FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ANSWER OF NEUTRAL TANDEM-MICHIGAN, LLC
AND
COUNTERCLAIM OF NEUTRAL TANDEM-MICHIGAN, LLC
AND
NEUTRAL TANDEM, INC.

Pursuant to Section 4905.26, Revised Code, Rule 4901:9-01, Ohio Administrative Code ("O.A.C."), and any other statutes and regulations deemed applicable, Neutral Tandem-Michigan, LLC ("NT Michigan"), by and through undersigned counsel, files this Answer to the Complaint of Level 3 Communications, LLC and Broadwing Communications, LLC, filed in this docket on May 31, 2007, and NT Michigan and Neutral Tandem, Inc. (collectively "Neutral Tandem") file their Counterclaim against Level 3 Communications, LLC and Broadwing Communications, LLC (collectively "Level 3").

ANSWER

For its answer, NT Michigan states as follows in response to the respective paragraphs of the complaint, which are repeated in their entirety for convenience.

1. Level 3 is a Delaware corporation, duly licensed to transact business in Ohio, and maintaining its principal place of business at 1025 Eldorado Blvd., Broomfield, Colorado 80021.

ANSWER: On information and belief, NT Michigan admits that Level 3 is a Delaware limited liability company headquartered in Broomfield, Colorado that is licensed to transact business in Ohio.

2. Level 3 is a "public utility" pursuant to Sections 4905.02 and 4905.03(A)(2), O.R.C., and is authorized to provide competitive local exchange and interexchange telecommunication services within Ohio pursuant to Certificate of Public Convenience and Necessity No. 90-9062 ("Certificate No. 90-9062").

ANSWER: On information and belief, NT Michigan admits the allegations contained in Paragraph 2.

3. Broadwing is a wholly-owned subsidiary of Level 3 and a Delaware limited liability company, duly licensed to transact business in Ohio.

ANSWER: On information and belief, NT Michigan admits the allegations contained in Paragraph 3.

4. Broadwing is a "public utility" pursuant to Sections 4905.02 and 4905.03(A)(2), O.R.C., and is authorized to provide competitive local exchange and interexchange telecommunication services within Ohio pursuant to Certificate of Public Convenience and Necessity No. 90-9107 ("Certificate No. 90-9107").

ANSWER: On information and belief, NT Michigan admits the allegations contained in Paragraph 4.

5. NT-M is a Delaware limited liability company, duly licensed to transact business in Ohio, and maintaining its principal place of business at One South Wacker Street, Suite 200, Chicago, Illinois 60606.

ANSWER: NT Michigan admits the allegations contained in Paragraph 5.

6. NT-M is a "public utility" pursuant to Sections 4905.02 and 4905.03(A)(2), O.A.C. *[sic]*, and is authorized to provide competitive local exchange and interexchange telecommunication services within Ohio under its Certificate of Public Convenience and Necessity No. 90-9283 ("Certificate No. 90-9287").

ANSWER: NT Michigan admits that it is a "public utility" authorized to provide competitive local exchange and interexchange telecommunications services within Ohio under its Certificate of Public Convenience and Necessity No. 90-9283.

7. NT-M is a wholly-owned subsidiary of Neutral Tandem, Inc. ("NTI"), a Delaware corporation, duly licensed to transact business in Ohio, and maintains its principal place of business at One South Wacker, Suite 200, Chicago, Illinois 60606.

ANSWER: NT Michigan admits the allegations contained in Paragraph 7.

8. Section 4905.26, O.R.C., provides, in pertinent part, as follows:

> **Upon complaint in writing against any public utility by any** person, firm, or **corporation,** or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or **that any** regulation, measurement, or **practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient,** unjustly discriminatory, or unjustly preferential, **or that any service is, or will be, inadequate or cannot be obtained,** and, upon complaint of a public utility as to any matter affecting its own product or service, **if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.** Such notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

(Emphasis added).

ANSWER: NT Michigan admits that the language quoted in Paragraph 8 appears in Section 4905.26, Revised Code, and refers to that provision for a complete and accurate statement of its contents. NT Michigan denies any remaining allegations contained in Paragraph 8.

9. Section 4905.22, O.R.C., provides as follows:

> **Every public utility shall furnish necessary and adequate service and** facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by

> law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

(Emphasis added).

ANSWER: NT Michigan admits that the language quoted in Paragraph 9 appears in Section 4905.22, Revised Code, and refers to that provision for a complete and accurate statement of its contents. NT Michigan denies any remaining allegations contained in Paragraph 9.

10. The Commission has jurisdiction pursuant to Sections 4905.26, 4905.05, and 4905.06, O.R.C.

ANSWER: NT Michigan states that each of the parties is a "telephone company" as defined by Section 4905.03(A)(2), Revised Code, admits that, as such, the Commission has jurisdiction over the parties pursuant to Sections 4905.04 and 4905.05, Revised Code, and states that the Commission also has general supervisory authority over each of the parties pursuant to Section 4905.06, Revised Code. NT Michigan admits that the Commission has authority to entertain this complaint pursuant to Section 4905.26, Revised Code.

11. Level 3 LLC provides high-quality voice and data services to carriers, ISPs, and other business customers over its IP-based network. In Ohio, Level 3 LLC provides resold and facilities-based local exchange and interexchange telecommunication services pursuant to Certificate No. 90-9028.

ANSWER: On information and belief, NT Michigan admits the allegations contained in Paragraph 11.

