.

Reciprocal Compensation

Reciprocal compensation is a principle recognized in federal law. The Telecommunications Act of 1996 mandates that "[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[30] This is a requirement of all LECs, not just ILECs.[31] The FCC rules further clarify that:

> a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.[32]

The evidence establishes that NT does not originate traffic. Furthermore, the rule does not impose reciprocal compensation obligations with respect to transiting the traffic.[33] In addition, this Commission previously has rejected attempts to impose reciprocal

[28] Level 3 ex. 1.1, ¶3 (emphasis added).

[29] *See* 220 ILCS 5/13-702 ("Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, [such traffic]." Level 3's letter dated May 8, 2007, implies the maintenance of the direct physical interconnection between NT and Level 3, thereby satisfying the condition for this Section of the Act to apply.); *see also MCI Tel. Corp.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ill. Bell Tel. Co.*, Docket 96-AB-006, 1996 Ill. PUC Lexis 706, at *38 (Dec. 17, 1996) ("The very essence of interconnection is the establishment of a seamless network of networks, and to develop fine distinctions between types of traffic, as Ameritech Illinois would have us do, will merely create inefficiencies, raise costs and erect barriers to competition.") In 1996, Illinois Bell Telephone Company was the only provider of transit service (*see id.* at *31), and the record of the instant case indicates that NT is the only independent provider of such service today. [*See supra* n.2 regarding Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T"), f/k/a SBC Illinois, f/k/a Ameritech Illinois.]

[30] 47 U.S.C. 251(b)(5).

[31] *Id.*

[32] 47 C.F.R. 51.701(e).

[33] *See id.*

compensation on transit providers.[34] Therefore, NT is not obligated to pay reciprocal compensation to Level 3.

Level 3 argues that the use of a transit provider enables the CLEC originating the call "to hide behind the transit provider to avoid compensating the terminating carriers."[35] This argument is both logically flawed and contrary to the evidence. The fallacy in Level 3's argument is that the doubly-indirect "Type L" interconnection that it seeks, which features *two* transit providers (NT and AT&T), would exacerbate rather than ameliorate the problem that Level 3 alleges. Furthermore, NT asserts, both in its Complaint and in testimony, that it provides all signaling information and call detail necessary for Level 3 to bill the originating CLECs. Level 3 offered nothing to rebut NT's claim. Accordingly, NT demonstrated that Level 3 has the ability to collect reciprocal compensation from the originating CLECs, but apparently chooses not to do so. Level 3 may choose not to use the information to collect reciprocal compensation, but it then waives the reciprocal compensation otherwise due, and may not require NT to collect the same on its behalf.

Finally, the per-minute surcharge proposed by Level 3 in its letter dated May 8, 2007, also is impermissible. It is little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label. Such charges have been disallowed in previous decisions.[36] We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label. In addition, the evidence of record demonstrates that NT pays 100% of the cost of the facilities of the interconnection, leaving no room for Level 3 to argue that there is any unrecovered or additional cost per minute for transited calls terminated on the Level 3 network.[37]

Section 9-250

NT has requested that it be awarded interconnection on terms no less favorable than the terms upon which Level 3 and AT&T interconnect. Despite several repetitions of that refrain, the Level 3-AT&T interconnection agreement is not of record. It appears from NT's presentation throughout the case that what it seeks is direct interconnection with no liability to Level 3 for per-minute termination charges and no obligation to bill or collect reciprocal compensation from the originating carriers. NT states it already pays for 100% of the costs of the direct, physical interconnection, and there is nothing to

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[34] *In re Verizon Wireless Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996*, 01-0007 ("...when one carrier transits traffic to another, the transiting carrier, by law, has no reciprocal compensation obligation (and no other payment obligation) to the termination carrier") (May 1, 2001) at 35; *see also* 04-0040 at 7-8.

[35] Level 3 Init. Br. at 30.

[36] *See* 01-0007 at 35, *supra* n. 34.

[37] While NT's payment of the entire cost of the facilities and electronics is evidence in its favor in the instant case, this should not be construed as a threshold or test *requiring* 100% payment by a similarly-situated complainant.

indicate that NT seeks a change thereto. As noted *supra*, NT has prevailed on the issues of interconnection and reciprocal compensation.

Level 3 disagrees that Section 9-250 allows the relief NT seeks. It notes that NT is barred from opting-in to particular clauses from an existing interconnection agreement, particularly one that is significantly different in scope and purpose.[38] Level 3 also argues that what NT really seeks is arbitration, but that the federal Telecommunications Act only has such procedures for disputes between a CLEC and an ILEC.[39] Staff generally agrees with the characterizations of Level 3 on this point.

At the outset, we concur with Level 3 and Staff that this case is not an arbitration within the meaning of Section 252 of the federal Telecommunications Act.[40] Furthermore, the "opt-in" provision for such interconnection agreements is similarly inapplicable.[41] Section 9-250 does apply to the State law claims brought in this matter, however, and requires abatement of the violations.[42]

NT argues that Section 9-250 is a basis for the Commission to impose its preferred agreement on Level 3, and it suggests that its Traffic Termination Agreement with Time Warner is a useful template. This approach is problematic for three reasons: it resembles a Section 252 arbitration; it is substantially similar to the opt-in approach just rejected; and, even if legally permissible, there is insufficient information of record to weigh whether such terms are genuinely appropriate to the relationship between NT and Level 3.

Instead, this Order imposes several mandates to abate the underlying violations, but ultimately leaves certain elements for further negotiation by the parties. These mandates are intended to confine the scope of the negotiation to just and reasonable charges and practices, thereby addressing the requirements of Section 9-250, without transforming the instant case into a federal Section 252 arbitration. By remaining limited, this approach also recognizes that the parties are in a better position than the Commission to craft the details of their business relationship, and it accords them some flexibility to do the same.

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[38] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Second Report and Order, FCC 04-164, ¶12 (rel. July 13, 2004). Level 3 also argues that NT reached a different arrangement with another ILEC, but that argument is, in essence, *Level 3* attempting to opt in to a single payment term of an outside agreement. As such, that argument also must be rejected.

[39] *See* 47 U.S.C. 252(b).

[40] *See generally* 47 U.S.C. 252(b).

[41] *See* 47 U.S.C. 252(i)

[42] 220 ILCS 5/9-250. ("Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges ... or that the rules, regulations, contracts, or practices ... are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law ... the Commission shall determine the just, reasonable or sufficient rates [etc.] and shall fix the same by order").

Therefore, NT and Level 3 shall observe the following provisions in their business relationship. First, as discussed *supra*, Level 3 shall continue to accept a direct physical interconnection by which NT delivers traffic to Level 3 for termination until a further order from the Commission, and for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to NT for transiting.

Second, Level 3 shall not require NT to pay or collect reciprocal compensation for traffic not originated by NT.

Third, Level 3 shall not require NT to pay any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3 for termination on the Level 3 network.

Fourth, NT shall continue to provide to Level 3 sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes.

Fifth, if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship, the interconnection shall continue based upon the status quo in effect between the parties on January 30, 2007.[43]

Remedies

NT seeks the following remedies: a declaration that Level 3 has violated Sections 13-514, 13-702, and 9-250 of the Act; an order requiring Level 3 to interconnect with NT on just, reasonable, and non-discriminatory terms and conditions no less favorable than those by which Level 3 accepts transit traffic from AT&T; attorneys fees and costs; and all further relief available under the Act.

Section 13-516 of the Act provides certain remedies for violations of Section 13-514,[44] including a cease-and-desist order,[45] damages,[46] and attorney's fees and costs.[47] Section 13-515(g) mandates an assessment of the Commission's own costs related to the case.[48]

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[43] Level 3 argues that Commission regulation of CLEC-to-CLEC interconnection is inconsistent with Section 252 of the federal Telecommunications Act. Separately, Level 3 argues that Section 252 does not apply to this proceeding—a point that no party contests. All of the alleged violations are of state statutes. Furthermore, interconnection was not an issue until Level 3 pursued an arrangement that was discriminatory against NT, 18 other CLECs, and their customers. It is Level 3's behavior, which is anti-competitive and contrary to the public interest, that is the primary interest of the Commission in this case.

[44] *See generally* 220 ILCS 5/13-516.

[45] 220 ILCS 5/13-516(a)(1).

[46] 220 ILCS 5/13-516(a)(3).

[47] *Id.*

[48] 220 ILCS 5/13-515(g).

By a preponderance of the evidence, NT has established that the conduct of Level 3 at issue in this dispute violates Sections 13-514(1), 13-514(2), 13-514(6), and 13-702, and, as such, is an impediment to competition and contrary to the public interest. There is no separately discernable violation of Section 9-250; instead, that Section requires certain attributes in the ongoing business relationship. The cease-and-desist order will be included, consistent with the findings herein, and will reflect the mandates set forth under Section 9-250. There will be no award of monetary damages at this time.[49]

The remaining issue concerns the assessment of fees and costs. Illinois courts have stated that "it is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary powers.'"[50] As noted, violations of Section 13-514 have occurred. NT therefore is entitled to an award of attorney's fees and costs[51] based upon its litigation success.[52]

NT did indeed establish violations by Level 3 of Sections 13-514(1), 13-514(2), and 13-514(6), as well as 13-702. NT was less clear in its arguments and evidence for its Section 9-250 claim, and ultimately the remedies sought by NT under this Section were denied in part. Following the model used most recently in the *Cbeyond* case,[53] the relative litigation success (for the sole purpose of assessing fees and costs) of NT is determined to be 80%, heavily weighted upon NT's prosecution of Sections 13-514(1), 13-514(2), 13-514(6), and 13-702.[54] Accordingly, Level 3 is assessed 80% of NT's attorney's fees and costs. Level 3 also is assessed 90% of the Commission's costs, consisting of all of its own half, and 80% of NT's half. NT is assessed the 10% balance of the Commission's costs, consisting of the remaining 20% of its half of the costs.

CONCLUSION

Based on the foregoing, we find that:

[49] This is included for completeness pursuant to Section 13-516(a)(3). No damages were quantified in the Complaint. From the record, it appears that any such damages only would accrue if Level 3 were to actually disconnect NT, which it has not done to date.

[50] *Globalcom, Inc. v. Ill. Commerce Comm'n*, 347 Ill.App.3d 592, 618 (1st Dist. 2004).

[51] 220 ILCS 5/13-516(a)(3) (the Commission "shall award" such fees and costs).

[52] *See Globalcom, Inc. v. Ill. Commerce Comm'n*, 347 Ill.App.3d 592, 618 (1st Dist. 2004); *Cbeyond Commun's, LLP v. Ill. Bell Tel. Co.*, Dockets 05-0154/05-0156/05-05-0174 (cons.) (June 2, 2005), at 43-44; *Globalcom, Inc., v. Ill. Bell Tel. Co.*, Docket 02-0365 (Order on Rehearing, Dec. 11, 2002), at 50-51.

[53] *See Cbeyond Commun's, LLP v. Ill. Bell Tel. Co.*, Dockets 05-0154/05-0156/05-05-0174 (cons.) (June 2, 2005), at 43-45.

[54] *See id.* at 45. (Such award is an approximation of NT's litigation success. "Absolute precision regarding this quantification is simply not practicable.")

(1) Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC own, control, operate, or manage, for public use, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of Section 13-202 of the Act;

(2) Level 3 Communications, LLC owns, controls, operates, or manages, for public use, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Act;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law; and

(5) the remedies set forth above should be adopted to address the violations of Section 13-514 and 13-702 of the Public Utilities Act.

IT IS THEREFORE ORDERED that Level 3 Communications, LLC cease and desist from its threat to disconnect or otherwise disrupt the direct physical interconnection with Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, by which Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC deliver traffic to Level 3 Communications, LLC.

IT IS FURTHER ORDERED that Level 3 Communications, LLC cease and desist from requiring Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC to pay or collect reciprocal compensation for traffic not originated by Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, or to pay any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3 Communications, LLC for termination on its network.

IT IS FURTHER ORDERED that Level 3 Communications, LLC cease and desist from any act discussed and found herein to violate Sections 13-514 or 13-702 of the Public Utilities Act.

IT IS FURTHER ORDERED that Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC shall continue to provide to Level 3 Communications, LLC sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes.

IT IS FURTHER ORDERED that, if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship,

that the exchange of traffic shall continue based upon the status quo in effect between the parties on January 30, 2007.

IT IS FURTHER ORDERED that Level 3 Communications, LLC pay 80% of the attorney's fees and costs of Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, as well as 90% of the Commission's costs incurred in this proceeding as prescribed by Sections 13-515 and 13-516 of the Public Utilities Act.

IT IS FURTHER ORDERED that Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC pay the remaining 10% of the Commission's costs incurred in this proceeding as prescribed by Section 13-515 of the Public Utilities Act.

IT IS FURTHER ORDERED that, subject to the provisions of Sections 10-113 and 13-515(d)(8) of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

So ordered this 25th day of June, 2007.

