STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of Complaint and Application for Emergency Relief by Neutral Tandem, Inc. for Interconnection with Level 3 Communications	))))	Case No. U-15230

NEUTRAL TANDEM, INC.'S RESPONSE TO LEVEL 3 COMMUNICATION'S APPLICATION FOR LEAVE TO APPEAL

I. INTRODUCTION

Neutral Tandem, Inc. files this response to Level 3 Communications' Application for Leave to Appeal and Request for Immediate Consideration (the "Application"), as well as Level 3's First and Second Supplemental filings in support of the Application.[1] As set forth more fully below, Neutral Tandem's limited disclosure in other states of Mediator Saghy's May 21, 2007 recommended settlement (the "Mediation Decision") has, at all times, been entirely consistent with Michigan law. Simply put, Neutral Tandem has done nothing wrong, as shown by ALJ Feldman's denial of Level 3's baseless motion for sanctions.

Moreover, unlike anything done by Neutral Tandem, Level 3's reckless filing of this Application raises a substantial risk of the Commission becoming aware of the substance of the Mediation Decision before the conclusion of this dispute. Granting Level 3's Application, and considering the issues presented therein on an expedited basis, is not necessary to prevent any harm to Level 3 or the public at large, nor will it serve to expedite resolution of the underlying

[1] While Level 3 requests "immediate consideration" of its Application, Level 3 failed to request expedited treatment from the presiding officer as required by Rule 337(1). As a result, the belated request for immediate consideration is procedurally defective, as well as unwarranted and should be denied for the same reasons its Application.

merits of this case in anyway. Indeed, as discussed more fully below, even though Neutral Tandem's limited disclosure of the Mediation Decision has at all times been consistent with Michigan law (Level 3's Application notably fails to acknowledge the safeguards Neutral Tandem has taken to ensure compliance with both the letter and the spirit of Michigan law), Neutral Tandem will not disclose the Mediation Decision to any other state commissions.

Should the Commission decide to grant Level 3's Application and consider the issues presented therein at this time, Neutral Tandem is confident that the Commission, upon reviewing all of the facts and relevant law, will deny the relief Level 3 seeks and find that Neutral Tandem's limited disclosure of the Mediation Decision to commissions in other states was entirely consistent with Michigan law.

II. SUMMARY OF THE ARGUMENT

On May 25, 2007, Level 3 filed a motion claiming that Neutral Tandem had violated Section 203a of the Michigan Telecommunications Act (the "MTA") by submitting the Mediation Decision to a limited number of commissions in other states where Neutral Tandem has filed complaints against Level 3 raising issues similar to those raised in Neutral Tandem's Michigan complaint (the "Motion"). After the Motion was briefed and argued by the parties, Administrative Law Judge Sharon L. Feldman denied Level 3's Motion. (Tr., 45-46.)[2] As Judge Feldman found, no legal basis existed to grant Level 3 the relief sought by its Motion.[3] Fourteen days after Judge Feldman's denial of its Motion, Level 3 filed its Application.

Level 3 fails to establish any basis for the Commission to grant its Application. Level 3 has not demonstrated how a decision or ruling on its Application now, before submission of the

[2] Citations to "Tr.," refer to the June 6, 2007 hearing before Judge Feldman on Level 3's Motion.

[3] Staff similarly concluded that Neutral Tandem did not violate the statute. (Tr., 36.)

full case to the Commission, will "materially advance a timely resolution of the proceeding" or "prevent substantial harm to [Level 3] or the public-at-large." R. 460.17337(2)(a) and (b). Level 3 offers no cogent argument for granting the Application, because as described below, none exists. Even if the Commission grants Level 3's Application, which it should not, the Commission would have to deny the relief Level 3 seeks, because Neutral Tandem's limited, extra-territorial disclosure of the Mediation Decision did not violate any statute, rule or order of this Commission.[4]

Neutral Tandem has complied in every respect with both the letter and the spirit of Michigan law. Section 203a(6) prevents disclosure of the Mediation Decision only to the three individual Michigan Commissioners before their final order is issued. Level 3's Motion and its Application fail to show any such violation by Neutral Tandem, because Neutral Tandem never engaged in any conduct that violated Section 203a(6). Neutral Tandem notified *each and every commission* in the other states where Neutral Tandem submitted the Mediation Decision that under the MTA, it cannot be revealed to the Michigan Commissioners. In fact, Level 3 never has explained how these limited and safeguarded disclosures, which are consistent with Section 203a(6), violate Michigan law, particularly when the Michigan Freedom of Information Act would allow any person to obtain the Mediation Decision from the Commission absent the issuance of a protective order pursuant to Section 210 of the MTA.[5] MCL 15.231 *et. seq*. Rather, without support in any Michigan law, rule, or order, Level 3 seeks to transform Section

[4] Despite Level 3's baseless assertions to the contrary in the Application, the Commission may only grant remedies "if after notice and hearing the Commission finds a person has violated this act. . . ." Section 601 of MTA.

[5] It is beyond dispute that no protective order has ever been issued and, in fact, one has never been requested by Level 3.

203a(6)'s clear language into a blanket, extra-territorial prohibition on Neutral Tandem's use of the Mediation Decision.

By contrast, Level 3's conduct in recklessly filing its Motion and now its Application may lead to the "individual Commissioners [being] … informed of the recommended settlement," in violation of Section 203a(6), before they issue their final order. That is because, in considering and ruling on Level 3's Application, the Commission may inevitably obtain some familiarity with the Mediation Decision. Thus, it is *Level 3*, not Neutral Tandem, that may have disclosed the Mediation Decision to the Commissioners. The Commission should see through Level 3's callous and self-serving effort to use its own violation of the MTA as a vehicle to avoid the effect of the Mediation Decision. Neutral Tandem's limited, extra-territorial disclosure of the Mediation Decision is, and has always been, entirely consistent with Michigan law.

III. BACKGROUND

On March 1, 2007, Neutral Tandem filed with the Commission a formal complaint and application for emergency relief against Level 3. Among other things, Neutral Tandem's complaint requested that the Commission establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 and issue an order for emergency relief directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnection while the complaint is pending.

On March 21, 2007, the Commission denied, without prejudice, Neutral Tandem's request for emergency relief. The Commission's March 21 order directed the parties to engage in an alternative dispute resolution process pursuant to Section 203a of the MTA and also encouraged Neutral Tandem to seek relief, if necessary, pursuant to Section 203(13), to bar Level 3 from discontinuing service while the complaint was pending, upon establishment of

adequate security. On May 22, 2007, the Commission issued an order barring Level 3 from discontinuing service to Neutral Tandem upon the filing of a letter of credit. Neutral Tandem filed its letter of credit with the Commission on June 22, 2007.

On April 11, 2007, Judge James N. Rigas issued a memorandum stating that the Commission had "directed the parties to engage in alternative dispute resolution pursuant to 484.2203(14) and 484.2203a" and announced the appointment of Thomas Saghy as the mediator. Judge Rigas' memorandum also created narrowly tailored safeguards to ensure compliance with Section 203a(6). Judge Rigas' memorandum only required that, when Mediator Saghy served the Mediation Decision on the parties, he was to file the Commission's copy of the Mediation Decision under seal and the parties were directed to file their acceptance or rejection under seal.

On May 21, 2007, Mediator Saghy issued the Mediation Decision. Thereafter, Neutral Tandem submitted the Mediation Decision to commissions in several states where the parties are engaged in similar disputes regarding Level 3's improper and unilateral efforts to terminate Neutral Tandem's interconnection. Neutral Tandem also provided the Mediation Decision to the Federal Communications Commission (the "FCC"). In each such submission, Neutral Tandem notified the relevant authority that, under the MTA, the Mediation Decision could not be shared with the Michigan Commissioners.

On May 25, 2007, Level 3 filed its Motion erroneously claiming that Neutral Tandem violated Section 203a(6) by filing the Mediation Decision with other state commissions. In its Motion, Level 3 failed to acknowledge the limited and safeguarded nature of Neutral Tandem's disclosures of the Mediation Decision. For example, as noted above, with respect to every such disclosure, Neutral Tandem advised the other commissions of the MTA requirement to not share the Mediation Decision with the Michigan Commissioners.

After the parties briefed and argued the Motion, Judge Feldman denied the Motion based upon the plain text of Section 203a(6). (Tr., 45-46) Section 203a(6) only prohibits disclosure of the Mediation Decision to three specific individuals: the three Michigan Commissioners, and only for a limited time period. Neither Section 203a(6) nor any applicable administrative rule placed a blanket prohibition on Neutral Tandem's sharing of the Mediation Decision with other state commissions or the FCC.