12. Broadwing provides high-quality voice and data services to carriers, ISPs, and other business customers over its IP-based network. In Ohio, Broadwing provides resold and facilities-based local exchange and interexchange telecommunications services pursuant to Certificate No 90-9107.

ANSWER: On information and belief, NT Michigan admits the allegations contained in Paragraph 12.

13. In Ohio, NT-M provides solely a wholesale tandem transit services to wireless, wireline, and cable companies pursuant to Certificate No. 90-9283. NT-M does not originate or terminate any telecommunications traffic.

ANSWER: NT Michigan denies the allegations contained in Paragraph 13. Answering further, NT Michigan refers to Certificate No. 90-9283 for a complete and accurate statement of the services that NT Michigan is authorized to provide in Ohio.

14. NT-M has on file with the Commission negotiated interconnection agreements with the following incumbent local exchange carriers: (a) Verizon North, Inc.; (b) SBC Ohio (now AT&T Ohio); and (c) Cincinnati Bell Telephone Bell Telephone (collectively, the "ILECs").

ANSWER: NT Michigan admits the allegations contained in Paragraph 14. Answering further, NT Michigan states that it also has an interconnection agreement with United Telephone Company of Ohio d/b/a Embarq.

15. NT-M has not filed, nor has this Commission approved, any traffic exchange agreements between NT-M and any other competitive local exchange carrier.

ANSWER: NT Michigan admits the allegations contained in Paragraph 15.

16. On July 6, 2004, Level 3 and NTI, on its own behalf and on behalf of its operating subsidiaries (hereinafter references to "NTI" shall include its subsidiary NT-M), entered into a commercially-negotiated traffic exchange agreement (the "Level 3 Agreement"), pursuant to which NTI delivers tandem transit traffic from third-party carriers to Level 3. A similar commercially-negotiated traffic exchange agreement (the "Broadwing Agreement") had been entered on February 2, 2004, by which NTI delivers tandem transit traffic from third-party carriers to Broadwing. The Level 3 Agreement and the Broadwing Agreement (collectively, the "Complainants' TE Agreements") each include a specific, bargained-for termination provision allowing either party to terminate the agreement upon thirty (30) days' advanced written notice to the other party.

ANSWER: NT Michigan admits that on July 6, 2004, Level 3 and Neutral Tandem, Inc. entered into a traffic exchange agreement pursuant to which Neutral Tandem, Inc. and its subsidiaries delivered tandem transit traffic from third party carriers to Level 3. NT Michigan admits that Level 3 and Neutral Tandem, Inc. entered into another agreement, dated February 2, 2004, pursuant to which Level 3's subsidiary, Broadwing, purchased Neutral Tandem Inc.'s

transit services and accepted transit traffic originated by third party carriers. NT Michigan admits that, under the terms of those agreements, Level 3 or Neutral Tandem, Inc. could terminate the agreements on thirty (30) days advance notice. NT Michigan denies any remaining allegations contained in Paragraph 16.

17. On January 30, 2007, Level 3 provided written notice to NTI that the Level 3 Agreement would be terminated on March 2, 2007. On February 14, 2007, written notice was provided on behalf of Broadwing to NTI that the Broadwing Agreement would be terminated on March 23, 2007. The February 14, 2007 notice also extended the termination effective date of the Level 3 Agreement to March 23, 2007. NTI does not dispute that Level 3 and Broadwing lawfully terminated the Complainants' TE Agreements.

ANSWER: NT Michigan admits that, on January 30, 2007, Level 3 provided notice to Neutral Tandem, Inc. that it intended to terminate the July 6, 2004 agreement on March 2, 2007, and that on February 14, 2007, Level 3 provided notice to Neutral Tandem, Inc. that it intended to terminate the February 2, 2004 agreement on March 23, 2007. NT Michigan admits that both agreements terminated by their terms. NT Michigan denies any remaining allegations contained in Paragraph 17.

18. In Ohio, Level 3 terminates approximately 7.6 million minutes of transit traffic each month from NT-M; Broadwing terminates approximately 1.7 minutes of transit traffic each month from NT-M. Based on information and belief, approximately 3.3 billion minutes of transit traffic are exchanged in Ohio by all carriers. As a result, the amount of traffic that NT-M terminates to the Complainants represents about three-tenths (0.3) of a percent of all tandem transit traffic in the state.

ANSWER: NT Michigan states that it terminates approximately 7.19 million minutes of transit traffic each month to Level 3 and approximately 2.12 million minutes of transit traffic to Broadwing each month in Ohio. Answering further, NT Michigan states that it terminates approximately 4.99 million minutes of transit traffic to ICG, Level 3's subsidiary in Ohio, each month. NT Michigan lacks sufficient information to admit or deny the remaining allegations contained in Paragraph 18, and therefore denies them.

19. In February and March of 2007, Complainants engaged in negotiations with NTI in an effort to reach a single, comprehensive, nationwide agreement. At the conclusion of those discussions, however, the parties were unable to reach a mutually acceptable replacement agreement.

ANSWER: NT Michigan admits that in February 2007, Neutral Tandem, Inc. and Level 3 engaged in negotiations to reach new agreements, and, to date, efforts to negotiate a new agreement have been unsuccessful. Answering further, from Neutral Tandem Inc.'s perspective, a significant impediment which stands in the way of the parties reaching a new agreement has been Level 3's continued insistence that Neutral Tandem, Inc. pay Level 3 "reciprocal compensation" when Neutral Tandem, Inc. delivers to Level 3 tandem transit traffic from third party carriers. NT Michigan denies any remaining allegations contained in Paragraph 19.