Ian Brodsky,
Administrative Law Judge

EXHIBIT 5

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 20, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-C-0233 - Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption.

ORDER PREVENTING SERVICE DISRUPTION AND REQUIRING CONTINUATION OF INTERIM INTERCONNECTION

(Issued and Effective June 22, 2007)

BY THE COMMISSION:

INTRODUCTION AND SUMMARY

We initiated this proceeding to consider a complaint in which Neutral Tandem, Inc. - New York LLC (Neutral Tandem) asks that we require Level 3 Communications LLC (Level 3) to continue direct interconnection with Neutral Tandem, while Level 3 asks us to require a migration plan for orderly divestiture of Neutral Tandem's customers in anticipation that we will allow Level 3 to discontinue the interconnection. The two firms established their present direct interconnection pursuant to a transport agreement and two termination agreements. Level 3 unilaterally has canceled the termination agreements, after fulfilling the notice requirements prescribed in the agreements.

In today's order we grant Neutral Tandem's requested relief provisionally by directing the parties to continue performing their respective obligations as if the canceled termination agreements remained in effect, pending the completion of a proceeding pursuant to Public Service Law (PSL) §97 if necessary to investigate the rates, charges, rules and

regulations under which the parties provide call transport and termination services to one another. We shall initiate the rate proceeding at our first regularly scheduled session after 90 days have elapsed from the date of this order, unless the parties execute a new termination agreement in the interim.

FACTUAL AND PROCEDURAL BACKGROUND

In New York and other states, Neutral Tandem maintains tandem switches which competitive local exchange carriers (CLECs) can use as an alternative to tandem switches owned by incumbent local exchange carriers (ILECs) such as Verizon New York Inc. Neutral Tandem provides this service to about 23 CLECs in New York. Level 3 or its affiliates likewise operate in New York and other states, as CLECs that transport local calls originated by their end-user customers and terminate local calls to those customers. Among telecommunications providers in the New York market, Neutral Tandem is unique in offering a competitive alternative to the ILEC's tandem switch, and in providing transport and termination services only to CLECs without having end-user customers of its own.

Until the controversy that led to this proceeding, Neutral Tandem and Level 3 had been handling local calls in New York pursuant to three interconnection agreements between them. Under the first, which may be described as a "transport agreement," local calls that are originated by Level 3's end-user customers and routed through Level 3 can be directed to Neutral Tandem's tandem switch (instead of Verizon's) and thence to a CLEC. An economic incentive for Level 3 to use this arrangement is that Neutral Tandem offers Level 3 the transport service at a lower price than Verizon's.

The other two interconnection agreements, initially executed in 2004, are described herein as "termination agreements" and govern calls in the opposite direction. That is,

the termination agreements specify terms whereby calls originating from a CLEC[1] and routed to Neutral Tandem's tandem switch can be directed to Level 3 (here again, bypassing the Verizon tandem switch) and thence to Level 3's end-user customers. One of the termination agreements with Neutral Tandem was executed by Level 3; the other was executed by Broadwing Communications LLC, and was inherited by Level 3 when it acquired Broadwing. For Level 3, the economic attraction of the termination agreements has been that Neutral Tandem pays Level 3 compensation for calls governed by the agreements. Verizon, in contrast, would be under no similar obligation to Level 3 if the calls in question were handled by Verizon rather than Neutral Tandem; instead, under that scenario, Level 3 would be compensated only if it made the effort to collect reciprocal compensation from the originating CLECs.

On January 31, 2007, the parties executed a newly negotiated transport agreement. Later that day, Level 3 notified Neutral Tandem that Level 3 intended to discontinue negotiations on a new termination agreement and cancel one of the two preexisting termination agreements, viz., the one executed by Level 3. Shortly thereafter, Level 3 gave notice that it also would cancel the termination agreement executed by Broadwing. Without examining any negotiating positions undisclosed by the parties, the record is clear that a primary obstacle to negotiation of a new termination agreement has been the issue whether Level 3 should continue to receive compensation directly from Neutral Tandem (as Level 3 contends) or should be relegated to its right of reciprocal compensation from the CLECs (as Neutral Tandem contends).

In accordance with the cancellation provisions in each of the termination agreements, Level 3 gave Neutral Tandem 30 days' notice of its intent to cancel. The later of the two

[1] For the present discussion, a CLEC in the situation governed by the termination agreement can be said to "originate" the calls in question--in the sense that the call originates on that CLEC's network--although of course the call initially originates from an end user.

resulting expiration dates was March 23, 2007, which Level 3 then extended voluntarily (as to both termination agreements) through June 25, 2007 to allow time for a hearing and decision in this expedited proceeding. Meanwhile, both parties have continued to operate in accordance with the terms of the newly executed transport agreement and the preexisting, but canceled, termination agreements.

The parties' numerous filings to the Commission or the assigned Administrative Law Judge have included, most notably, Neutral Tandem's complaint and petition in which it seeks an order requiring interconnection and preventing service disruption; Level 3's motions to dismiss the complaint and compel Neutral Tandem to prepare a migration plan in anticipation of dismissal;[2] and prefiled testimony by both parties, which was examined in an evidentiary hearing.

ARGUMENTS AND CONCLUSIONS

Jurisdiction

The threshold question, broadly stated, is whether we have jurisdiction to grant Neutral Tandem's request for direct interconnection with Level 3. If not, then our obligation to ensure the continuity of safe and adequate service would require that we direct Neutral Tandem to implement an orderly migration plan as Level 3 proposes. For the following reasons, however, we conclude that the requisite jurisdiction to grant Neutral Tandem's requested relief is established by the PSL and is not preempted by the Telecommunications Act of 1996.

According to Neutral Tandem, its role as a transiting provider entitles it to direct interconnection with a CLEC such as Level 3 by operation of 16 NYCRR 605.2(a)(2), which provides that "interconnection into the networks of telephone corporations shall be provided for other public or private networks." In

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[2] Consistently with the determinations in today's order, we formally deny Level 3's dismissal motion, which the Administrative Law Judge previously denied by informal ruling.

response, Level 3 correctly observes that Rule 605.2(a)(2) never has been relied upon to require that a CLEC offer direct interconnection to an entity such as Neutral Tandem (as distinguished from an end user). Level 3 emphasizes that, if it ended the termination agreements at issue and ended Neutral Tandem's direct interconnection under those agreements, Neutral Tandem nevertheless would remain interconnected to Level 3 indirectly via the Verizon tandem. Therefore, Level 3 argues, the interconnection requirement in Rule 605.2(a)(2) would continue to be satisfied.

As Neutral Tandem points out, however, we unquestionably have the authority to interpret our rules in a manner that "is not irrational or unreasonable."[3] Thus, Level 3's objection that Neutral Tandem's proposed interpretation is novel begs the question whether Rule 605.2(a)(2) may reasonably be read to require direct interconnection between Level 3 and Neutral Tandem, should we determine that direct interconnection would be a "just, reasonable, adequate, efficient and proper" practice within the meaning of PSL §97(2) and a "suitable" connection method as required by §97(3). The question must be answered affirmatively. Under Level 3's theory, the regulation's silence regarding "direct" interconnection would implicitly prevent our requiring anything more than indirect interconnection through the Verizon tandem, even though the regulation does not expressly preclude our requiring a direct interconnection. Thus, instead of construing Rule 605.2(a)(2) conventionally, i.e., as an implementation of statutory authority, Level 3's interpretation perversely would transform the rule into a constraint on our statutory authority to require direct interconnection in any instance where Level 3 refuses to offer it.

Moreover, given Level 3's theory that Rule 605.2(a)(2) requires interconnections only indirectly and only between a CLEC and the originating end users, Neutral Tandem is correct that it is self-contradictory for Level 3 to reject the notion of a

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[3] Ass'n of Cable Access Producers v. PSC, 1 AD3d 761, 763, 767 NYS2d 166, 168 (3d Dept. 2003).

mandatory direct interconnection between Neutral Tandem and Level 3, as that is precisely the configuration that creates, between Level 3 and originating end users, the "indirect interconnection" supposedly prescribed (according to Level 3) by Rule 605.2(a)(2).

The argument over Rule 605.2(a)(2) points to a more basic consideration, namely the scope of our authority pursuant to the statute from which any rule or ratemaking decision must be derived. Neutral Tandem properly invokes several relevant PSL provisions applicable to Level 3 as a telephone corporation (a characterization undisputed by Level 3). Thus, Neutral Tandem says, it must be granted direct interconnection with Level 3 pursuant to the requirement in PSL §91 that a telephone corporation provide such "facilities as shall be adequate and in all respects just and reasonable." Neutral Tandem cites also our responsibility to exercise "general supervision" over all telephone companies and facilities (PSL §94(2)); to ensure that rates are not "unjust, unreasonable or unjustly discriminatory or unduly preferential or in anywise in violation of law" (PSL §97(1)); to require just and reasonable rules, regulations, and practices, and adequate, efficient, proper, and sufficient equipment and service (PSL §97(2)); and to require suitable connections or transfers at just and reasonable rates (PSL §97(3)).

Assuming for the moment that nothing in the Telecommunications Act of 1996 preempts us from granting the relief sought by Neutral Tandem, and that direct interconnection between Neutral Tandem and Level 3 is shown to be necessary for the effective provision of telephone service (as contemplated in, e.g., the cited provisions of PSL §§ 91, 97(2), and 97(3)), Level 3 has provided no plausible basis for its claim that the requested relief would exceed our statutory authority. On the contrary, the PSL provisions cited above are designed to vest us with plenary jurisdiction comprehensive enough to include supervision of the terms and conditions of interconnection for

transport and termination services, to the extent consistent with federal law.[4]

As noted, Level 3 misinterprets Rule 605.2(a)(2) as an implied prohibition against our requiring that Level 3 provide Neutral Tandem direct connection, as distinguished from indirect interconnection through the Verizon tandem. In a related argument, Level 3 says the Telecommunications Act of 1996 preempts any state statute or regulation that otherwise might authorize us to order Level 3 to offer direct interconnection. Level 3 argues that the 1996 Act, like Rule 605.2, bars us from requiring direct interconnection because the Act, in 47 USC §251(a)(1), provides that every carrier has a duty to "interconnect directly or indirectly with other carriers" (emphasis added). Accordingly, says Level 3, the Federal Communications Commission (FCC) has described indirect interconnection as "a form of interconnection explicitly recognized and supported by" the 1996 Act.[5] Level 3 further notes that Rule 605.2(a)(2) antedates the 1996 Act, as if to imply that the rule cannot be reconciled with the 1996 regulatory framework.

That the 1996 Act recognizes indirect interconnection does not imply that the Act forecloses direct interconnection when the latter is more appropriate. The network configuration contemplated in the Act is one that provides the originating CLEC and its end users the opportunity to choose their preferred routing based on consideration of all relevant factors such as cost, reliability, and efficiency. As Level 3 itself, has argued to the Federal Communications Commission (FCC), "it is always the option of the carrier with the financial duty for transport [i.e., the originating CLEC] to choose how to transport its

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4 As an illustration of our exercise of such jurisdiction, Neutral Tandem cites Case 00-C-0789, Omnibus Interconnection Proceeding, Order Establishing requirements for the Exchange of Local Traffic (issued December 22, 2000).

5 In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 (¶125)(rel. March 3, 2005).

traffic," as among "direct interconnection . . . via its own facilities, [via] the terminating carrier's facilities, or via the facilities of a third party."[6]

In this proceeding, however, as we have noted regarding Level 3's interpretation of Rule 605.2(a)(2), Level 3's interpretation of the 1996 Act would perversely transform the options assured the originating CLEC under 47 USC §251(a)(1) into a supposed power on Level 3's part to dictate that the originating CLEC cannot choose direct interconnection with Level 3. And, just as in its mistakenly restrictive interpretation of Rule 605.2(a)(2), Level 3 would read out of the 1996 Act the option of direct interconnection between Neutral Tandem and Level 3 even though such direct interconnection results in "indirect interconnection," which Level 3 says the Act requires, between Level 3 and originating CLECs' end users. Because Level 3's reading of §251(a)(1) would enable Level 3 to compel these results in disregard of the principle that originating CLECs may choose how to route their traffic, Level 3 errs in asserting that §251(a)(1), properly construed, preempts our requiring direct interconnection between by Neutral Tandem and Level 3 pursuant to the PSL and Rule 605.2(a)(2).

Indeed, the 1996 Act not only allows us to require direct interconnection, as discussed; the Act also affirmatively preserves our obligation to do so, when effective provision of service requires it, as part of our role in supervising interconnection arrangements under PSL §§ 91, 94, and 97. According to 47 USC §251(d)(3)(A), federal regulation must not prevent a state commission from establishing interconnection requirements otherwise consistent with the Act. Thus, even though indirect interconnection may, in the proper circumstances, satisfy a general duty of interconnection established in §251(a)(1), the Act does not preclude our requiring direct interconnection when that option is more reasonable and therefore is necessary for the discharge of our obligations under state

[6] Reply Comments of the Missoula Plan Supporters, CC Docket No. 01-92 (February 1, 2007), p. 26.

law.[7] Similarly, to the extent consistent with the Act, 47 USC §261(b) authorizes the enforcement of preexisting state regulations (such as Rule 605.2(a)(2), insofar as applicable); and §261(c) authorizes us to impose new requirements for furtherance of competition in the provision of exchange access. As noted below, a major benefit of direct interconnection between Neutral Tandem and Level 3 is that it promotes such competition. Thus, 47 USC §§ 251 and 261 provide further assurance that we can act consistently with federal law in requiring the parties to maintain their present interconnection.