Throughout its Motion and Application, Level 3 repeatedly refers to the mediation and the Mediation Decision as "confidential." Level 3's mischaracterization of the mediation as "confidential" is neither supported by law nor the facts surrounding the mediation. For example, Section 203a, under which the mediation occurred, does not use or contain the term "confidential." Notably, the Commission's March 21, 2007 order requiring the parties to mediate did not require a "confidential mediation." Moreover, Mediator Saghy never designated the Mediation Decision as "confidential." And Level 3 never requested that the mediation be "confidential" and or sought a protective order pursuant to Section 210 of the MTA to designate the mediation as confidential. Only after Mr. Saghy issued the Mediation Decision did Level 3 assert for the first time that the mediation process was "confidential."

IV. ARGUMENT

A. Level 3's Application Fails To Meet The Standard For Granting An Application To Appeal Judge Feldman's Decision.

Level 3 fails to establish any basis in law to grant its Application to appeal Judge Feldman's denial of its Motion. Rule 337(2) of the Commission's Rules of Practice and Procedure, R 460.17337(2), establishes the basis for granting an application and states:

> (2) The commission will grant an application and review the presiding officer's ruling if any of the following provisions apply:

> (a) A decision on the ruling before the submission of the full case to the commission for final decision will materially advance a timely resolution of the proceeding.
>
> (b) A decision on the ruling before submission of the full case to the commission for final decision will prevent substantial harm to the appellant or the public-at-large.
>
> (c) A decision on the ruling before submission of the full case to the commission for final decision is consistent with other criteria that the commission may establish by order.

Level 3's Application fails to establish any basis to grant its Application. For this reason, the Commission should deny the Application.

1. Granting the Application will not materially advance a timely resolution of the Michigan proceeding.

Level 3 first argues, in two short paragraphs, that the Application should be granted "to advance a timely resolution." (Application, at 6.) Yet Level 3 offers no cogent basis to support a claim that granting its Application "before the submission of the full case to the Commission will materially advance a timely resolution of the [Michigan] proceeding." Rule 337(2)(a).

Level 3 offers zero explanation for why the Commission granting its Application would impact the previously-agreed to schedule in this matter. Simply, Judge Feldman's decision on Level 3's Motion is not the type of decision that, if reversed by the Commission, will advance a timely resolution of the Michigan proceeding. Indeed, the relief Level 3's Application seeks is not the type that could bring a timely resolution of this matter. Level 3 does not, for example, seek dismissal of Neural Tandem's Complaint or any other dispostive relief. (*See* Application, at 17-18.) Nor will a Commission decision on Level 3's Application impact the scope of the issues, discovery, or the evidence to be presented at the hearing. Thus, no basis exists for Level 3 to assert that the granting of its Application now -- before the submission of the full case to the Commission -- will materially advance a timely resolution of this proceeding.

In apparent recognition of its inability to demonstrate the need to grant its Application to "materially advance a timely resolution" of this proceeding, Level 3 improperly attempts to expand the scope of Rule 337(2)(a) by suggesting that granting the Application may favorably impact the timely resolution of other "out-of-state proceedings." (Application, at 6). This assertion has no merit and cannot provide a basis for the Commission to grant the Application. The parties' out-of-state cases are proceeding according to their own schedules and will be entirely unaffected by a Commission ruling on the Application. In fact, the three state commissions that Level 3's Application identifies as having received the Mediation Decision -- Connecticut, Georgia, and New York -- all have rendered decisions favorable to Neutral Tandem regarding similar complaints against Level 3. (*See* Attachments A, B and C hereto).[6] Thus, Level 3's claim that granting its Application somehow will materially advance the parties' out-of-state proceedings has no merit.

2. Level 3 fails to demonstrate that granting the Application will prevent substantial harm to it or the public at large.

a. Granting the Application prevents no substantial harm to Level 3.

Level 3 fails to demonstrate that granting the Application would prevent a substantial harm to it. The Application is completely devoid of any claim of future harm that would befall Level 3 if the Commission denies the Application. Instead, Level 3 continues to erroneously argue, as it did before Judge Feldman (Tr., 17), that disclosure of the Mediation Decision to other state commissions harmed Level 3's ability to accept Mediator Saghy's recommendation without compromising its litigation positions in the other proceedings. (Application, at 6-7.) As Judge Feldman recognized, this alleged harm, if any, was not caused by any Neutral Tandem disclosure

[6] The Illinois Administrative Law Judge presiding over the parties' dispute issued an order which finds that Level 3's conduct violated Illinois law. (Attachment D hereto.) A final Illinois Commerce Commission order on the merits is expected on July 10, 2007.

because if both parties accepted the mediator's recommendation, then the recommendation would have become the Commission's final order. (Tr., 17; *see also* Section 203a(3).) Thus, Level 3 was free to accept or reject Mediator Saghy's recommendation and the perceived harm is neither a "future harm" nor related to any Neutral Tandem disclosure.

In another futile attempt to show future harm, Level 3 speculatively asserts, without any basis in fact, that Neutral Tandem caused Level 3's purported settlement position to be revealed to other state commissions. (Application, at 6-7.) The implication Level 3 apparently seeks to leave is that Level 3 revealed a position in its Michigan mediation submissions that had not previously been made public, and that Neutral Tandem's disclosure of that position somehow compromises Level 3's litigation position in other states. But nothing could be further from the truth. Simply put, while Neutral Tandem will not discuss here the substance of Level 3's so-called settlement position, the fact is that Level 3's settlement position is the very same position Level 3 has articulated publicly in nearly *twenty* pleadings and pre-filed testimony submissions since this dispute began. A list of those submissions is attached hereto as Attachment E. Moreover, the Mediation Decision did not even reveal the substance of Level 3's position, so to the extent any state commissions were not already aware of Level 3's so-called settlement position based on Level 3's own submissions, they learned nothing new from the Mediation Decision.

While Level 3 did designate as "confidential" one exhibit attached to one of the two submissions it made to Mr. Saghy, that exhibit was not part of the Mediation Decision and was not shared with any other commission. Notably, Level 3 already had publicly filed the information it claimed to be "confidential" in its mediation submission. Moreover, if Level 3 truly believed that the entire mediation process was confidential, as it now claims for litigation

purposes, why did it mark only one part, of one mediation submission, as "confidential" and not so mark all other portions of its submissions?[7] Only after the mediation result became known did Level 3 assert that all of its filings and the Mediation Decision somehow are confidential.

Neutral Tandem's limited and safeguarded disclosure of the Mediation Decision has caused Level 3 no harm, let alone the type of substantial harm the Commission must find before granting the Application.[8] Moreover, even though Neutral Tandem's limited, extra-territorial disclosure of the Mediation Decision was entirely consistent with Michigan law, and even though Level 3 has not suffered any harm as a result, to ensure that further claims by Level 3 will not surface in the future, and further distract the Commission from resolution of this important matter, Neutral Tandem will not submit the Mediation Decision to any other agencies or bodies while this matter remains pending.

b. Granting the Application prevents no substantial harm to the public-at-large.

Level 3 also fails to demonstrate any substantial harm to the public-at-large that would be prevented by the granting of its Application. In fact, Level 3 does not even attempt to show any substantial harm to the public-at-large as required by Rule 337(2)(b). (*See* Application, at 6-7.) Instead, Level 3 focuses on the harms that allegedly would befall the Commission if the hypothetical, inadvertent disclosure of the Mediation Decision, by another commission, to a Michigan Commissioner occurs. (*Id.* at 7.)

[7] Even in proceedings where protective orders are issued, the orders require the party asserting the confidentiality a document to mark it as "confidential" in order for the document to fall within the protection provided by the order.

[8] The alleged "harm" to Level 3, if any, is self-inflicted. As a result of the findings by numerous commissions that Level 3's actions violated state law and were against the public interest, it is in the public's interest that other commissions received limited disclosure of the Michigan Decision which was consistent with those other decisions.

Level 3's hypocritical argument is incredulous because it ignores that Level 3's own reckless conduct in filing the Motion and the Application, not any Neutral Tandem conduct or speculative, hypothetical conduct of another commission, may lead to the Commission becoming aware of the substance of the Mediation Decision. Thus, the very harm Level 3 claims that it seeks to avoid through its Application -- familiarization with the Mediation Decision by a Michigan Commissioner -- may already have been caused through Level 3's own conduct.

Furthermore, Level 3's Application wholly ignores the steps Neutral Tandem repeatedly took to eliminate any possible inadvertent disclosure of the Mediation Decision to the Michigan Commissioners when Neutral Tandem filed the decision with other commissions. Indeed, the exhibits to Level 3's own Application demonstrate that when Neutral Tandem supplied the Mediation Decision to the New York, Georgia, and Connecticut commissions, Neutral Tandem clearly and unequivocally warned the commissions that "Neutral Tandem notes that, under the Michigan PSC process, Mr. Saghy's recommendation was not to be disclosed to the Michigan Commissioners or adjudicatory staff." (*See* Exhibit 1 to the Application, at 6, n.16.)

