

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

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

**INITIAL BRIEF OF
NEUTRAL TANDEM, INC.**

NEUTRAL TANDEM, INC.

Ronald Gavillet
Executive Vice President &
General Counsel
Neutral Tandem, Inc.
One South Wacker, Suite 200
Chicago, IL 60606
rongavillet@neutraltandem.com

Michael Ashton
Fraser Trebilcock Davis &
Dunlap, P.C.
124 W. Allegan, Suite 100
Lansing, MI 48933
(517) 377-0875
Mashton@fraserlawfirm.com

John R. Harrington
Jenner & Block LLP
330 N. Wabash Ave.
Suite 4700
Chicago, IL 60611
(312) 222-9350
jharrington@jenner.com

Pursuant to Rule 339 of the Commission's Rules of Practice and Procedure, R. 460.17339, and the schedule established by Administrative Law Judge ("ALJ") Feldman for this matter, complainant Neutral Tandem, Inc. and its subsidiaries (collectively "Neutral Tandem") respectfully submits this initial brief.

I. INTRODUCTION

Neutral Tandem is the telecommunications industry's only independent provider of tandem transit services and the only viable transit alternative in the State of Michigan. Although the incumbent local exchange carriers ("ILECs"), including AT&T, continue to dominate the transit market, Neutral Tandem currently provides tandem transit services to eleven significant wireless and wireline competitive carriers in Michigan and transits over 300 million minutes per month of local telecommunications traffic in the State. Of that amount, Neutral Tandem sends approximately 30 million minutes of local telephone traffic per month to Level 3 and its subsidiaries (collectively "Level 3") alone on behalf of Neutral Tandem's originating carrier customers. At present, Neutral Tandem is directly interconnected with Level 3 in Michigan and uses those direct facilities for the exclusive purpose of delivering traffic from third party originating carriers to Level 3 for termination to Level 3 end-users.

In brief, all that Neutral Tandem seeks in its Complaint is that Level 3 be required to: (a) maintain the existing direct facilities (for which *Neutral Tandem* pays 100% of the costs) for the *sole purpose* of continuing to accept traffic from third party carriers that choose to use Neutral Tandem to deliver their originating traffic to Level 3; and (b) accept transit traffic through Neutral Tandem on non-discriminatory terms and conditions.¹ As the record in this proceeding clearly establishes, Neutral Tandem is entitled to this relief.

¹ Neutral Tandem does not seek to supplant commercial negotiations between competitive carriers, nor is it seeking a blanket requirement of CLEC-to-CLEC direct interconnection. As explained herein, Neutral

First, and foremost, Level 3’s demand for compensation² from Neutral Tandem for termination of transit traffic sent through Neutral Tandem by originating third party carriers directly contravenes Section 305a of the Michigan Telecommunications Act (“MTA”).³ Under MTA Section 305a, Level 3 is entitled to recover reciprocal compensation payments from carriers that *originate* traffic that is sent to Level 3’s network. Yet the undisputed evidence demonstrates that Level 3 has made no effort to collect these statutorily-provided reciprocal compensation payments. Moreover, Neutral Tandem does not originate any traffic to Level 3. Instead, Neutral Tandem provides “tandem transit” services, which allows third party carriers to route traffic for termination to Level 3. As a tandem transit carrier, Neutral Tandem is obligated by Michigan law to provide Level 3 with the information that will allow Level 3 to identify and bill originating carriers. Neutral Tandem has complied and will continue to comply with that obligation. (*See infra*, Section III. A.)

Second, the Commission has express authority to grant the precise type of relief that Neutral Tandem seeks in its Complaint. For example, MTA Section 305(b) specifically provides that “[a] provider of basic local exchange service shall not...[r]efuse or delay interconnections or provide inferior connections to another provider.” In addition, MTA Section 305(a) provides that Level 3 shall not “discriminate against another provider by refusing or delaying access service to the local exchange.” (*See infra*, Section III. B.)

Tandem is only seeking to have Level 3 comply with the reciprocal compensation laws under Section 305a of the Michigan Telecommunications Act and to allow Neutral Tandem to deliver tandem transit traffic on non-discriminatory terms and conditions.

² During the hearing, Level 3’s Sara Baack insisted that Level 3 is not seeking “reciprocal compensation” from Neutral Tandem. Baack Tr., at 606. As was shown, Ms. Baack’s testimony directly contradicts sworn statements made by Level 3 in other proceedings. *Id.* at 607-08. Regardless of what Ms. Baack or Level 3 wishes to call the compensation sought, as will be explained in more detail below, MTA Section 305a directs Level 3 to collect the compensation from the originating carrier, not Neutral Tandem.

³ MICH. COMP. LAWS § 484.2101 *et seq.*

Third, Level 3's attempt to impose overtly discriminatory terms -- i.e., seek compensation from Neutral Tandem for the delivery of transited traffic when it imposes no charge on the ILEC for the delivery of identical transit traffic -- is completely unwarranted. As Level 3's witnesses concede, Neutral Tandem's transit services are the functional equivalent of those provided by the ILECs, including AT&T. Moreover, although there may be costs associated with the delivery of traffic from any transit provider, the record in this case clearly establishes that Level 3 incurs no incremental costs associated with the delivery of transit traffic by Neutral Tandem relative to the ILECs because Neutral Tandem pays for 100% of the transport and equipment costs associated with traffic transited through its tandem (as well as the ongoing daily costs to maintain and supervise that transport and equipment). Thus, no legitimate basis exists for Level 3's discriminatory efforts to impose charges on Neutral Tandem for transited traffic when Level 3 imposes no such charges on the ILEC for the delivery of identical traffic. Moreover, in any event, the law is clear that *originating* carriers, not transiting carriers, are responsible for the cost of terminating their traffic, and Level 3 therefore cannot force those costs on the transit carrier, either Neutral Tandem or the ILECs. (*See infra*, Section III. C.)

Fourth, the development of a competitive transit market promotes various critical policy goals of this Commission, including bolstering competition and the development of a secure, redundant telecommunications network that is better able to respond to homeland security concerns and disaster recovery. Neutral Tandem's transit service fosters those important policy goals. (*See infra*, Section III. D.)

Fifth, Level 3's attempt to justify its position on the basis of "business judgment" is, at best, misguided. Contrary to Level 3's assertions, Neutral Tandem does not seek to replace commercial negotiations or to create a new set of CLEC interconnection rights by way of this

proceeding. Neutral Tandem seeks merely to ensure that the competitive market for transit service providers in Michigan, and the attendant benefits derived therefrom, are not held hostage to Level 3's unlawful demands. For example, Level 3 seeks to turn the basic rights of originating carriers on their head by dictating how originating carriers have to deliver their traffic and through which tandem (even though it strenuously argued just the opposite position in recent filings before the Federal Communications Commission (the "FCC")). (*See infra*, Section III. E.)

Finally, as the Commission may be aware, there are several pending, related proceedings between these same two parties which raise almost identical issues as those presented in this case. Since this proceeding began, the Illinois Commerce Commission, the Georgia Public Service Commission, the New York Public Service Commission, and the Connecticut Department of Public Utility Control, each has expressed its views on this dispute. Although each decision will be discussed more thoroughly below, each Commission has recognized its authority to decide these issues and each has refused to allow Level 3 to disconnect from Neutral Tandem. In addition, the Illinois, Georgia and New York Commissions have all expressly ordered, at a minimum, that the existing direct connection between Neutral Tandem and Level 3 be maintained without imposing the discriminatory charges sought by Level 3.⁴ Similarly, the Connecticut Department ordered the parties to negotiate a *non-discriminatory* agreement for traffic termination. Although the findings by these other state commissions are not necessarily

⁴ For example, in Illinois, the Commission's order prohibits Level 3 from imposing any fee or seeking any compensation from Neutral Tandem for transit traffic. Furthermore, the Illinois Commission found that Level 3's effort to impose a \$.001 termination rate on Neutral Tandem by way of its May 8, 2007 letter (*see* Wren Tr., at 464) was "little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label." *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n Docket No. 07-0277, Final Order, at 10, 14 (adopted July 10, 2007) (hereinafter the "Illinois Order"). A copy of the Illinois Order is Attachment 1 to this initial brief. A more in-depth discussion of the Illinois Order, as well as the actions of the other commissions noted above, is included in Section III. F., *infra*.

dispositive, Neutral Tandem believes that they will be useful as this Commission deliberates on the merits of the Complaint in this proceeding. (*See infra*, Section III. F.)

Thus, based on the record in this matter, and for the reasons noted above and discussed more thoroughly below, Neutral Tandem respectfully requests that the Commission grant its request for relief and order Level 3 to maintain its direct connection with Neutral Tandem and receive traffic that other originating carriers have chosen to transit through Neutral Tandem, just as Level 3 would do if those originating carriers had chosen instead to route the traffic to Level 3 through the ILEC.

II. FACTS

On August 9 and 10, 2007, ALJ Feldman presided over an evidentiary hearing on the merits of Neutral Tandem's Complaint. Neutral Tandem presented testimony from Surendra Saboo, Neutral Tandem's Chief Operating Officer and Executive Vice President of Neutral Tandem⁵, and Rian Wren, Neutral Tandem's President and Chief Executive Officer.⁶ Level 3 offered testimony from Sara Baack, a Senior Vice President in its Wholesale Markets Group⁷, and Timothy Gates, a retained witness employed by QSI Consulting, Inc.⁸

A. SUMMARY OF NEUTRAL TANDEM'S EVIDENCE

Mr. Wren testified that Neutral Tandem is not asking the Commission to force Level 3 to become an originating carrier customer of Neutral Tandem, but rather only is asking that Level 3 receive traffic, that third party carriers elect to send through Neutral Tandem, on non-

⁵ Saboo Tr., at 289.

⁶ Wren Tr., at 439.

⁷ Baack Tr., at 578.