Network Design and Public Policy Objectives

Having determined that 47 USC §251(a)(1) does not limit our statutory authority to require that Level 3 continue providing Neutral Tandem direct interconnection, the next issue is whether such a requirement would serve the interests entrusted to us under the PSL. In other proceedings, the Commission or our staff already has answered that question in the affirmative, and Level 3 has not persuasively demonstrated the contrary in this case.

Direct interconnection between Neutral Tandem and Level 3 enables Neutral Tandem to maintain its independent tandem switch as a viable alternative to Verizon's. The availability of an independent tandem in turn furthers the development of facilities-based competition among wireless, cable, and landline telephony, by offering the providers of all such services an economically advantageous alternative to the Verizon tandem. According to Level 3, the volume of traffic it receives from Neutral Tandem is insufficient to make direct interconnection with Neutral Tandem a more cost-effective configuration, as

[7] The 1996 Act recognizes that we may need to decide how interconnections should be structured in the course of rate arbitration between an ILEC and a CLEC. 47 USC §§ 252(c),(d). Although this case does not involve an ILEC, it involves a similarly inseparable interrelationship between the reasonableness of interconnection methods and the reasonableness of the rates charged for those interconnections.

compared with receiving the same traffic indirectly from Neutral Tandem through the Verizon tandem. However, the record shows that Neutral Tandem sends Level 3 a volume of traffic about 180 times greater than the DS-1 level, and we have found the latter sufficient to justify maintenance of dedicated transport capacity on the part of a terminating CLEC such as Level 3.[8]

For originating CLECs, the ability to choose the more cost effective tandem service, as between Neutral Tandem's and Verizon's competing services, creates an opportunity for cost savings and optimum efficiency. The resulting mitigation of the CLECs' cost of service tends to enhance competition among CLECs, minimize the costs recovered through end users' rates, and encourage additional investment in facilities-based services, consistently with the similar objectives we have cited in supporting the principles of open network architecture and comparably efficient interconnection.[9]

In addition, the redundancy resulting from alternative tandem switching options enhances the diversity and reliability of the public switched telephone network. These objectives have consistently been recognized on several occasions, particularly as a response to lessons of the September 11, 2001 attacks and Hurricane Katrina.[10] While Level 3 disputes the benefits of redundancy on the basis that Neutral Tandem's tandem switch is just as vulnerable as other CLECs' facilities sharing the same physical location with Neutral Tandem's, even an arrangement where Neutral Tandem and CLECs collocate provides clear diversity

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[8] Case 00-C-0789, supra, Order Establishing Requirements for the Exchange of Local Traffic (issued December 22, 2000).

[9] See, e.g., Case 88-C-004, Interconnection Arrangements, Open Network Architecture, and Comparably Efficient Interconnection, Opinion No. 89-28 (issued September 11, 1989), at pp. 7-8.

[10] Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, WC Docket No. 06-159, Reply Comments of NYSDPS (filed September 25, 2006); Case 03-C-0922, Telephone Network Reliability, Order Instituting Proceeding (issued July 21, 2003); DPS Staff White Paper (issued November 2, 2002).

and reliability advantages as compared with relying only on an ILEC's tandem switch maintained solely at the ILEC's location.

Conversely, denial of the relief sought by Neutral Tandem would create potential impediments to competition, by enhancing Level 3's capacity to act as a bottleneck between its end users and CLECs if the CLEC chooses Neutral Tandem's tandem switch over Verizon's. While Level 3 argues that any interference with originating CLECs' access through Neutral Tandem to Level 3's end users would violate Level 3's own business interests, Neutral Tandem has shown that Level 3 has allowed incoming traffic to be disrupted in analogous situations in the past. Level 3's potential bottleneck function becomes an ever greater concern insofar as Level 3 may seek to provide tandem switch service in competition with Neutral Tandem.

Remedies

The final question--albeit the primary one, evidently, in the parties' negotiations--is whether to credit Level 3's argument that, even if the public policy benefits of the present network configuration are more substantial than Level 3 concedes, they cannot justify an order compelling Level 3 to offer Neutral Tandem a termination agreement under which Level 3 serves Neutral Tandem free of charge. A corollary issue is Neutral Tandem's claim that Level 3, by insisting on payment, is attempting to extract terms that would be discriminatory or potentially anticompetitive. We view these claims as arguments that address neither the scope of our jurisdiction nor the merits, from a policy standpoint, of requiring direct interconnection pursuant to our authority under PSL §§ 97(2) and (3). Rather, they implicate only the question of just and reasonable pricing under §97, which is a conventional ratemaking issue to be resolved through the ratemaking process prescribed in PSL §97(1). It is for that reason that we will initiate a rate proceeding if the parties do not negotiate a new agreement.

In a rate case, as in negotiations, relevant considerations might include (among other things) whether

Level 3's access to reciprocal compensation from CLECs is an adequate substitute for direct payments from Neutral Tandem; whether the parties' transport and termination agreements should be considered independently or in combination when assessing the reasonableness of the rates they establish relative to the obligations and benefits they confer on each party; and, if the agreements are to be considered in combination, whether the terms established in the present transport agreement should be modified so that the agreements collectively will yield results that are just and reasonable overall.[11] As long as such considerations have yet to be examined in a future phase of this proceeding, it would be premature to determine whether any particular level of compensation (or the absence of compensation) renders a termination agreement unreasonable as Level 3 claims.

The parties have offered conflicting testimony regarding the extent, if any, to which cancellation of the present direct interconnection would disrupt traffic currently routed to Level 3 through Neutral Tandem. According to Neutral Tandem, an orderly transition would require six months. Level 3 seems to assert that a nearly instantaneous transition could be managed through the use of emergency facilities that link the Verizon tandem to Level 3, and adds that any disruption would be the product of Neutral Tandem's own failure to anticipate an adverse decision in this proceeding.

We find that the risk of disruption has been demonstrated sufficiently that an order requiring immediate cancellation of the present interconnection would not be consistent with the sound exercise of our supervisory authority under the PSL. Moreover, cancellation would be unreasonably disruptive under the best of circumstances because our objective at this stage of the proceeding is to initiate further

[11] A full rate proceeding, if any, also would be the more appropriate forum in which to consider (if necessary) the allegations that certain rates and practices are discriminatory or otherwise improper, as the parties have discussed in a series of late, unauthorized pleadings filed May 23, 2007 and subsequently.

negotiations and thus obviate a contested rate proceeding. It would make little sense to suspend the present interconnection in anticipation that it will be reinstituted as soon as the terms and conditions of a new termination agreement have been established.

Accordingly, we are directing the parties to continue operating in accordance with their preexisting transport and termination agreements, provided however that payments pursuant to those agreements after the date of this order will be subject to adjustment, by reparation, credit, or refund,[12] should we find at the conclusion of a rate proceeding that such payments were insufficient or excessive. By postponing the commencement of a rate proceeding until our first session 90 days after issuance of today's order, we intend to provide the parties a reasonable opportunity to negotiate new rates and thus avoid the resource expenditure that would result from a litigated rate case.

Although Level 3 proposes that we direct Neutral Tandem to pay an interim rate of $0.0007 per minute of use for termination service, that rate would be inconsistent with the objectives of today's order because it avowedly is designed to encourage Neutral Tandem to stop offering tandem switching service. Instead, by letting interim rates remain at the same level that the parties themselves negotiated at arms' length in the preexisting agreements, we ensure that the rates will be sufficiently reasonable as a proxy, subject to retrospective adjustment, for permanent rates subsequently established in a rate case. As should be obvious from the foregoing discussion, we have not thereby determined that a permanent termination agreement would be inherently unreasonable either if it exempted Neutral Tandem from any payment, or if it required that Neutral Tandem pay a rate different from the amount payable under the preexisting agreements.

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[12] See PSL §113(1).

The Commission orders:

1. Neutral Tandem, Inc. - New York LLC (Neutral Tandem) and Level 3 Communications LLC (Level 3) are directed to maintain their current interconnections with each other in accordance with the transport agreement and the termination agreements described in this order.

2. Order Clause 1 above will remain in effect, and the rates prescribed therein will remain in effect subject to adjustment for the period from the date of this order until the later of (a) the execution of a termination agreement to replace the canceled agreements under which Neutral Tandem and Level 3 currently operate, or (b) completion of a rate proceeding to consider the parties' rates for transport and termination services.

3. This proceeding is continued but, upon completion, shall be closed in the Secretary's discretion.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

MURTHA CULLINA LLP

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By E-Mail and By Hand

August 3, 2007

Catrice Williams, Secretary
Department of Telecommunications and Cable
One South Station, 2nd Floor
Boston, MA 02110

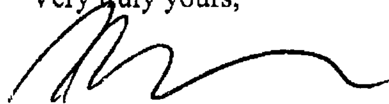
Re: In The Matter Of The Petition Of Level 3 Communications, LLC To Direct Neutral Tandem-Massachusetts, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements
Docket No. 07-3

Dear Secretary Williams:

Enclosed please find an original and three (3) copies of Neutral Tandem's Motion to Dismiss Level 3's Petition as Moot.

Please contact the undersigned if you have any questions.

Very truly yours,



Robert J. Munnelly, Jr.

Enc.

cc: Tina Chin, Esq., Hearing Officer (by e-mail and hand)
Meabh Purcell, Esq. (by e-mail and mail)
Richard E. Thayer, Esq. (by e-mail and mail)
William Hunt, Esq. (by e-mail and mail)
Sandra E. Callahan, Esq. (by e-mail and mail)
Ronald Gavillet, Esq. (by e-mail and mail)
John R. Harrington, Esq. (by e-mail and mail)

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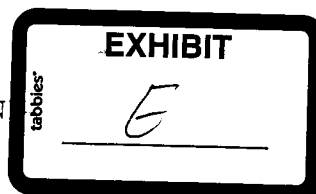

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

In the Matter of the Petition of Level 3 Communications, LLC To Direct Neutral Tandem-Massachusetts, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements	)	DTC No. 07-3

NEUTRAL TANDEM'S MOTION TO DISMISS LEVEL 3'S PETITION AS MOOT

Neutral Tandem, Inc. and Neutral Tandem-Massachusetts, LLC (collectively "Neutral Tandem"), pursuant to 220 C.M.R. 1.04(5) and Mass. R. Civ. P. 12(b)(1), respectfully move the Department to dismiss as moot the Petition of Level 3 Communications, LLC ("Petition"). Upon the dismissal of the Petition, Neutral Tandem will file a notice of withdrawal of its Cross-Petition against Level 3 Communications, LLC and its subsidiaries, including Broadwing Communications, LLC (collectively "Level 3") pursuant to 220 C.M.R. 1.04(4)(a). In support of this Motion, Neutral Tandem states as follows:

1. Level 3 filed its Petition with the Department on May 30, 2007.[1] The Petition stated that Level 3 intended to terminate its existing interconnections with Neutral Tandem as of June 25, 2007. (Pet. ¶¶ 6-7.) Level 3 requested that the Department direct Neutral Tandem to stop routing traffic through the parties' existing interconnections as of that date and to provide notice to Neutral Tandem's carrier customers of such impending service migration. (*Id.*) Level 3 also requested that the Department order Neutral Tandem to pay Level 3 an exorbitant $.001/minute usage charge for any traffic delivered over the parties' existing interconnections after June 25, 2007. (*Id.* ¶ 8.) The only basis cited by Level 3 for the Department to impose this

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[1] Level 3 filed its original petition with the DTC on May 24, 2007. On May 30, Level 3 withdrew that petition and replaced it with another petition filed on May 30. Accordingly, all references in this Motion to the "Petition" or "Level 3's Petition" are to the May 30, 2007 petition.

$.001/minute charge was a May 8 letter from Level 3 to Neutral Tandem, in which Level 3 unilaterally announced that it would begin imposing such a charge after June 25. (*Id.*)

2. On June 13, 2007, Neutral Tandem filed its Answer and Cross-Petition against Level 3. Neutral Tandem's Cross-Petition requested that the Department order Level 3 to continue receiving traffic via the parties' existing interconnections after June 25, 2007 on nondiscriminatory terms and conditions. (Cross-Petition, ¶¶ 67-69.)

3. On June 27, 2007, Level 3 filed its response to and motion to dismiss Neutral Tandem's Cross-Petition. On July 9, 2007, Neutral Tandem filed its opposition to Level 3's motion to dismiss the Cross-Petition. To date, the Department has not issued a ruling on Level 3's motion to dismiss or any other substantive rulings, and no formal procedural schedule has been issued.