In its June 22, 2007 Supplement to its Application, Level 3 accuses Neutral Tandem of improperly filing the Mediation Decision with the District of Columbia Public Service Commission (the "DC Commission") on June 20, 2007. (*See* Supplement to Application, at ¶ 4.) But what Level 3's Supplemental fails to mention is that Neutral Tandem filed the Mediation Decision ***under seal*** with the DC Commission. Thus, there can be no argument that Neutral Tandem increased the likelihood that the Michigan Commissioners would be exposed to the Mediation Decision in violation of Section 203a(6). Level 3's exclusion of this critical fact from its Supplement reveals the desperation of Level 3's arguments.

Level 3's Second Supplement to its Application, filed June 27, 2007, is equally disingenuous as it related to an FCC filing by Neutral Tandem which occurred on May 25, 2007 well before Level 3 filed its initial motion and before the motion hearing on June 6, 2007. In its "Second Supplement," Level 3 accuses Neutral Tandem of improperly filing the Mediation Decision with the FCC. (*See* Second Supplement to Application.) But, as it did when referencing Neutral Tandem's filing with the DC Commission in its First Supplement, Level 3 omits from its Second Supplement any acknowledgment that Neutral Tandem took appropriate steps to ensure that its FCC filing would not be viewed by the Michigan Commissioners.[9] Exhibit 1 to Level 3's Second Supplement is Neutral Tandem's cover letter to the FCC. Thus, the very first document seen by anyone reviewing Neutral Tandem's FCC filing clearly contains the explicit statement: "[p]lease note that pursuant to the Michigan Telecommunications Act, the Mediation Decision is not to be disclosed to the Michigan Commissions or other Michigan PSC decision makers." (*Id.* at Exhibit 1, p. 1.)

Moreover, consistent with Judge Feldman's request during the June 6, 2007 hearing (Tr., 47),[10] Neutral Tandem inquired whether the FCC could remove the Mediation Decision from its public docket and place the Mediation Decision under seal. The FCC informed Neutral Tandem, however, that the FCC's rules prohibited such action.

In short, Neutral Tandem has not caused any harm to the Commission because Neutral Tandem's actions have not, and will not, lead to the three Michigan Commissioners learning anything about the Mediation Decision. Neutral Tandem's efforts to ensure that the Mediation

[9] Level 3 also fails to mention why it delayed four weeks in bringing Neutral Tandem's FCC filing to the Commission's attention. As Level 3's Second Supplement makes clear, Neutral Tandem filed the Mediation Decision with the FCC on May 25, 2007, almost four weeks before Level 3 filed its Application on June 20, 2007. (*See* Second Supplement at ¶¶ 3-4; Exhibit 1 to Second Supplement.) Yet Level 3 did not file its Second Supplement until June 27, 2007.

[10] Judge Feldman made her request several weeks after the filing with the FCC.

Decision is not seen by the Michigan Commissioners -- efforts that Level 3's Application and Supplements concealed from the Commission -- emasculate Level 3's arguments.

Last, contrary to Level 3's assertion, granting Level 3's Application will not "protect the integrity . . . of the mediation process." (Application, at 7.) To the extent this Commission or parties in future proceedings wish to conduct confidential mediations, the Commission may issue a protective order pursuant to Section 210 of the MTA.[11] Moreover, as noted above, Neutral Tandem agrees that it will not further disseminate the Mediation Order to any state commission or other government agency.

Neutral Tandem's limited and safeguarded disclosures of the Mediation Decision did not violate either the letter or spirit of Section 203a(6) and its handling of the Mediation Decision with other commissions has ensured that the integrity of the mediation process is protected. Neutral Tandem has caused no harm, let alone substantial harm necessary to grant the Application, to Level 3, the public-at-large, the Commission, or future mediation proceedings before the Commission. As a result, the Commission should deny Level 3's Application.

B. In Any Event, Judge Feldman Properly Denied Level 3's Motion.

Even if Level 3's Application satisfied the requirements of Rule 337(2), which it does not, Judge Feldman properly denied Level 3's Motion because it was based on Level 3's faulty premise that Michigan law prohibits the limited extra-territorial disclosure of the Mediation Decision. As Judge Feldman and the Commission Staff recognized, based on the plain text of Section 203a, no violation of the MTA occurred. (Tr., 36, 45-46.)

Neutral Tandem fully complied with both the letter and spirit of Michigan law, because Section 203a(6) only precludes the three Michigan Commissioners from learning about the

[11] An action which Level 3, notably, failed to seek in this proceeding.

Mediation Decision until the Commission issues its final order in this proceeding. At no time has Neutral Tandem disclosed the Mediation Decision to the Michigan Commissioners. As noted above, in making limited extra-territorial disclosures to other commissions, Neutral Tandem repeatedly has taken safeguards to eliminate even inadvertent disclosure of the Mediation Decision to Michigan Commissioners. Thus, no Neutral Tandem conduct has or will result in any violation of Section 203a(6).

As seen from the relief Level 3's Application seeks, Level 3 is more interested in tarring Neutral Tandem before other state commissions, and precluding those commissions from considering the reasoning of the Mediation Decision, than preventing the disclosure of the Mediation Decision to the Michigan Commissioners. Indeed, among the relief Level 3 seeks is:

> Order Neutral Tandem to publicly affirm in writing to each state public service Commission to which Neutral Tandem wrongfully disclosed a Recommendation that such disclosure was made in violation of the MTA, and that the Commission's [sic] should disregard Neutral Tandem's attempt to influence those commissions in an unlawful manner.

(Application, at 17-18.) But as recognized by Judge Feldman, the text of the MTA does not support any Neutral Tandem violation of the MTA. In essence, Level 3's Application assumes that a protective order has been issued by this Commission which limited the disclosure of the Mediation Decision. Yet no such protective order was issued and Level 3 never even sought a protective order here.

In an effort to demonstrate a violation of the MTA, Level 3's Application relies upon Section 203a(6) of the MTA, Michigan Court Rule 2.411, Michigan Rule of Evidence 408, and, now, the "ADR's Spirit." (Application, at 9-18.) Stripped of shrill accusations, an examination of Level 3's legal arguments reveals that no violation of Michigan law occurred and, thus, no remedy is appropriate. Neutral Tandem addresses below each of Level 3's baseless arguments.

1. Level 3's Application is unsupported by Section 203a of the MTA.

The language of Section 203a(6) states as follows:

> If the recommendation is not accepted under subsection (3), the individual commissioners shall not be informed of the recommended settlement until they have issued their final order under section 203.

Section 203a(6) thus prohibits disclosure of the Mediation Decision *only* to the three individual *Michigan* commissioners. Nowhere in its Motion or Application does Level 3 allege that Neutral Tandem disclosed the Mediation Decision to the Michigan Commissioners. Nor could Level 3 make such an assertion, because Neutral Tandem did not do so. Indeed, in an admission that is fatal to its Application, Level 3's counsel admitted during the June 6, 2007 hearing before Judge Feldman that Neutral Tandem's conduct did not violate Section 203a(6), as follows:

> We agree that there's no specific language in the statute [Section 203a(6)] in the Telecommunications Act that says parties may not publicly disclose in other state proceedings the mediator's report/recommendation.

(Tr., 12-13.)

Faced with this admission and the plain language of Section 203a(6), Level 3's Motion and Application simply repeat the words "confidential" or "confidentially" more than thirty different times, as if simply saying over and over that the alternative dispute process or the Mediation Decision is "confidential" somehow transforms the plain language of Section 203a(6) into the blanket, extra-territorial restriction on distributing the Mediation Decision that Level 3 seeks. Level 3's repeated incantations cannot transform Section 203a(6)'s plain language. Only a Michigan statute, administrative rule or Commission order can codify the blanket, extra-territorial prohibition Level 3 wishes to obtain, and no such statute, administrative rule or order exists. As a result, Judge Feldman properly denied Level 3's Motion.

In enacting the alternative dispute resolution process set forth in Section 203a, the Michigan Legislature was clear. It required only that "the individual commissioners shall not be informed of the recommended settlement until they have issued their final order under section 203." MCL 484.2203a(6). The Michigan Legislature thus determined that the "recommended settlement" was only required to be kept from the individual commissioners (i.e. three people) and only for a limited period of time.[12] If the Michigan Legislature intended to incorporate the broad, extra-territorial prohibition Level 3 wishes to obtain, it would have required that treatment in the statute.[13] It did not do so.