⁸ Gates Tr., at 504.

discriminatory terms.⁹ Mr. Wren explained that Neutral Tandem provides Level 3 with all the signaling information it needs to bill originating carriers for reciprocal compensation payments that are provided for under Michigan law.¹⁰

Dr. Saboo explained at length that when Neutral Tandem sends traffic to Level 3, Level 3 incurs no incremental costs to receive that traffic as opposed to having the traffic delivered through the ILEC tandem.¹¹ Specifically, Dr. Saboo testified that Neutral Tandem pays for 100% of the transport to deliver traffic to Level 3 as well as all the electronic equipment needed at the switch site to connect to Level 3's switch.¹² Dr. Saboo also testified that Neutral Tandem pays for 100% of the ongoing costs to monitor and supervise the transport and equipment.¹³ Because Neutral Tandem pays all of the expenses to deliver traffic to Level 3, Dr. Saboo testified, the only step Level 3 must take to receive traffic from Neutral Tandem is to move a cross-connect co-axial cable from the ILEC electronic equipment to the Neutral Tandem-provided equipment.¹⁴ It similarly is undisputed that when Level 3 receives tandem traffic from the ILEC, the ILEC requires Level 3 to share in the transport costs for such traffic.¹⁵

The record further revealed that Level 3 has admitted that it is seeking reciprocal compensation payments from Neutral Tandem.¹⁶ Level 3 indicated as much in its Verified

⁹ Wren Tr., at 443-44; *see also* Saboo Tr., at 401.

¹⁰ Wren Tr., at 447.

¹¹ Saboo Tr., at 316-20.

¹² *Id.* Dr. Saboo explained that on average, Neutral Tandem pays for more than 8 miles of transport for routing calls to its carrier customers. *Id.* at 414.

¹³ Saboo Tr., at 318.

¹⁴ *Id.* at 320.

¹⁵ Saboo Tr., at 319 (citing Gates' admission that Level 3 splits interconnection costs with the ILEC).

¹⁶ Exhibit C-26, Amendments to Verified Answer and Defenses of Level 3 Commc'ns, LLC (U-5941-C) to the Complaint of Neutral Tandem, Inc., Cal. Pub. Util. Comm'n (Apr. 16, 2007), at 17.

Answer to a similar complaint Neutral Tandem filed in California. That Answer was verified by John Ryan, Level 3's Assistant General Counsel.¹⁷ Level 3 admits that it is demanding "reciprocal compensation" from Neutral Tandem, while at the same time acknowledging that it does not require any compensation from the ILEC for delivery of identical tandem transit traffic.¹⁸ Because Level 3 incurs no incremental costs to receive traffic from Neutral Tandem, its effort to charge Neutral Tandem reciprocal compensation -- or any compensation -- that Level 3 does not charge the ILEC, when it delivers identical traffic, would amount to a windfall for Level 3.¹⁹

Both Dr. Saboo and Mr. Wren testified about the competitive and policy benefits of Neutral Tandem's presence in the market. Dr. Saboo explained that Neutral Tandem "builds redundancy into the telecommunications transport and switching infrastructure, which, in turn, provides diversity, redundancy, efficiency, and increased reliability to the PSTN [Public Switched Telephone Network]."²⁰ Importantly, Neutral Tandem does not collocate with the ILECs and uses six different transport providers.²¹ Mr. Wren also testified about the important redundancy and reliability benefits of Neutral Tandem. As Mr. Wren explained, Level 3's actions would deprive Neutral Tandem's customers of these important benefits that they have sought by choosing to route their traffic through Neutral Tandem.²² Neutral Tandem's

¹⁷ Baack Tr., at 607-08.

¹⁸ Baack Tr., at 608-09.

¹⁹ Wren Tr., at 464-65.

²⁰ Saboo Tr., at 292.

²¹ *Id.* at 307-08.

²² Wren Tr., at 456-57, 461-62.

customers also would no longer enjoy the benefit of lower transit costs by utilizing Neutral Tandem in lieu of the ILEC.²³

Dr. Saboo testified that if Level 3 refuses to accept transit traffic from Neutral Tandem, it could take up to 6 months for originating carriers to re-route all of their traffic bound for Level 3 in Michigan to the ILEC tandems.²⁴ During that migration, third party carriers would have to augment their capacity with the ILEC and insufficient capacity could result in call blocking.²⁵ Dr. Saboo noted that Level 3 has shown a willingness to cause traffic blocking in the past when its compensation demands are not met.²⁶

B. SUMMARY OF LEVEL 3'S EVIDENCE

Ms. Baack testified that Level 3 terminated its contract for traffic termination with Neutral Tandem because the contract did not make “commercial or economic sense.”²⁷ Yet Ms. Baack acknowledged that AT&T does not pay Level 3 when AT&T delivers transit traffic to Level 3.²⁸ Ms. Baack further explained that she was not aware of any efforts by Level 3 to collect reciprocal compensation from originating carriers that send traffic to Level 3 through a transit provider.²⁹ Ms. Baack admitted this lack of any effort to collect reciprocal compensation despite the fact that Level 3's subsidiary, Broadwing Communications, currently has in place

²³ Saboo Tr., at 301-02, 321; Wren Tr., at 456-57.

²⁴ Saboo Tr., at 299-300, 322. Dr. Saboo also testified that Neutral Tandem's experience in other states with much less traffic than Michigan supports his original estimate of up to 6 months for complete migration. *Id.* at 408-09.

²⁵ Saboo Tr., 297.

²⁶ *Id.* at 304.

²⁷ Baack Tr., at 591.

²⁸ *Id.* at 608-09.

²⁹ *Id.* at 610.

agreements with at least four originating carriers to collect such reciprocal compensation.³⁰ Ms. Baack also acknowledged that Level 3 has taken no steps to invoke the assistance of the Commission to collect reciprocal compensation, as provided for by Michigan law.³¹

Mr. Gates admitted that Neutral Tandem's service is similar to AT&T's transit offering.³² He also explained that indirect interconnection is the most common type of interconnection between CLECs.³³ As a result, Mr. Gates believes that transiting is important to local competition.³⁴ In fact, "[i]n the absence of transiting, competitive carriers would be severely disadvantaged in the marketplace..."³⁵ Nonetheless, Level 3 disclaims any concern about eliminating Neutral Tandem from the marketplace, because, according to Level 3, third party carriers "would simply route the traffic to AT&T instead of Neutral Tandem."³⁶

Mr. Gates claimed that, in his mind, there is "no question" that Level 3 incurs costs to terminate traffic delivered by Neutral Tandem.³⁷ However, Mr. Gates admitted that he has not done a cost study to analyze the purported costs Level 3 allegedly incurs.³⁸

³⁰ *Id.* at 610-11.

³¹ *Id.* at 611.

³² Gates Tr., at 509, 539.

³³ *Id.* at 514.

³⁴ *Id.* at 519-20

³⁵ *Id.* at 520.

³⁶ *Id.* at 532.

³⁷ *Id.* at 545.

³⁸ *See id.* at 546.

III. ANALYSIS

A. **MICHIGAN LAW REQUIRES LEVEL 3 TO RECOVER RECIPROCAL COMPENSATION PAYMENTS FOR TRANSITED TRAFFIC FROM THE ORIGINATING CARRIERS.**

Michigan law directly addresses the compensation responsibilities applicable to carriers in the transiting context, which is the central issue in this proceeding. When tandem transit services are used to deliver telecommunications traffic, three carriers are involved: (1) the originating carrier (typically a CLEC, a cable company providing telephone service, a cellular carrier, or other non-ILECs); (2) the transiting carrier (in this case Neutral Tandem); and (3) the terminating carrier (in this case Level 3).

Section 305a of the MTA clearly and unequivocally describes the compensation responsibilities in the transiting context, as follows:

A provider that originates an intrastate call...shall agree to establish a reciprocal compensation arrangement for the termination of those calls. Originating and terminating providers shall agree to begin negotiations no more than 30 days after the originating provider receives a request from a terminating provider to establish an arrangement. During the negotiation period, reciprocal compensation rates shall be assessed by the terminating carrier under an interim arrangement with the originating carrier. Originating and terminating providers shall use good faith efforts to conclude negotiations and finalize an agreement within a reasonable time period.³⁹

Thus, Section 305a provides that the *originating* carrier is responsible for making the “reciprocal compensation” payments used to compensate the terminating carrier for use of its facilities.⁴⁰

To facilitate the payment of reciprocal compensation when a transiting carrier is involved in call delivery, Section 305a requires originating carriers to provide the transiting carrier with the “telephone number” for an originating call “without alteration in the network signaling

³⁹ MTA Section 305a(5).

⁴⁰ *See id.*

information” that identifies the originating carrier.⁴¹ In turn, Section 305a requires the transiting carrier to pass that information on to the terminating carrier.⁴² This allows the terminating carrier to identify the carriers that are originating traffic being sent to the terminating carrier’s network, so the terminating carrier can bill the originating carriers. There is no dispute that Neutral Tandem fulfills its obligation to provide caller identification information to Level 3.⁴³

Section 305a establishes specific procedures that terminating carriers such as Level 3 can utilize to obtain reciprocal compensation from originating carriers. Section 305a requires that an originating carrier “agree to begin negotiations” no more than 30 days after receiving a request for reciprocal compensation from a terminating carrier such as Level 3.⁴⁴ During the negotiation period, the originator must pay reciprocal compensation to Level 3 “under an interim arrangement.”⁴⁵ If Level 3 has a dispute with an originating carrier over reciprocal compensation, Section 305a provides that the Commission can “resolve disputes under this section between originating and terminating providers related to negotiation of the reciprocal compensation agreement....”⁴⁶ Despite the unambiguous statutory rights provided by Section 305a, Level 3 has not made any efforts to collect reciprocal compensation from carriers that originate traffic to Level 3 through Neutral Tandem.⁴⁷

There is a clear delineation of compensation responsibilities in the transiting context under Michigan law; and the Commission has found that a transiting carrier should not “have to

⁴¹ MTA Section 305a(1)(a).

⁴² MTA Section 305a(1)(b).

⁴³ *See* Baack Tr., at 610.

⁴⁴ MTA Section 305a(5).

⁴⁵ *Id.*

⁴⁶ MTA Section 305a(7).

⁴⁷ *See* Baack Tr., at 610.

act as a billing agent or conduit for compensation between carriers that transit its network.”⁴⁸ Yet, because Level 3 has chosen not to seek compensation from the originating carriers, this is precisely what Level 3 is seeking to do -- make Neutral Tandem serve as its clearinghouse for reciprocal compensation from originating carriers. Michigan law, however, is clear: the transiting carrier is not responsible to compensate the terminating carrier for the costs incurred to terminate traffic -- that responsibility lies exclusively with the originating carrier.⁴⁹ If Level 3 chooses to sit on its right to collect reciprocal compensation directly from the originating carriers, Level 3 should not be allowed to turn to Neutral Tandem to make it whole.

