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Sent: Thursday, April 24, 2008 3:49 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 070408
Attachments: 20080424153336102.pdf

Attached for filing in the referenced Docket, please find Neutral Tandem's Response in Opposition to Level 3's Amended Motion for Interim Compensation. Thank you for your assistance, and please do not hesitate to let me know if you have any questions.

Sincerely,

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b. Docket No. 070408-TP: Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for resolution of Interconnection Dispute with level 3 Communications and request for Expedited Resolution

C. On behalf of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC

D. Number of Pages: Total with attachment - 27

E: Response in Opposition to Amended Motion for Interim Compensation

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April 24, 2008

VIA ELECTRONIC FILING

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

Docket No. 070408-TP - Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for Resolution of Interconnection Dispute with Level 3 Communications and Request for Expedited Resolution

Dear Ms. Cole:

Enclosed for electronic filing in the above-referenced Docket, please find Neutral Tandem's Response in Opposition to Level 3's Amended Motion for Interim Compensation.

Thank you for assistance in this matter. If you have any questions whatsoever, please do not hesitate to contact me.

Sincerely,

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Enclosures

(TL156779;1)

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 and Request for Expedited Resolution	)))))	Docket No. 070408-TP Filed: April 24, 2008

NEUTRAL TANDEM'S RESPONSE IN OPPOSITION TO LEVEL 3'S AMENDED MOTION FOR INTERIM COMPENSATION PENDING FINAL AGENCY ACTION

Pursuant to Rule 28-106.204, Florida Administrative Code, Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC (collectively "Neutral Tandem") respectfully files its response in opposition to Level 3 Communications, LLC's ("Level 3") amended motion for interim compensation.

RESPONSE TO AMENDMENT TO LEVEL 3'S ORIGINAL MOTION FOR INTERIM COMPENSATION

Level 3's "amended motion" for interim compensation is simply a back door attempt to introduce new arguments into this old proceeding in a manner not contemplated by Commission rules or sanctioned by Chapter 120.[1] Indeed, not only did Level 3's original motion fail to even mention Section 11.3 of the parties' July 2004 contract, Level 3 has also never made any arguments based on Section 11.3 in any prior submissions before the Commission. Rather, Level 3 has claimed only that it would be "fair" for the Commission to require Neutral Tandem to make payments to Level 3 at the rate Level 3 alleges (incorrectly) was contained in the July

[1] *See* Rule 28-106.204, Florida Administrative Code, which by its terms does not contemplate such a filing.

2004 Agreement.[2] Thus, the "amended" motion is nothing more than an attempt to remedy the prior failure to raise Section 11.3.

Moreover, Level 3 must recognize that raising a new argument in an amended motion is improper, since Level 3 now asserts it did rely on Section 11.3 in its original motion.[3] This assertion is belied not only by a plain reading of Level 3's original motion, but also Level 3's own conduct. If Level 3 had in fact addressed Section 11.3 in its original motion, it presumably would not have been necessary for Level 3 to file this amended motion. The Commission should therefore decline to consider Level 3's belated attempt at a second bite at the apple.

However, if the Commission does decide to address Level 3's new reference to Section 11.3 on the merits, the Commission should reject it out-of-hand, as it misreads the Agreement. As indicated in Neutral Tandem's response to Staff's first set of interrogatories, the parties only agreed in Section 11.3 that they would complete their payment obligations for any services that were performed ***while the contract was in effect***, even if those payments might not come due and owing until after the contract terminated. The Section does not give either party a right to demand payment for any new activity or obligation that arose or occurred ***after the contract was terminated***.

Additionally, Neutral Tandem's witnesses will provide a more detailed explanation of the meaning of Section 11.3 in their pre-filed testimony. Thus, any decision requiring Neutral Tandem to make payments to Level 3 based on disputed provisions in the parties' contract would improperly compromise the debate, as it would be based on premature findings about a highly

[2] L3 Mot., ¶¶ 11, 12, 14. *See also* Transcript of the January 8, 2008 Agenda Conference, at 79 ("We would ask that the Commission use the term from the prior contract between the parties as a fair, sort of, number for purposes of compensation for interim purposes.").

[3] L3 Amended Mot., at 2.

disputed factual issue, without consideration of any evidence in the record, or full briefing on the merits.

Moreover, as Neutral Tandem previously has pointed out, the provisions of the parties' prior contract are irrelevant to the issues presented in Neutral Tandem's Petition. As Staff has noted in prior recommendations, this Commission found in the *TDS Telecom Order* that originating carriers, not transiting carriers, are responsible for compensating terminating carriers such as Level 3 for any costs they incur to terminate the originating carriers' traffic.[4] Thus, Staff recommended that "any dispute regarding compensation for Level 3's terminating service is more appropriately brought against originating carriers of local exchange telecommunications services and not the transit provider, in this case Neutral Tandem."[5] Level 3's interconnection obligations under Florida law and the nondiscriminatory terms and conditions that govern the continued interconnection are completely independent of the parties' prior contractual relationship, which was a two-way commercial relationship under which Level 3 purchased services from Neutral Tandem, in addition to receiving traffic from Neutral Tandem.[6] Level 3's refusal to recognize its legal obligations independent of any contract is underscored by the fact that it has continued to bill Neutral Tandem for traffic termination, even after the Illinois

[4] June 27, 2007 Staff Rec., at 6-7.

[5] *Id.* at 7.