Notably, Level 3 cites no case law to support its strained interpretation of Section 203a. (*See* Application, at 9-11, 15-16.)[14] It is unable to do so, because none exists. It is axiomatic that under Michigan law the primary goal of statutory interpretation is to give effect to the Legislature's intent. *Verizon North, Inc. v. Michigan Public Serv. Comm'n*, 260 Mich. App. 432, 438 (2004). The first step in that determination is to review the language of the statute itself. If the statutory language is unambiguous, the reviewing court, or in this case the Commission, must presume the legislature meant what it stated. *Id., citing In re MCI*, 460 Mich. 396, 411 (1999). The statutory language of Section 203a(6) is unambiguous and does not support Level 3's Application or Motion.

Furthermore, Michigan courts repeatedly have held that when the Michigan Legislature enacts a statute which expressly includes certain persons within the scope of a statute, the

[12] In fact, Neutral Tandem's notice was much broader than that contemplated by the Michigan Legislature and stated that the Mediation Decision should not be disclosed to any decision maker at the Commission.

[13] For example, Section 210 of the MTA provides a process to treat information as confidential. MCL 484.2210.

[14] While Level 3's Application cites two cases, *Goodyear Tire & Rubber Corm. v. Chiles Power Supply*, 332 F.3d 976 (6th Cir. 2003) and *Irwin Seating Co. v. Int'l Bus. Machines Corp.*, 2007 WL 518866 (W.D. Mich. 2007), neither even mentions a party's obligations under Section 203a(6) of the MTA.

legislature did not intend to include others within the scope of the statute. For example, in *Bradley v. Saranac Cmty. Sch. Bd. of Educ.*, 455 Mich. 285, 299 (1997), the court found that where the Michigan Legislature exempted personnel records of law enforcement officials from the Freedom of Information Act ("FOIA"), the personnel records of other public employees were subject to FOIA. In the present matter, the Michigan Legislature created a very narrow class of persons to whom the "recommended settlement" should not be disclosed -- the three Michigan Commissioners. The rules of statutory interpretation prevent the expansion of the narrow scope of this legislatively established classification.[15]

Critically, when Neutral Tandem disclosed the Mediation Decision to other state commissions, Neutral Tandem took great care to ensure that there would be no inadvertent violation of Section 203a(6). Indeed, Neutral Tandem has informed ***each and every*** commission with which it shared the Mediation Decision that it cannot be shared with the Michigan Commissioners.[16] Level 3's Motion, Application, and Supplements never have acknowledged these Neutral Tandem precautions. This omission reveals Level 3 to be engaging in an opportunistic gambit to try to avoid the effect of a Mediation Decision.[17]

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[15] The Michigan Legislature's decision to prevent disclosure of the recommended settlement only to the individual commissioners when it enacted Section 203a(6) is consistent with Michigan's longstanding policy toward open government. "Sunshine laws," were adopted in Michigan as early as 1895. *Wexford Co. Prosecutor v. Pranger*, 83 Mich. App. 197, 201 n.5, 268 N.W.2d 344 (1978). Their purpose is to prevent real injury, triggered when government acts in secret. *Id.* In this regard, the Michigan Legislature's decision to narrowly tailor the non-disclosure of the recommended settlement to three individuals for a limited duration is consistent with Michigan's longstanding policy favoring open government and decision making.

[16] These safeguards taken by Neutral Tandem were made out of an abundance of caution because Section 82 of the Michigan Administrative Procedures Act of 1969 already prevents commissioners and other decision makers from having contact directly or indirectly with any person or parties regarding a pending contested case. MCL 24.282(1).

[17] Further demonstrating the flaws of Level 3's argument, the Motion cited a phantom Order in Case No. U-14004 as supposedly supporting the proposition that "the Commission has determined that mediation recommendations must remain confidential." (Motion, at 4.) Level 3 neither cited the date on which this alleged "order" was issued, nor did it provide any page

Any argument that disclosure of the Mediation Decision to other commissions creates a risk of violating Section 203a(6) is farcical and ignores the statutory safeguards applicable to contested case proceedings before the Commission. For example, as noted above, Section 82 of the Michigan Administrative Procedures Act of 1969 clearly prevents Commissioners and other decision makers from having contact directly or indirectly with any person or parties regarding a pending contested case. MCL 24.282(1). Any overly-inflated concern proffered by Level 3 that the Commissioners may learn of the Mediation Decision through other commissions ignores this safeguard.

The reason the Commission's copy of the Mediation Decision was filed under seal, as Judge Rigas ordered in his April 11, 2007 memorandum, was not to prevent others from discussing the decision with the individual Michigan Commissioners, because a statute already prevents those types of communications. Instead, the purpose was to prevent inadvertent disclosure as the Commission reviews its own files when reaching its final decision. Level 3's actions, not anything done by Neutral Tandem, have created the risk of inadvertent disclosure of the Mediation Decision to the Commissioners.

2. MCR 2.411 does not support Level 3's position.

Level 3 also fails to cite any administrative rule promulgated by the Commission to support its misreading of Section 203a(6). Instead, Level 3 references Michigan Court Rule

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reference at which the Commission allegedly made the statement relied upon by Level 3. Neutral Tandem reviewed the Commission's docket in Case U-14004 and uncovered only two orders in that matter, dated September 21, 2004 and February 24, 2005. Neither order supports the broad confidentiality principle which Level 3 claims, namely, that "the Commission has determined that mediation recommendations must remain confidential." (*Id.*) In fact, neither order even references Section 203a, recommended settlements or mediations, let alone the broad confidentiality principle Level 3 claims. Unable to find any meritorious legal support for its position, Level 3 apparently stooped to fabricating Commission orders "out of whole cloth."

2.411(C)(5) regarding the confidentiality of certain communications and written submissions in the mediation process ***before the Michigan circuit courts***. Level 3's Application offers no explanation for why this rule for mediation in circuit courts is applicable to alternative dispute resolutions pursuant to Section 203a of the MTA.

Rule 2.411(C)(5) simply is inapplicable to the process set forth in Section 203a. If the Michigan Legislature wished to adopt similar confidentiality provisions, it could have done so by either paraphrasing MCR 2.411(C)(5) or referencing MCR 2.411(C)(5), but it did not. Similarly, if the Commission wished to adopt similar confidentiality provisions as those set forth in MCR 2.411(C)(5) in its administrative rules, it could have done so, but it did not. MCR 2.411(C)(5) is not applicable to this case and, in fact, demonstrates by contrast that Section 203a(6) does not impose the blanket, extra-territorial restrictions on disclosing the Mediation Decision that Level 3 now belatedly seeks to enforce.

To be sure, with respect to the Rules of Practice and Procedures before the Commission, Rule 103 does provide that "[i]n areas not addressed by these rules, the presiding officer ***may*** rely on appropriate provisions of the currently effective Michigan court rules." (Emphasis added; R.460.17103(1)). This rule is clearly permissive and not mandatory. A presiding officer may choose or may choose not to rely on Michigan Court rules. Here, no presiding officer has ever chosen to rely upon MCR 2.411(C)(5) and therefore it is inapplicable to Level 3's Application.[18]

[18] Level 3 also conveniently chooses only a small selection of MCR 2.411 to be automatically applicable to the parties' mediation. But MCR 2.411 imposes many other obligations regarding the conduct of mediations in circuit court. MCR 2.411 imposes rules on the selection of the mediator, the scheduling and conduct of the mediation, the qualifications and training of mediators and the standards of conduct for mediators. Level 3 does not even suggest that the Commission has or was required to automatically follow all of these other requirements of MCR 2.411. Yet, Level 3 perversely argues that Michigan law somehow automatically mandated Neutral Tandem to comply with a select portion of MCR 2.411, even though neither the Commission nor any presiding officer elected to apply this select portion of MCR 2.411 or provide any notice of its applicability to the parties.

Level 3's argument that MCR 2.411(C)(5) imposed a legal duty on Neutral Tandem is simply untenable.

3. Neutral Tandem did not violate MRE 408.

Level 3 next asserts that Neutral Tandem's disclosure of the Mediation Decision, with safeguards, to other commissions violated Michigan Rules of Evidence 408. (*See* Application, at 11-13.) Level 3 ignores that the purpose of the Michigan Rules of Evidence is to determine what evidence is allowed to be considered by a Michigan tribunal during an evidentiary proceeding regarding a disputed factual issue. *See* MRE 1102, MRE 402, and *People v. Manning*, 434 Mich. 1, 37, 450 N.W.2d 534 (1990) (Justice Archer *dissenting*). Because no evidentiary hearing has been conducted in this proceeding, and Neutral Tandem has not and will not present the Mediation Decision as evidence in this proceeding, it is impossible for Neutral Tandem to have violated MRE 408.