4. As of August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in Massachusetts via the parties' existing interconnections. (Ex. 1, Saboo Aff. ¶ 3.) Accordingly, there no longer is any basis for Level 3 to continue pursuing its requests that the Department order Neutral Tandem to stop routing traffic over the parties' existing interconnections and order Neutral Tandem to provide notice to its carrier customers. Accordingly, Level 3's Petition should be dismissed as moot.[2]

5. Similarly, there no longer is any basis for Neutral Tandem to pursue its Cross-Petition against Level 3, and Neutral Tandem will withdraw such Cross-Petition upon the Department's dismissal of the Petition.

6. Level 3 may contend that its request that the Department order Neutral Tandem to pay Level 3's unilateral $.001/minute charge is not moot. (Pet. ¶ 8.) There is no basis

[2] *See, e.g., Robinson v. Contributory Retirement Appeal Bd.*, 62 Mass. App. Ct. 935-36 (2005) (rescript); *In the Matter of Sturtz*, 410 Mass. 58, 59-60 (1991).

whatsoever for the Department to issue an order requiring Neutral Tandem to pay any such charge. There is no contract between Neutral Tandem and Level 3 providing for the payment of any such charge; nor (to Neutral Tandem's knowledge) has Level 3 tariffed any such charge.

7. To the contrary, the $.001/minute charge literally was made up out of thin air by Level 3. Level 3 has admitted in other proceedings that the $.001/minute charge is not based on any costs Level 3 claims to incur to receive traffic from Neutral Tandem.[3] As noted in Neutral Tandem's July 9, 2007 Response to Level 3's Motion to Dismiss (at pp. 2-3), the excessive charge demanded by Level 3 almost approximates the sum total of the per-minute charges that Neutral Tandem assesses to its own customers for transit services.

8. Other state commissions have rejected Level 3's attempt to unilaterally impose this unsupported and excessive $.001/minute charge. The Illinois Commerce Commission found that Level 3's attempt to impose this charge as an offer of compromise was "illusory"[4] and violated that state's laws forbidding carriers from "knowingly impeding the development of competition" in Illinois. The Illinois Commission also described Level 3's attempts to impose this charge as "impermissible," and noted that Level 3's efforts were:

> little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT [Neutral Tandem] under a different label. . . . We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label.[5]

9. The New York Public Service Commission rejected a similar request by Level 3 that Neutral Tandem pay Level 3 a $.0007/minute charge after June 25 -- less than the charge

[3] *See* Docket No. 07-03-008, *Neutral Tandem California, LLC. v. Level 3 Communications, LLC*, Cal. Pub. Util. Comm'n, 06/05/07 Evidentiary Hearing Transcript, at 257. (Ex. 2.)

[4] Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, adopting June 25, 2007 Order of ALJ Brodsky, at 9 (July 10, 2007) (Ex. 3). The June 25, 2007 Order of ALJ Brodsky (hereafter "Brodsky Order") is attached hereto as Exhibit 4.

[5] Brodsky Order, at 10. Level 3's conduct in that proceeding was found so egregious that Level 3 was ordered to pay nearly all of Neutral Tandem's attorneys' fees. (*Id.* at 13, 15.)

Level 3 demands here -- concluding that the charge was "avowedly designed to encourage Neutral Tandem to stop offering tandem switching service" and would be "inconsistent with the objectives" that the commission cited in granting Neutral Tandem's petition for relief in that state.[6]

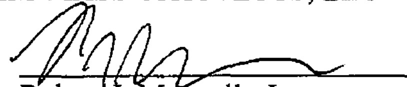
10. In sum, there is no basis, in law, contract, or otherwise, for the Department to order Neutral Tandem to pay Level 3's excessive, non cost-based, unilaterally imposed charge for the few weeks from June 25, 2007 until such traffic to Level 3 ceased as of August 3, 2007.

[6] Docket No. 07-C-0233, *In re Petition of Neutral Tandem-New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption*, New York Public Service Commission, Order Preventing Service Disruption and Requiring Continuation of Interim Interconnection, at 13 (June 22, 2007) (Ex. 5).

WHEREFORE, for the reasons set forth herein, Neutral Tandem respectfully requests that the Department dismiss Level 3's Petition as moot, at which time Neutral Tandem will file a notice of withdrawal of its Cross-Petition.

Respectfully submitted,

NEUTRAL TANDEM, INC. and NEUTRAL TANDEM-MASSACHUSETTS, LLC

By: 

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Attorneys for Neutral Tandem, Inc. and Neutral Tandem-Massachusetts, LLC

Dated: August 3, 2007

EXHIBIT 1

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

In the Matter of the Petition of Level 3 Communications, LLC To Direct Neutral Tandem-Massachusetts, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements	)))))))	DTC No. 07-3

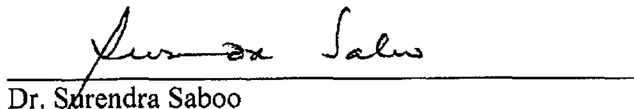
AFFIDAVIT OF DR. SURENDRA SABOO

I, Dr. Surendra Saboo, being duly sworn under oath, state the following:

1. I am Surendra Saboo, the Chief Operating Office and Executive Vice President of Neutral Tandem, Inc. and Neutral Tandem-Massachusetts, LLC ("Neutral Tandem"). I have personal knowledge of the facts set forth herein, and I am authorized to make the statements contained herein.

2. Neutral Tandem previously delivered tandem transit traffic to Level 3 Communications, LLC and its subsidiary Broadwing Communications, LLC (collectively "Level 3"), in the Commonwealth of Massachusetts via existing direct interconnections between Neutral Tandem and Level 3.

3. As of August 3, 2007, Neutral Tandem no longer delivers tandem transit traffic to Level 3 in the Commonwealth of Massachusetts through the parties' existing direct interconnections.



Dr. Surendra Saboo

Sworn to and subscribed before me

this 2 day of August, 2007

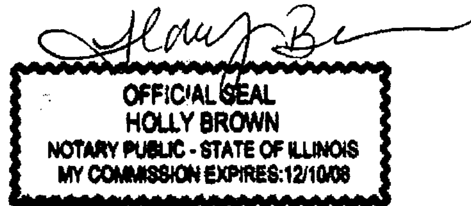


EXHIBIT 2

1 SAN FRANCISCO, CALIFORNIA, JUNE 5, 2007 - 12:30 P.M.
2 * * * * *
3 ADMINISTRATIVE LAW JUDGE REED: We are on the
4 record.
5 This is the time and place for the
6 continuation of the evidentiary hearing for Case
7 07-03-008, Neutral Tandem California, LLC, versus Level
8 3 Communications and its Subsidiaries.
9 Good afternoon. Yesterday we had the first
10 part of this proceeding, which was Neutral Tandem's
11 case, and this afternoon we will have Level 3's case.
12 And are there any preliminary matters?
13 MR. BLOOMFIELD: No, your Honor.
14 MR. ROGERS: Level 3 does not have any.
15 ALJ REED: Okay. Mr. Levin, Mr. Rogers, do you
16 want to call your first witness.
17 MR. ROGERS: Yes, your Honor. Thank you. We will
18 call Ms. Sara Baack as our first witness.
19 ALJ REED: Ms. Baack, how are you?
20 THE WITNESS: I'm fine. Thank you.
21 SARA BAACK, called as a witness by
Level 3 Communications, having been
22 sworn, testified as follows:
23
24 ALJ REED: Okay. Would you have a seat. Would
25 you state your full name and your business address.
26 THE WITNESS: Yes.
27 ALJ REED: Spelling your full name for the record.
28 THE WITNESS: My name is Sara, S-a-r-a, Baack,

1 Thank you.
2 Q Ms. Baack, let me direct your attention to
3 Exhibit 1.1 to your direct testimony, which was a May
4 8th letter from you --
5 A Yes.
6 Q -- to Rian Wren and Surendra Saboo of Neutral
7 Tandem.
8 A Mm-mm.
9 Q And it's -- I believe in the third paragraph
10 of that letter you indicate that if Neutral Tandem sends
11 traffic to Level 3 beyond June 25th, 2007, Level 3 will
12 charge Neutral Tandem a rate of $0.001 per minute
13 terminated. Do you see that?
14 A Yes.
15 Q Is that rate a cost-based rate for Level 3?
16 A No.
17 Q Let me direct your attention to page 24 of
18 your testimony. And I want to ask you just one or two
19 questions about the network issues that you've testified
20 about. Are you on page 24?
21 A Yes.
22 Q Do you see, you're asked a question regarding
23 Mr. Saboo's estimate of the time it would take to
24 rearrange traffic, and you say, "Mr. Saboo's six-month
25 estimate is unreliable and self-contradicted"?
26 A Yes, I do.
27 Q Do you see that?
28 A Yes.

EXHIBIT 3

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

July 10, 2007

Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC -vs- Level 3 Communications, LLC Verified Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.	:	07-0277

CERTIFICATE OF COMMISSION ACTION

TO ALL PARTIES OF INTEREST:

This is to certify that the Commission in conference on July 10, 2007, took the following action:

DENIED Neutral Tandem's Response to Level 3's Motion Requesting Oral Argument, filed on July 6, 2007;

DENIED Neutral Tandem's Response to Level 3's Petition for Review, filed on July 6, 2007;

GRANTED the adoption of the Administrative Law Judge's Order dated June 25, 2007.

Related memoranda will be available on our web site (www.icc.illinois.gov/e-docket) in the docket number referenced above.

Elizabeth A. Rolando
Chief Clerk

EAR:ml
Administrative Law Judge Brodsky

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* Active Parties

EXHIBIT 4

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Neutral Tandem, Inc. and	:	
Neutral Tandem-Illinois, LLC	:	
-vs-	:	
Level 3 Communications, LLC	:	
	:	**07-0277**
Verified Complaint and Request for	:	
Declaratory Ruling pursuant to	:	
Sections 13-515 and 10-108 of the	:	
Illinois Public Utilities Act.	:	

ORDER

This matter concerns an interconnection dispute between Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (collectively "NT") and Level 3 Communications, LLC ("Level 3"). NT alleges that Level 3 refuses to accept delivery of transit traffic without NT paying charges for which it is not properly responsible, and that Level 3 has threatened to disconnect NT if it does not accept Level 3's terms. NT states that it seeks interconnection at reasonable and non-discriminatory terms for the delivery of traffic bound for Level 3 subscribers, but that it does not seek to force Level 3 to be a customer of NT. Level 3 maintains that the prior agreement under which NT delivers traffic to Level 3 has expired. Level 3 avers that it is free to terminate the agreement pursuant to the provisions contained therein. For the reasons that follow, we find in favor of NT, with the relief sought granted in part and denied in part.

BACKGROUND

NT and Level 3 are both telecommunications carriers in Illinois. Level 3 is a competitive local exchange carrier (CLEC) with end user customers. Traffic is originated by or terminated to customers on the Level 3 network. NT does not have such end-user customers; no traffic originates from or terminates to NT's network. NT's customers use NT to deliver traffic to the networks of other CLECs with which they are not directly interconnected. NT "transits" such traffic over its tandems, and delivers it to the recipient CLEC for termination to its end user.

To achieve this, NT is interconnected with various local exchange carriers (LECs), both incumbent (ILEC) as well as CLEC. NT receives traffic from the originating LEC at their point of interconnection, transits the traffic over its own network,

and delivers it to its point of interconnection with the terminating LEC. The terminating LEC accepts the traffic and completes the call to the end user.

Interconnection, as a general matter, is an obligation of LECs pursuant to federal and Illinois law.[1] The parties to this matter disagree on which *manner* of interconnection complies with federal and state law.

NT states that it is the only independent tandem services provider; all other providers of tandem services are ILECs. NT's competitor for this service in Illinois is none other than AT&T.[2] NT also states that it delivers 492 million minutes of traffic per month on behalf of the nineteen CLECs that utilize NT's services. NT avers that these nineteen CLECs are among the largest facilities-based CLECs in Illinois. NT's volume represents 50% of the local tandem transit traffic in Illinois, and includes 56 million minutes per month delivered to Level 3 for termination to its subscribers. NT notes that, if Level 3 is allowed to block traffic from NT, all of these third-party CLECs will be denied their chosen method of delivering this traffic to Level 3.

NT's network provides an alternate path for traffic to the AT&T tandems. NT asserts that this benefits the public and the strength of the public switched telephone network (PSTN) by decreasing the likelihood of tandem exhaust, call blocking, and, during an emergency, network-wide failure due to a disruption at a particular point.

Pursuant to various contracts, NT and Level 3 exchanged traffic since 2004. Under one contract, NT delivered to Level 3 traffic originated by third-party CLECs and bound for Level 3. Under a second, NT similarly delivered traffic to Level 3's subsidiary Broadwing Communications. Under a third contract, Level 3 delivers to NT traffic originated by Level 3 and bound for third-party CLECs. Pursuant to this contract, NT transits the traffic originated on the Level 3 network.