Level 3 has acknowledged in its Verified Answer to Neutral Tandem’s complaint in California, verified by a high-ranking Level 3 legal officer, that it seeks “reciprocal compensation” payments from Neutral Tandem.⁵⁰ Ms. Baack attempted to shy away from the sworn statements in Level 3’s verified answer and suggest that the compensation Level 3 is requesting is not technically “reciprocal compensation.”⁵¹ Instead Ms. Baack would prefer to characterize the compensation Level 3 is seeking as a “market based charge” of \$0.001 per

⁴⁸ *In re Application of AT&T Commc’ns of Mich., Inc., and TCG Detroit for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ameritech Mich. Pursuant to 47 USC 252(b)*, Case No. U-12465, 2000 Mich. PSC LEXIS 493, at *26 (Nov. 20, 2000).

⁴⁹ The one exception to this rule is that, where a tandem provider *fails* to pass along information identifying an originating carrier, the Commission can order the transiting carrier to compensate the terminating carrier for the costs incurred to terminate that traffic. *See* MTA Section 305a(1)(b). The Commission recently applied this exception to find that, when Verizon failed to provide identifying information in its capacity as a transiting carrier, the terminating carrier could bill Verizon “for the unidentified calls.” *In re Complaint of Mich. Exch. Carriers Ass’n, Inc., Against Verizon N. Inc. and Contel of the S., Inc., d/b/a Verizon N. Sys., Regarding Measurement of Usage of Nonpayment of Usage-based Charges*, Case No. U-14905, 2006 Mich. PSC LEXIS 401, at *29-30 (Dec. 21, 2006). As noted, however, it is undisputed that Neutral Tandem provides information allowing Level 3 to identify originating carriers. *See* Baack Tr., at 610.

⁵⁰ Exhibit C-26, Amendments to Verified Answer and Defenses of Level 3 Commc’ns, LLC (U-5941-C) to the Complaint of Neutral Tandem, Inc., Cal. Pub. Util. Comm’n (Apr. 16, 2007), at 17.

⁵¹ *See* Baack Tr., at 613-14.

minute.⁵² The Commission should be wary of Ms. Baack's efforts to directly contradict Level 3's prior sworn public statements, especially when the urge to avoid use of the term "reciprocal compensation" appears to be an unsubtle attempt to circumvent MTA Section 305a's mandates. The Illinois Commerce Commission found that Level 3's demand for a \$0.001 per minute fee is "little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label."⁵³ Regardless of the terminology, Level 3's compensation demand is not tied to any costs Level 3 incurs by maintaining an interconnection with Neutral Tandem.⁵⁴ Level 3 wants to be paid for terminating calls to its end-users and it seeks compensation that is identical to the traditional reciprocal compensation paid by originating carriers to terminating carriers. At the same time, Level 3 concedes that it does not and cannot demand that the ILEC make any payments when the ILEC transits traffic to Level 3's network.⁵⁵

Level 3's demands are in direct contravention of Michigan law and apparently are merely the result of Level 3's unwillingness to take the necessary steps to recover reciprocal compensation from the appropriate (i.e. originating) carrier. As noted above, Level 3 has not even tried to collect reciprocal compensation from originating carriers in Michigan despite the extremely clear and helpful provisions of Michigan law on this issue.⁵⁶ Level 3 has also chosen to forego any attempt to collect these payments despite the fact that its own subsidiary, Broadwing Communications, *has* successfully negotiated reciprocal compensation payments

⁵² See Wren Tr., at 464-65.

⁵³ Attachment 1, Illinois Order, at 10.

⁵⁴ As is discussed at Section III. C, Ms. Baack must concede that the compensation Level 3 is seeking is not cost-based because the evidence clearly demonstrates that Level 3 incurs no incremental costs by receiving traffic from Neutral Tandem's originating customers via Neutral Tandem.

⁵⁵ Baack Tr., at 608-09.

⁵⁶ Baack Tr., at 610.

with at least four originating carriers.⁵⁷ In other states, Ms. Baack has attempted to explain this failure to collect reciprocal compensation from originating carriers on the grounds that it would be “hard” to collect that compensation.⁵⁸ Mr. Gates has also testified that Level 3 does not seek to collect reciprocal compensation from originating carriers because “[i]t’s time consuming, it’s difficult and it’s evidently from Level 3’s perspective not worth their time.”⁵⁹ Even assuming that Level 3’s concerns regarding collection of reciprocal compensation from originating carriers are well-founded in other states (which Neutral Tandem strenuously disagrees with), those same concerns cannot be heard in Michigan where MTA Section 305a provides an exceptionally direct path for Level 3 to secure such payments from the appropriate party. Yet, Level 3 candidly admits that it has not made any attempt to invoke the assistance of this Commission to collect reciprocal compensation.⁶⁰

Level 3’s business decision to forego efforts to obtain reciprocal compensation from originating carriers, and instead insist that Neutral Tandem act as a “billing agent or conduit for compensation between carriers that transit its network,” is contrary to the MTA and the Commission’s clear pronouncements regarding appropriate compensation arrangements in the transiting context.⁶¹

⁵⁷ Baack Tr., at 610-11.

⁵⁸ See Wren Tr. at 445.

⁵⁹ *Id.*

⁶⁰ Baack Tr., at 611.

⁶¹ *In re Application of AT&T Commc’ns*, 2000 Mich. PSC LEXIS 493, at *26.

B. THIS COMMISSION HAS AMPLE AUTHORITY TO REQUIRE DIRECT INTERCONNECTION FOR THE DELIVERY OF TANDEM TRANSIT TRAFFIC FROM NEUTRAL TANDEM TO LEVEL 3.

The Michigan Legislature empowered the Michigan Public Service Commission to “have the jurisdiction and authority to administer [the MTA].”⁶² Abiding by this clear grant of broad authority, Michigan courts recognize that the Commission “has wide authority over the extensive regulatory scheme that it is empowered to administer...”⁶³ As part of its express authority provided by the MTA, the Commission has undisputed authority under Michigan law to order Level 3 to maintain its direct interconnection with Neutral Tandem for the purpose of Neutral Tandem delivering traffic to Level 3 on behalf of third party carriers.

In addition to violating MTA Section 305a, Level 3’s unlawful demands also violate MTA Section 305. In particular, Section 305(b) provides that: “A provider of basic local exchange service shall not...[r]efuse or delay interconnections or provide inferior connections to another provider.” Section 305(a) also requires that providers of basic local exchange service not “[d]iscriminate against another provider by refusing or delaying access service to the local exchange.”⁶⁴ To redress such violations, Section 204 of the MTA provides that, if two or more telecommunications providers “are unable to agree on a matter...prohibited by section 305, then either telecommunication provider may file with the Commission an application for resolution of the matter.”

The Commission also has authority to grant the relief requested in Neutral Tandem’s Complaint pursuant to MTA Sections 203 and 205. Section 203 authorizes the Commission,

⁶² MICH. COMP. LAWS § 484.2101(1).

⁶³ *Attorney General v. Michigan Pub. Serv. Comm’n*, 237 Mich. App. 82, 90, 602 N.W.2d 225 (Mich. Ct. App. 1999).

⁶⁴ It is undisputed that Level 3 is a provider of basic local exchange service. *See* Level 3’s Answer at ¶ 1; *see also* Baack Tr., at 580.

upon receipt of a complaint, to “conduct an investigation, hold hearings, and issue its findings and order under the contested case provisions of the administrative procedure act of 1969.” Section 205(2) provides that, if the Commission finds that “rates, quality, general availability, or conditions for a regulated service violate this act,” the Commission may “require changes in how the telecommunications services are provided.”

Notably, Level 3 has not contested that it has an obligation to interconnect with Neutral Tandem. Instead, it takes the position that Neutral Tandem can still interconnect with Level 3, albeit it indirectly:

Level 3 never said it would block traffic the traffic [sent from Neutral Tandem] to its end users. Instead, Level 3 has said...that it would no longer accept such traffic directly through Neutral Tandem. The traffic would continue to be delivered to Level 3 via the AT&T transit service.⁶⁵

In other words, Level 3 is saying “we are not refusing to interconnect with you, we are just requiring you to route all of your customer’s traffic to the competing tandem transit provider before we will accept it.”

Leaving aside for the moment the fact that Level 3’s analysis completely disregards its state law obligations, Level 3’s position is the *functional equivalent of refusing to interconnect*, at least in the context of interconnection with a tandem transit provider like Neutral Tandem. In fact, what Level 3 proposes -- a situation where an originating carrier sends its traffic to one transit provider, who then sends it to another transit provider, and then to the terminating carrier - - does nothing other than impose an inefficient, costly and at best, duplicative service on carriers

⁶⁵ Gates Tr., at 531.

that have otherwise chosen to use Neutral Tandem as their transit provider.⁶⁶ It also degrades the reliability of the PSTN by removing the redundancy benefits of Neutral Tandem. Although such a network configuration may be technically possible, it cannot even properly be characterized as “indirect interconnection.” Requiring this type of routing for transiting traffic is like suggesting that someone drive from Detroit to Lansing by way of Indianapolis; it may be technically possible but no one in their right mind would do it.⁶⁷

Notably, several other commissions, considering the related complaints and petitions Neutral Tandem filed against Level 3 in other states, have explicitly found that Neutral Tandem is entitled to *direct* interconnection with Level 3. For example, the Georgia Public Service Commission unanimously adopted its Staff’s recommendation finding that:

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 interconnection⁶⁸, direct interconnection is reasonable for Level 3 as well.⁶⁹

The Adopted Georgia Staff Recommendation concluded: “For the public policy goals cited to in Neutral Tandem’s brief...requiring Level 3 to interconnect directly with Neutral Tandem is necessary to further competition.”⁷⁰

The Illinois Commerce Commission similarly concluded that:

⁶⁶ Saboo Tr., at 324-325; *see also* Attachment 1, Illinois Order, at 6 (“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.”).

⁶⁷ *See* Saboo Tr., at 325.