Any analysis of MRE 408 also reveals that the rule imposes no confidentiality requirement on any party. Instead, MRE 408 merely limits the admissibility in evidentiary proceedings of certain statements made in "compromise negotiations." MRE 408. Moreover, the exclusion of statements made in "compromise negotiations" is not absolute. MRE 408 provides a nonexclusive list of circumstances where a Michigan court may permit a party to use statements made in "compromise negotiations" during an evidentiary proceeding. *Id.*

Furthermore, during the oral argument on its Motion, Level 3 expressly recognized that Neutral Tandem is not submitting the Mediation Decision as "evidence" in other states' proceedings. (Tr., 42.) Indeed, the other state commissions have their own legal standards and requirements as to what materials may be filed with them and what they may consider. Level 3 also conveniently ignores that it has filed motions to strike the Mediation Decision with several

state commissions and those commissions have not granted Level 3's motions. These commissions will determine the appropriate weight, if any, they may give to the Mediation Decision.

Unable to convince other state commissions to strike Neutral Tandem's filing of the Mediation Decision, Level 3 now pursues an ill-advised appeal of its Motion seeking to enlist this Commission to meddle in the decision-making process of other state commissions. But as demonstrated by their failure to entertain Level 3's motions to strike, the other state commissions already have applied or will apply their own analysis of the appropriate use of the Mediation Decision in their proceedings.

4. Neutral Tandem did not violate the "ADR's Spirit."

Level 3 also attempts to marshal various policy arguments as to why this Commission should grant the relief requested against Neutral Tandem. (*See* Application, at 9-11, 14-16.) These arguments must be rejected for several reasons. First, "as a creature of the Legislature, the Commission possesses only that authority bestowed upon it by statute." *Union Carbide Corp v. PSC*, 431 Mich. 135, 146 (1998). The authority for the Commission to take an action "must be found in statutory enactments." *Sparta Foundry Co v. PUC*, 275 Mich. 562, 564; 267 N.W. 736 (1936).

Here, the only basis for the Commission to issue a remedy under the MTA is Section 601 and that section requires a finding that a person "violated this Act." MCL 484.2601. As set forth above, and recognized by Judge Feldman, Neutral Tandem did not violate Section 203a(6) or any other section of the MTA. Thus, even if Level 3's policy arguments regarding the "ADR's Spirit" had any merit, which they do not, no basis exists for the Commission to grant the extremely broad relief requested by Level 3's Application.

Second, Level 3's policy arguments fail because they are based on the completely false and unsupported claim that Neutral Tandem, in its limited and safeguarded disclosure of the Mediation Decision, somehow exposed some secret settlement and compromise positions of Level 3. But as discussed above, this argument is patently false. The Mediation Decision did not contain any Level 3 position that Level 3 itself had not previously made public numerous times. And, as noted above, state commissions routinely have refused to accept Level 3's efforts to strike the Mediation Decision from their dockets. Level 3 simply has identified no harm to the mediation process by allowing other commissions to review the rationale and reasoning underlying Mr. Saghy's Mediation Decision.

Third, Level 3's Application ignores the fact that there is absolutely no value in keeping fact finding or decision-making secret from other commissions. Courts repeatedly have stressed the benefits of openness in fact finding and decision-making. In *Brown & Williamson v FTC*, 710 F.2d 1178 (6th Cir 1983) *citing Richmond Newspapers, Inc v. Virginia*, 448 U.S. 555, 571; 100 S.Ct. 2814 (1980), for example, the court stressed that openness assured that decision makers "will continue to be held responsible for . . . their rulings" and openness allows for critique of the decision makers' analysis. *Id.* at 1178. Further, the court recognized that openness plays a critical role in promoting "true and accurate fact finding." *Id.* Last, the court recognized that "secrecy insulates the participants, masking impropriety" and "openness in the courtroom discourages perjury." *Id.* at 1178-79. Level 3's policy argument that it is necessary to cloak the entire mediation process in secrecy to gain the confidence of participants will have the opposite impact. Mediations will become meaningless because there will be no repercussions for a party willing to tell half-truths or flat-out lies to gain a better mediation result.

5. Neutral Tandem fully complied with Judge Rigas' April 12, 2007 Memorandum.

On April 11, 2007, Judge James N. Rigas issued a memorandum[19] stating that the Commission had directed the "parties to engage in alternative dispute resolution." The memorandum also created narrowly tailored safeguards to ensure compliance with Section 203a(6). Judge Rigas' memorandum required only that, when the Mediator served the Mediation Decision on the parties, he was to file the Commission's copy of the Mediation Decision under seal. (*Id.*) Judge Rigas also ordered the parties to file their acceptance or rejection of the Mediation Decision under seal. (*Id.*)

The clear purpose of filing the Commission's copy of the Mediation Decision, and the parties' acceptance or rejection, under seal was to ensure that, when the Commission was reviewing the file to reach its final determination, it would not inadvertently learn of the Mediation Decision or the parties' acceptance or rejection. These safeguards were narrowly tailored to ensure compliance with Section 203a(6) and, for all of the reasons explained above, Neutral Tandem has wholly complied with the requirements imposed by Judge Rigas' memorandum.

6. The FOIA requires the public disclosure of the Mediation Decision upon request.

A final flaw in Level 3's claim that Neutral Tandem violated the law through its limited and safeguarded disclosure of the Mediation Decision is the fact that absent a protective order issued pursuant to Section 210 of the MTA -- which has not occurred in this case and indeed has

[19] This memorandum does not constitute a statute, rule or order of the Commission, but is instead a guideline "which does not have the force and effect of law." MCL 24.203. Nevertheless, Neutral Tandem fully complied with the procedures set forth in the memorandum.

not even been requested by Level 3 -- the Michigan Freedom of Information Act (the "FOIA") requires the public disclosure of the Mediation Decision.

The FOIA states that all persons "are entitled to full and complete information regarding the affairs of government." MCL 15.231(2). It is beyond dispute that the Commission is a public body subject to FOIA, MCL 15.232(d), and that the Mediation Decision meets the definition of public record, MCL 15.232(e). Unless expressly exempted by the FOIA, a public body, upon request, must produce a public record for inspection and copying to a requesting person. MCL 15.233. A review of the FOIA's exceptions discloses none that apply to the Mediation Decision. MCL 15.243(1). It thus would violate Michigan law to bar the public from access to the Mediation Decision. Level 3 never has even attempted to explain how Neutral Tandem's limited disclosure of the Mediation Decision, with safeguards, violates Michigan law in light of the fact that the FOIA mandates the disclosure of the Mediation Decision absent entry of a protective order that Level 3 has not even bothered to seek.

V. RELIEF REQUESTED

Wherefore, for the reasons explained above, Neutral Tandem respectfully requests that this Commission deny Level 3's Application for Leave to Appeal.

Dated: July 5, 2007

Respectfully submitted,

NEUTRAL TANDEM, INC.

By: Mike Ashton

Digitally signed by Mike Ashton
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ATTACHMENT A

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 07-02-29 PETITION OF NEUTRAL TANDEM, INC. FOR AN INTERCONNECTION AGREEMENT WITH LEVEL 3 COMMUNICATIONS AND REQUEST FOR INTERIM ORDER

June 20, 2007

By the following Commissioners:

Anthony J. Palermino
Anne C. George
John W. Betkoski, III

DECISION

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DECISION

I. INTRODUCTION

A. BACKGROUND OF THE PROCEEDING

By petition received on February 28, 2007 (Petition), Neutral Tandem, Inc. (Neutral Tandem) requested the approval of the Department of Public Utility Control (Department) of an interconnection agreement and also requested that an interim Decision pursuant to §§16-247a, 16-247b and 16-247f of the General Statutes of Connecticut (Conn. Gen. Stat.) be issued. Specifically, Neutral Tandem requested that the Department establish interconnection terms and conditions for the continued delivery of tandem transit traffic from Neutral Tandem to Level 3 Communications LLC (Level 3) and issue an interim Decision directing Level 3 not to block traffic carried under existing interconnections while the Petition was pending.

B. CONDUCT OF THE PROCEEDING

In order to facilitate its investigation, the Department, on March 29, 2007, sought written comments from interested persons addressing the Petition, including but not limited to, the applicability of federal and Connecticut law relative to interconnection and commercial agreements as they apply to Neutral Tandem and Level 3 and the Department's authority in approving those agreements; the alternative administrative vehicles (e.g., tariffs) for interconnection and/or commercial agreements that the Department might employ to provide the terms and conditions for interconnection between Neutral Tandem and Level 3; the compensation arrangements for originating and terminating traffic over the Neutral Tandem and Level 3 networks in Connecticut; and the status of similar Neutral Tandem petitions filed in other states.