[6] *See, e.g.*, Case No. U-15230, *In the matter of the complaint and request for emergency relief of Neutral Tandem, against Level 3*, Mich. Pub. Serv. Comm'n, Final Order, at 18 (issued Nov. 26, 2007) (hereinafter "Michigan Order") ("The rights and obligations under the properly terminated contracts are irrelevant to whether Neutral Tandem has a right to nondiscriminatory interconnection terms and conditions for delivering tandem transit traffic to Level 3.").

Commerce Commission "resolved, with clarity" in a parallel proceeding between the parties that Level 3 "had no such right" to do so.[7]

Finally, in light of Level 3's decision to "amend" its Motion, Neutral Tandem is compelled to dispute several representations that Level 3 has made in its responses to Staff's interrogatories on this subject:

- *First*, Level 3 asserted that "[t]he July 2004 Agreement was superseded by an August 18, 2005 Master Service Agreement... for the purposes of setting the terms and rates and conditions for traffic which Level 3 originated and chose to send to Neutral Tandem for transit to the terminating third-party."[8] This claim is inconsistent with Level 3's own admissions in several of the parallel proceedings in other states."[9]

- *Second*, Level 3 claimed that "[t]he August 2005 Agreement has been properly terminated by the parties."[10] Again, Level 3's statement is irreconcilable with its admission in ***verified*** answers in the parallel proceedings in other states that "***neither*** party has sought to terminate the August of 2005 contract, which was amended on January 31, 2007."[11]

- *Third*, Level 3 argues that it "is not seeking to recover reciprocal compensation" from Neutral Tandem.[12] Again, this claim is belied by Level 3's admission in a verified answer in another state that it demanded that Neutral Tandem pay Level 3 reciprocal compensation.[13]

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[7] Docket No. 08-0261, *Ill. Commerce Comm'n v. Level 3*, Order, at 2-3 (April 9, 2008), whereby the Illinois Commerce Commission has commenced proceedings requiring Level 3 to show cause as to why it should not be penalized violation of the Commission's prior Order.

[8] Ex __, Excerpts from Level 3's Confidential Responses to Staff's Interrogatories.

[9] Excerpts from Level 3 Verified Answer, ¶¶ 21, 23, filed in *Neutral Tandem v. Level 3*, Ill. Commerce Comm'n Docket No. 07-0277 (May 2, 2007). *E.g.* Level 3 Exceptions, at 9, filed in Minn. Pub. Utils. Comm'n Docket Nos. P5733/C-07-296 and P5733, 6403/M-07-354, *In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem* (filed Nov. 27, 2007) (noting that the July 2004 agreement is a 'two way' agreement, covering traffic both originated and terminated by Level 3").

[10] Ex __, Excerpts from Level 3's Confidential Responses to Staff's Interrogatories.

[11] Excerpts from Level 3 Verified Answer to Counterclaim, ¶ 25, filed in *Level 3 v. Neutral Tandem, Michigan-LLC*, Ohio Pub. Utils. Comm'n Docket No. 07-668-TP-CSS (July 13, 2007) (emphasis added). *See also* Excerpts from Level 3 Verified Answer, ¶ 26, filed in *Neutral Tandem v. Level 3*, Ill. Commerce Comm'n Docket No. 07-0277 (May 2, 2007).

[12] Ex __, Excerpts from Level 3's Confidential Responses to Staff's Interrogatories.

[13] Amendments to Verified Answer and Defenses of Level 3 to the Complaint of Neutral Tandem, at 17, filed in *Neutral Tandem v. Level 3*, Cal. Pub. Util. Comm'n Docket No. C.07-03-008 (Apr. 16, 2007)

- *Fourth*, Level 3 admitted in its discovery responses that it does not charge a termination payment from any tandem transit provider, when the provider delivers local traffic on behalf of other carriers, except Neutral Tandem. Level 3, however, tried to downplay this admission by asserting that its relationship with the incumbent LEC tandem transit provider is "very different" than its relationship with Neutral Tandem.[14] Level 3's claim, however, already has been thoroughly rejected by every state to consider this argument on the merits. Indeed, ***three*** other state commissions have concluded that Level 3's attempt to impose a termination fee on Neutral Tandem that it does not bill to any other tandem transit provider, is discriminatory and unlawful.[15] As noted recently by the Minnesota Commission, "[w]hile Level 3 argues that the terms under which it receives call traffic from [the ILEC] cannot be compared to the terms under which it receives call traffic from Neutral Tandem, this argument was thoroughly considered and rejected by the ALJ. ***Carriers may not exploit the quirks of interconnection agreements to evade their duty to act in a nondiscriminatory manner***."[16]

Thus, in light of the foregoing, the Commission should afford no weight to Level 3's discovery responses when rendering its decision on the Motion for Interim Compensation.

INTRODUCTION

Level 3's request for "interim compensation" should be denied. The clear aim of Level 3's current motion is to distract the Commission from consideration of the merits of Neutral Tandem's Petition and the underlying conduct by Level 3 that forced Neutral Tandem to file that Petition in the first place.

Of course, Level 3 has good reason to try to distract the Commission from the merits of this dispute. Each and every state commission that has ruled on the merits of this dispute has ruled in Neutral Tandem's favor. A number of those commissions have found that Level 3's conduct, including its attempt to extract the same discriminatory payments from Neutral Tandem

[14] Ex __, Excerpts from Level 3's Confidential Responses to Staff's Interrogatories.

[15] Docket No. 24844-U, *Petition of Neutral Tandem for Interconnection with Level 3 and Request for Emergency Relief*, Ga. Pub. Serv. Comm'n, Final Order, at 9 (August 27, 2007); Michigan Order, at 11.