⁶⁸ As explained in Section III.C.2., *infra*, Neutral Tandem does pay for all the costs of interconnection.

⁶⁹ *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief*, Ga. Pub. Serv. Comm’n Docket No. 24844-U, Consideration of Staff’s Recommendation, at 1 (June 12, 2007) (adopted by the Commission on June 19, 2007) (hereinafter the “Adopted Georgia Staff Recommendation”). A copy of the Adopted Staff’s Recommendation is Attachment 2 to this initial brief.

⁷⁰ *Id.* at 4.

[W]here a ‘Type N’ [direct] interconnection is possible, forcing the use of a ‘Type L’ [indirect] interconnection violates [Illinois law], which prohibits the provision of inferior connections to another carrier.... Therefore, to the extent that Level 3 seeks to redefine its relationship with NT, it must do so without violating [Illinois law], 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.⁷¹

The Illinois Commission further explained that “NT points out that the FCC previously determined that direct interconnection is appropriate when more than 200,000 minutes of traffic per month. NT states that it delivers approximately 56 million minutes of traffic per month to Level 3 -- many times the threshold level of traffic [for direct interconnection].”⁷²

The New York Public Service Commission also determined that it has the authority to order Level 3 to directly interconnect with Neutral Tandem, rejecting Level 3’s arguments that New York law did not provide for direct interconnection. In so doing, the New York PSC stated:

Level 3’s interpretation [of New York law] 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.... Indeed, the 1996 [Federal Telecommunications] 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 [New York law].⁷³

⁷¹ Attachment 1, Illinois Order, at 6, 8. The Illinois Order refers to the direct interconnection sought by Neutral Tandem as a “Type N” interconnection and the double-indirect interconnection (through Neutral Tandem and then through the ILEC) suggested by Level 3 as a “Type L” interconnection.

⁷² *Id.* at 6-7. The Illinois Order cites to *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), *Id.* at 7 n.19, for the FCC direct interconnection threshold. As explained in the record, Neutral Tandem delivers over 30 million minutes of traffic a month to Level 3 in Michigan -- a volume well in excess of the 200,000 minute threshold.

⁷³ Case No. 07-C-0233, *In re Petition of Neutral Tandem - New York, LLC for Interconnection with Level 3 Commc’ns*, N.Y. Pub. Serv. Comm’n, Order Preventing Service Disruption and Requiring Continuation of Interim Connection, at 5, 8 (June 22, 2007) (hereinafter “New York Order”). A copy of the New York Order is Attachment 3 to this initial brief.

As each of these state commissions has clearly indicated, direct interconnection is within its authority and is the appropriate method of delivery for traffic sent through a competitive transit provider.

Additionally, as discussed more thoroughly below, Level 3's suggested "alternative routing" scheme completely disregards the basic choice being made by Neutral Tandem's third party carrier customers -- their choice to use an alternative to the ILEC tandem for delivering transited traffic -- while undermining the benefits of a redundant network and requiring Neutral Tandem to purchase from its ILEC competitors the very service with which Neutral Tandem competes.

In brief, it is squarely within the power and the duty of this Commission to determine that Level 3 is required to interconnect directly with Neutral Tandem for the limited purpose of receiving transited traffic.

C. MICHIGAN LAW PROHIBITS LEVEL 3'S UNJUST AND DISCRIMINATORY DEMANDS ON NEUTRAL TANDEM FOR ACCEPTING TRANSIT TRAFFIC.

Level 3's attempt to condition its willingness to maintain direct connections with Neutral Tandem on some form of payment by Neutral Tandem -- when it requires no such payment from ILEC transit providers -- clearly violates the Commission's prohibition on discriminatory treatment. As noted above, MTA Section 305(a) prohibits providers of basic local exchange service from "[d]iscriminat[ing] against another provider by refusing or delaying access service to the local exchange." Here, the specific discrimination at issue is also in contravention of the reciprocal compensation mandates in MTA Section 305a. Given that Level 3 admits it does not attempt to impose any such compensation requirements on ILEC transit providers when those

providers deliver identical transit traffic to Level 3⁷⁴, there is no question that Level 3's compensation demands on Neutral Tandem are impermissible.

As an initial matter, Level 3 does not really contest that it is attempting to impose discriminatory terms on Neutral Tandem; instead, it attempts to justify that discriminatory treatment. For example, Level 3 asserts that it can impose such burdensome terms on Neutral Tandem because Neutral Tandem is a CLEC and not an ILEC.⁷⁵ Level 3 also attempts to justify its discriminatory treatment of Neutral Tandem by asserting there is “no question” that Level 3 incurs costs associated with maintaining interconnections with Neutral Tandem for the delivery of transit traffic.⁷⁶

Level 3's justifications, however, should be rejected for many reasons, including the following: (1) the transit service provided by Neutral Tandem and by AT&T or Verizon is indistinguishable from the vantage points both of a terminating carrier like Level 3 and its end-users receiving the call; i.e., the transit carrier's respective designations as a CLEC or an ILEC is a “distinction without a difference” in this context -- indeed, it is especially egregious to suggest that discrimination should be done *in favor* of the ILECs, who controlled the transit monopoly before Neutral Tandem entered the market; (2) Level 3 incurs no incremental costs associated with traffic transited by Neutral Tandem because Neutral Tandem pays for 100% of the transport costs and the equipment costs associated with the traffic delivered to Level 3; and (3) whatever costs Level 3 associates with the termination of transited traffic, it is a clear mandate of Michigan law and a well-settled principle of interconnection that the *originating* carrier, not the

⁷⁴ Baack Tr., at 608-09.

⁷⁵ See Gates Tr., at 540.

⁷⁶ See Gates Tr., at 545. Neutral Tandem does not dispute that there are costs associated with establishing direct interconnection to facilitate the delivery of transited traffic but notes that the evidence is clear that Neutral Tandem bears 100% of those costs in this case. See Section III.C.2., *infra*.

transiting carrier, is responsible for those costs. As discussed above, the fact that Level 3 chooses not to recover those costs from those originating carriers -- for whatever reason, despite the clear opportunity to do so under Michigan law -- does not give Level 3 the right to impose those costs on Neutral Tandem.

1. **Level 3's Purported Basis for Discriminating Between Neutral Tandem as a CLEC and AT&T as an ILEC is Artificial and Unreasonable.**

Level 3 first attempts to justify its discriminatory demand for compensation from Neutral Tandem by pointing out the obvious, i.e., Neutral Tandem is a CLEC and AT&T and Verizon are ILECs.⁷⁷ Level 3's justification, however, is based on a distinction without a difference and certainly is not a basis to discriminate *in favor* of the incumbent LEC.

Although Level 3 argues that it derives many benefits from interconnecting with incumbent LECs that are not available through interconnection with Neutral Tandem,⁷⁸ such statements are irrelevant to their respective provision of transit services to third party carriers or the delivery of that traffic to Level 3. The evidence developed in this record is undisputed that a call transited by Neutral Tandem and a call transited by AT&T are indistinguishable from the vantage point of the end-user receiving that call.⁷⁹ Moreover, the total amount of transited traffic that Level 3 terminates for originating carriers remains the same regardless of whether it is transited entirely by AT&T, entirely by Neutral Tandem, or in part by each (as is the case here).⁸⁰

⁷⁷ See Gates Tr., at 540.

⁷⁸ See Gates Tr., at 541-42.

⁷⁹ Wren Tr., at 451, 457; see also Attachment 2, Adopted Georgia Staff Recommendation, at 6.

⁸⁰ See Saboo Tr., at 319-20.

In addition, Level 3's own witnesses have conceded that Neutral Tandem offers a tandem service that is the functional equivalent of the service offered by the incumbent carriers.⁸¹ In fact, as noted below, the only difference between the two services from a terminating carrier's perspective is that Neutral Tandem's service is less costly. Finally, Neutral Tandem, like the ILECs, provides Level 3 with all call detail information so that Level 3 can (if it chooses to) bill the originating carriers for terminating their traffic.⁸²

As the Georgia Public Service Commission Staff stated in its recommended decision, which was adopted unanimously by the Georgia Commission:

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.⁸³

The inescapable truth is that if the traffic transited to Level 3 through Neutral Tandem instead was transited through AT&T or Verizon (as it formerly was), Level 3 would not be seeking compensation from AT&T or Verizon for this traffic.⁸⁴ This type of discriminatory treatment is simply unsupportable under Michigan law.⁸⁵

⁸¹ Gates Tr., at 509, 539.

⁸² Baack Tr., at 610.

⁸³ See Attachment 2, Adopted Georgia Staff Recommendation, at 6.

⁸⁴ See Baack Tr., at 608-09.

⁸⁵ The primary distinction between transit services provided by ILECs and those provided by Neutral Tandem as a CLEC is that Level 3 has greater competitive leverage over a small CLEC, and absent Commission intervention, it can make discriminatory interconnection and compensation demands that it would never be able to impose on ILECs.

2. Level 3 Incurs No Incremental Costs to Terminate Traffic That is Transited Through Neutral Tandem.

As the record clearly confirms, Level 3 bears no incremental costs as a result of maintaining direct interconnections with both Neutral Tandem and the incumbent LECs.⁸⁶ In fact, as discussed more thoroughly below, Level 3's costs for interconnecting with Neutral Tandem are *less than* its cost for interconnecting with the incumbent LECs because Neutral Tandem pays 100% of the transport and equipment costs of delivering transit traffic on behalf of third party carriers to Level 3's switch sites for termination.⁸⁷

In order to fully understand the cost issue, it is important to keep in mind that the total volume of transited traffic delivered to Level 3 remains the same regardless of whether it is delivered entirely by the ILECs, entirely by Neutral Tandem, or in part by both.⁸⁸ It is perhaps helpful to break the costs of transporting and terminating that traffic (regardless of who the transiting carrier may be) into three component parts: (1) the costs of transporting the traffic from the transit provider's facility to Level 3 switch, (2) the delivery of the transited traffic at the Level 3 switch, and (3) the costs of transporting and terminating the traffic from the Level 3 switch to the Level 3 end user. As the record plainly established, the costs associated with each of those component parts for traffic transited by Neutral Tandem is either the same as, or less than, the costs associated with traffic transited by the ILECs, and the overall net cost of receiving transit traffic from Neutral Tandem versus the ILEC is clearly lower.