On March 30, 2007, Level 3 submitted a Motion to Strike Petition of Neutral Tandem (Motion to Strike). On April 24, 2007, the Department ruled that the public interest was best served by holding the Motion to Strike in abeyance until the final Decision in this proceeding, thus preserving all legal issues raised by Level 3 in its Motion to Strike, and allowing the docket to continue in parallel with proceedings in other states.

By Notice of Hearing dated April 25, 2007, a public hearing on this matter was convened at the Department's offices, Ten Franklin Square, New Britain Connecticut 06051 on May 7, 2007, at which time it was closed.

The Department issued a draft Decision in this matter on June 7, 2007. All parties were afforded the opportunity to submit written exceptions and present oral argument concerning the draft Decision.

C. PARTIES

The Department recognized Neutral Tandem-New York, 1 South Wacker Drive, Suite 200, Chicago, Illinois 60606; Level 3 Communications, LLC, 1025 Eldorado

Boulevard, Broomfield Colorado 80021; and the Office of Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051 as parties to this proceeding.

II. DEPARTMENT ANAYLSIS

Neutral Tandem has requested that the Department (1) establish interconnection terms and conditions for the continued delivery of tandem transit traffic to Level 3 Communications,[1] and (2) issue an interim order directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while the Petition is pending.[2]

Neutral Tandem states that for over two years, it has interconnected with Level 3 in Connecticut and other states pursuant to negotiated contracts. Recently, Level 3 informed Neutral Tandem that it was terminating their contracts that enabled Neutral Tandem to deliver tandem transit traffic to Level 3, because Level 3 did not believe their terms were sufficiently advantageous to Level 3. Neutral Tandem also states that to date, efforts to negotiate new contracts have been unsuccessful. Accordingly, Neutral Tandem has requested that the Department enforce the interconnection mandates of Connecticut law, by establishing prospective terms and conditions under which Neutral Tandem and Level 3 would continue to interconnect for the delivery of tandem transit traffic to Level 3.[3]

In addition, Neutral Tandem contends that Level 3 plans to terminate their agreements as of March 23, 2007, which could lead to service disruption for the carriers that utilize Neutral Tandem's tandem transit service in Connecticut, as well as those carriers' end-user customers. To prevent these service disruptions, Neutral Tandem requests that the Department issue an interim order directing Level 3 to maintain the parties' existing interconnections pending resolution of the Petition.[4]

In its response to the Petition, Level 3 argues that Neutral Tandem seeks to radically alter the existing interconnection methodology between non-dominant competitive local exchange carriers (CLEC). Specifically, Level 3 maintains that Neutral Tandem has requested the Department to mandate, without any legal basis, that CLECs must directly, rather than indirectly interconnect with each other on rates, terms and conditions mandated by the Department, rather than through commercial negotiations, including requiring that each CLEC perform the termination function without any compensation from the directly interconnected CLEC. Level 3 also maintains that Neutral Tandem seeks to directly interconnect with Level 3. Additionally, Level 3 claims that other CLECs would then be indirectly interconnected with Level 3 via the voluntary tandem transit service function being offered by Neutral Tandem. Level 3 further claims that if Neutral Tandem is given the right to demand direct interconnection,

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[1] Tandem transit traffic refers to the intermediary switching of local and other non-access traffic that originates and terminates on the networks of different telecommunications providers within a local calling area. Petition, p. 1.

[2] Id.

[3] Id.

[4] Id., p. 2.

then every CLEC would be allowed to demand the same treatment from every other CLEC.[5]

Consequently, Level 3 concludes that the fundamental legal issued raised by the Petition is whether the Department has the statutory authority to and should (1) compel a CLEC to directly interconnect with another CLEC, and (2) require Level 3 to transport and terminate transit traffic without adequate compensation.[6]

The issue of transit traffic is not new to the Department. For example, in its January 15, 2003 Decision in Docket No. 02-01-03 Petition of Cox Connecticut Telcom, L.L.C. for Investigation of the Southern New England Telephone Company's Transit Service Cost Study and Rates, the Department addressed the offering of transit traffic service by the Southern New England Telephone Company (Telco), Connecticut's major incumbent local exchange company (ILEC) and the CLECs' purchase of that service from the Telco. In that Decision, the Department required in part that the Telco offer, in addition to its existing transit traffic service offering, another transit service which did not include a "bill clearinghouse" function. The January 15, 2003 Decision did not prohibit the offering of a bill clearinghouse function nor did it address direct or indirect interconnection or the issues from which Neutral Tandem seeks relief from in this proceeding.

In support of the Petition, Neutral Tandem also cites to Conn. Gen. Stat. §§16-247a, 16-247b(b) and 16-247f.[7] The Department is not persuaded by Neutral Tandem's reliance on Conn. Gen. Stat. §16-247b(b). While it is true that this statute requires telephone companies to provide "reasonable nondiscriminatory access and pricing to all telecommunications services . . ." the Department finds this statute does not apply here because Level 3 is not a telephone company as defined by Conn. Gen. Stat. §16-1(a)(23). In particular, Level 3 does not provide "one or more noncompetitive or emerging competitive services."[8] Rather, Level 3 (and Neutral Tandem) are considered a telecommunications company[9] or certified telecommunications provider.[10] Consequently, Conn. Gen. Stat. §16-247b(b) does not apply.[11]

The Department also finds that Conn. Gen. Stat. §16-247f also does not apply. Conn. Gen. Stat. §16-247f merely provides for the classification of and tariffing requirements for telecommunications services. It does not provide for the regulatory or interconnection relief sought by the Petition.

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[5] Level 3 Motion to Strike, pp. 1 and 2.

[6] Id., p. 2.

[7] Petition, pp. 3, 9-12.

[8] Conn. Gen. Stat. §16-1(a)(23).

[9] Conn. Gen. Stat. §16-1(a)(25).

[10] Conn. Gen. Stat. §16-1(a)(38).

[11] The distinction between a "telephone company" and a "telecommunications company" or "certified telecommunications provider" is not mere pedantry. A "telephone company" is among the list of companies included in the definition of a "public service company" (Conn. Gen. Stat. § 16-1(a)(4)), and thus may charge rates for noncompetitive and emerging competitive services only in accordance with traditional regulation pursuant to Conn. Gen. Stat. §16-19 or alternative regulation pursuant to Conn. Gen. Stat. §16-247k.

However, Conn. Gen. Stat. §16-247a does provide the Department with the ability to facilitate the development of competition for all telecommunications services within the state. While this statute may provide the Department with the requisite authority to address this issue, the evidentiary record does not warrant Department intervention at this time. In particular, the record does not demonstrate that there has been a good faith effort by the parties to resolve this matter. Consequently, the Department will not decide this matter now, but will direct the parties to continue their negotiations to develop a settlement that produces a nondiscriminatory commercial agreement governing the delivery of tandem transit traffic. The Department encourages the parties to resolve this matter quickly so that Neutral Tandem's customers are not disadvantaged by the absence of a commercial agreement governing the delivery of this traffic.

The Department will permit the parties until November 1, 2007, to conduct their good faith negotiations. If Neutral Tandem and Level 3 are unable to produce a commercial agreement, the parties will be required to report to the Department at that time detailing those negotiations.

III. CONCLUSION AND ORDERS

A. CONCLUSION

The record of this proceeding does not demonstrate that there has been a good faith effort on behalf of the parties to resolve this matter. Consequently, the Department will not decide this matter, but will direct the parties to continue their negotiations to develop a settlement that produces a nondiscriminatory commercial agreement. The Department encourages the parties to resolve this matter quickly so that Neutral Tandem's customers are not disadvantaged by the absence of a commercial agreement governing service.

B. ORDERS

1. Neutral Tandem and Level 3 shall continue good faith negotiations to produce a commercial agreement.

2. In the event that the Neutral Tandem and Level 3 are successful in producing a commercial agreement they shall inform the Department within 15 business days of that agreement.

3. Neutral Tandem and Level 3 shall, no later than November 15, 2007, report to the Department concerning their negotiations to produce a commercial agreement.

DOCKET NO. 07-02-29 PETITION OF NEUTRAL TANDEM, INC. FOR AN INTERCONNECTION AGREEMENT WITH LEVEL 3 COMMUNICATIONS AND REQUEST FOR INTERIM ORDER

This Decision is adopted by the following Commissioners:

Anthony J. Palermino

Anne C. George

John W. Betkoski, III

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

June 20, 2007
Date

ATTACHMENT B

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

ADMINISTRATIVE SESSION

Hearing Room 110
244 Washington Street
Atlanta, Georgia

Tuesday, June 19, 2007

The administrative session was called to order at 10:00 a.m., pursuant to Notice.