20. In early March of 2007, the Complainants extended the date on which they would no longer accept traffic via a direct network connection from NTI to June 25, 2007. (Complainants will continue to accept traffic from NTI and its carrier customers on an indirect basis.) The term of the Complainants' TE Agreements was not extended. As a result of this action, NTI has had more than the 30 days bargained-for in the Complainants' TE Agreements to inform its customers of the changed circumstances, and to allow its customers to take appropriate steps to ensure that their originating traffic reaches the Complainants' customers.

ANSWER: NT Michigan states that in March 2007, after Neutral Tandem, Inc. and its subsidiaries had filed petitions before other state utility commissions to require Level 3 to fulfill its statutory obligation to continue to accept terminating traffic from Neutral Tandem, Inc., and that Level 3 unilaterally decided that it would begin refusing to accept tandem transit traffic Neutral Tandem, Inc. delivers to Level 3 on behalf of third party carriers as of June 25, 2007. NT Michigan admits that the July 6, 2004 and February 2, 2004 agreements were not reinstated or formally extended. NT Michigan denies the remaining allegations contained in Paragraph 20.

Answering further, Level 3's assertion that NT Michigan must inform its customers of Level 3's threatened termination of service ignores the substantive issues discussed in the Counterclaim below, and simply presumes that Level 3 will prevail in this dispute. Level 3 made

the same demands of Neutral Tandem, Inc. in a virtually identical proceeding before the Georgia Public Service Commission. Level 3's demand proved to be self-serving and unmeritorious, and was rejected by the Georgia Commission when it granted Neutral Tandem's petition in that proceeding.[1] As detailed below, NT Michigan has a right to deliver traffic to Level 3 for termination on just, reasonable, and nondiscriminatory terms and conditions, and therefore is under no obligation to inform its customers of Level 3's decision to cancel the parties' previous contracts. Accordingly, NT Michigan is under no obligation at this time to inform its customers of Level 3's unlawful refusal to maintain its existing interconnection with NT Michigan for the purpose of accepting terminating traffic from NT Michigan on nondiscriminatory terms as required by law.

21. The calls in this dispute are destined to customers of the Complainants. The Complainants have no incentive to see those calls fail and do not wish for their customers to be prevented from receiving calls. The Complainants believe that the calls originating from NTI's carrier customers may successfully be routed to the Complainants through other transit arrangements, so long as reasonable steps are taken by NTI. NTI has not taken these responsible steps (i.e. informing its customers of termination of the Complainants' TE Agreements so that arrangements can be made), and has instead chosen only to file complaints against Level 3 in a number of states. While the Complainants have indicated their willingness to work to ensure that there are no disruptions of service associated with the termination of the agreements, NTI has taken no discernable actions to address the needs of its customers. Consequently, the Complainants initiate this proceeding to bring this matter to the attention of the Commission, and ask the Commission to order NT-M to notify its customers and make the arrangements necessary to ensure uninterrupted service to its customers. [FN: Complaints are pending in New York, Georgia, Florida, Illinois, Michigan, Minnesota, Connecticut, and California. No final decisions have been issued as of the date of this filing.]

ANSWER: NT Michigan admits that the calls at issue in Level 3's Complaint are destined to customers of Level 3. With respect to the allegations contained in the footnote in Paragraph 21, NT Michigan admits that, as of the date of Level 3's Complaint, no final decisions had been issued in the proceedings in New York, Georgia, Florida, Illinois, Michigan, Minnesota,

[1] *See* Counterclaim ¶ 61.

Connecticut, and California. Answering further, as of the date of this Answer, the Georgia Commission issued a final decision on June 19, 2007 granting Neutral Tandem, Inc. the same relief it seeks in its Counterclaim below, and ordering Level 3 to maintain its direct interconnection with Level 3 for the purpose of accepting terminating traffic. Neutral Tandem, Inc. and its subsidiaries have also filed complaints against Level 3 and Broadwing in Indiana, Washington D.C., New Jersey, and Massachusetts. NT Michigan denies the remaining allegations contained in Paragraph 21.

Answering further, for the reasons set forth in its response to Paragraph 20, which NT Michigan incorporates herein, NT Michigan states that the Commission should reject Level 3's self-serving request that the Commission "order NT-M to notify its customers and make the arrangements necessary to ensure uninterrupted service to its customers." Level 3 essentially requests that NT Michigan transit all of its traffic through a second tandem transit provider, the ILEC, in order to have the traffic terminated to Level 3's network. Routing traffic through two tandems for normal calling transport is a waste of tandem switching capacity and negates the benefits of network survivability and redundancy, as discussed below in the Counterclaim. Forcing NT Michigan to deliver traffic through the ILEC's tandem would negate the purpose for which its connection with the ILEC was created. NT Michigan connects with the ILEC solely to provide its customers with diverse and reliable facilities and routings in case one of the customer's connections with NT Michigan is temporarily cut. NT Michigan has used its connection with the ILEC for this purpose only to provide third party carriers using its tandem transit services with a highly reliable service to end-user customers, and to promote its ability to respond to disaster recovery. The connection therefore is not sized to handle the massive amounts of day-to-day traffic that NT Michigan terminates to Level 3 on behalf of third party

carriers. Routing through the ILEC destroys the redundancy benefits provided by Neutral Tandem as well as the competitive benefits.

22. The refusal of NT-M to take appropriate steps in response to the pending termination of the Complainants' TE Agreements in order to avoid a possible disruption in service represents a failure to furnish necessary and adequate service as required by Section 4905.22, O.R.C.