[16] Docket Nos. P5733/C-07-296 and P5733, 6403/M-07-354, *In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem*, Minn. Pub. Utils. Comm'n, Order Reaffirming Jurisdiction, Denying Disconnection, and Establishing Terms for Continued Connection, at 17 (March 20, 2008) (emphasis added).

that Level 3 seeks here, is anticompetitive and detrimental to the development of local telecommunications competition. State commissions uniformly have rejected Level 3's request that Neutral Tandem be required to pay Level 3 for the termination of transit traffic. And in this case, as the Commission's Staff has pointed out, the Commission's precedent is consistent with the other states' decisions on this point.[17]

Level 3's motion notably fails to acknowledge the uniform precedent arrayed against its position. Likewise, Level 3's motion fails to cite any legal or factual basis upon which the Commission could require "interim" payments from Neutral Tandem. Instead, Level 3 tries to support its request by arguing that Neutral Tandem should be required to pay Level 3 simply because Neutral Tandem allegedly "paid" Level 3 to terminate traffic under one of the parties' prior contracts.

The foundation of Neutral Tandem's Petition is that, as a matter of law and sound public policy, it should not be required to make payments to Level 3 as a condition of interconnection. The imposition of "interim compensation" to be paid directly to Level 3 would compromise the debate on that issue. Requiring payment of interim compensation to Level 3 would be particularly inappropriate because Level 3 would not receive any compensation from AT&T or Verizon in the event the traffic were re-routed and delivered to Level 3 by those carriers, as Level 3 requests.

Nonetheless, to ensure that the Commission has no concerns about Neutral Tandem's ability to fulfill its obligations should the Commission disagree with Neutral Tandem's position after a full hearing on the matter, Neutral Tandem is prepared to post a letter of credit. In Michigan, where the volume of traffic at issue is approximately 60% of the volume in Florida,

[17] Dec. 26, 2007 Revised Staff Rec., at 11.

the state commission, without objection from Level 3, accepted a letter of credit for $10,000 as sufficient to address the "interim" period prior to the commission's final decision on the merits of Neutral Tandem's complaint in that state. Neutral Tandem is prepared to post a substantially larger letter of credit in Florida.

Most importantly, the best way to resolve the "interim" issues in this case is to hear and decide the case as quickly as possible. Thus, Neutral Tandem respectfully urges the Commission to deny Level 3's motion and move forward with the hearing as scheduled.

BACKGROUND[18]

With respect to Level 3's claim for "interim" payments, as noted in Level 3's motion, Neutral Tandem and Level 3 previously exchanged traffic pursuant to multiple contracts, including a contract dated July 6, 2004. Level 3 terminated that contract in January 2007. Immediately thereafter, Level 3 began threatening to unilaterally disconnect the parties' existing interconnections, unless Neutral Tandem agreed to begin paying reciprocal compensation to

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[18] Before addressing the factual background relevant to Level 3's motion, Neutral Tandem must take issue with two inaccurate (and irrelevant) claims in Level 3's motion. First, Level 3 claims that Neutral Tandem's position with respect to 911 services has been altered. To the contrary, at the May 24, 2007 Agenda Conference, Neutral Tandem's counsel pointed out that Neutral Tandem does not "provide" services, such as 911 services, to end-users. However, as Commissioner Argenziano in particular noted at the January 8, 2008 Agenda Conference, Fl. Stat. § 364.337 requires only that a carrier provide "access to" 911 services, not that a carrier actually provide 911 services to end-user customers.[18] Although Neutral Tandem does not concede that the requirements of Fl. Stat. § 364.337 have any bearing on Neutral Tandem's standing to bring its Petition, as Neutral Tandem's counsel made clear during the January 8, 2008 Agenda Conference, Neutral Tandem can and will demonstrate that it has "access to" 911 services in Florida. *E.g.*, Transcript of the January 8, 2008 Agenda Conference, at 42.

Second, Level 3 claims that Neutral Tandem has sought to "postpone these proceedings" in order to continue allegedly "free use of Level 3's services." (Mot., ¶ 1.) In profound contrast to this claim, Neutral Tandem twice has requested expedited consideration of its Petition.[4] On both occasions, Level 3 has resisted Neutral Tandem's requests for expedited treatment. Even more ironic, Level 3 has now filed its Amended Motion for Interim Compensation, which will likely only further delay resolution of an issue Level 3 has claimed must be resolved in order to put an end to Neutral Tandem's "procedural tactics and delays." (Mot., ¶ 4) Nevertheless, Neutral Tandem still believes that prompt resolution of its Petition is appropriate, and it is fully prepared to proceed in accordance with any hearing schedule established by the Commission.

Level 3. As a result of these threats, Neutral Tandem was forced to file its Petition with this Commission and in several other state commissions around the country.

Notably, the parties' prior contract was a ***two-way*** agreement under which Level 3 was to begin ***purchasing services*** from Neutral Tandem.[19] In consideration for Level 3's agreement to begin purchasing services, Neutral Tandem agreed to an interim credit arrangement that was ***specifically tied*** to Level 3's purchase of services from Neutral Tandem. As Neutral Tandem's CEO has testified in other states and in this proceeding, the entire point of that interim credit was to provide an inducement to convince Level 3 to purchase Neutral Tandem's transiting service to deliver traffic to other carriers.[20] Critically, as Neutral Tandem's CEO has testified, the contract also provided that the promotional credit was designed to phase down to zero as Level 3's usage of Neutral Tandem's transit service increased. It should go without saying that Neutral Tandem's current Petition does not seek to require Level 3 to become a customer of Neutral Tandem, or to purchase any services from Neutral Tandem. It also should go without saying that Neutral Tandem does not seek reinstatement of the contract that Level 3 chose to terminate. Neutral Tandem merely seeks interconnection with Level 3 under nondiscriminatory terms and conditions.