⁸⁶ Saboo Tr., 315-320.

⁸⁷ See Saboo Tr., at 317, 420; see also Attachment 1, Illinois Order, at 10 (“[T]he 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.”).

⁸⁸ Saboo Tr., at 319-20.

a. Level 3 Incurs No Transport Costs for Traffic Transited by Neutral Tandem

It is undisputed that Level 3 does not incur any costs for the transport (i.e., the circuits used to deliver the traffic from Neutral Tandem to Level 3) of transited traffic from Neutral Tandem's facility to the Level 3 switch. Neutral Tandem pays for 100% of those transport costs without any contribution from Level 3.⁸⁹

Unlike when Neutral Tandem delivers transit traffic to Level 3, however, Level 3 actually pays a portion of the cost to transport transited traffic from the ILEC tandems to Level 3's network.⁹⁰ Thus, Level 3's transport costs for receiving transit traffic from Neutral Tandem is actually less -- in fact it is zero -- as compared to the ILEC.

b. Neutral Tandem Pays for 100% of the Equipment Necessary to Deliver the Transited Traffic at the Level 3 Switch.

Once the transited traffic is transported to the Level 3 switch (again regardless of the identity of the transiting carrier), certain electronic equipment is necessary to complete the interconnection to deliver the traffic to Level 3's switch. In particular, that equipment includes: a fiber distribution panel; fiber optic terminals; and DSX-3 panels.⁹¹ As Neutral Tandem's Chief Operating Officer, Dr. Saboo, testified: Neutral Tandem pays for 100% of all of that necessary electronic equipment as well as all of the on-going costs to supervise, monitor and maintain that equipment daily.⁹²

When transit traffic is sent to Level 3 via an ILEC, that transit traffic requires the same electronic equipment for termination. However, unlike when Neutral Tandem brings transit

⁸⁹ Saboo Tr., at 318.

⁹⁰ Indeed, Level 3's paid witness, Timothy J. Gates, has admitted in other state proceedings between Neutral Tandem and Level 3 that, with respect to the costs associated with ILECs transporting traffic to Level 3, "the parties split the cost of those interconnection facilities." *See* Saboo Tr., at 319.

⁹¹ Saboo Tr., at 318; *see also* Ex. C-13.

⁹² Saboo Tr., at 318-19.

traffic to Level 3, the costs for the electronic equipment needed to receive transit traffic from the ILEC are borne by Level 3.⁹³ Thus, just as with the transport cost, there are no incremental costs for Level 3 associated receiving transited traffic at the Level 3 switch from Neutral Tandem. As Dr. Saboo's undisputed hearing testimony makes clear, Level 3 actually *reduces* its costs when it accepts transit traffic from Neutral Tandem versus the ILEC.⁹⁴ Further, as Dr. Saboo testified, there is very little that Level 3 needs to do to enjoy this cost reduction: when transited traffic is delivered to Level 3 by Neutral Tandem instead of an ILEC, essentially the only action Level 3 has to take is to move a co-axial cable which previously connected the electronics being used by the ILEC to the electronics being provided by Neutral Tandem.⁹⁵

Neutral Tandem has provided undisputed evidence that it provides and pays for *any and all* additional equipment required to accept transit traffic from Neutral Tandem.⁹⁶ Traffic transited by Neutral Tandem travels essentially the same route as any traffic sent through the ILEC tandem to the Level 3 switch, albeit it travels on transport and electronics now provided and paid for by Neutral Tandem, instead of (partially) by Level 3. As shown in Exhibit C-13, all transited traffic is "cross-connected" from the DSX-3 Panel to Level 3 switch ports. When originating carriers elect to route their traffic through Neutral Tandem instead of the ILEC, it causes a corresponding decrease in the number of switch ports and cross-connects between the ILEC and Level 3. Because Neutral Tandem is sending the same traffic that the ILEC previously handled, the volume of traffic from Neutral Tandem can be accommodated by the switch port(s)

⁹³ Saboo Tr., at 319, *see also* Ex. C-13.

⁹⁴ Saboo Tr., at 420.

⁹⁵ Saboo Tr., at 320; *see also* Ex. C-13.

⁹⁶ As noted above, Neutral Tandem also assumes all costs associated with the daily supervision, maintenance, and monitoring of the equipment. *See* Saboo Tr., at 318.

previously dedicated to the ILEC transit provider.⁹⁷ As Dr. Saboo explained, Level 3 does not need to use any additional switch ports to receive transit traffic from Neutral Tandem.⁹⁸

Thus, Level 3 incurs no incremental traffic delivery or switching-related costs associated with accepting delivery of traffic transited to it by Neutral Tandem.⁹⁹

c. The Costs of Transporting and Terminating Transited Traffic from the Level 3 Switch to Level 3 End-users is the Same Regardless of the Identity of the Transiting Carrier.

As noted above, the volume of transited traffic received by Level 3 is not impacted by whether the traffic is delivered through the ILECs, through Neutral Tandem, or some combination of both. Accordingly no additional facilities are needed to transport and terminate this traffic from the Level 3 switch to the Level 3 end-users because all necessary facilities had to be in place regardless of what transiting carrier delivered the traffic. Thus, the costs of transporting and terminating that traffic from the Level 3 switch to the Level 3 end-users is identical regardless of which carrier transits that traffic initially.¹⁰⁰

3. Originating Carriers, Not Transiting Carriers, are Responsible for the Costs of Terminating Traffic.

As was described at length above, MTA Section 305a clearly provides that originating carriers are responsible for compensating Level 3 for call terminations. In that respect, Michigan law is consistent with the FCC and every state commission that has addressed the issue, which

⁹⁷ See Saboo Tr., at 319-20, 418-19.

⁹⁸ *Id.*

⁹⁹ The only cost to Level 3 that it would not otherwise incur if it only connected directly with incumbent LECs the “extremely insignificant” cost associated with moving a cross connect from the ILEC’s DSX-3 to the Neutral Tandem DSX-3 and perhaps testing that cross connect. See Saboo Tr., at 320.

¹⁰⁰ It is noteworthy that Level 3 did not provide any evidence in this proceeding to substantiate its claim that there is “no question” that Level 3 incurs some cost by receiving transit traffic from Neutral Tandem. See Gates Tr., at 545. Indeed, Mr. Gates readily admits that he has not done a cost study to quantify Level 3’s alleged incremental costs. *Id.* at 545-46.

have all found that originating carriers, not transit carriers like Neutral Tandem, are responsible for paying reciprocal compensation for transited traffic originated by their end users.¹⁰¹ The FCC similarly has made clear that “there is no requirement that [a transiting carrier] involve itself in the payment of access charges or reciprocal compensation on traffic it does not originate[.]”¹⁰² Thus, to the extent that Level 3 incurs any incremental costs for terminating traffic delivered by tandem transit carriers, such as Neutral Tandem or incumbent LECs, Level 3 has the ability to recover these costs from the originating carriers and may not seek it from the transit carrier.

D. NEUTRAL TANDEM’S TRANSIT SERVICE FOSTERS SOUND PUBLIC POLICY GOALS.

As demonstrated above, this Commission has the authority, if not the obligation, to order Level 3 to directly interconnect with Neutral Tandem on non-discriminatory terms and conditions. In addition to the legal reasons why Neutral Tandem should be permitted to maintain its direct interconnection with Level 3, there are several public policy factors that weigh in favor of enabling Neutral Tandem to continue offering its independent transit services. One key policy benefit is that Neutral Tandem’s presence in the market serves to foster competition amongst

¹⁰¹ See, e.g. *TexCom, Inc. v. Bell Atlantic Corp.*, File No. EB-00-MD-14, Memorandum Opinion and Order, 16 F.C.C.R. 21493, ¶¶ 9-10 (rel. Nov. 28, 2001); *Petition of Cellco P’ship To Establish an Interconnection Agreement With Alltel Pa., Inc.*, Pa. P.U.C. Docket No. A-310489F7004, Opinion and Order, at 27 (January 13, 2005), available at <http://www.puc.state.pa.us/PcDocs/516746.doc> (“the cost responsibility for third party transit [is] on the originating carrier”); *In re Petition for Arbitration of Cellco P’ship.*, Tenn. Regulatory Authority Docket No. 03-00585, Order of Arbitration Award, at 24 (January 12, 2006), available at <http://www.state.tn.us/tra/orders/2003/0300585ey.pdf> (in transiting situation, “the company that originates the call is responsible for paying the party terminating the call.”); *Rural Iowa Indep. Tel. Ass’n v. Iowa Util. Bd.*, 385 F.Supp.2d 797, 816-820 (S.D. Iowa 2005) (affirming the Iowa Utilities Board holding that terminating LECs needed to seek compensation from originating carriers and not the transit provider).

¹⁰² *In the Matter of Petition of Cavalier Tele. LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Va. State Corp. Comm. Regarding Interconnection Disputes with Verizon Va., Inc. and for Arbitration*, WC Docket No. 02-359, Memorandum Opinion and Order, 18 F.C.C.R. 25887, ¶ 41 (rel. Dec. 12, 2003).

competitive carriers. Neutral Tandem both lowers competitive carriers' costs to provide service as well as reduces their dependence on the ILEC. In addition to promoting competition, competitive transit services can play a critical role in the promotion of network redundancy and reliability, homeland security, and disaster recovery. Neutral Tandem *hardens* the PSTN infrastructure by creating a completely redundant path for termination of local telephone calls between carriers. Each of these important policy considerations further underscores the importance of granting the relief sought by Neutral Tandem's Complaint.

The record establishes that the benefits of competition are neither illusory nor hypothetical.¹⁰³ For example, competition for tandem transit services reduces the overall cost to CLECs for tandem transiting, while fostering market competition and entry into the telecommunications industry.¹⁰⁴ The Commission itself has noted, in comments to the FCC regarding the *Missoula* plan, that it is concerned about the development of competitive alternatives to the ILECs' tandem transit services.¹⁰⁵ Granting the relief sought by Neutral Tandem is important to ensuring the ability of competitive transit providers to compete in the marketplace. More immediately, individual carriers realize significant savings and efficiencies because Neutral Tandem pays for and manages 100% of all the interconnection transport

¹⁰³ The FCC has recognized these points since even before the 1996 Act was passed:

By further reducing barriers to competition in switched access services, our actions will benefit all users of tandem switching. . . . Our actions also should promote more efficient use and deployment of the country's telecommunications networks, encourage technological innovation, and exert downward pressure on access charges and long-distance rates, all of which should contribute to economic growth and the creation of new job opportunities. In addition, these measures should increase access to diverse facilities, which could improve network reliability.