ANSWER: NT Michigan denies the allegations contained in Paragraph 22.

23. The Complainants respectfully request that the Commission:

a. Find that the Complainants have stated reasonable grounds for their Complaint;

b. Find that NT-M's failure to inform its customers of the termination of the Complainants' TE Agreements is an unreasonable, unjust, and insufficient practice affecting or relating to its services as a telecommunication services provider, and a violation of its responsibility and duty under Section 4905.22, O.R.C., to furnish necessary and adequate service;

c. Order NT-M to notify its customers of the termination of the Complainants' TE Agreements, and to take such other steps as are necessary to ensure uninterrupted service to customers;

d. In the event that NT-M's customers cannot complete the steps to route the Complainants' traffic via an alternative provider by June 25, 2007, order NT-M to route its customer's traffic over its existing interconnection arrangements with the ILECs;

e. If NT-M terminates traffic to the Complainants after June 25, 2007, order NT-M to pay the Complainants $0.001 per minute of use as compensation for the use of the Complainants' network;

f. Order NT-M to post a bond to ensure that Complainants do not suffer financial harm in the event that NT-M refuses to pay for terminating traffic to the Complainants; and

g. Order any and all such other relief as the Commission deems appropriate.

ANSWER: NT Michigan denies the allegations contained in Paragraph 23, and, as a defense, affirmatively asserts, pursuant to Rule 4901:9-01(B), O.A.C., that the Complaint fails to state reasonable grounds for complaint, and, therefore, should be dismissed.

NEUTRAL TANDEM'S COUNTERCLAIM AGAINST LEVEL 3 AND BROADWING

Neutral Tandem is the telecommunications industry's only independent provider of "tandem transit" services. As a tandem transit provider, Neutral Tandem allows third party carriers to route calls to each other's networks, even though they may not be directly interconnected with each other. Neutral Tandem provides the transiting link between originating carriers who need to direct call traffic from their end-users to terminating carriers, like Level 3, whose end-users will receive the calls.[2] Neutral Tandem currently delivers tandem transit traffic to Level 3 for Level 3's end-users in Ohio on behalf of eleven third party originating carriers in Ohio.

For over two years, Neutral Tandem and Level 3 have been interconnected in Ohio, and other states, pursuant to negotiated agreements. Level 3, however, informed Neutral Tandem that it was terminating the interconnection contracts that enabled Neutral Tandem to deliver tandem transit traffic to Level 3, because Level 3 did not believe the terms of those contracts were sufficiently advantageous to Level 3. To date, efforts to negotiate new agreements have been unsuccessful.

As its Complaint makes clear, Level 3 has threatened to disconnect its current interconnections with Neutral Tandem as of June 25, 2007. Level 3 has demanded objectively unreasonable and discriminatory terms and conditions to continue to accept tandem transit traffic over those existing interconnections. Level 3's refusal to accept terminating traffic from Neutral Tandem on reasonable, nondiscriminatory terms and conditions evidences its attempt to impede the development of competition in the telecommunications service market in Ohio in violation of

[2] As used in this Counterclaim, "tandem transit" traffic refers to the intermediary switching of local and other non-access traffic that originates on the networks of one telecommunications provider, and the delivery of that traffic to the network of a second telecommunications provider located within the same local calling area.

Sections 4905.22 and 4905.35, Revised Code, and contrary to the policy objectives of this state expressly set forth in Section 4927.02, Revised Code.

Other commissions and staff addressing the same set of facts and virtually identical claims filed by Neutral Tandem against Level 3 have found that Neutral Tandem's claims are meritorious. On June 19, 2007, the Georgia Public Service Commission issued a final decision granting Neutral Tandem the relief it seeks in this Counterclaim, and ordering Level 3 to maintain its direct interconnection with Neutral Tandem for the purpose of accepting terminating traffic.[3] Similarly, Staff of the Illinois Commerce Commission recommended to the commission in that parallel proceeding that Neutral Tandem should be afforded the relief it seeks.[4]

Neutral Tandem therefore respectfully requests that the Commission order Level 3 to maintain its existing interconnection with Neutral Tandem in order to accept terminating traffic from Neutral Tandem on just, reasonable, and nondiscriminatory terms and conditions pursuant to Sections 4905.05, 4905.06, 4905.22, and 4905.35, Revised Code. In further support of its Counterclaim, Neutral Tandem states as follows:

BACKGROUND TO COUNTERCLAIM

I. The Parties

1. Neutral Tandem, Inc. is a Delaware corporation and is registered to do business in Ohio. Neutral Tandem-Michigan, LLC is a Delaware limited liability company and is a telecommunications carrier in Ohio authorized to provide local exchange and interexchange telecommunications services. Neutral Tandem-Michigan LLC and Neutral Tandem, Inc. and its subsidiaries are collectively referred to herein as "Neutral Tandem." Like AT&T and other ILECs in Ohio, Neutral Tandem provides "tandem transit" services to other competitive

[3] *See* Counterclaim ¶ 61.

[4] *See* Counterclaim ¶¶ 62-63.

telecommunications carriers that use Neutral Tandem's services to deliver traffic to the networks of other competitive telecommunications carriers with which they are not directly interconnected.