NT notes that it pays 100% of the cost of the transport facilities and electronics between NT and Level 3 that are used to terminate traffic to Level 3's network. NT also provides to Level 3 all of the billing information that Level 3 needs to collect reciprocal compensation from the originating carriers, including all of the signaling information NT receives from the originating carrier.

On January 31, 2007, the parties executed a contract[3] extending the term for Level 3 to deliver traffic to NT for transiting to third-party CLECs. Later that same day, Level 3 sent notice terminating the agreement by which third-party CLECs can deliver traffic to Level 3 via NT's tandems. Termination of the agreement was designated to

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[1] *See* 47 U.S.C. 251; 220 ILCS 5/13-514(1).

[2] Both NT and Level 3 refer to the ILEC by its brand name of "AT&T" rather than its legal name of Illinois Bell Telephone Company. For consistency, this Order will do the same.

[3] NT calls it an amendment to the prior contract; Level 3 explicitly denies that it is an amendment, and insists that it is a new contract. Its label is immaterial to the chronology of events leading to this proceeding.

occur on March 2, 2007. The same executive at Level 3 who signed the contract with NT also signed the notice of termination.[4]

Letters were exchanged between NT and Level 3 throughout February, 2007. The termination date was moved back to March 23, 2007, and at some subsequent time, to June 25, 2007.

On April 24, 2007, Level 3 sent a letter stating that, pursuant to 83 Ill. Adm. Code 731.905, it was giving notice that the expiration was set for June 25, 2007, after which Level 3 would disconnect NT.

On April 25, 2007, NT filed with the Illinois Commerce Commission (the "Commission") its Verified Complaint and Request for Declaratory Ruling (the "Complaint"), in which it alleges violations by Level 3 of Section 13-514, subsections (1), (2), and (6), as well as Sections 13-702 and 9-250, of the Public Utilities Act[5] (the "Act").

Respondent filed its Answer on May 2, 2007, in accordance with Section 13-515(d)(4) of the Act.

Consistent with Section 13-515(d)(6) of the Act and pursuant to due notice, a status hearing was convened on May 8, 2007. Also on May 8, 2007, Level 3 sent a letter to NT stating 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 Neutral Tandem's behalf, Level 3 will charge Neutral Tandem at a rate of $0.001 per minute terminated. Level 3 reserves ... the right to terminate the acceptance and delivery of Neutral Tandem's transit traffic. * * * * By continuing to send traffic to Level 3 for termination from and after June 25, 2007, Neutral Tandem will be evidencing its acceptance of these financial terms.[6]

Notwithstanding the foregoing, Level 3 has stated in this proceeding that it does not collect reciprocal compensation from originating carriers for traffic terminated to the Level 3 network, and does not proactively pay reciprocal compensation to other CLECs for traffic it originates and terminates on their networks.

The case was tried on May 22 and May 23, 2007. NT, Level 3, and the Staff of the Commission ("Staff") all appeared by counsel. NT offered testimony from Mr. Rian Wren, its President and Chief Executive Officer, as well as from Mr. Surendra Saboo, its

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[4] In its Answer, Level 3 generally admits this allegation and, in any event, did not deny it (*See* Complaint and Answer ¶25). Accordingly, Level 3 is deemed to have admitted it. 735 ILCS 5/2-610(b) ("Every allegation, except allegations of damages, not explicitly denied is admitted...").

[5] *See generally* 220 ILCS 5/1-101 *et seq.*

[6] Level 3 ex. 1.1.

Chief Operating Officer and Executive Vice President. Level 3 offered testimony from Ms. Sara Baack, the Senior Vice President of its Wholesale Markets Group, as well as from Mr. Timothy J. Gates, Senior Vice President of QSI Consulting, located in Highlands Ranch, Colorado. Staff offered testimony from Mr. Jeffrey Hoagg, Principal Policy Advisor in the Telecommunications Division of the Commission.

ANALYSIS

The Public Utilities Act

NT asserts that Level 3's actions violate Section 13-514 of the Act. That Section states:

> A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:
>
> (1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;
>
> (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; * * * *
>
> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers[.][7]

NT also alleges a violation of Section 13-702, which states:

> Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations, messages or other transmissions of every other telecommunications carrier with which a joint rate has been established or with whose line a physical connection may have been made.[8]

Finally, NT relies upon Section 9-250 of the Act, which states that, where the Commission, upon complaint or its own motion, finds that a rate, charge, ... contract, or other utility practice:

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[7] 220 ILCS 5/13-514, 13-514(1), 13-514(2), 13-514(6).

[8] 220 ILCS 5/13-702.

> [is] unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, ... the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.[9]

The Complaint does not seek relief pursuant to the federal Telecommunications Act of 1996.

Interconnection; Section 13-514

It is undisputed that Section 251 of the federal Telecommunications Act requires all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[10] The parties appear to agree that the fundamental purpose of interconnection is the exchange of traffic. At issue in this proceeding is the manner in which such interconnection may occur.

NT seeks to maintain its existing direct interconnection with Level 3. NT's CLEC customers, via NT, are indirectly interconnected with Level 3 under this arrangement. Because NT is a transit provider rather than a LEC, the preferred arrangements of both NT and Level 3 feature "indirect interconnection" but for different entities. For the purpose of this Order, this direct/indirect interconnection arrangement will be labeled "Type N" interconnection after its proponent.

Level 3 asserts that all that is required of it is indirect interconnection with NT. It argues that Section 251(a) requires all carriers to directly or indirectly interconnect, but does not mandate direct interconnection between carriers.[11] Level 3 relies on this choice offered by Section 251(a)(1) to justify its termination of the existing direct interconnection.

After Level 3 disconnects NT to prevent it from delivering traffic to Level 3, NT would be indirectly interconnected with Level 3 via AT&T. As Staff points out, NT's CLEC customers then would only have a doubly-indirect interconnection with Level 3, via NT *and* AT&T. This indirect/doubly-indirect interconnection arrangement will be labeled "Type L" interconnection for the purpose of this Order.

The difference between a "Type L" and "Type N" interconnection is that the "Type L" involves a second transit provider, i.e., a more intricate call path and a second set of transit costs for the originating CLEC. Furthermore, as Staff witness Hoagg explains, the "Type L" interconnection forces originating CLECs to utilize a call path other than

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[9] 220 ILCS 5/9-250. (This authority is explicitly extended to single rates or other charges, classifications, etc. *Id.*) *Cf.* 220 ILCS 5/13-101 (applying Section 9-250, *inter alia*, to competitive telecommunications rates and services).

[10] 47 U.S.C. 251(a)(1).

[11] *See id.*

the one they apparently prefer, as evident from their present subscriptions with NT. Accordingly, where a "Type N" interconnection is possible, forcing the use of a "Type L" interconnection violates Section 13-514(1) of the Act, which prohibits the provision of inferior connections to another carrier.[12] Requiring NT or an originating CLEC to incur a second set of transit costs is the hallmark of the inferiority of this type of interconnection. It also violates Section 13-514(2) of the Act, which prohibits a telecommunications carrier from inhibiting the speed, quality, or efficiency of services used by another carrier.[13]

Level 3 has secured a "Type N" interconnection for its own use, i.e., it is directly interconnected with NT for the purpose of having traffic originated on the Level 3 network transited by NT to other CLECs. The instant dispute concerns, in part, an attempt by Level 3 to force upon NT and its 18 other CLEC customers a "Type L" interconnection. By disconnecting NT and forcing it to route traffic bound for Level 3 via AT&T, Level 3 would simultaneously impose a substantial adverse effect on NT's ability to serve its customers, and foreclose from competing CLECs the very arrangement that Level 3 uses for itself. Both of these effects violate Section 13-514(6).[14]

In addition, Staff explains that, if Level 3 disconnects NT, it prevents other CLECs from using NT to transit their traffic to Level 3. The CLECs then will face the choice of paying either (i) the AT&T price, which is 130% of that charged by NT, or (ii) the price of both NT and AT&T (230% of NT's price[15]), and will invariably return to AT&T at the expense of NT. This scenario will degrade the ability of NT to do business, and will impede the development of competition in Illinois. Therefore, the position advocated by Level 3 violates Illinois law.[16] Also, NT accurately characterizes Level 3's scheme, with two transit providers, two sets of costs, and mandatory routing of traffic through the ILEC, as functionally equivalent of a refusal by Level 3 to interconnect with NT. This violates the requirement of Section 251(a) of the Telecommunications Act to interconnect directly or indirectly. Notwithstanding Level 3's arguments that it is shielded by Section 251(a), that Section does not explicitly authorize doubly-indirect interconnection or preempt enforcement of State law claims.[17]

Finally, NT points out that the FCC previously determined that direct interconnection[18] is appropriate when more than 200,000 minutes of traffic are delivered

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[12] *See* 220 ILCS 5/13-514(1).

[13] *See* 220 ILCS 5/13-514(2).

[14] *See* 220 ILCS 5/13-514(6).

[15] Setting NT's price as the base price, this figure represents the sum of the proportions of NT's price (100%) and AT&T's price (130%).

[16] *See* 220 ILCS 5/13-514 (prohibiting a telecommunications carrier from "imped[ing] the development of competition in any telecommunications service market").

[17] *See* 47 U.S.C. 251(a)(1).

[18] This corresponds to that labeled as "Type N" interconnection in this matter, and favors a direct rather than indirect interconnection between NT and Level 3.

per month.[19] NT states it delivers approximately 56 million minutes of traffic per month to Level 3—*many times the threshold level of traffic*. Therefore, the position advocated by Level 3 also is not consistent with the federal law on point.

Level 3 does argue that it should be free to end the existing relationship based on the termination clause in the contract. Nevertheless, Level 3 is still certified under the Act to operate as a telecommunications carrier in Illinois, and as such, it must comply with Illinois law. Section 13-406 of the Act, concerning discontinuation or abandonment of telecommunications service, directly addresses Level 3's argument. Section 13-406 provides, in relevant part, that:

> No telecommunications carrier offering or providing competitive telecommunications service shall discontinue or abandon such service once initiated except upon 30 days notice to the Commission and affected customers. The Commission may, upon its own motion or upon complaint, investigate the proposed discontinuance or abandonment of a competitive telecommunications service and may, after notice and hearing, *prohibit such proposed discontinuance or abandonment if the Commission finds that it would be contrary to the public interest.*[20]

By proposing to disconnect[21] NT, Level 3 would impose upon NT, its 18 other CLEC customers, and all of their subscribers a discontinuation of service, as well as the *per se* impediments to competition complained of pursuant to Section 13-514. These impacts, along with the scheme of disparate treatment that would cause them, are contrary to the public interest.

Both the unreasonableness and the knowing intent elements of NT's Section 13-514 claims[22] are apparent from the nature and timing of Level 3's actions. In seeking to impose its uneven arrangement, it signed the contract related to traffic originated by Level 3, and that same day gave notice to terminate the contract related to traffic to be terminated to Level 3. Level 3 also fails to reconcile its own interpretation of federal Section 251(a)—that either a direct or an indirect interconnection is required—with the FCC's requirement of a direct interconnection above a 200,000 minute per month threshold.[23] Furthermore, the impact of Level 3's threats on third-party CLECs not involved in the instant dispute, as well as their customers, amplifies the unreasonableness of Level 3's position.

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[19] *In the Matter of Interconnection Disputes with Verizon Virginia, Inc.*, DA 02-1731, CC 00-218, 00-249, 00-251, Memorandum Opinion and Order, ¶¶ 115-16 (rel. July 17, 2002).

[20] 220 ILCS 5/13-406 (emphasis added).

[21] Under the facts of this case, we find no material distinction between the labels of "discontinuation" of service and "disconnection" of an existing interconnection point.

[22] *See* 220 ILCS 5/13-514 *et seq.*

[23] For citations and discussion, *see supra* nn. 11 and 19.

Level 3 repeatedly complains that it is being made to provide a direct physical interconnection in perpetuity. Staff notes that, given the amount of traffic that NT transits to Level 3 for termination, direct physical interconnection is required as a matter of federal law,[24] and, as a practical matter, is simply a condition of doing business in the market. We agree, although our holding is not that Level 3 must permanently maintain the exact status quo, but rather that Level 3 must comply with the law. This includes, but is not limited to, refraining from actions that discriminate against other telecommunications carriers or the public. Therefore, to the extent that Level 3 seeks to redefine its relationship with NT, it must do so without violating Section 13-514 or any other section of the Act, and without taking actions that are detrimental to the public interest. As applied to the facts of the instant case, this means that the direct interconnection between NT and Level 3 must remain intact.

Section 13-702

Section 13-702 prohibits discrimination or delay in receiving, transmitting, and delivering traffic with telecommunications carriers with whom "a physical connection may have been made."[25] NT and Level 3 were and still are directly, physically interconnected for the exchange of traffic, so the condition upon the applicability of Section 13-702 is satisfied.