As noted above, in addition to the contract mentioned in Level 3's motion, the parties also exchanged traffic pursuant to a number of other contracts. ***None*** of these other contracts included similar promotional credits.[21] Moreover, Neutral Tandem does not make any payments for the delivery of local tandem transit traffic to any other carrier. It is important to note that

[19] At Staff's request, Neutral Tandem filed a confidential copy of the parties' contract in March 2007 in Docket No. 070127-TP.

[20] *See, e.g.*, 07/11/07 Wren Pre-Filed Direct Testimony, at 9.

[21] *Id.*

Level 3 does not receive payments from other tandem transit carriers, such as AT&T and Verizon, when those carriers deliver local transit traffic to Level 3. Thus, Level 3's suggestion that Neutral Tandem be forced to re-route traffic back to the incumbent LEC on an interim basis would not even benefit Level 3.

ARGUMENT

I. LEVEL 3 HAS PROVIDED NO BASIS FOR THE COMMISSION TO REQUIRE PAYMENT OF ANY "INTERIM COMPENSATION" BASED ON ONE PROVISION IN A CONTRACT LEVEL 3 CHOSE TO TERMINATE.

As the party seeking a Commission order, Level 3 bears the burden to provide the basis upon which the Commission can and should act.[22] Here, Level 3 has failed to point to any legal or factual basis upon which the Commission reasonably could require Neutral Tandem to pay "interim compensation" to Level 3. The reason is simple -- Level 3's request for payment under one provision plucked from a contract Level 3 alone chose to terminate is discriminatory, unlawful, and without support for several reasons.

First, as noted above, commissions in other states uniformly have held that Level 3's claim for compensation from Neutral Tandem is contrary to federal law, which requires Level 3 to seek compensation for terminating traffic from originating carriers, not transiting carriers such as Neutral Tandem. For instance, the Georgia Commission noted that "[u]nder 47 C.F.R. § 51.701(e), ... 'carriers receive 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.'"[23] The Georgia Commission refused to shift this

[22] *See, e.g. Dep't of Banking and Finance v. Osborne Stern and Co.*, 670 So.2d 932, 934 (Fla.1996).

[23] Docket No. 24844-U, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 and Request for Emergency Relief*, Georgia Pub. Serv. Comm'n, Final Order, at 10-11 (Aug. 27, 2007) (emphasis added) (hereinafter the "Georgia Order").

obligation from the originating to the transiting carrier, because "[i]mposing reciprocal compensation costs on the transit provider would be inconsistent with this federal regulation."[24]

Numerous other state commissions have also found that Level 3 cannot force Neutral Tandem to pay Level 3 for terminating traffic from originating carriers:

- "The evidence establishes that [Neutral Tandem] does not originate traffic. Furthermore, [47 C.F.R. § 57.101] does not impose reciprocal compensation obligations with respect to transiting the traffic... Therefore, [Neutral Tandem] is not obligated to pay reciprocal compensation to Level 3."[25]

- "The ALJ correctly found that those costs properly recovered through reciprocal compensation should not also be charged to Neutral Tandem, as they must be recovered from the originating carrier."[26]

- "Level 3 is not entitled to bill Neutral Tandem for termination of traffic on Level 3's network. Level 3 is obligated to bill the originating network to see payment of any applicable termination fee. The cost of that billing is appropriately borne by Level 3."[27]

Notably, testimony from Level 3 executives in other states shows that Level 3 has ***not even attempted*** to obtain such compensation from originating carriers, even though its own business personnel have testified that Level 3's subsidiary Broadwing does receive such compensation from numerous carriers.[28] As to traffic bound for Broadwing, an award of

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[24] *Id.*

[25] Docket No. 07-0277, *Neutral Tandem. v. Level 3*, Ill. Comm. Comm'n, Final Order, at 9-10 (issued June 25, 2007) (hereinafter the "Illinois Order").

[26] Case No. U-15230, *In the matter of the complaint and request for emergency relief of Neutral Tandem, Inc. against Level 3 Communications, LLC*, Mich. Pub. Serv. Comm'n, Final Order, at 16 (issued Nov. 26, 2007) (hereinafter the "Michigan Order").

[27] Docket No. P5733/C-07-296 and P5733, 6403/M-07-354, *In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc. Against Level 3 Commc'ns and the Application of Level 3 Commc'ns LLC to Terminate Services to Neutral Tandem, Inc.*, Minn. Pub. Utils. Comm'n, Administrative Law Judge's Findings of Fact, Conclusions, and Recommendations of Law, at 22 (issued Nov. 7, 2007) (hereinafter the "Minnesota ALJ Order").

[28] For example, Ms. Sara Baack, a Level 3 Senior Vice-President, admitted during an evidentiary hearing in another state that she has "no knowledge of efforts by Level 3 to enter into contracts with parties to receive compensation for transited traffic that those parties originate." Docket No. P5733/C-07-296 and P5733, 6403/M-07-354, *In the Matter of a Complaint and Request for Expedited Hearing of Neutral*

"interim compensation" would result in Level 3 being compensated twice for the delivery of the same traffic. Staff in other states have even offered publicly to help Level 3 in the event it believes it is having any difficulty obtaining reciprocal compensation payments from originating carriers.[29]