2. Neutral Tandem's address and telephone number are:

Neutral Tandem, Inc.
One South Wacker
Suite 200
Chicago, IL 60606
(312) 384-8000
(312) 346-3276 (fax)

Neutral Tandem's representatives to be served are:

Barth E. Royer
Bell & Royer Co., L.P.A.
33 South Grant Avenue
Columbus, Ohio 43215-3900
(614) 228-0704
(614) 228-0201 (fax)
barthroyer@aol.com

Ronald Gavillet
Executive Vice President &
General Counsel
Neutral Tandem, Inc.
One South Wacker, Suite 200
Chicago, IL 60606
(312) 384-8000
(312) 346-3276 (fax)
rongavillet@neutraltandem.com

John R. Harrington
Jenner & Block LLP
330 N. Wabash Ave.
Suite 4700
Chicago, IL 60611
(312) 222-9350
(312) 840-7791 (fax)
jharrington@jenner.com

3. On information and belief, Level 3 is a Delaware limited liability company and is an authorized telecommunications carrier in Ohio.

4. On information and belief, Broadwing Communications, LLC is a Delaware limited liability company, is an authorized telecommunications carrier in Ohio.

II. Jurisdiction

5. Ohio law plainly requires that "[e]very public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable." Section 4905.22, Revised Code.

6. In addition, public utilities may only charge or demand rates that are "just, reasonable," Section 4905.22, Revised Code, and "no public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage." Section 4905.335, Revised Code.

7. Level 3 has unequivocally stated its intention to refuse to accept terminating traffic delivered to Level 3 by Neutral Tandem after June 25, 2007.

8. The Commission has authority to inquire into Level 3's threatened service termination under Sections 4905.04, 4905.05, and 4905.06, Revised Code, and has jurisdiction to entertain this Counterclaim under Section 4905.26, Revised Code, which grants the Commission the specific power to hear complaints against any public utility alleging "that any rate, fare, charge, toll, . . . or service . . . is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law . . . or that any service is, or will be, inadequate or cannot be obtained . . . ."

9. If carried out, Level 3's threats to refuse Neutral Tandem's traffic after June 25, 2007 would have a substantial adverse effect on the ability of Neutral Tandem to provide services to the eleven third party carriers that utilize Neutral Tandem's tandem transit services in Ohio. Level 3's unilateral refusal to accept Neutral Tandem's traffic also could lead to call blockages for the end-user customers of the third party carriers.

III. The Nature of Neutral Tandem's Service

10. Incumbent local exchange carriers ("ILECs") no longer are the sole providers of telecommunications services to end-users. Rather, competitive local exchange carriers ("CLECs"), wireless carriers, and cable companies all provide these services as well.

11. In an era of multiple telecommunications providers, customers of one non-incumbent LEC carrier, such as a cable telephone provider, inevitably call customers of another non-ILEC, such as a wireless carrier. These companies must be able to route such calls to each other's networks, even though they may not be directly interconnected with each other.

12. Traditionally, the only way for these companies to obtain this service (known as "tandem transit" service) was to utilize the incumbent LECs' tandem transit services. In Ohio and elsewhere, ILECs such as AT&T are the principal providers of such transit services to competitive carriers.

13. Neutral Tandem is the telecommunication industry's only independent provider of tandem transit services. Neutral Tandem offers tandem transit services to CLECs, wireless carriers, and cable companies throughout Ohio, and in over 74 LATAs nationwide. Neutral Tandem provides these carriers with alternative means to indirectly interconnect and exchange local traffic with each other, without using the incumbent LECs' tandem transit services.

14. Neutral Tandem provides service to and/or has direct connections with nearly every major CLEC, wireless carrier, and cable provider in the United States. Neutral Tandem provides tandem transit service to eleven different competitive carriers that originate traffic for termination in Ohio.

15. Through its competitive tandem transit services, Neutral Tandem seeks to provide carriers with lower per-minute transit charges, reduced port charges and nonrecurring fees, simpler network configurations, increased network reliability, improved quality of service, and

traffic transparency. The availability of Neutral Tandem's tandem transit services gives competitive carriers an alternative to dealing solely with incumbent LECs for these essential services.

16. Competitive tandem transit service also inherently builds redundancy into the telecommunications sector and infrastructure, which should allow for faster disaster recovery and provide more robust homeland security. Neutral Tandem's competitive tandem transit services also strengthen the redundancy and survivability of the public switched telephone network ("PSTN").

17. Apart from the public benefits associated with competition in the tandem transit business, Neutral Tandem provides significant benefits to competitive carriers that utilize Neutral Tandem's tandem transit service. These benefits include Neutral Tandem's willingness to pay for and manage -- through the use of diverse transport suppliers -- all of the transport connecting Neutral Tandem to the competitive carrier.

IV. The Parties' Dispute and Level 3's Threat to Block Neutral Tandem's Traffic

18. Neutral Tandem and Level 3 have been interconnected for over two years pursuant to a series of negotiated contracts. Specifically, Neutral Tandem delivers tandem transit traffic to Level 3 that has been originated by third party carriers, and accepts certain traffic originated by Level 3 for delivery to third party carriers, pursuant to a contract dated July 6, 2004 (the "Level 3 Contract").

19. Similarly, Neutral Tandem delivers tandem transit traffic from third party carriers to Level 3's subsidiary Broadwing, and accepts tandem transit traffic from Broadwing for delivery to third party carriers, pursuant to a February 2, 2004 contract (the "Broadwing Contract").

20. Neutral Tandem also accepts certain traffic originated by Level 3 for delivery to other carriers pursuant to a contract dated August 18, 2005 (the "Originating Contract"). Under these three contracts, Neutral Tandem and Level 3 currently are interconnected in thirteen states, including Ohio, and in Washington D.C.