NT complains that Level 3's threat to block traffic from NT violates this Section. NT also avers that the *per se* impediments to competition complained of pursuant to Section 13-514 are sufficient to establish "discrimination or delay" under Section 13-702. We agree.[26]

Level 3 argues that Section 13-702 merely "requires Level 3 to receive traffic where there is an ongoing agreement for the exchange of traffic."[27] The scope of 13-702 is more broad than that advocated by Level 3, however. As discussed *supra*, Level 3's position would simultaneously impact NT adversely in its ability to serve its customers, and would foreclose from others the very arrangement that Level 3 uses for itself. The intent of this Section of the Act is the prohibition of discrimination or delay. Although Level 3 protests that there is no duty to maintain interconnection imposed by this Section, the discrimination flowing from Level 3's leveraging of the interconnection with NT is prohibited.

Finally, Level 3 advances the letter dated May 8, 2007, from Level 3 witness Baack to NT witnesses Wren and Saboo, to indicate the possibility of continued direct

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[24] *See id.*

[25] *See* 220 ILCS 5/13-702.

[26] *Compare id.* ("discrimination or delay") *with* 220 ILCS 5/13-514(1) ("unreasonably refusing or delaying interconnections" ... "providing inferior connections"); 5/13-514(2) ("unreasonably impairing the speed, quality, or efficiency"); 5/13-514(6) ("unreasonably [imposing] a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.")

[27] Level 3 Init. Br. at 14.

interconnection conditioned upon payment by NT per minute of traffic terminated. To the extent that Level 3 asserts that the letter comprises an offer, it contains language that violates Section 13-702 and, as a general matter, is illusory. The letter states that, if NT delivers traffic to Level 3, "and *if Level 3 elects to terminate such traffic* on [NT]'s behalf.... Level 3 reserves ... the right *to terminate the acceptance and delivery of [NT]'s transit traffic*."[28] Level 3, however, does not get to choose whether or not it will terminate traffic bound for its subscribers.[29] Level 3's position also is inconsistent with the law concerning reciprocal compensation, as discussed *infra*.

Reciprocal Compensation

Reciprocal compensation is a principle recognized in federal law. The Telecommunications Act of 1996 mandates that "[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[30] This is a requirement of all LECs, not just ILECs.[31] The FCC rules further clarify that:

> a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.[32]

The evidence establishes that NT does not originate traffic. Furthermore, the rule does not impose reciprocal compensation obligations with respect to transiting the traffic.[33] In addition, this Commission previously has rejected attempts to impose reciprocal

[28] Level 3 ex. 1.1, ¶3 (emphasis added).

[29] *See* 220 ILCS 5/13-702 ("Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, [such traffic]." Level 3's letter dated May 8, 2007, implies the maintenance of the direct physical interconnection between NT and Level 3, thereby satisfying the condition for this Section of the Act to apply.); *see also MCI Tel. Corp.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ill. Bell Tel. Co.*, Docket 96-AB-006, 1996 Ill. PUC Lexis 706, at *38 (Dec. 17, 1996) ("The very essence of interconnection is the establishment of a seamless network of networks, and to develop fine distinctions between types of traffic, as Ameritech Illinois would have us do, will merely create inefficiencies, raise costs and erect barriers to competition.") In 1996, Illinois Bell Telephone Company was the only provider of transit service (*see id.* at *31), and the record of the instant case indicates that NT is the only independent provider of such service today. [*See supra* n.2 regarding Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T"), f/k/a SBC Illinois, f/k/a Ameritech Illinois.]

[30] 47 U.S.C. 251(b)(5).

[31] *Id.*

[32] 47 C.F.R. 51.701(e).

[33] *See id.*

compensation on transit providers.[34] Therefore, NT is not obligated to pay reciprocal compensation to Level 3.

Level 3 argues that the use of a transit provider enables the CLEC originating the call "to hide behind the transit provider to avoid compensating the terminating carriers."[35] This argument is both logically flawed and contrary to the evidence. The fallacy in Level 3's argument is that the doubly-indirect "Type L" interconnection that it seeks, which features *two* transit providers (NT and AT&T), would exacerbate rather than ameliorate the problem that Level 3 alleges. Furthermore, NT asserts, both in its Complaint and in testimony, that it provides all signaling information and call detail necessary for Level 3 to bill the originating CLECs. Level 3 offered nothing to rebut NT's claim. Accordingly, NT demonstrated that Level 3 has the ability to collect reciprocal compensation from the originating CLECs, but apparently chooses not to do so. Level 3 may choose not to use the information to collect reciprocal compensation, but it then waives the reciprocal compensation otherwise due, and may not require NT to collect the same on its behalf.

Finally, the per-minute surcharge proposed by Level 3 in its letter dated May 8, 2007, also is impermissible. It is little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label. Such charges have been disallowed in previous decisions.[36] We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label. In addition, the evidence of record demonstrates that NT pays 100% of the cost of the facilities of the interconnection, leaving no room for Level 3 to argue that there is any unrecovered or additional cost per minute for transited calls terminated on the Level 3 network.[37]

Section 9-250

NT has requested that it be awarded interconnection on terms no less favorable than the terms upon which Level 3 and AT&T interconnect. Despite several repetitions of that refrain, the Level 3-AT&T interconnection agreement is not of record. It appears from NT's presentation throughout the case that what it seeks is direct interconnection with no liability to Level 3 for per-minute termination charges and no obligation to bill or collect reciprocal compensation from the originating carriers. NT states it already pays for 100% of the costs of the direct, physical interconnection, and there is nothing to

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[34] *In re Verizon Wireless Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996*, 01-0007 ("...when one carrier transits traffic to another, the transiting carrier, by law, has no reciprocal compensation obligation (and no other payment obligation) to the termination carrier") (May 1, 2001) at 35; *see also* 04-0040 at 7-8.

[35] Level 3 Init. Br. at 30.

[36] *See* 01-0007 at 35, *supra* n. 34.

[37] While NT's payment of the entire cost of the facilities and electronics is evidence in its favor in the instant case, this should not be construed as a threshold or test *requiring* 100% payment by a similarly-situated complainant.

indicate that NT seeks a change thereto. As noted *supra*, NT has prevailed on the issues of interconnection and reciprocal compensation.

Level 3 disagrees that Section 9-250 allows the relief NT seeks. It notes that NT is barred from opting-in to particular clauses from an existing interconnection agreement, particularly one that is significantly different in scope and purpose.[38] Level 3 also argues that what NT really seeks is arbitration, but that the federal Telecommunications Act only has such procedures for disputes between a CLEC and an ILEC.[39] Staff generally agrees with the characterizations of Level 3 on this point.

At the outset, we concur with Level 3 and Staff that this case is not an arbitration within the meaning of Section 252 of the federal Telecommunications Act.[40] Furthermore, the "opt-in" provision for such interconnection agreements is similarly inapplicable.[41] Section 9-250 does apply to the State law claims brought in this matter, however, and requires abatement of the violations.[42]

NT argues that Section 9-250 is a basis for the Commission to impose its preferred agreement on Level 3, and it suggests that its Traffic Termination Agreement with Time Warner is a useful template. This approach is problematic for three reasons: it resembles a Section 252 arbitration; it is substantially similar to the opt-in approach just rejected; and, even if legally permissible, there is insufficient information of record to weigh whether such terms are genuinely appropriate to the relationship between NT and Level 3.

Instead, this Order imposes several mandates to abate the underlying violations, but ultimately leaves certain elements for further negotiation by the parties. These mandates are intended to confine the scope of the negotiation to just and reasonable charges and practices, thereby addressing the requirements of Section 9-250, without transforming the instant case into a federal Section 252 arbitration. By remaining limited, this approach also recognizes that the parties are in a better position than the Commission to craft the details of their business relationship, and it accords them some flexibility to do the same.

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[38] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Second Report and Order, FCC 04-164, ¶12 (rel. July 13, 2004). Level 3 also argues that NT reached a different arrangement with another ILEC, but that argument is, in essence, *Level 3* attempting to opt in to a single payment term of an outside agreement. As such, that argument also must be rejected.

[39] *See* 47 U.S.C. 252(b).

[40] *See generally* 47 U.S.C. 252(b).

[41] *See* 47 U.S.C. 252(i)

[42] 220 ILCS 5/9-250. ("Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates or other charges ... or that the rules, regulations, contracts, or practices ... are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law ... the Commission shall determine the just, reasonable or sufficient rates [etc.] and shall fix the same by order").

Therefore, NT and Level 3 shall observe the following provisions in their business relationship. First, as discussed *supra*, Level 3 shall continue to accept a direct physical interconnection by which NT delivers traffic to Level 3 for termination until a further order from the Commission, and for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to NT for transiting.

Second, Level 3 shall not require NT to pay or collect reciprocal compensation for traffic not originated by NT.

Third, Level 3 shall not require NT to pay any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3 for termination on the Level 3 network.

Fourth, NT shall continue to provide to Level 3 sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes.

Fifth, if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship, the interconnection shall continue based upon the status quo in effect between the parties on January 30, 2007.[43]

Remedies

NT seeks the following remedies: a declaration that Level 3 has violated Sections 13-514, 13-702, and 9-250 of the Act; an order requiring Level 3 to interconnect with NT on just, reasonable, and non-discriminatory terms and conditions no less favorable than those by which Level 3 accepts transit traffic from AT&T; attorneys fees and costs; and all further relief available under the Act.

Section 13-516 of the Act provides certain remedies for violations of Section 13-514,[44] including a cease-and-desist order,[45] damages,[46] and attorney's fees and costs.[47] Section 13-515(g) mandates an assessment of the Commission's own costs related to the case.[48]

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[43] Level 3 argues that Commission regulation of CLEC-to-CLEC interconnection is inconsistent with Section 252 of the federal Telecommunications Act. Separately, Level 3 argues that Section 252 does not apply to this proceeding—a point that no party contests. All of the alleged violations are of state statutes. Furthermore, interconnection was not an issue until Level 3 pursued an arrangement that was discriminatory against NT, 18 other CLECs, and their customers. It is Level 3's behavior, which is anti-competitive and contrary to the public interest, that is the primary interest of the Commission in this case.

[44] *See generally* 220 ILCS 5/13-516.

[45] 220 ILCS 5/13-516(a)(1).

[46] 220 ILCS 5/13-516(a)(3).

[47] *Id.*

[48] 220 ILCS 5/13-515(g).

By a preponderance of the evidence, NT has established that the conduct of Level 3 at issue in this dispute violates Sections 13-514(1), 13-514(2), 13-514(6), and 13-702, and, as such, is an impediment to competition and contrary to the public interest. There is no separately discernable violation of Section 9-250; instead, that Section requires certain attributes in the ongoing business relationship. The cease-and-desist order will be included, consistent with the findings herein, and will reflect the mandates set forth under Section 9-250. There will be no award of monetary damages at this time.[49]

The remaining issue concerns the assessment of fees and costs. Illinois courts have stated that "it is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary powers.'"[50] As noted, violations of Section 13-514 have occurred. NT therefore is entitled to an award of attorney's fees and costs[51] based upon its litigation success.[52]

NT did indeed establish violations by Level 3 of Sections 13-514(1), 13-514(2), and 13-514(6), as well as 13-702. NT was less clear in its arguments and evidence for its Section 9-250 claim, and ultimately the remedies sought by NT under this Section were denied in part. Following the model used most recently in the *Cbeyond* case,[53] the relative litigation success (for the sole purpose of assessing fees and costs) of NT is determined to be 80%, heavily weighted upon NT's prosecution of Sections 13-514(1), 13-514(2), 13-514(6), and 13-702.[54] Accordingly, Level 3 is assessed 80% of NT's attorney's fees and costs. Level 3 also is assessed 90% of the Commission's costs, consisting of all of its own half, and 80% of NT's half. NT is assessed the 10% balance of the Commission's costs, consisting of the remaining 20% of its half of the costs.

CONCLUSION

Based on the foregoing, we find that:

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[49] This is included for completeness pursuant to Section 13-516(a)(3). No damages were quantified in the Complaint. From the record, it appears that any such damages only would accrue if Level 3 were to actually disconnect NT, which it has not done to date.

[50] *Globalcom, Inc. v. Ill. Commerce Comm'n*, 347 Ill.App.3d 592, 618 (1st Dist. 2004).

[51] 220 ILCS 5/13-516(a)(3) (the Commission "shall award" such fees and costs).

[52] *See Globalcom, Inc. v. Ill. Commerce Comm'n*, 347 Ill.App.3d 592, 618 (1st Dist. 2004); *Cbeyond Commun's, LLP v. Ill. Bell Tel. Co.*, Dockets 05-0154/05-0156/05-05-0174 (cons.) (June 2, 2005), at 43-44; *Globalcom, Inc., v. Ill. Bell Tel. Co.*, Docket 02-0365 (Order on Rehearing, Dec. 11, 2002), at 50-51.