PRESENT WERE:

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

P R O C E E D I N G S

CHAIRMAN BAKER: Good morning, everyone. This is the June 19, 2007 administrative session.

We will take up first today our Utilities Division agenda with the consent items first. Is there any consent agenda item that any Commissioner wishes to have held or moved to the regular agenda?

(No response.)

CHAIRMAN BAKER: All right, seeing no response, is there any objection to approving the Utilities consent agenda?

(No response.)

CHAIRMAN BAKER: Seeing or hearing no response, it's approved unanimously by the Commission.

(Commissioner Speir, Everett, Baker, Wise and Eaton present and voting.)

CHAIRMAN BAKER: We now move on to our regular agenda items, beginning with R-1.

MR. ROSEMOND: Good morning, Commissioners.

Item R-1 is Docket Number 24844-U, it's Petition of Neutral Tandem for Interconnection with Level 3 Communications and Request for Emergency Relief: Consideration of staff's recommendation.

Staff recommends approval of its recommendation as proposed in last Thursday's Telecommunications Committee

meeting.

CHAIRMAN BAKER: All right, any questions for Mr. Rosemond on this item?

(No response.)

CHAIRMAN BAKER: Any questions on this item?

(No response.)

CHAIRMAN BAKER: Is there any objection to approving staff's recommendation?

(No response.)

CHAIRMAN BAKER: Seeing or hearing no objection, it's approved unanimously by the Commission.

(Commissioner Speir, Everett, Baker, Wise and Eaton present and voting.)

COMMISSIONER WISE: Mr. Rosemond, Mr. Bowles, Mr. Walsh; thank you for a good job on this docket -- clearly written, well explained and could be held up as a document for around the country.

CHAIRMAN BAKER: All right. Item R-2.

MR. WACKERLY: Good morning, Commissioners.

Item R-2 is Docket Number 15326-U, Notice of Proposed Rulemaking to revise existing Commission Rule 515-7-5 Universal Service Fund: Consideration of Notice of Proposed Rulemaking.

On June 6, 2006, the Commission approved a stipulation in Docket Number 15326-U between staff, the

DOCKET NO. 24844-U: **Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief**: Consideration of Staff's Recommendation. (Shaun Rosemond, Dan Walsh)

I. Background

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

At its April 3, 2007 Administrative Session, the Commission adopted a Procedural and Scheduling Order. Consistent with the Procedural and Scheduling Order, Level 3 filed its Response to Petition, Motion to Dismiss Petition and Motion for Migration Plan ("Response") on April 6, 2007. On May 3, 2007, the Commission held a hearing on the Petition, and received testimony and evidence from expert witnesses sponsored by both Neutral Tandem and Level 3.

II. Summary of Staff's Recommendation

Staff recommends that the Commission order Level 3 to interconnect directly with Neutral Tandem provided that Neutral Tandem pays Level 3's reasonable costs of interconnection. Neutral Tandem should not be required to pay reciprocal compensation or an additional fee to Level 3 as a condition of the direct interconnection. The Commission is not preempted from requiring Level 3 to interconnect directly with Level 3. Level 3 is obligated under O.C.G.A. § 46-5-164(a) to permit reasonable interconnection with Neutral Tandem. Given that Neutral Tandem is a transit provider, direct interconnection is necessary for interconnection to be reasonable. Under the condition that Neutral Tandem pays all of Level 3's reasonable costs of interconnection, direct interconnection is reasonable for Level 3 as well. Level 3 does not require AT&T to pay reciprocal compensation when it transports traffic that originates on the network of another provider. There is not a reasonable basis for Level 3 to discriminate between Neutral Tandem and AT&T with regard to the provision of transit service.

The reasoning behind Staff's conclusions is set forth in more detail below.

III. Positions of the Parties

A. NEUTRAL TANDEM

Neutral Tandem complains that Level 3 refuses to interconnect directly with it unless Neutral Tandem pays Level 3 reciprocal compensation for traffic that originates on the networks of a carrier customer of Neutral Tandem and terminates on Level 3's system, or if Neutral Tandem collects the reciprocal compensation payment from the carrier customer and passes it on

to Level 3. Neutral Tandem charges that Level 3's refusal to directly interconnect with it absent this condition violates the Georgia Telecommunications and Competition Development Act of 1995 ("State Act") O.C.G.A. § 46-5-160 *et seq.*, which requires local exchange companies to allow for reasonable interconnection and prohibits local exchange companies from discriminating in the provision of interconnection services. (*See*, O.C.G.A. § 46-5-164(a) and (b)). Neutral Tandem states that Level 3 directly interconnects with AT&T as a tandem traffic provider, and therefore, should directly interconnect with Neutral Tandem.

B. LEVEL 3

Level 3 rebuts the Petition with the following arguments:

1) The State Act is preempted by the Federal Telecommunications Act of 1996 ("Federal Act"), 47 U.S.C. 251 *et seq.*
2) State Act only requires "reasonable" interconnection. It does not require direct interconnection.
3) AT&T is an incumbent local exchange company ("ILEC"), and Neutral Tandem is not. Therefore, a reasonable basis exists for treating the two providers differently.
4) Neutral Tandem is not providing an "interconnection service" as defined in the State Act; therefore the State Act cannot be construed to prohibit discrimination against it.
5) Cost recovery arrangements proposed by Level 3 were intended to defray delivery costs borne by Level 3 as a result of the direct interconnection.

IV. Staff's Recommendation

Staff recommends that the Commission order Level 3 to interconnect directly with Neutral Tandem provided that Neutral Tandem pays all of Level 3's reasonable costs of interconnection. Neutral Tandem should not be required to pay or pass on reciprocal compensation payments to Level 3. Staff responds to the arguments raised by Level 3 as follows:

1. *Preemption*

The Eleventh Circuit recently explained:

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

> preemption," as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law.

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

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

It does not appear that Level 3 is alleging express preemption of the State Act, and Staff is not aware of any provision in the Federal Act that provides that states are so preempted. The second type of preemption is field preemption, which as explained above, exists when federal regulation is so pervasive that Congress left no room for states to supplement it. Again, it is unclear as to whether Level 3 is asserting field preemption. Regardless, the express preservation in Section 261of state authority to implement state regulations that are non inconsistent with federal regulations defeats any such argument.

Level 3 does assert "conflict" preemption in this instance. Level 3 claims that it is permitted under Section 251(a)(1) of the Federal Act to interconnect indirectly. (Level 3 Response, p. 5). Level 3 characterizes Neutral Tandem's Petition as "an impermissible attempt to circumvent the federally-mandated interconnection process . . ." *Id*. Level 3 argues that construing O.C.G.A. § 46-5-164 to require Level 3 to interconnect directly with Neutral Tandem would conflict with its obligations under the Federal Act to interconnect directly or indirectly. (Level 3 Brief, pp. 9-10).

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

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

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

Further, as discussed above, Section 261(b) and (c) preserve state authority to enforce or impose requirements on telecommunication carriers that are necessary to further competition, provided the requirement is not inconsistent with the Federal Act or FCC regulations to implement the Act. For the public policy goals cited to in Neutral Tandem's brief and discussed herein, Staff concludes that requiring Level 3 to interconnect directly with Neutral Tandem is necessary to further competition. In Michigan Bell, the Sixth Circuit found that as long as state regulations do not prevent carriers from taking advantage of Sections 251 and 252 of the Federal Act, state regulations are not preempted. 323 F.3d at 358-59. For the reasons discussed above, Staff does not believe that requiring Level 3 to interconnect directly with Neutral Tandem would not prevent a carrier from taking advantage of Section 251 or 252.

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

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

applicable interconnection agreements or contravene the Federal Act's provision that agreements have the force of law.

Level 3 also relies upon the decision in MCI v. Illinois Bell, 222 F.3d 323 (7th Cir. 2000). (Level 3 Brief, p.11). However, the language cited to in Level 3's brief is from the Court's discussion of whether the state has waived its Eleventh Amendment immunity by participating in the Federal Act's scheme. It is not discussing the issue of preemption. The question of state regulations that are necessary to further telecommunications competition and are not inconsistent with the Federal Act were not before the Court so there is no analysis of what type of state regulation would survive preemption.

2. *Reasonable Interconnection*

Level 3 also argues that the State Act only requires reasonable interconnection; it does not require direct interconnection. (Level 3 Response, p. 11). However, whether "direct" or "indirect" interconnection is reasonable in a given instance is a determination for the Commission.