Expanded Interconnection with Local Tel. Co. Facilities, Transport Phase II, CC Docket No. 91-141, Third Report and Order, 9 F.C.C.R. 2718, ¶ 2 (rel. May 27, 1994).

¹⁰⁴ See Saboo Tr., at 301; see also Wren Tr., at 456-57.

¹⁰⁵ See *Reply Comments of the Mich. Pub. Serv. Comm'n in the Matter of Developing a Unified Compensation Regime*, at 3-4, filed in CC Docket No. 01-92 (Feb. 1, 2007).

facilities between it and Level 3 thereby reducing the overall transit cost for originating carriers as compared to using the ILECs' services.¹⁰⁶ As a result, Neutral Tandem enables facilities-based carriers in Michigan to lower their service costs, facilitating lower end user rates and greater network investment. Ironically, Level 3 has secured its right to avail itself of these benefits, while at the same time seeking to deny other carriers, and the public at large, those very same benefits.¹⁰⁷

Beyond these important competitive benefits, Neutral Tandem's presence in the market is also critical to the important policy goals of network redundancy and reliability, homeland security, and disaster recovery.¹⁰⁸ In fact, lack of tandem redundancy directly impacts homeland security and disaster recovery.¹⁰⁹ As noted by the FCC, the impact of Hurricane Katrina illustrated the importance of building network redundancy in tandem switches:

[M]ore than 3 million customer phone lines were knocked out in Louisiana, Mississippi, and Alabama following Hurricane Katrina. . . . Katrina highlighted the dependence on tandems and tandem access to SS7 switches. The high volume routes from tandem switches, especially in and around New Orleans were especially critical and vulnerable. Katrina highlighted the need for diversity of call routing and avoiding strict reliance upon a single routing solution.¹¹⁰

¹⁰⁶ See Saboo Tr., at 320-21; Wren Tr., at 456-57.

¹⁰⁷ Saboo Tr., at 295. Although Level 3 and Broadwing have apparently stopped originating traffic through Neutral Tandem in Michigan very recently, Level 3 has not yet terminated the contract whereby Level 3 is able to originate traffic to Neutral Tandem. See Saboo Tr., at 335.

¹⁰⁸ See Saboo Tr., at 308-09.

¹⁰⁹ See, e.g. *Initial Report by the N.Y. State Dept of Pub. Serv. on the August 14, 2003 Blackout*, at 95 (Feb. 2004), in which the Department of Public Service recommends that due to the problem of lack of redundancy in certain situations, "Verizon should approach the City of New York to establish alternate routing for EMS calls to eliminate signal points of failure."

¹¹⁰ *Recommendations of the Indep. Panel Reviewing the Impact of Hurricane Katrina on Commc'ns Networks Effect of Hurricane Katrina on Various Types of Commc'ns Networks*, FCC Docket No. 06-83 at 9 (2006) (emphasis added).

Furthermore, a study performed by the Staff of the New York Department of Public Service regarding network reliability post-9/11 further echoes that “local carriers should increase the redundancy” of elements within the local telecommunications infrastructure.¹¹¹ The study also found that “[m]igrating toward a more distributed switching network rather than concentration of more customers on fewer, larger switches should also be considered.”¹¹² Consistent with the reports regarding 9/11, the New York PSC noted in its recent decision in the related dispute between Neutral Tandem and Level 3 in that state: “The redundancy resulting from alternative switch options enhances the diversity and reliability of the public switched telephone network.”¹¹³

Neutral Tandem’s network provides this very type of redundancy into the telecommunications transport and switching infrastructure, which, in turn, provides diversity, efficiency, and increased reliability to the PSTN.¹¹⁴ Moreover, Neutral Tandem does not collocate with the ILEC tandem and uses six different transport providers to deliver the traffic originated by its carrier customers, both of which provide protection against, among other things, single points of failure.¹¹⁵ In addition, in the event of a cut cable, or other disruption to its network, Neutral Tandem has the ability to reroute traffic to other transit providers to maintain the integrity of the PSTN.¹¹⁶

¹¹¹ *Network Reliability After 9/11: A Staff White Paper on Local Telephone Exchange Network Reliability*, at 7 (Nov. 2, 2002) available at http://www.sia.com/business_continuity/pdf/Telephone_Network_Reliability_White_Paper.pdf

¹¹² *Id.*

¹¹³ Attachment 3, New York Order, at 10.

¹¹⁴ *See Saboo Tr.*, at 308-09.

¹¹⁵ *Saboo Tr.*, at 307-08.

¹¹⁶ *Saboo Tr.*, at 325.

In sum, redundancy and diversity are essential to improving competition, reducing costs, and preparing for potentially devastating man-made and natural disasters. Non-discriminatory, direct interconnection for the purpose of delivering tandem transit traffic is crucial to Neutral Tandem's ability to continue fostering these objectives.¹¹⁷

E. LEVEL 3 ATTEMPTS TO JUSTIFY ITS DISCRIMINATORY PRACTICE BY MISCHARACTERIZING THE DISPUTE AND ASSERTING THE RIGHT TO DICTATE HOW ORIGINATING CARRIERS CAN DELIVER THEIR TRAFFIC.

Despite Level 3's protestations to the contrary, Neutral Tandem does not seek to supplant commercial negotiations between competitive carriers nor does it seek to require Level 3 to provide termination services for "free."¹¹⁸ Rather, Neutral Tandem merely seeks to insure that it is provided with the right to deliver transited traffic to Level 3 on non-discriminatory terms and conditions.¹¹⁹ Moreover, Neutral Tandem is not suggesting that Level 3 provide any termination services for "free"; only that Level 3 look to the originating carrier (not the transiting carrier) for compensation as required by MTA Section 305a. To that end, as noted above, Neutral Tandem has made it clear on the record that it will continue to pass to Level 3 all signaling information from originating carriers, so that Level 3 can charge reciprocal compensation to the originating carriers, just as incumbent carriers generally do when they provide tandem transit services.¹²⁰

In effect, what Level 3 is proposing is that it -- as the *terminating* carrier -- should be able to dictate the route by which an originating carrier delivers its traffic to Level 3 and dictate which transiting carrier the originating carrier uses and thus the costs to the originating carrier of

¹¹⁷ See Attachment 3, New York Order, at 9-11 (discussion of the various public policy advantages of maintaining direct connection between Neutral Tandem and Level 3).

¹¹⁸ See Wren Tr., at 443-44.

¹¹⁹ Wren Tr., at 451.

¹²⁰ See Wren Tr., at 447; Baack Tr., at 610.

delivering that traffic. Such a result would have severe consequences and would be contrary to sound policy and even the express position of Level 3 before the FCC.

1. Level 3 Should Not Be Allowed to Dictate the Routing of Calls By Originating Carriers.

Eleven leading competitive carriers in this State have chosen to deliver their end-users' local tandem transit traffic to Level 3 via Neutral Tandem.¹²¹ Nonetheless, Level 3 is attempting to change that decision and dictate how these originating carriers deliver their tandem transit traffic to Level 3 by refusing to terminate transit traffic unless Neutral Tandem agrees to the discriminatory terms discussed above. It is this *choice* of the eleven third party carriers served by Neutral Tandem in Michigan, however, that the Commission must protect:

First, it is a well-established principle that the originating carrier, as the carrier that bears the expense for routing the call, should be allowed to choose the call routing for delivering its traffic to the terminating carrier. In fact, Level 3's own witness, Mr. Gates, has admitted in other related proceedings that the originating carrier determines the routing of a call.¹²²

Second, Level 3's termination of its interconnection with Neutral Tandem would impair the efficiency of the service used by Neutral Tandem's customers by forcing them to use "double transiting" first through Neutral Tandem and then through AT&T, thus denying them the very benefits they chose when they selected Neutral Tandem as their transit provider in the first place.¹²³

¹²¹ Saboo Tr., at 314.

¹²² See Wren Tr., at 455-56.

¹²³ Saboo Tr., at 324-25. As Dr. Saboo explained, "based on my experience, it simply makes no sense, except in exceptional circumstances, to route traffic from an originating carrier to a transit carrier to another transit carrier and then to a terminating carrier. The second transiting carriers is superfluous." *Id.* at 325.

Third, as a practical matter, Level 3 would compel carriers to bear the expense and inefficiencies of re-routing their local traffic to Level 3's end-users through the incumbent LECs' tandems.¹²⁴ As a result, the eleven third party carriers currently originating traffic through Neutral Tandem would be forced to bear increased overall transiting costs for terminating traffic to Level 3 via the incumbent LECs' tandem switches.¹²⁵

Fourth, Level 3's suggested "policy" that would permit it to dictate who each originating carrier uses for tandem transit and transport presumably would allow Level 3 to select its own transport and transit service.¹²⁶ Level 3 could thus arbitrarily dictate that its competitors use Level 3's transit service at rates, terms and conditions Level 3 sets, thereby leveraging its position as the operator of "one of the largest communications and Internet backbones in the world."¹²⁷

Fifth, Level 3's position is inconsistent with its own desire and ability to determine the routing of traffic it originates, which can be sent through Neutral Tandem or any other route chosen by Level 3.

¹²⁴ See Saboo Tr., at 299-300. As Dr. Saboo testified, "[s]hould disconnection of existing direct interconnections occur, third-party carriers utilizing Neutral Tandem's network will be required to rearrange their network routing in order to [terminate traffic to Level 3.] This will cause these carriers...significant time and resources." *Id.* at 299. Indeed, Dr. Saboo estimates that Neutral Tandem's third party carrier customers "could require up to six months to rearrange the additional transport capacity needed and to make the individual switch programming changes required in their...individual switches for routing traffic through the AT&T tandems." *Id.*

¹²⁵ Saboo Tr., at 320-21.

¹²⁶ Level 3 has asserted that it is currently offering transit services in Michigan. Baack Tr., at 584.