21. The parties' various contracts renewed automatically on several occasions without incident. Indeed, Neutral Tandem and Level 3 entered into an amendment of the Originating Contract on January 31, 2007 (the "Originating Amendment") in order to provide Level 3 with more advantageous tandem transit pricing for traffic originated by Level 3. This was a continued attempt by Neutral Tandem to encourage Level 3 to utilize Neutral Tandem's services.

22. Within hours of signing the Originating Amendment, Level 3 sent a fax to Neutral Tandem stating its intention to terminate the Level 3 Contract effective March 2, 2007, a copy of which is attached hereto as Exhibit 1. Level 3's fax was sent by the same Level 3 executive who just hours earlier had signed the Originating Amendment, yet the fax offered no explanation for Level 3's decision.

23. On February 14, 2007, Level 3 notified Neutral Tandem that it intended to terminate the February 2004 Broadwing Contract in addition to the July 2004 Level 3 Contract. A copy of the February 14 letter is attached hereto as Exhibit 2. The February 14 letter stated that Level 3 would terminate both contracts effective March 23, 2007. (*Id.*) Level 3 has not, however, sought to terminate its August 2005 Contract, which was amended on January 31, 2007, under which Level 3 takes advantage of Neutral Tandem's transit service for delivering its originating traffic to other carriers.

24. On information and belief, by terminating the contracts under which Level 3 received tandem transit traffic, while at the same time renewing the contract under which Level 3

originated tandem transit traffic, Level 3 sought to deny its competitors the benefit of Neutral Tandem's competitive tandem transit services, while at the same time increasing Level 3's benefit by obtaining better terms from Neutral Tandem for Level 3's own originating traffic.

25. Nevertheless, in its February 14 letter, Level 3 claimed that the contracts were "not commercially balanced between the two parties" and that maintaining interconnection with Neutral Tandem under those contracts "is not a commercially reasonable or manageable option." (*Id.*) The letter stated that Level 3's goal was to "reach a single agreement with Neutral Tandem" prior to March 23 that would "supersede the current agreements" and "provide a single set of terms and conditions for the benefit of both parties." (*Id.* at 2.)

26. In its February 14 letter to Neutral Tandem, Level 3 also threatened to "otherwise manage the traffic exchanged under" the parties' February 2004 and July 2004 Contracts if the parties did not reach agreement on a new contract by March 23, 2007. (*Id.*) Level 3 further stated that it would attempt to "affect an orderly transition to mitigate any risks associated with Neutral Tandem customer traffic" if that occurred. (*Id.*)

27. On February 19, 2007, Neutral Tandem responded to Level 3's letters. A copy of this response is attached hereto as Exhibit 3. In its response, Neutral Tandem reiterated its desire to work with Level 3 to arrive at mutually acceptable terms and conditions for interconnection. (*Id.*) Neutral Tandem also reminded Level 3 that it was obligated to interconnect with Neutral Tandem pursuant to the law of several states. (*Id.*) Neutral Tandem notified Level 3 that any refusal by Level 3 to interconnect with Neutral Tandem would violate these interconnection obligations. However, the parties have been unable to reach an agreement.

28. On February 22, 2007, Level 3 responded to Neutral Tandem's request for interconnection under state law. A copy of this response is attached hereto as Exhibit 4. In its

response, Level 3 denied that it was required to interconnect with Neutral Tandem for the purpose of receiving tandem transit traffic from third party carriers' networks. (*Id.*) Level 3 also reiterated its threat to effectuate the termination of the parties' existing interconnection facilities as of March 23, 2007. (*Id.* at 2.) Specifically, Level 3 stated that its termination of the parties' current interconnections could "materially impact the flow of traffic for [Neutral Tandem's] customers" and that there could be "interruptions of service associated with the termination of the agreements." (*Id.* at 2.)

29. Neutral Tandem responded to Level 3's February 22 letter on Monday, February 26. A copy of this response is attached hereto as Exhibit 5. Neutral Tandem notified Level 3 that its continued unwillingness to interconnect with Neutral Tandem on reasonable terms and conditions, as well as Level 3's continued threat to disrupt Neutral Tandem's service, constitute violations of its statutory obligations to accept terminating traffic on nondiscriminatory terms and conditions. Neutral Tandem requested that Level 3 remedy its violations by confirming that, in the event the parties have not established terms and conditions for continued interconnection by March 23, Level 3 would not disconnect the parties' existing interconnections. (*Id.*)

30. On March 8, 2007, Level 3 notified Neutral Tandem that it would extend its self-imposed deadline and would not terminate its current interconnection facilities with Neutral Tandem until June 25, 2007.

31. On May 8, 2007, Level 3 reiterated its intent to stop accepting tandem transit traffic from Neutral Tandem. It further stated that if Neutral Tandem continues to deliver traffic on behalf of third parties to Level 3 after June 25, 2007, Level 3 intends to charge Neutral Tandem a rate of $.001 per minute for that terminating traffic. Level 3 has not provided any cost justification to support the demanded $.001 per minute charge imposed on Neutral Tandem.

32. On May 31, 2007, Level 3 filed its Complaint with the Commission.

V. Neutral Tandem's Attempts to Resolve This Dispute Through Negotiation

33. Neutral Tandem has attempted to negotiate with Level 3 to maintain the parties' current interconnection. Neutral Tandem has met with representatives from Level 3 on multiple occasions in an attempt to resolve these disputes. Several senior executives from Neutral Tandem traveled to Level 3's Colorado headquarters for an in-person meeting on February 16, 2007. Neutral Tandem also has had multiple telephone and e-mail exchanges with Level 3 to try to negotiate mutually agreeable interconnection terms.