Neutral Tandem is a provider of transit services. Its carrier customers use its service to transport calls that originate on one of their networks and terminate on the network of another. AT&T also provides transit services and is interconnected directly with the other telecommunications companies as a result of its historic position in the market. It would not serve any purpose for a carrier to transport a call originating on its network through Neutral Tandem if that call still must be transported through AT&T in order to terminate on Level 3's system. The carrier would simply use AT&T as the transit provider and exclude Neutral Tandem from the process. Therefore, indirect interconnection is not a reasonable option for Neutral Tandem. Under the condition that Neutral Tandem pays all of Level 3's reasonable costs for interconnection, Level 3 is not harmed by the Staff's recommendation. Level 3 does not have a reasonable basis for refusing direct interconnection under such circumstances.

Given Neutral Tandem's function as a transit provider and including the condition that Neutral Tandem pay Level 3's reasonable costs, Staff recommends that the Commission order that direct interconnection is necessary for reasonable interconnection in this instance.

3. *Unreasonable Discrimination*

Neutral Tandem has charged that Level 3 is unreasonably discriminating against it in violation of O.C.G.A. § 46-5-164(b). The basis for this charge is that Level 3 will not interconnect directly with Neutral Tandem unless Neutral Tandem pays it reciprocal compensation or some other fee in addition to its costs, when a comparable payment is not required from AT&T as a condition of direct interconnection with Level 3. Level 3 responds that AT&T's ILEC status provides a reasonable basis for the disparate treatment. Specifically, Level 3 states that it receives other services and benefits from direct interconnection with AT&T. (Level 3 Brief, p. 28). Level 3 also points out that AT&T may be required to provide transit services as a result of its historically derived ubiquitous network. *Id.*

That AT&T is an ILEC and Neutral Tandem is a CLEC does not by itself constitute a reasonable basis for discriminating between the two providers. There has to be a distinction that provides a reason for treating the two differently in this instance. The fact that AT&T became in effect a default transit service provider as a result of its ubiquitous network is not a reasonable basis for Level 3 to refuse as favorable terms and conditions from another transit service provider. The fact that AT&T provides other services to Level 3 that have nothing to do with transit traffic is not a reasonable basis to refuse to interconnect directly with another transit provider. If the calls from Neutral Tandem's carrier customers were transported to Level 3 using AT&T as a transit provider, Level 3 would not receive reciprocal compensation from AT&T and would not be given any better or additional information about the originating carrier.

A reasonable objection by Level 3 would be if there were costs related to directly interconnecting with Neutral Tandem that Neutral Tandem was not willing to cover. There was conflicting record evidence on this issue. Staff recommends that Neutral Tandem be required to pay for all reasonable costs of the direct interconnection.

Finally, Staff recommends that the Commission find it has authority to order direct interconnection regardless of whether there is unreasonable discrimination.

4. *Interconnection Service*

Level 3 argues that Neutral Tandem is not providing an interconnection service because it does not originate or terminate telecommunications service. (Level 3 Brief, pp. 26-27). Because O.C.G.A. § 46-5-164(b) only applies to the provision interconnection services, Level 3 argues that Neutral Tandem is not entitled to the relief that it seeks. *Id.* at 26.

Level 3 is correct that Neutral Tandem does not originate or terminate telecommunications service. However, that does not mean that Neutral Tandem does not provide an interconnection service. O.C.G.A. § 46-5-162(8) defines "interconnection service" to mean "the service of providing access to a local exchange company's facilities for the purpose of enabling another telecommunications company to originate or terminate telecommunications service." The definition does not require that the LEC originate or terminate a call. Neutral Tandem's service meets the definition of "interconnection service" because it provides access to a LEC's facilities for the purpose of enabling another company to originate or terminate telecommunications service.

O.C.G.A. § 46-5-164(b) provides that "The rates, terms, and conditions for such interconnection services shall not unreasonably discriminate between providers . . ." The prohibition against unreasonable discrimination applies to the service offered by Neutral Tandem.

5. *Cost Recovery*

Level 3 states that the cost recovery arrangements were intended to defray delivery costs borne by Level 3 from the traffic sent to it by Neutral Tandem. (Response, p. 18). As mentioned above, Staff recommends Neutral Tandem be ordered to pay all reasonable costs of direct interconnection. In connection with any uncollected amounts from incoming calls, again, Level 3 is not placed in any worse position as a result of its interconnection with Neutral Tandem. That is, Neutral Tandem will provide Level 3 with the same information that AT&T will provide if the calls are transited over AT&T's network.

ATTACHMENT C

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

[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.

[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

ATTACHMENT D

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

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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]

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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

ATTACHMENT E

ATTACHMENT E

LIST OF PUBLIC SUBMISSIONS IN WHICH LEVEL 3 HAS DISCLOSED PUBLICLY ITS SO-CALLED "COMPROMISE POSITION"

1. See Case No. 07-C-00233, *In re Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Commc'ns,* Direct Testimony of Timothy J. Gates, at 14-15 (March 23, 2007).

2. Docket No. 24844-U, *In re Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Commc'ns,* Ga. Pub. Serv. Comm'n, Direct Testimony of Timothy J. Gates, at 14-15 (April 13, 2007).

3. Docket No. 07-02-29, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc'ns,* Conn. Dep't of Pub. Util. Control, Direct Testimony of Timothy J. Gates, at 23-24 (May 1, 2007).

4. Case No. 07-03-008, *Neutral Tandem California, LLC v. Level 3,* Cal. Pub. Util. Comm'n, Declaration of Timothy J. Gates, at 21 (May 7, 2007).

5. Case No. 07-03-008, *Neutral Tandem California, LLC v. Level 3,* Cal. Pub. Util. Comm'n, Opposition to Neutral Tandem's Motion for Interim Relief, at 3, 14 (May 15, 2007).

6. Case No. 07-03-008, *Neutral Tandem California, LLC v. Level 3,* Cal. Pub. Util. Comm'n, Letter Notice of May 8, 2007 From Level 3 to NTI, at 2-3 (May 15, 2007).

7. Docket No. 07-0277, *Petition of Neutral Tandem and Neutral Tandem-Illinois, LLC for Interconnection with Level 3,* Ill. Commerce Comm'n, Pre-Filed Direct Testimony of Sara Baack, at 29 (May 15, 2007).

8. Docket No. 07-0277, *Petition of Neutral Tandem and Neutral Tandem-Illinois, LLC for Interconnection with Level 3,* Ill. Commerce Comm'n, Pre-Filed Direct Testimony of Timothy J. Gates, at 31 (May 15, 2007).

9. Docket No. 24844-U, *In re Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Commc'ns,* Ga. Pub. Serv. Comm'n, Post-Hearing Brief, at 29 (May 15, 2007).

10. *In the Matter of the Petition of Level 3 to Direct Neutral Tandem-New Jersey, LLC to Provide Notice to its Customers of the Termination of Certain Contract Arrangements,* N.J. Bd. of Pub. Utils., Petition, at 4 (May 17, 2007).

11. *Petition of Level 3 to Direct Neutral Tandem-Pennsylvania, LLC to Provide Notice to its Customers of the Termination of Certain Traffic Exch. Agreements,* Pa. Pub. Util. Comm'n, Petition, at 6 (May 18, 2007).

12. Case No. 892-T-3611, *In the Matter of the Petition of Level 3 to Direct Neutral Tandem-Washington DC LLC to Provide Notice to its Customers of the Termination of Certain Traffic Exh. Agreements*, D.C. Pub. Serv. Comm'n, Petition, at 5 (May 18, 2007).

13. *Petition of Level 3 to Direct Neutral Tandem-Maryland LLC to Provide Notice to its Customers of the Termination of Certain Contract Arrangements*, Md. Pub. Serv. Comm'n, Petition, at 5 (May 18, 2007).

14. Case No. 07-03-008, *Neutral Tandem California, LLC v. Level 3*, Cal. Pub. Util. Comm'n, Response of Level 3 to Neutral Tandem's Notice of Supplemental Authority in Support of its Motion for Interim Relief, at 2-3 (May 23, 2007).

15. Docket No. 07-02-29, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc'ns*, Conn. Dep't of Pub. Util. Control, Level 3's Post-Hearing Brief, at 34 (May 24, 2007).

16. *Petition of Level 3 to Direct Neutral Tandem to Provide Notice to Customers of Termination of Contract*, Mass. Dep't of Telecomm. and Cable, Petition, at 5 (May 24, 2007).

17. Case No. 07-03-008, *Neutral Tandem California, LLC v. Level 3*, Cal. Pub. Util. Comm'n, Pre-Filed Direct Testimony of Sara Baack, at 32 (May 25, 2007).

18. Case No. 07-03-008, *Neutral Tandem California, LLC v. Level 3*, Cal. Pub. Util. Comm'n, Direct Testimony of Timothy J. Gates, at 29-30 (May 25, 2007).