Second, Level 3's claim that it is providing "direct interconnection services" to Neutral Tandem is a red herring. (Mot., ¶ 1.) This so-called "service" is nothing more than a restatement of Level 3's legal obligation to terminate traffic that has been initiated by originating carriers' end-users, and is bound for Level 3's end-users. Level 3 already is entitled to receive reciprocal compensation from those originating carriers for complying with this obligation. Notably, Level 3 does not seek or receive payment for this alleged "service" from the incumbent providers of transiting services in Florida, such as AT&T and Verizon.[30] Thus, although Level 3 complains that Neutral Tandem did not acquiesce to Level 3's unilateral demand for payment in May 2007, the Illinois Commerce Commission correctly observed that the very same Level 3 demand for compensation from Neutral Tandem was "little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label."[31]

Third, Level 3's claim that Neutral Tandem is seeking to maintain interconnection with Level 3 "for free" is specious. (Mot., ¶ 13.) As multiple commissions have found following full

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Tandem, Inc. Against Level 3 Comme'ns and the Application of Level 3 Commc'ns LLC to Terminate Services to Neutral Tandem, Inc., Minn. Pub. Utils. Comm'n, Tr. of 07/31/07 Evid. Hrg., at 63. Yet, she was aware of four instances where "Broadwing [Level 3's subsidiary] receives compensation for that traffic from originating carriers." *Id.* at 61.

[29] For example, the Staff of the Illinois Commerce Commission suggested that if Level 3 attempts to collect reciprocal compensation from originating carriers without success, the Commission likely would get "involve[d]." Docket No. 07-0277, *Neutral Tandem. v. Level 3*, Ill. Comm. Comm'n, Tr. of 05/23/07 Hearing, at 489.

[30] *See, e.g.*, 07/11/07 Wren Pre-Filed Direct Testimony, at 14-15.

[31] *See* Illinois Order, at 10.

evidentiary hearings, Neutral Tandem already pays ***100% of the costs*** to deliver transit traffic to Level 3, including all costs associated with the facilities used to deliver that traffic:

- "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."[32]

- "The Commission is not persuaded that direct interconnection has been or will be a significant cost to Level 3[.]"[33]

- "Level 3 is not entitled to bill Neutral Tandem for termination of traffic on Level 3's network...Level 3 has not shown that any differences in the cost of providing a service market conditions, or ILEC pricing practices exist to justify charging a termination fee to Neutral Tandem and not to the [incumbent]."[34]

By contrast, incumbents such as BellSouth require Level 3 to ***share the cost*** of their interconnection facilities when the incumbent is performing the transiting function.[35] As such, it is false and disingenuous for Level 3 to argue that Neutral Tandem seeks "free" termination. To the contrary, it costs Level 3 less to receive transit traffic from Neutral Tandem than it does for Level 3 to receive the very same traffic from AT&T or Verizon.

Fourth, Level 3's demand for "interim compensation" is little more than a thinly-veiled effort to harm Neutral Tandem's business and its customers. As noted, Level 3 admittedly receives no compensation from AT&T and Verizon when they deliver tandem transit traffic to Level 3. Thus, Level 3's suggestion that Neutral Tandem be forced to re-route traffic back to BellSouth on an interim basis ***would not even benefit Level 3*** as Level 3 would receive no compensation from BellSouth. Moreover, adopting Level 3's position would result in immediate cost increases for the numerous carriers that have chosen to use Neutral Tandem's services to

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[32] *Id.*

[33] Michigan Order, at 11.

[34] Minnesota ALJ Order, at 22-23.

[35] *See, e.g.*, 07/11/07 Wren Pre-Filed Direct Testimony, at 19.

deliver their originating traffic to Level 3, as the Michigan Commission found in rejecting Level 3's demand for a termination fee from Neutral Tandem:

> Adopting Level 3's position could [ ] create extra costs for Neutral Tandem's CLEC customers... The only manner in which competitive tandem transit service will have a market is if the requesting providers have the right to request direct interconnection on a reasonable, non-discriminatory basis.[36]

Fifth, Level 3's suggestion that the Commission could simply adopt what Level 3 claims was the "effective rate owed by Neutral Tandem" under the parties' prior contract is without merit. (Mot., ¶ 11.) As noted above, none of the parties' prior contracts has any relevance to this case. The one contract on which Level 3 selectively has relied was a two-way contract under which the interim promotional credits to Level 3 were expressly tied to Level 3's purchasing of services from Neutral Tandem -- an issue not presented in Neutral Tandem's Petition. Moreover, as noted above, the parties' other contracts did not include any such promotional credit. Thus, even if the Commission did find (wrongly) that any of the parties' prior contracts had any relevance, Level 3 has provided no basis, and no such basis exists, upon which the Commission could incorporate any of the requirements of any of the parties' now-terminated prior contracts into this case.[37]

Lastly, as stated herein, Neutral Tandem's position in this case is that no payments are owed from Neutral Tandem to Level 3 in Florida as a condition of continued interconnection. However, even if the Commission ultimately disagrees and orders any such payments, Neutral Tandem is a strong, financially viable public company with substantial cash holdings and other

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[36] Michigan Order, at 13.

[37] Neutral Tandem does not concede that, even if the contract had any relevance, which it does not, Level 3's Motion accurately characterizes any facets of the contract, including but not limited to what Level 3 incorrectly calls the "effective rate" under the contract.

assets.[38] Since Neutral Tandem could easily satisfy any payment obligation the Commission might order, there is no need to order "interim compensation" prior to the resolution of Neutral Tandem's Petition on the merits.

II. NEUTRAL TANDEM IS WILLING TO SUBMIT A LETTER OF CREDIT TO ALLEVIATE ANY CONCERNS THE COMMISSION MAY HAVE REGARDING LEVEL 3'S MERITLESS REQUEST FOR "INTERIM COMPENSATION."