34. However, the parties have been unable to reach agreement. From Neutral Tandem's perspective, a significant impediment which stands in the way of the parties resolving this dispute has been Level 3's continued insistence that Neutral Tandem pay Level 3 "reciprocal compensation" when Neutral Tandem delivers to Level 3 tandem transit traffic from third party carriers. Level 3 demands "reciprocal compensation" from Neutral Tandem even though the traffic Neutral Tandem delivers to Level 3 is originated by end-users of the third party carriers. This would in effect force Neutral Tandem to become Level 3's clearinghouse, by collecting compensation from the carriers whose end-users originate the traffic that Neutral Tandem delivers to Level 3's network. Indeed, in its Verified Answer filed in response to a nearly identical complaint recently filed by Neutral Tandem in California, Level 3 "admits that in negotiations for a new contract, . . . it requested 'reciprocal compensation' from Neutral Tandem."[5]

35. Neutral Tandem does not believe that paying Level 3 "reciprocal compensation" is appropriate when Neutral Tandem, like the incumbent LEC, serves as a transit provider for

[5] Level 3's Verified Answer, Cal. Pub. Util. Comm'n, ¶ 29 (Apr. 16, 2007).

third party carriers. Under its contracts with Level 3, Neutral Tandem passed to Level 3 the signaling information that Neutral Tandem received from the originating carrier, so that Level 3 could bill the originating carrier appropriate termination charges. Neutral Tandem has made clear to Level 3 that it is willing to continue providing such information to Level 3, just as the incumbent LEC provides to Level 3 when the incumbent LEC provides transit services to Level 3, so that Level 3 can seek appropriate compensation from the originating carrier. Further, Level 3 incurs no incremental costs to maintain a direct interconnection with Neutral Tandem.

36. Based upon Level 3's testimony in New York in a similar proceeding, Level 3 does not receive "reciprocal compensation" from incumbent LECs when the incumbent LEC provides tandem transit service and delivers third party carriers' traffic to Level 3's network. No other third party carrier in Ohio has demanded reciprocal compensation from Neutral Tandem for delivering transit traffic for termination by such third party carrier.

37. Thus, even though Level 3 will continue to receive the benefit of competitive tandem transit service (including lower rates) for traffic that it originates through Neutral Tandem pursuant to the Originating Amendment, Level 3 repeatedly has stated that it will begin refusing to accept tandem transit traffic Neutral Tandem delivers to Level 3 on behalf of third party carriers as of June 25, 2007.

VI. Level 3's Self-Contradictory Assertions Regarding the Basis for its Effort To Terminate Interconnection With Neutral Tandem

38. Level 3 has, on more than one occasion, made public statements that are contrary to positions it has taken in connection with this dispute. For example, in the Reply Comments of the Supporters of the Missoula Plan On Their Phantom Traffic Proposal, which was signed by Level 3's Vice President for Public Policy, William Hunt, and filed with the Federal Communications Commission ("FCC") in January 2007, Level 3 argued that its proposal

"reflects the more reasoned approach of establishing rules, which are enforceable pursuant to established [FCC] 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."[6]

39. Similarly, in the Reply Comments of the Missoula Plan supporters, which included Level 3, filed with the FCC in February 2007, Level 3 stated that "it 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 terminating carrier's facilities, or via the facilities of a third party."[7] In fact, Level 3 itself has argued strenuously that tandem transit carriers should be entitled to direct interconnection in order to deliver other carriers' originating traffic to terminating carriers, and that terminating carriers (in this case Level 3 itself) should recover their costs from the originating carriers, not the intermediate carriers.[8]

40. In a letter Level 3 submitted in February 2007 to the FCC in support of Time Warner Cable's request for a declaratory ruling that CLECs may obtain interconnection under Section 251 of the 1934 Communications Act, Level 3 argued in favor of broad interconnection rights for wholesale telecommunications carriers.[9] Each of these public assertions by Level 3 is inconsistent with Level 3's position in this dispute.

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[6] *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).

[7] *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).

[8] *Id.*

[9] *See Ex Parte Letter in Support of Petition of Time Warner Cable for Declaratory Ruling that CLEC May Obtain Interconnection under Section 251 of the Comm. Act of 1934, as Amended, to Provide Wholesale Telecomm. Svcs. to VOIP Providers*, WC Docket No. 06-55, Letter at 4 (filed February 13, 2007). A copy of this letter is attached hereto as Exhibit 6.

41. Level 3's assertions that it seeks to terminate its interconnections with Neutral Tandem because of cost concerns are belied by the facts. Neutral Tandem pays 100% of the cost to transport tandem transit traffic to Level 3's network on behalf of third party carriers. Incumbent LECs, on the other hand, require Level 3 to share in the cost of the incumbent LEC delivering tandem transit traffic to Level 3. Moreover, in order to accept incumbent LEC tandem transit traffic, Level 3 must incur expenditures for establishing connectivity with multiple incumbent LEC switch locations, as opposed to a single point of connectivity with Neutral Tandem, for which, as noted above, Neutral Tandem bears all costs. Connectivity with Neutral Tandem also provides Level 3 with significant redundancy benefits.