¹²⁷ See Baack Tr., at 579. As noted *infra*, the FCC has found that non-incumbent carriers can undoubtedly wield market power by unreasonably leveraging bottleneck access to their end-users.

2. Level 3's Advocacy Before this Commission is Irreconcilable with Level 3's Advocacy before the FCC.

Earlier this year, Level 3 advanced positions before the FCC which diametrically contradict the positions Level 3 has taken here in Michigan. First, Level 3 argued that the Missoula Plan “affirms” the rule that the terminating carrier collects reciprocal compensation from the originating carrier, even in the transiting context.¹²⁸ More significantly, Level 3 vigorously disputed that transiting carriers have *any* obligation to pay terminating carriers reciprocal compensation, even if the transiting carrier refused to follow Neutral Tandem’s example and provide the terminating carrier with information necessary to identify the traffic:

There is no basis for Cavalier et al.’s assertion that transit providers should pay terminating intercarrier compensation for traffic that is passed to terminating carriers without call detail information. . . . Cavalier et. al’s proposal will simply compel terminating carriers to always seek terminating compensation from transit providers for traffic received without call detail information. The Proposal reflects the more reasoned approach of establishing rules, which are enforceable pursuant to established Commission enforcement procedures, affirming that the terminating compensation is paid by originating carriers to terminating carriers, and requiring transit providers to pass through call detail information they receive to terminating carriers.¹²⁹

Moreover, Level 3 advocated that terminating carriers should not be able to dictate how an originating carrier chooses to deliver terminating traffic to Level 3:

[I]t is always the option of the carrier with the financial duty for transport [*i.e.*, the originating carrier] to choose how to transport its traffic to the terminating carrier’s [network]: direct interconnection to the [network] via its own facilities, use of the

¹²⁸ See *Reply Comments of the Missoula Plan Supporters in Support of Their Phantom Traffic Plan*, at 11-12, filed in CC Docket No. 01-92 (Jan. 5, 2007).

¹²⁹ See *id.* (emphasis added).

terminating carrier's facilities, or via the facilities of a third party.¹³⁰

Level 3's comments in support of the Missoula Plan betray the opportunistic nature of its position in this docket. Level 3 cannot argue against Neutral Tandem's request for direct interconnection on the basis of principles that it is simultaneously disavowing before the FCC.

3. Level 3's Purported Economic Motive For Refusing To Accept Terminating Traffic From Neutral Tandem Without Compensation Is Suspect.

Level 3 claims it terminated its traffic termination contract with Neutral Tandem because it did not make "commercial or economic sense."¹³¹ Ms. Baack testified that the contracts did not make "sense" because Level 3 was incurring a great deal of costs to maintain its interconnection with Neutral Tandem without receiving "sufficient revenue" to justify that interconnection.¹³² The evidence in this case raises enough red flags to suggest otherwise.

As an initial matter, the timing of Level 3's decision to terminate the former contract which allowed for the delivery of transited traffic to Level 3 and to condition the maintenance of the direct connection on Neutral Tandem's payment of discriminatory charges is at best suspicious. The record is clear that Level 3 acted on that decision only four hours after first securing its ability to actually use Neutral Tandem's transit services to deliver its originated traffic to other competitive carriers.¹³³ In addition, all this happened within a few days of Neutral Tandem registering its intent to make an Initial Public Offering of stock, the proceeds of which were for the express purpose of expanding the facilities Neutral Tandem has deployed in

¹³⁰ See *Reply Comments of the Missoula Plan Supporters in Support of the Missoula Plan*, at 26, filed in CC Docket No. 01-92 (Feb. 1, 2007).

¹³¹ Baack Tr., at 591.

¹³² Baack Tr., at 591-92.

¹³³ Wren Tr., at 453.

Michigan and elsewhere across the country, while Level 3 admits that it plans to compete against Neutral Tandem in the tandem transit market.¹³⁴

In addition, Level 3 has previously shown its willingness to block traffic when it deems appropriate.¹³⁵ Such threats to block traffic absent Neutral Tandem's capitulation to Level 3's unlawful reciprocal compensation demands are a dangerous precedent to allow in this State and are contrary to the clear rulings of the FCC chastising blocking traffic in any scenario.¹³⁶

Moreover, Level 3 competes with Neutral Tandem's carrier customers for local service. Thus, to the extent Level 3 can lower its operating costs by using Neutral Tandem, while increasing its competitors' costs by directing them to use the more costly ILEC services, Level 3 gains a significant competitive advantage. Because Level 3 extended its transit agreement with Neutral Tandem for outbound, originating traffic, it has assured itself the right to benefit from Neutral Tandem's lower overall transit costs.¹³⁷ By the same token, to the extent other carriers using Neutral Tandem's service are forced off its service and onto the ILEC tandem for their originating traffic, those carriers face a significant increase in transit costs, thus improving Level 3's competitive position in the marketplace.¹³⁸

¹³⁴ *Id.* at 452-53. Indeed, the Illinois Commission has found that Level 3's action violated Illinois law, because its conduct "knowingly impede[d] the development of competition" within the state. Attachment 1, Illinois Order, at 4, 7.

¹³⁵ *See Saboo Tr.*, at 304.

¹³⁶ As the FCC has noted, tactics like those employed by Level 3 have no place in the PSTN: "If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through." *In re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 9923, ¶ 24 (rel. Apr. 27, 2001); *see also In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, ¶ 6 (rel. June 28, 2007) (FCC "precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.").

¹³⁷ *Saboo Tr.*, at 321.

¹³⁸ *Wren Tr.*, at 456-57.

Finally, Level 3 also has indicated that it currently provides transiting services in Michigan in competition with Neutral Tandem.¹³⁹ To the extent Level 3 can prevent Neutral Tandem from providing its services, or raise questions about the reliability of Neutral Tandem's service with its customers, Level 3 effectively kick-starts its own marketing efforts through unlawful, anti-competitive actions.

Given this factual backdrop, the Commission should be wary of Level 3's purported business justifications for demanding compensation from Neutral Tandem.¹⁴⁰ The anti-discrimination provisions of the MTA exist precisely to prevent situations, like this, where unfair disparate treatment of competitive carriers can be used to gain an improper competitive advantage.

G. NO COMMISSION TO DATE HAS ALLOWED LEVEL 3 TO DISCONNECT NEUTRAL TANDEM'S DIRECT CONNECTION OR TO IMPOSE A DISCRIMINATORY CHARGE.

As the Commission may be aware, Neutral Tandem has filed similar complaints and petitions with numerous state commissions that raise, in all material respects, the same issues raised in this proceeding. In four states, Illinois, New York, Georgia, and Connecticut, the Commissions have issued a decision on the merits of Neutral Tandem's petition.¹⁴¹ Noticeably, *none* of these rulings support Level 3's position in this matter.

¹³⁹ Baack Tr., at 584.

¹⁴⁰ It is unclear what would legitimately motivate a party that is developing a business in the transit market to oppose a requirement that transit providers be provided with non-discriminatory terms for direct interconnection with terminating carriers.

¹⁴¹ In addition, the Staff of the Florida Public Service Commission issued initial recommendations on Neutral Tandem's Petition in that state. Although this is not an official commission decision, Neutral Tandem anticipates that Level 3 will attempt to characterize these recommendations in its brief and therefore Neutral Tandem includes a brief discussion of the Florida proceedings herein.

1. Illinois Commerce Commission

On July 10, 2007, the Illinois Commerce Commission unanimously adopted the proposed order of Administrative Law Judge Brodsky in the parties' Illinois proceeding, which essentially vindicated Neutral Tandem's request in its entirety.¹⁴² In the order, the Commission concluded that Level 3's attempt to force Neutral Tandem and Neutral Tandem's carrier customers into a "doubly-indirect interconnection with Level 3 via NT and [the ILEC]"¹⁴³ violated Illinois law and Section 251 of the Telecommunications Act, for numerous reasons, including the following: (1) the originating CLECs' transit rates to Level 3 will be 230% of the current costs for transiting traffic, essentially forcing customers to return to AT&T "at the expense of NT";¹⁴⁴ (2) it "will degrade the ability of NT to do business, and will impede the development of competition in Illinois;"¹⁴⁵ (3) it would be contrary to the public interest, insofar as "Level 3 would impose on NT, its 18 other CLEC customers and all of their subscribers a discontinuance of service as well as the *per se* impediments to competition;"¹⁴⁶ (4) Level 3's refusal to provide Neutral Tandem direct connection is the "functional[] equivalent of a refusal by Level 3 to interconnect with NT;"¹⁴⁷ and (5) Level 3's efforts to disconnect its direct connection from Neutral Tandem was decidedly unreasonable, given the "nature and timing" of Level 3's termination of its terminating contract with Neutral Tandem on the very same day that Level 3 extended its originating contract

¹⁴² Level 3 petitioned the Illinois Commerce Commission for rehearing. On August 16, 2007, the Commission unanimously denied Level 3's petition for rehearing.

¹⁴³ See Attachment 1, Illinois Order, at 5.

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 7 (emphasis in original).

¹⁴⁷ *Id.* at 6.

with Neutral Tandem, and given that “the impact of Level 3’s threats” extends beyond Neutral Tandem to third party CLECs and their customers.¹⁴⁸

The Commission further determined that Level 3’s demand for a termination fee from Neutral Tandem also violated Illinois law, regardless of whether the request was dressed as a “reciprocal compensation” payment or a per minute surcharge. At the outset, the Commission found that Neutral Tandem, as a transiting carrier, “is not obligated to pay reciprocal compensation to Level 3” under federal or state law.¹⁴⁹ Similarly, the Commission rejected Level 3’s May 8, 2007 attempt to charge Neutral Tandem a \$.001 per-minute surcharge, because the record established that Level 3 bore no incremental costs from connecting with Neutral Tandem that would justify this rate:

[Level 3’s request] is little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label.... We also reject Level 3’s notion that such a charge is a market-based rate... 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.¹⁵⁰

Accordingly, the Illinois Order provides, among other things, the following substantive relief:

- Level 3 must “cease and desist from its threat to disconnect or otherwise disrupt the direct physical interconnection with Neutral Tandem...”;
- Level 3 must “cease and desist from requiring Neutral Tandem...to pay or collect any fee or other compensation, either on a per-minute basis or otherwise, for traffic delivered to Level 3...”;

¹⁴⁸ *Id.* at 7.