For all the reasons set forth above, Level 3's request for "interim compensation" is meritless and should be denied. If the Commission nonetheless has some concern about ensuring that any payment obligation would be satisfied, Neutral Tandem is prepared to post a letter of credit or similar guarantee. Although no other commission has ordered Neutral Tandem to make payments to Level 3, in a parallel proceeding between Neutral Tandem and Level 3 in Michigan, Neutral Tandem submitted a letter of credit for $10,000 as a condition of the commission requiring Level 3 to maintain its connection with Neutral Tandem pending resolution of the dispute in that state.[39] Level 3 never claimed that a $10,000 letter of credit was insufficient to provide adequate security in Michigan.

Even though the volume of traffic at issue in Michigan is approximately 60% of the traffic at issue in Florida, Neutral Tandem is prepared to post a substantially larger $100,000 letter of credit in Florida. As noted above, Level 3 is a multi-billion dollar company, it had no objection to a $10,000 letter of credit in Michigan, and it has not even attempted to show why or how it needs any "interim" payments prior to the conclusion of this proceeding. Level 3 thus has no basis to assert that a $100,000 letter of credit is insufficient to provide Level 3 with adequate security in Florida.

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[38] *See, e.g.*, Neutral Tandem's February 5, 2008 Earnings Release.

[39] Ex. A, Case No. U-15230, *In the matter of the complaint and request for emergency relief of Neutral Tandem, Inc. against Level 3 Communications, LLC*, Mich. Pub. Serv. Comm'n, Order Granting Rehearing on Request for Emergency Relief, at 3 (issued May 22, 2007).

At bottom, Neutral Tandem respectfully believes that the best way for the Commission to resolve these so-called "interim" issues is to adopt a schedule for a prompt hearing and disposition of Neutral Tandem's Petition. Neutral Tandem is prepared to proceed as quickly as possible to assist the Commission in reaching this resolution.

CONCLUSION

WHEREFORE, for the reasons stated herein, Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC (collectively "Neutral Tandem") respectfully requests that the Commission deny Level 3's motion for "interim compensation."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail and Hand Delivery to Martin McDonnell, Esquire, and Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301, and that an electronic copy has also been provided to the persons listed below on April 24, 2008:

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EXHIBIT A

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint and request for emergency relief of **NEUTRAL TANDEM, INC.**, against **LEVEL 3 COMMUNICATIONS, LLC.**	))))	Case No. U-15230

At the May 22, 2007 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Laura Chappelle, Commissioner
Hon. Monica Martinez, Commissioner

ORDER GRANTING REHEARING

On March 1, 2007, Neutral Tandem, Inc., filed a complaint and request for emergency relief concerning interconnection issues with Level 3 Communications, LLC (Level 3), pursuant to the provisions of MCL 484.2203. In an order dated March 21, 2007, the Commission denied Neutral Tandem's request for emergency relief based on representations by Level 3 that it would not terminate service to Neutral Tandem before June 25, 2007. The Commission stated:

> The Commission finds that Neutral Tandem's request for emergency relief should be denied without prejudice. It appears that there are no exigent circumstances at this time, based in part on Level 3's commitment to continue providing service to Neutral Tandem . . .. Moreover, the Commission notes that MCL 484.2203(13) prohibits a provider from discontinuing service while a complaint is pending before the Commission, if the complainant has provided adequate security in an amount determined by the Commission. Should the parties be unable to resolve this complaint before the deadline established by Level 3's commitment, Neutral Tandem may seek protection under this section. Order, p. 3.

On April 19, 2007, Neutral Tandem filed a motion requesting that Administrative Law Judge Sharon E. Feldman (ALJ) determine the form and adequate amount of security required to satisfy MCL 484.2203(13). The ALJ ultimately denied this motion by letter dated April 24, 2007.

On April 20, 2007, Neutral Tandem filed a petition for rehearing of the March 21, 2007 order, requesting the Commission to establish the form and adequate amount of security to be provided pending resolution of the complaint to satisfy the requirements of MCL 484.2203(13). On April 26, 2007, Neutral Tandem filed a supplement to its petition for rehearing. In its rehearing petition, Neutral Tandem states that it will participate in the mediation in good faith, but it doubts that a recommended settlement will satisfy both parties. Therefore, Neutral Tandem fears that the complaint will go to hearing, which will most assuredly require more time than Level 3 has committed to continuing service. Given the Commission's posted meeting schedule, Neutral Tandem requests that the Commission consider its rehearing petition promptly so that adequate security may be posted and Neutral Tandem can be protected under MCL 484.2203(13).

As to the form and adequate amount of security, Neutral Tandem points to the Commission's October 14, 2004 order in Case No. U-14282, a complaint of JAS Networks, Inc., against Michigan Bell Telephone Company, in which the Commission found that the amount of security provided under MCL 484.2203(13) must be sufficient to pay any amounts in dispute between the parties. Neutral Tandem interprets that to mean that any security posted must be sufficient to cover losses that Level 3 might suffer as a result of its continued service to Neutral Tandem. Neutral Tandem states that Level 3 receives no compensation from incumbent local exchange carriers that act as a transiting carrier, delivering third party carriers' traffic to Level 3's network. Therefore, Neutral Tandem argues, Level 3 is foregoing no compensation, and is suffering no losses, as a result of its continued interconnection with Neutral Tandem while this complaint is

pending. Neutral Tandem argues that its commitment to apply the terms and conditions of the Commission's final decision in this case retroactively to March 23, 2007 should be sufficient security. Thus, it argues, no additional form or amount of security should be required.