[53] *See Cbeyond Commun's, LLP v. Ill. Bell Tel. Co.*, Dockets 05-0154/05-0156/05-05-0174 (cons.) (June 2, 2005), at 43-45.

[54] *See id.* at 45. (Such award is an approximation of NT's litigation success. "Absolute precision regarding this quantification is simply not practicable.")

(1) Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC own, control, operate, or manage, for public use, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of Section 13-202 of the Act;

(2) Level 3 Communications, LLC owns, controls, operates, or manages, for public use, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Act;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law; and

(5) the remedies set forth above should be adopted to address the violations of Section 13-514 and 13-702 of the Public Utilities Act.

IT IS THEREFORE ORDERED that Level 3 Communications, LLC cease and desist from its threat to disconnect or otherwise disrupt the direct physical interconnection with Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, by which Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC deliver traffic to Level 3 Communications, LLC.

IT IS FURTHER ORDERED that Level 3 Communications, LLC cease and desist from requiring Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC to pay or collect reciprocal compensation for traffic not originated by Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, or to pay any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3 Communications, LLC for termination on its network.

IT IS FURTHER ORDERED that Level 3 Communications, LLC cease and desist from any act discussed and found herein to violate Sections 13-514 or 13-702 of the Public Utilities Act.

IT IS FURTHER ORDERED that Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC shall continue to provide to Level 3 Communications, LLC sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes.

IT IS FURTHER ORDERED that, if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship,

that the exchange of traffic shall continue based upon the status quo in effect between the parties on January 30, 2007.

IT IS FURTHER ORDERED that Level 3 Communications, LLC pay 80% of the attorney's fees and costs of Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC, as well as 90% of the Commission's costs incurred in this proceeding as prescribed by Sections 13-515 and 13-516 of the Public Utilities Act.

IT IS FURTHER ORDERED that Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC pay the remaining 10% of the Commission's costs incurred in this proceeding as prescribed by Section 13-515 of the Public Utilities Act.

IT IS FURTHER ORDERED that, subject to the provisions of Sections 10-113 and 13-515(d)(8) of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

So ordered this 25th day of June, 2007.

Ian Brodsky,
Administrative Law Judge

EXHIBIT 5

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of Albany on June 20, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-C-0233 - Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption.

ORDER PREVENTING SERVICE DISRUPTION AND
REQUIRING CONTINUATION OF INTERIM INTERCONNECTION

(Issued and Effective June 22, 2007)

BY THE COMMISSION:

INTRODUCTION AND SUMMARY

We initiated this proceeding to consider a complaint in which Neutral Tandem, Inc. - New York LLC (Neutral Tandem) asks that we require Level 3 Communications LLC (Level 3) to continue direct interconnection with Neutral Tandem, while Level 3 asks us to require a migration plan for orderly divestiture of Neutral Tandem's customers in anticipation that we will allow Level 3 to discontinue the interconnection. The two firms established their present direct interconnection pursuant to a transport agreement and two termination agreements. Level 3 unilaterally has canceled the termination agreements, after fulfilling the notice requirements prescribed in the agreements.

In today's order we grant Neutral Tandem's requested relief provisionally by directing the parties to continue performing their respective obligations as if the canceled termination agreements remained in effect, pending the completion of a proceeding pursuant to Public Service Law (PSL) §97 if necessary to investigate the rates, charges, rules and

regulations under which the parties provide call transport and termination services to one another. We shall initiate the rate proceeding at our first regularly scheduled session after 90 days have elapsed from the date of this order, unless the parties execute a new termination agreement in the interim.

FACTUAL AND PROCEDURAL BACKGROUND

In New York and other states, Neutral Tandem maintains tandem switches which competitive local exchange carriers (CLECs) can use as an alternative to tandem switches owned by incumbent local exchange carriers (ILECs) such as Verizon New York Inc. Neutral Tandem provides this service to about 23 CLECs in New York. Level 3 or its affiliates likewise operate in New York and other states, as CLECs that transport local calls originated by their end-user customers and terminate local calls to those customers. Among telecommunications providers in the New York market, Neutral Tandem is unique in offering a competitive alternative to the ILEC's tandem switch, and in providing transport and termination services only to CLECs without having end-user customers of its own.

Until the controversy that led to this proceeding, Neutral Tandem and Level 3 had been handling local calls in New York pursuant to three interconnection agreements between them. Under the first, which may be described as a "transport agreement," local calls that are originated by Level 3's end-user customers and routed through Level 3 can be directed to Neutral Tandem's tandem switch (instead of Verizon's) and thence to a CLEC. An economic incentive for Level 3 to use this arrangement is that Neutral Tandem offers Level 3 the transport service at a lower price than Verizon's.

The other two interconnection agreements, initially executed in 2004, are described herein as "termination agreements" and govern calls in the opposite direction. That is,

the termination agreements specify terms whereby calls originating from a CLEC[1] and routed to Neutral Tandem's tandem switch can be directed to Level 3 (here again, bypassing the Verizon tandem switch) and thence to Level 3's end-user customers. One of the termination agreements with Neutral Tandem was executed by Level 3; the other was executed by Broadwing Communications LLC, and was inherited by Level 3 when it acquired Broadwing. For Level 3, the economic attraction of the termination agreements has been that Neutral Tandem pays Level 3 compensation for calls governed by the agreements. Verizon, in contrast, would be under no similar obligation to Level 3 if the calls in question were handled by Verizon rather than Neutral Tandem; instead, under that scenario, Level 3 would be compensated only if it made the effort to collect reciprocal compensation from the originating CLECs.

On January 31, 2007, the parties executed a newly negotiated transport agreement. Later that day, Level 3 notified Neutral Tandem that Level 3 intended to discontinue negotiations on a new termination agreement and cancel one of the two preexisting termination agreements, viz., the one executed by Level 3. Shortly thereafter, Level 3 gave notice that it also would cancel the termination agreement executed by Broadwing. Without examining any negotiating positions undisclosed by the parties, the record is clear that a primary obstacle to negotiation of a new termination agreement has been the issue whether Level 3 should continue to receive compensation directly from Neutral Tandem (as Level 3 contends) or should be relegated to its right of reciprocal compensation from the CLECs (as Neutral Tandem contends).

In accordance with the cancellation provisions in each of the termination agreements, Level 3 gave Neutral Tandem 30 days' notice of its intent to cancel. The later of the two

[1] For the present discussion, a CLEC in the situation governed by the termination agreement can be said to "originate" the calls in question--in the sense that the call originates on that CLEC's network--although of course the call initially originates from an end user.

resulting expiration dates was March 23, 2007, which Level 3 then extended voluntarily (as to both termination agreements) through June 25, 2007 to allow time for a hearing and decision in this expedited proceeding. Meanwhile, both parties have continued to operate in accordance with the terms of the newly executed transport agreement and the preexisting, but canceled, termination agreements.

The parties' numerous filings to the Commission or the assigned Administrative Law Judge have included, most notably, Neutral Tandem's complaint and petition in which it seeks an order requiring interconnection and preventing service disruption; Level 3's motions to dismiss the complaint and compel Neutral Tandem to prepare a migration plan in anticipation of dismissal;[2] and prefiled testimony by both parties, which was examined in an evidentiary hearing.

ARGUMENTS AND CONCLUSIONS

Jurisdiction

The threshold question, broadly stated, is whether we have jurisdiction to grant Neutral Tandem's request for direct interconnection with Level 3. If not, then our obligation to ensure the continuity of safe and adequate service would require that we direct Neutral Tandem to implement an orderly migration plan as Level 3 proposes. For the following reasons, however, we conclude that the requisite jurisdiction to grant Neutral Tandem's requested relief is established by the PSL and is not preempted by the Telecommunications Act of 1996.

According to Neutral Tandem, its role as a transiting provider entitles it to direct interconnection with a CLEC such as Level 3 by operation of 16 NYCRR 605.2(a)(2), which provides that "interconnection into the networks of telephone corporations shall be provided for other public or private networks." In

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[2] Consistently with the determinations in today's order, we formally deny Level 3's dismissal motion, which the Administrative Law Judge previously denied by informal ruling.

response, Level 3 correctly observes that Rule 605.2(a)(2) never has been relied upon to require that a CLEC offer direct interconnection to an entity such as Neutral Tandem (as distinguished from an end user). Level 3 emphasizes that, if it ended the termination agreements at issue and ended Neutral Tandem's direct interconnection under those agreements, Neutral Tandem nevertheless would remain interconnected to Level 3 indirectly via the Verizon tandem. Therefore, Level 3 argues, the interconnection requirement in Rule 605.2(a)(2) would continue to be satisfied.

As Neutral Tandem points out, however, we unquestionably have the authority to interpret our rules in a manner that "is not irrational or unreasonable."[3] Thus, Level 3's objection that Neutral Tandem's proposed interpretation is novel begs the question whether Rule 605.2(a)(2) may reasonably be read to require direct interconnection between Level 3 and Neutral Tandem, should we determine that direct interconnection would be a "just, reasonable, adequate, efficient and proper" practice within the meaning of PSL §97(2) and a "suitable" connection method as required by §97(3). The question must be answered affirmatively. Under Level 3's theory, the regulation's silence regarding "direct" interconnection would implicitly prevent our requiring anything more than indirect interconnection through the Verizon tandem, even though the regulation does not expressly preclude our requiring a direct interconnection. Thus, instead of construing Rule 605.2(a)(2) conventionally, i.e., as an implementation of statutory authority, Level 3's interpretation perversely would transform the rule into a constraint on our statutory authority to require direct interconnection in any instance where Level 3 refuses to offer it.

Moreover, given Level 3's theory that Rule 605.2(a)(2) requires interconnections only indirectly and only between a CLEC and the originating end users, Neutral Tandem is correct that it is self-contradictory for Level 3 to reject the notion of a

[3] Ass'n of Cable Access Producers v. PSC, 1 AD3d 761, 763, 767 NYS2d 166, 168 (3d Dept. 2003).

mandatory direct interconnection between Neutral Tandem and Level 3, as that is precisely the configuration that creates, between Level 3 and originating end users, the "indirect interconnection" supposedly prescribed (according to Level 3) by Rule 605.2(a)(2).

The argument over Rule 605.2(a)(2) points to a more basic consideration, namely the scope of our authority pursuant to the statute from which any rule or ratemaking decision must be derived. Neutral Tandem properly invokes several relevant PSL provisions applicable to Level 3 as a telephone corporation (a characterization undisputed by Level 3). Thus, Neutral Tandem says, it must be granted direct interconnection with Level 3 pursuant to the requirement in PSL §91 that a telephone corporation provide such "facilities as shall be adequate and in all respects just and reasonable." Neutral Tandem cites also our responsibility to exercise "general supervision" over all telephone companies and facilities (PSL §94(2)); to ensure that rates are not "unjust, unreasonable or unjustly discriminatory or unduly preferential or in anywise in violation of law" (PSL §97(1)); to require just and reasonable rules, regulations, and practices, and adequate, efficient, proper, and sufficient equipment and service (PSL §97(2)); and to require suitable connections or transfers at just and reasonable rates (PSL §97(3)).

Assuming for the moment that nothing in the Telecommunications Act of 1996 preempts us from granting the relief sought by Neutral Tandem, and that direct interconnection between Neutral Tandem and Level 3 is shown to be necessary for the effective provision of telephone service (as contemplated in, e.g., the cited provisions of PSL §§ 91, 97(2), and 97(3)), Level 3 has provided no plausible basis for its claim that the requested relief would exceed our statutory authority. On the contrary, the PSL provisions cited above are designed to vest us with plenary jurisdiction comprehensive enough to include supervision of the terms and conditions of interconnection for

transport and termination services, to the extent consistent with federal law.[4]

As noted, Level 3 misinterprets Rule 605.2(a)(2) as an implied prohibition against our requiring that Level 3 provide Neutral Tandem direct connection, as distinguished from indirect interconnection through the Verizon tandem. In a related argument, Level 3 says the Telecommunications Act of 1996 preempts any state statute or regulation that otherwise might authorize us to order Level 3 to offer direct interconnection. Level 3 argues that the 1996 Act, like Rule 605.2, bars us from requiring direct interconnection because the Act, in 47 USC §251(a)(1), provides that every carrier has a duty to "interconnect directly or indirectly with other carriers" (emphasis added). Accordingly, says Level 3, the Federal Communications Commission (FCC) has described indirect interconnection as "a form of interconnection explicitly recognized and supported by" the 1996 Act.[5] Level 3 further notes that Rule 605.2(a)(2) antedates the 1996 Act, as if to imply that the rule cannot be reconciled with the 1996 regulatory framework.

That the 1996 Act recognizes indirect interconnection does not imply that the Act forecloses direct interconnection when the latter is more appropriate. The network configuration contemplated in the Act is one that provides the originating CLEC and its end users the opportunity to choose their preferred routing based on consideration of all relevant factors such as cost, reliability, and efficiency. As Level 3 itself, has argued to the Federal Communications Commission (FCC), "it is always the option of the carrier with the financial duty for transport [i.e., the originating CLEC] to choose how to transport its

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4 As an illustration of our exercise of such jurisdiction, Neutral Tandem cites Case 00-C-0789, Omnibus Interconnection Proceeding, Order Establishing requirements for the Exchange of Local Traffic (issued December 22, 2000).