¹⁴⁹ *Id.* at 9-10.

¹⁵⁰ *Id.* at 10 (emphasis added).

- Neutral Tandem shall continue to provide to Level 3 “sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes;” and
- “if the parties are unable to reach an agreement on terms and conditions for their commercial relationship, the interconnection shall continue based upon the status quo in effect between the parties on January 31, 2007.”¹⁵¹

2. New York Public Service Commission

On June 22, 2007, the New York PSC ordered Level 3 to continue its existing connection with Neutral Tandem.¹⁵² The Commission first concluded that it had jurisdiction to order direct connection under New York law. In so ruling, the Commission unequivocally held that its authority to order direct connections had not been preempted by the 1996 Act.¹⁵³ The New York Order also announced that the continued direct interconnection between Level 3 and Neutral Tandem would serve the following public policy interests:

- “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.”¹⁵⁴
- “[T]he redundancy resulting from alternative tandem switching options enhances the diversity and reliability of the public switched telephone network.”¹⁵⁵
- “[D]enial 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.... Neutral Tandem has shown that Level 3 allowed incoming traffic to be disrupted in analogous situations in the past. Level 3’s potential

¹⁵¹ *Id.* at 14-15.

¹⁵² *See* Attachment 3, New York Order, at 14.

¹⁵³ *Id.* at 6-9.

¹⁵⁴ *Id.* at 9.

¹⁵⁵ *Id.* at 10.

bottleneck function becomes an even greater concern insofar as Level 3 may seek to provide tandem switch service in competition with Neutral Tandem.”¹⁵⁶

The New York PSC also found that it would hold further proceedings pursuant to New York state law to investigate the rates and regulations under which “the parties provide call transport and termination services to each other.”¹⁵⁷ However, until the rate proceeding is concluded, the New York PSC ordered Level 3 to maintain its existing connection with Neutral Tandem. The New York PSC also rejected Level 3’s argument that Neutral Tandem should pay it an interim termination rate of \$.0007 per minute, “*because it avowedly is designed to encourage Neutral Tandem to stop offering tandem switching service.*”¹⁵⁸ Instead, the PSC ordered Neutral Tandem and Level 3 to continue to exchange traffic as designated in their prior arrangements until the rate proceeding was concluded.

3. Connecticut Department of Public Utility Control

On June 20, 2007, the Connecticut Department of Public Utility Control (“Department”) determined Connecticut law gave the Department “the ability to facilitate the development of competition for all telecommunications services within the state.”¹⁵⁹ The Department, however, determined that the parties must first make a good-faith effort to resolve their dispute and directed “the parties to continue their negotiations to produce a settlement that produces a *non-*

¹⁵⁶ *Id.* at 11.

¹⁵⁷ *Id.* at 1-2.

¹⁵⁸ *Id.* at 13 (emphasis added).

¹⁵⁹ See *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc’ns*, Conn. Dep’t of Pub. Util. Control Docket No. 07-02-29, 06/20/2007 Decision, at 5 (hereinafter “Connecticut Decision”). A copy of the Connecticut Decision is Attachment 4 to this initial brief.

discriminatory commercial agreement governing the delivery of tandem transit traffic.”¹⁶⁰ Moreover, the decision effectively requires Level 3 to maintain its connection with Neutral Tandem until the parties reach a negotiated agreement “on non-discriminatory terms” or the parties otherwise return to the Department for further assistance.¹⁶¹

4. Georgia Public Service Commission

On June 19, 2007, the Georgia Public Service Commission (“Georgia Commission”), by an unanimous 5-0 vote, adopted the recommendation of its Staff and ordered Level 3 to maintain its direct interconnection with Neutral Tandem for the purpose of accepting terminating traffic.¹⁶² The Adopted Georgia Staff Recommendation found that “Level 3 does not have a reasonable basis for refusing direct interconnection” with Neutral Tandem:

Neutral Tandem is a provider of transit services.... 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.... 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 [direct interconnection].¹⁶³

¹⁶⁰ *Id.* (emphasis added). After the Department’s decision, Level 3 filed a motion for articulation, asking the Department to remove the portion of its decision that required the parties to negotiate a “non-discriminatory” agreement. On August 13, 2007, the Department re-affirmed its June 20 Decision and indicated that the decision “is reasonably clear on the issue” of non-discrimination. *See Petition of Neutral Tandem Inc. for Interconnection with Level 3 Commc’ns*, Conn. Dep’t of Pub. Util. Control Docket No. 07-02-29, 08/13/2007 Order re Motion No. 8, at 1. A copy of the Order is Attachment 5 to this initial brief.

¹⁶¹ Attachment 4, Connecticut Decision, at 5 (the Department retained jurisdiction over the dispute and stated that “[i]f 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”).

¹⁶² *See* Attachment 2, Adopted Georgia Staff Recommendation, at 1. A formal written opinion from the Georgia Commission is expected soon.

¹⁶³ *Id.* at 5.

In addition, the Adopted Georgia Staff Recommendation stated that “[f]or the public policy goals cited to in Neutral Tandem’s brief and discussed herein” continued direct interconnection between the parties “is necessary to further competition.”¹⁶⁴

It further provided that Neutral Tandem is not required to pay Level 3 reciprocal compensation or an additional fee as a condition of direct interconnection.¹⁶⁵ Although Level 3 was entitled to demand any “reasonable costs of direct interconnection,” it unequivocally ruled that there *was no reasonable basis for Level 3 to discriminate against Neutral Tandem* as compared to the ILEC tandem transit service provider.¹⁶⁶

Finally, the Adopted Georgia Staff Recommendation determined that federal law did not preempt it from requiring Level 3 to interconnect directly with Neutral Tandem, because “the statute does not say that the party from whom interconnection is being required is permitted to demand its preferred form of interconnection....”¹⁶⁷

5. Staff of the Florida Public Service Commission

On June 27, 2007, the Staff of the Florida Public Service Commission (the “Florida PSC”) issued its written recommendations on the pending Florida petition.¹⁶⁸ The recommendations seem to support the merits of Neutral Tandem’s position in almost every regard. For example, the staff recommended that the Florida PSC has jurisdiction to hear the

¹⁶⁴ *Id.* at 4.

¹⁶⁵ *Id.* at 1.

¹⁶⁶ *Id.* at 6-7.

¹⁶⁷ *Id.* at 4.

¹⁶⁸ See *Petition for Interconnection with Level 3 Communications and Request for Expedited Resolution, by Neutral Tandem*, Fla. Pub. Serv. Comm’n Docket No. 070127-TX, Staff Recommendation (June 27, 2007). A copy of the Florida Staff’s recommendation is Attachment 6 to this initial brief.

Neutral Tandem petition and that Level 3 is “required to provide access and interconnection with both ILECs and CLECs.”¹⁶⁹

Moreover, the staff noted that originating carriers (not the terminating carriers) have the right to choose a transit provider, that Neutral Tandem’s transit services “is identical” to the ILEC’s transit service and that “Level 3’s refusal to directly interconnect with Neutral Tandem hinders the further development of a competitive telecommunications market in the State of Florida.”¹⁷⁰ Indeed, staff even expressed “concern[s]” over what would happen if Level 3 was allowed to stop accepting the tandem traffic of other third party carriers directly from Neutral Tandem:

[I]f Level 3 is allowed to refuse direct interconnection with Neutral Tandem, Level 3 is unilaterally removing an originating carrier’s right to choose a transit provider and negotiate on its own behalf the rates, terms, and conditions for transiting its traffic over the PSTN and jeopardizing the efficient and reliable exchange of traffic over the PSTN.¹⁷¹

While the staff further recommended that Neutral Tandem’s petition be dismissed *without prejudice* on the basis that Neutral Tandem may not have sufficient standing to seek relief under the specific statutes at issue,¹⁷² in an attempt to remedy staff’s concerns, Neutral Tandem withdrew and re-filed its petition with additional authority to support its standing argument.¹⁷³

¹⁶⁹ *Id.* at 3-6.

¹⁷⁰ *Id.* at 6-7.

¹⁷¹ *Id.* at 6.

¹⁷² *Id.* at 8-11.

¹⁷³ On August 14, 2007, the Florida PSC granted Neutral Tandem’s request to dismiss its initial Petition without prejudice.

III. CONCLUSION

As a matter of law, the record developed in this proceeding, and sound public policy, Neutral Tandem respectfully requests that the Commission find in favor of Neutral Tandem and provide the following relief:

- Level 3 shall maintain direct connections with Neutral Tandem for the sole purpose of delivering traffic from carriers that have chosen Neutral Tandem to deliver their originating traffic to Level 3;
- Level 3 shall not require Neutral Tandem to pay any fee or other compensation, either on a per-minute basis or otherwise, for transit traffic delivered to Level 3 by Neutral Tandem;
- Level 3 and Neutral Tandem shall interconnect on terms and conditions no less favorable to Neutral Tandem than the terms and conditions that Level 3 currently offers to the ILEC tandem transit provider for delivery of transit traffic to Level 3;
- Neutral Tandem shall provide all the necessary caller identification information regarding the originating carrier to Level 3, as required by MTA Section 305a, to enable Level 3 to collect reciprocal compensation payments from those originating carriers;
- If Neutral Tandem and Level 3 cannot agree on non-discriminatory terms and conditions within 45 days of the Commission's decision, the parties shall report the same to the Commission which shall take appropriate action at that time; and
- For any other relief that the Commission determines is just and reasonable.

Dated: August 24, 2007

Respectfully submitted,

NEUTRAL TANDEM, INC.

Ronald Gavillet
Executive Vice President &
General Counsel
Neutral Tandem, Inc.
One South Wacker, Suite 200
Chicago, IL 60606
(312) 384-8000
rongavillet@neutraltandem.com

John R. Harrington
Jenner & Block LLP
330 N. Wabash Ave.
Suite 4700
Chicago, IL 60611
(312) 222-9350
jharrington@jenner.com

By:

Michael Ashton
Fraser Trebilcock Davis & Dunlap, P.C.
124 W. Allegan, Suite 100
Lansing, MI 48933
(517) 377-0875
Mashton@fraserlawfirm.com

Attorney for Neutral Tandem, Inc.