However, should the Commission determine that additional security is necessary to satisfy the requirements of MCL 484.2203(13), Neutral Tandem asserts that it is a strong, multi-million dollar company with no solvency concerns or history of credit problems. Neutral Tandem takes the position that, given its excellent credit rating and previous relationship with Level 3, the Commission should determine that nothing more is required than a letter of credit or similar guarantee that funds will be available to pay amounts in dispute with Level 3.

Pursuant to R 460.17403, a response to the motion for rehearing was due by May 11, 2007. No response to the motion was filed.

The Commission finds that Neutral Tandem's motion for rehearing should be granted and that the Commission should establish an adequate security for purposes of MCL 484.2203(13). Given the representations made by Neutral Tandem in its request for rehearing and the lack of any timely response to the motion by Level 3, the Commission finds that Neutral Tandem's posting a letter of credit or similar guarantee that funds will be available to pay amounts in dispute with Level 3, in an amount not less than $10,000, will be sufficient to trigger the protections of MCL 484.2203(13).

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The motion for rehearing should be granted.

c. Neutral Tandem's posting of a letter of credit or similar guarantee that funds will be available to pay amounts in dispute with Level 3 in an amount not less than $10,000 is an adequate form of security for purposes of MCL 484.2203(13).

THEREFORE, IT IS ORDERED that the motion for rehearing filed by Neutral Tandem, Inc., is granted, as set out in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, pursuant to MCL 484.2203(6).

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of May 22, 2007.

/s/ Mary Jo Kunkle
Its Executive Secretary

EXHIBIT B

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 Dated: April 9, 2008

LEVEL 3 COMMUNICATIONS, LLC'S
RESPONSES TO STAFF'S
FIRST SET OF INTERROGATORIES (NOS. 1-13)

1. Describe how Level 3's recommended confidential interim rate was developed from the July 6, 2004, Traffic Exchange Agreement between Level 3 and Neutral Tandem.

Response: Under the Traffic Exchange Agreement dated July 6, 2004 (the "July 2004 Agreement") Neutral Tandem agreed to pay Level 3 an Interim Transport Charge. The charge was determined through a formula that included Level 3 billing Neutral Tandem a per minute rate of [redacted]. Neutral Tandem then reduced the charge by certain transport costs they incurred to transport calls to Level 3. According to the last month in which Neutral Tandem properly paid Level 3, the rate of [redacted] (which is the rate requested by Level 3 as Interim Compensation) reflects the effective rate paid by Neutral Tandem to Level 3 under the formula [redacted] per minute of use, minus transport costs claimed by Neutral Tandem.) The compensation provisions of the July 2004 Agreement remain in effect and Neutral Tandem remains legally obligated to continue payment under Sec. 11.3 of the Agreement which expressly survives the termination of the Agreement.

2. On page 11 of Neutral Tandem's Response in Opposition to Level 3's Motion for Interim compensation, Neutral Tandem states that Level 3 has not shown why or how it needs interim compensation prior to the conclusion of this proceeding. Please explain specifically why or how Level 3 needs interim compensation prior to the conclusion of this proceeding.

Response: Under the terms of the July 2004 Agreement, the Parties agreed in Section 11.3 that "[i]n the case of the expiration or termination of this Agreement for any reason, each of the Parties shall be entitled to payment for all services performed and expenses accrued or incurred after such expiration or termination." Since Neutral Tandem continues to terminate traffic to Level 3, it is obligated to compensate Level 3 for those services.

a. for traffic transited by Neutral Tandem and terminated on Level 3's network?

Response: **Under the July 2004 Agreement, Neutral Tandem agreed to pay to Level 3 a per minute Usage Sensitive Transport Recovery Charge for all third-party traffic sent to Level 3 for termination. Theses rates provided for a per minute rate of [redacted], less the cost of certain facilities on Neutral Tandem's side of the Point of Interconnection and are further detailed in Confidential Exhibit 1. The total payment Neutral Tandem was liable for was then capped at a percentage of revenue that Neutral Tandem received from its customers. The rate that Neutral Tandem agreed to pay Level 3 for interconnection service was not a "promotional rate," but acknowledged that Level 3 should be compensated if the amount of traffic exchanged between the parties was imbalanced (with much more traffic flowing from Neutral Tandem to Level 3). If the traffic eventually came into balance, the agreement accounted for that by lowering (and potentially eliminating) the rate paid by Neutral Tandem to Level 3. However, since that balance never materialized (in fact the traffic is now purely unidirectional traffic to the sole benefit of Neutral Tandem), Neutral Tandem should still, under the July 2004 Agreement, be paying Level 3 at the Tier 1 [redacted] rate structure. The plain language of the Agreement shows that this compensation arrangement was not limited in time but was only limited by the traffic ratio which was never reached. The plain language of Section 11.3 of the July 2004 Agreement also clearly obligates Neutral Tandem to continue paying for the traffic it is sending to Level 3 in Florida.**

b. for traffic originated by Level 3 and transited by Neutral Tandem?

Response: **The July 2004 Agreement was superseded by an August 18, 2005 Master Service Agreement ("August 2005 Agreement") for the purpose of setting the terms, rates and conditions for traffic which Level 3 originated and chose to send to Neutral Tandem for transit to the terminating third-party. Under the August 2005 Agreement, Level 3 was to pay between [redacted] and [redacted] for transit traffic in various cities in Florida. The August 2005 Agreement has been properly terminated between the parties and Level 3 no longer sends any traffic to Neutral Tandem in Florida for transiting to a third-party carrier.**

6. Does Level 3 receive compensation from any other transit provider for which it terminates traffic originating by a third-party? If yes, please indicate those transit providers Level 3 receives compensation from terminating traffic originated by a third-party.