5 In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 (¶125)(rel. March 3, 2005).

traffic," as among "direct interconnection . . . via its own facilities, [via] the terminating carrier's facilities, or via the facilities of a third party."[6]

In this proceeding, however, as we have noted regarding Level 3's interpretation of Rule 605.2(a)(2), Level 3's interpretation of the 1996 Act would perversely transform the options assured the originating CLEC under 47 USC §251(a)(1) into a supposed power on Level 3's part to dictate that the originating CLEC cannot choose direct interconnection with Level 3. And, just as in its mistakenly restrictive interpretation of Rule 605.2(a)(2), Level 3 would read out of the 1996 Act the option of direct interconnection between Neutral Tandem and Level 3 even though such direct interconnection results in "indirect interconnection," which Level 3 says the Act requires, between Level 3 and originating CLECs' end users. Because Level 3's reading of §251(a)(1) would enable Level 3 to compel these results in disregard of the principle that originating CLECs may choose how to route their traffic, Level 3 errs in asserting that §251(a)(1), properly construed, preempts our requiring direct interconnection between by Neutral Tandem and Level 3 pursuant to the PSL and Rule 605.2(a)(2).

Indeed, the 1996 Act not only allows us to require direct interconnection, as discussed; the Act also affirmatively preserves our obligation to do so, when effective provision of service requires it, as part of our role in supervising interconnection arrangements under PSL §§ 91, 94, and 97. According to 47 USC §251(d)(3)(A), federal regulation must not prevent a state commission from establishing interconnection requirements otherwise consistent with the Act. Thus, even though indirect interconnection may, in the proper circumstances, satisfy a general duty of interconnection established in §251(a)(1), the Act does not preclude our requiring direct interconnection when that option is more reasonable and therefore is necessary for the discharge of our obligations under state

[6] Reply Comments of the Missoula Plan Supporters, CC Docket No. 01-92 (February 1, 2007), p. 26.

law.[7] Similarly, to the extent consistent with the Act, 47 USC §261(b) authorizes the enforcement of preexisting state regulations (such as Rule 605.2(a)(2), insofar as applicable); and §261(c) authorizes us to impose new requirements for furtherance of competition in the provision of exchange access. As noted below, a major benefit of direct interconnection between Neutral Tandem and Level 3 is that it promotes such competition. Thus, 47 USC §§ 251 and 261 provide further assurance that we can act consistently with federal law in requiring the parties to maintain their present interconnection.

Network Design and Public Policy Objectives

Having determined that 47 USC §251(a)(1) does not limit our statutory authority to require that Level 3 continue providing Neutral Tandem direct interconnection, the next issue is whether such a requirement would serve the interests entrusted to us under the PSL. In other proceedings, the Commission or our staff already has answered that question in the affirmative, and Level 3 has not persuasively demonstrated the contrary in this case.

Direct interconnection between Neutral Tandem and Level 3 enables Neutral Tandem to maintain its independent tandem switch as a viable alternative to Verizon's. The availability of an independent tandem in turn furthers the development of facilities-based competition among wireless, cable, and landline telephony, by offering the providers of all such services an economically advantageous alternative to the Verizon tandem. According to Level 3, the volume of traffic it receives from Neutral Tandem is insufficient to make direct interconnection with Neutral Tandem a more cost-effective configuration, as

[7] The 1996 Act recognizes that we may need to decide how interconnections should be structured in the course of rate arbitration between an ILEC and a CLEC. 47 USC §§ 252(c),(d). Although this case does not involve an ILEC, it involves a similarly inseparable interrelationship between the reasonableness of interconnection methods and the reasonableness of the rates charged for those interconnections.

compared with receiving the same traffic indirectly from Neutral Tandem through the Verizon tandem. However, the record shows that Neutral Tandem sends Level 3 a volume of traffic about 180 times greater than the DS-1 level, and we have found the latter sufficient to justify maintenance of dedicated transport capacity on the part of a terminating CLEC such as Level 3.[8]

For originating CLECs, the ability to choose the more cost effective tandem service, as between Neutral Tandem's and Verizon's competing services, creates an opportunity for cost savings and optimum efficiency. The resulting mitigation of the CLECs' cost of service tends to enhance competition among CLECs, minimize the costs recovered through end users' rates, and encourage additional investment in facilities-based services, consistently with the similar objectives we have cited in supporting the principles of open network architecture and comparably efficient interconnection.[9]

In addition, the redundancy resulting from alternative tandem switching options enhances the diversity and reliability of the public switched telephone network. These objectives have consistently been recognized on several occasions, particularly as a response to lessons of the September 11, 2001 attacks and Hurricane Katrina.[10] While Level 3 disputes the benefits of redundancy on the basis that Neutral Tandem's tandem switch is just as vulnerable as other CLECs' facilities sharing the same physical location with Neutral Tandem's, even an arrangement where Neutral Tandem and CLECs collocate provides clear diversity

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[8] Case 00-C-0789, supra, Order Establishing Requirements for the Exchange of Local Traffic (issued December 22, 2000).

[9] See, e.g., Case 88-C-004, Interconnection Arrangements, Open Network Architecture, and Comparably Efficient Interconnection, Opinion No. 89-28 (issued September 11, 1989), at pp. 7-8.

[10] Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, WC Docket No. 06-159, Reply Comments of NYSDPS (filed September 25, 2006); Case 03-C-0922, Telephone Network Reliability, Order Instituting Proceeding (issued July 21, 2003); DPS Staff White Paper (issued November 2, 2002).

and reliability advantages as compared with relying only on an ILEC's tandem switch maintained solely at the ILEC's location.

Conversely, denial of the relief sought by Neutral Tandem would create potential impediments to competition, by enhancing Level 3's capacity to act as a bottleneck between its end users and CLECs if the CLEC chooses Neutral Tandem's tandem switch over Verizon's. While Level 3 argues that any interference with originating CLECs' access through Neutral Tandem to Level 3's end users would violate Level 3's own business interests, Neutral Tandem has shown that Level 3 has allowed incoming traffic to be disrupted in analogous situations in the past. Level 3's potential bottleneck function becomes an ever greater concern insofar as Level 3 may seek to provide tandem switch service in competition with Neutral Tandem.

Remedies

The final question--albeit the primary one, evidently, in the parties' negotiations--is whether to credit Level 3's argument that, even if the public policy benefits of the present network configuration are more substantial than Level 3 concedes, they cannot justify an order compelling Level 3 to offer Neutral Tandem a termination agreement under which Level 3 serves Neutral Tandem free of charge. A corollary issue is Neutral Tandem's claim that Level 3, by insisting on payment, is attempting to extract terms that would be discriminatory or potentially anticompetitive. We view these claims as arguments that address neither the scope of our jurisdiction nor the merits, from a policy standpoint, of requiring direct interconnection pursuant to our authority under PSL §§ 97(2) and (3). Rather, they implicate only the question of just and reasonable pricing under §97, which is a conventional ratemaking issue to be resolved through the ratemaking process prescribed in PSL §97(1). It is for that reason that we will initiate a rate proceeding if the parties do not negotiate a new agreement.

In a rate case, as in negotiations, relevant considerations might include (among other things) whether

Level 3's access to reciprocal compensation from CLECs is an adequate substitute for direct payments from Neutral Tandem; whether the parties' transport and termination agreements should be considered independently or in combination when assessing the reasonableness of the rates they establish relative to the obligations and benefits they confer on each party; and, if the agreements are to be considered in combination, whether the terms established in the present transport agreement should be modified so that the agreements collectively will yield results that are just and reasonable overall.[11] As long as such considerations have yet to be examined in a future phase of this proceeding, it would be premature to determine whether any particular level of compensation (or the absence of compensation) renders a termination agreement unreasonable as Level 3 claims.

The parties have offered conflicting testimony regarding the extent, if any, to which cancellation of the present direct interconnection would disrupt traffic currently routed to Level 3 through Neutral Tandem. According to Neutral Tandem, an orderly transition would require six months. Level 3 seems to assert that a nearly instantaneous transition could be managed through the use of emergency facilities that link the Verizon tandem to Level 3, and adds that any disruption would be the product of Neutral Tandem's own failure to anticipate an adverse decision in this proceeding.

We find that the risk of disruption has been demonstrated sufficiently that an order requiring immediate cancellation of the present interconnection would not be consistent with the sound exercise of our supervisory authority under the PSL. Moreover, cancellation would be unreasonably disruptive under the best of circumstances because our objective at this stage of the proceeding is to initiate further

[11] A full rate proceeding, if any, also would be the more appropriate forum in which to consider (if necessary) the allegations that certain rates and practices are discriminatory or otherwise improper, as the parties have discussed in a series of late, unauthorized pleadings filed May 23, 2007 and subsequently.

negotiations and thus obviate a contested rate proceeding. It would make little sense to suspend the present interconnection in anticipation that it will be reinstituted as soon as the terms and conditions of a new termination agreement have been established.

Accordingly, we are directing the parties to continue operating in accordance with their preexisting transport and termination agreements, provided however that payments pursuant to those agreements after the date of this order will be subject to adjustment, by reparation, credit, or refund,[12] should we find at the conclusion of a rate proceeding that such payments were insufficient or excessive. By postponing the commencement of a rate proceeding until our first session 90 days after issuance of today's order, we intend to provide the parties a reasonable opportunity to negotiate new rates and thus avoid the resource expenditure that would result from a litigated rate case.

Although Level 3 proposes that we direct Neutral Tandem to pay an interim rate of $0.0007 per minute of use for termination service, that rate would be inconsistent with the objectives of today's order because it avowedly is designed to encourage Neutral Tandem to stop offering tandem switching service. Instead, by letting interim rates remain at the same level that the parties themselves negotiated at arms' length in the preexisting agreements, we ensure that the rates will be sufficiently reasonable as a proxy, subject to retrospective adjustment, for permanent rates subsequently established in a rate case. As should be obvious from the foregoing discussion, we have not thereby determined that a permanent termination agreement would be inherently unreasonable either if it exempted Neutral Tandem from any payment, or if it required that Neutral Tandem pay a rate different from the amount payable under the preexisting agreements.

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[12] See PSL §113(1).

The Commission orders:

1. Neutral Tandem, Inc. - New York LLC (Neutral Tandem) and Level 3 Communications LLC (Level 3) are directed to maintain their current interconnections with each other in accordance with the transport agreement and the termination agreements described in this order.

2. Order Clause 1 above will remain in effect, and the rates prescribed therein will remain in effect subject to adjustment for the period from the date of this order until the later of (a) the execution of a termination agreement to replace the canceled agreements under which Neutral Tandem and Level 3 currently operate, or (b) completion of a rate proceeding to consider the parties' rates for transport and termination services.

3. This proceeding is continued but, upon completion, shall be closed in the Secretary's discretion.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

August 6, 2007

Sureel Choksi
President, Wholesale Markets
Level 3 Communications, LLC
1025 Eldorado Blv'd
Broomfield, CO 80021

Dear Mr. Choksi:

As you know, Neutral Tandem, Inc. and certain of its affiliates (collectively "Neutral Tandem") are engaged in a series of disputes with Level 3 Communications, LLC and certain of its affiliates (collectively "Level 3") in state commissions throughout the country. You may be aware that a number of state commissions already have found in Neutral Tandem's favor in these disputes.

Neutral Tandem has made multiple settlement offers to Level 3. Neutral Tandem's settlement offers would have delivered substantially greater value to Level 3 than it was receiving under the parties' prior contracts, via the purchase by Neutral Tandem of Level 3's transport services. Level 3 has rejected those offers.

Level 3's termination of the parties' contracts occurred fewer than 10 days after Neutral Tandem filed its form S-1 with the Securities and Exchange Commission ("SEC"), as a step toward an initial public offering. As you know, Neutral Tandem was forced to delay its initial public offering as a result of these disputes.

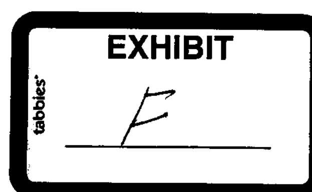
Neutral Tandem has now resumed moving forward with its initial public offering and will be filing an amended form S-1 with the SEC shortly. In light of Level 3's prior rejection of multiple reasonable settlement offers from Neutral Tandem, we understand that Level 3 intends to continue pursuing the parties' state commission disputes. Nonetheless, Neutral Tandem trusts that Level 3 will not take any unwarranted action that would disrupt Neutral Tandem's fundraising.

If you have any questions or concerns about this letter, please contact me.

Very truly yours,

Rian J. Wren
President & CEO

cc: John Ryan, Level 3
Ron Gavillet, Neutral Tandem



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