Response: **The request by Neutral Tandem for free one-way interconnection service from Level 3 is unique and Level 3 does not connect with any other company that sends traffic to Level 3 without any compensation or other quid-pro-quo. For example, although Level 3 forgoes compensation from the ILEC for transit traffic, it is willing to do so because that traffic is a relatively minimal part of the traffic**

flowing between the parties and because Level 3 receives many counterbalancing benefits under that agreement.

It is very important to recognize that the relationship that Level 3 has with the ILEC and the relationship that Neutral Tandem proposes to force upon Level 3 are very different. Level 3's agreement with the ILEC covers a broad, multifaceted relationship that governs a wide variety of business and regulatory matters between the interconnecting parties, including, but not limited to, terms relating to exchange of traffic, performance intervals, unbundled network elements, 911 trunking, collocation, reciprocal compensation, establishment of interconnection points, etc. Terms relating to the manner in which Level 3 handles transit traffic to its telephone numbers is a very small component of the broad relationship between Level 3 and the ILEC. Moreover, the interconnection between Level 3 and the ILEC carries a variety of traffic types flowing between Level 3 and the ILEC in both directions and the ILEC compensates Level 3 for much of the traffic it sends to Level 3. Conversely, Neutral Tandem simply wants Level 3 to connect and accept transit traffic with no compensation or other quid-pro-quo. Level 3 receives absolutely no benefit from connecting with Neutral Tandem. It would be irresponsible for Level 3 – or any other company – to enter into an agreement where it was obligated to provide a valuable service to another company without receiving any compensation of any sort. This principle is recognized on an on-going basis in the July 2004 Agreement negotiated by the parties.

7a. Does Level 3 receive adequate call detail information from Neutral Tandem, including the originating telephone number, for it to bill originating carriers for call termination?

Response: Neutral Tandem's argument that Level 3 should seek compensation from Neutral Tandem's originating carrier customers is an irrelevant red herring and should be dismissed by the Commission. Neutral Tandem has a valid contractual obligation to pay Level 3 the Usage Sensitive Transport Recovery Charge detailed in the July 2004 Agreement. Level 3 is not seeking to recover "reciprocal compensation" from Neutral Tandem. Even if it were feasible for Level 3 to recover reciprocal compensation from the originating carriers, reciprocal compensation is only designed to cover the cost of transport and termination. Level 3 incurs additional expense and resource expenditure to maintain and support a separate interconnection network with Neutral Tandem. The way Neutral Tandem makes money is by obtaining interconnection service from companies like Level 3 and then reselling that capability to originating carriers at a substantial mark-up. The value of Level 3's service to Neutral Tandem exceeds the costs incurred by Level 3 to provide that service—just as the value and price of the service provided by Neutral Tandem to its customers exceeds the costs incurred by Neutral Tandem. Neutral Tandem's transit service is more marketable and valuable if Neutral Tandem's third party carrier customers can also originate calls to Level 3 numbers. It is neither fair, reasonable nor in the public interest to force Level 3 to subsidize the profits of Neutral Tandem. Open, competitive markets should not prohibit Level

3 from recovering the value of the service it provides to Neutral Tandem through appropriate prices just as Neutral Tandem does with its customers.

b. If the response to (a) is no, please list the specific information not provided by Neutral Tandem that Level 3 needs to bill originating carriers for call termination.

c. If the response to (a) is yes, does Level 3 bill originating carriers for call termination? If no, please explain why not.

Response: Neutral Tandem's argument that Level 3 should seek compensation from Neutral Tandem's originating carrier customers is irrelevant to the question of whether Neutral Tandem should compensate Level 3 for building and maintaining an interconnection network for the sole purpose of accepting one-way traffic for the financial gain of Neutral Tandem. As discussed above, Neutral Tandem is contractually obligated to pay Level 3 pursuant to the terms of Section 11.3 of the July 2004 Agreement between the parties as well as according to the tenets of fairness, justice and unjust enrichment.

8. Level 3's alternative to imposing its recommended interim rate is for Neutral Tandem to re-route traffic during the pendency of this proceeding. Please explain the possible end-user impact of re-routing traffic for Neutral Tandem's originating carriers.

Response: Last year, Neutral Tandem decided to unilaterally terminate its interconnection with Level 3 in Indiana, New Jersey, Massachusetts, Ohio, Wisconsin and Maryland because traffic volumes in those states and revenues there from did not justify continued litigation with Level 3. To effectuate this rerouting, Neutral Tandem simply advised its customers that it would no longer be routing transit traffic to NPA-NXXs belonging to Level 3 and the originating carriers responded by rerouting that traffic to Level 3 via another transit provider. By Neutral Tandem's own account, this rerouting was accomplished in approximately one month and without any call failures. The only real reason Neutral Tandem does not want to have its Florida customers reroute Level 3 traffic is because of the high revenues it receives for routing that traffic to Level 3 in Florida.

9. Has Level 3 billed Neutral Tandem a rate of $0.001 per MOU for terminating transit traffic since June 25, 2007?

Response: Level 3 initially issued some bills to Neutral Tandem at $.001, but later re-billed those periods at the [redacted] rate that Neutral Tandem agreed to in the July 2004 Agreement. Hence, Level 3 has billed Neutral Tandem at a rate of [redacted] since March 24, 2007 pursuant to the July 2004 Agreement. Although Neutral Tandem continues to accept the services provided under the July 2004 Agreement, and the July 2004 Agreement still requires Neutral Tandem to pay Level 3 for those services, Neutral Tandem has failed to pay for any services provided after March 23, 2007.