42. Level 3's demands for unsupported and discriminatory payments from Neutral Tandem, in the absence of any underlying costs, appear to be motivated by improper and unlawful motives aimed at causing Neutral Tandem harm. Level 3 has stated its intention to begin providing tandem transit services and compete with Neutral Tandem in that market. In a March 14, 2007 letter to Neutral Tandem, a copy of which is attached hereto as Exhibit 7, Mr. John Ryan, Level 3's Senior Vice President and Assistant General Counsel, stated "Level 3 has made no secret of its intentions to offer its own competitive transit services . . . ." (*Id. at* 1-2) On January 22, 2007, Neutral Tandem announced that it had filed a registration statement with the SEC in connection with a proposed Initial Public Offering ("IPO") of its stock. In the press release announcing its IPO, Neutral Tandem said that it anticipated using the net proceeds from the IPO to fund the continued expansion of its business.

43. Within a few days of Neutral Tandem's IPO announcement, Level 3 contacted Neutral Tandem and requested that the parties amend their August 2005 Contract – the agreement by which Neutral Tandem accepts traffic originated by Level 3 for delivery to other

carriers – and that the amendment had to be executed very quickly. Neutral Tandem accommodated Level 3's request, and the parties entered into an amendment of the August 2005 Contract on January 31, 2007, in order to provide Level 3 with more advantageous pricing for the traffic Level 3 originated to Neutral Tandem for delivery to other carriers.

44. Also on January 31, 2007, less than 10 days after Neutral Tandem announced its IPO, and only a few hours after Level 3 obtained the more advantageous pricing for the traffic Level 3 originated to Neutral Tandem, Level 3 sent Neutral Tandem notice of Level 3's intent to terminate certain of the parties' interconnection agreements effective March 2, 2007.

45. Against the backdrop of: (a) Level 3's stated intention to compete with Neutral Tandem for tandem transit services, (b) Neutral Tandem's IPO announcement, and (c) the suspicious timing of Level 3's contract termination notice, Level 3's motivation for threatening to terminate interconnection with Neutral Tandem and for demanding compensation from Neutral Tandem when it demands none from the incumbent LEC appears to be aimed at causing Neutral Tandem harm. Level 3 wants to compete against a financially weaker Neutral Tandem. Level 3 may have believed it could accomplish that goal by impacting Neutral Tandem's IPO, while obtaining for itself the benefits of lower transit traffic rates.

BASIS FOR COMPLAINT

I. Ohio Law Requires Level 3 to Accept Terminating Traffic From Neutral Tandem On Nondiscriminatory, Just, and Reasonable Terms.

46. As discussed above, Neutral Tandem and Level 3 have been interconnected for over two years pursuant to negotiated contracts. Under the parties' contracts, Level 3 pays Neutral Tandem for tandem transit services when Level 3 is the originating carrier, i.e., the carrier whose end-user originates the call that Neutral Tandem delivers to other carriers' networks. When Level 3 is the terminating carrier, i.e., the carrier whose end-user receives the

call from another carrier's customer, Level 3 does not pay Neutral Tandem for that service. Instead, the originating carrier compensates Neutral Tandem for that service.

47. As also noted above, during the parties' negotiations aimed at resolving the current disputes, Level 3 repeatedly took the position that Neutral Tandem should be required to pay Level 3 "reciprocal compensation" when Level 3 is the terminating carrier, i.e., when Neutral Tandem transits traffic to Level 3 originating from a third party carrier's network. Level 3 thus seeks to collect reciprocal compensation from Neutral Tandem and compensation from the carriers whose end-users originate the traffic that Neutral Tandem transits to Level 3's network.

48. Level 3's efforts to force Neutral Tandem to pay "reciprocal compensation" are inappropriate and violate Sections 4905.22 and 4905.35, Revised Code. Under its contracts with Level 3, Neutral Tandem passed to Level 3 signaling information that Neutral Tandem received from the originating carrier, so that Level 3 could bill the originating carrier appropriate termination charges. Neutral Tandem has made clear to Level 3 that it is willing to continue providing such billing information, so that Level 3 can seek appropriate compensation from the originating carrier.

49. Level 3 does not receive reciprocal compensation from AT&T or other ILECs in Ohio when they act as the tandem transit carrier and deliver third party carriers' traffic to Level 3's network. As set forth above, Level 3 does not even incur any incremental costs by receiving traffic from Neutral Tandem as opposed to the ILECs.

50. Requiring Neutral Tandem to pay Level 3 compensation for receiving and terminating traffic that originates from the networks of third party carriers, when Level 3 does not receive such compensation from AT&T or any other ILEC for the same traffic, and Level 3

has not provided a cost study that justifies differential treatment, discriminates against Neutral Tandem, in violation of Sections 4905.22 and 4905.35, Revised Code.

51. It also would violate the requirement that reciprocal compensation payments are to be made by the carrier that originates the traffic, not the transit service provider. Level 3's legal obligation to accept terminating traffic from Neutral Tandem is consistent with the calling-party's-network-pays principle adopted by the Commission[10] and the FCC.[11] Neutral Tandem's customers, third party originating carriers, have selected Neutral Tandem as their tandem transit provider to deliver calls from their end-users to Level 3's end-users. They, not Level 3, have the right to determine how their calls are routed because they, not Level 3, bear the responsibility for paying the calls' costs.

52. Level 3's continued receipt of terminating traffic from Neutral Tandem on nondiscriminatory terms is also in the public interest. Neutral Tandem provides the sole alternative to the tandem transit services offered by ILECs in Ohio. Consequently, Neutral Tandem provides third party carriers with a critical competitive alternative. This results in more efficient delivery of traffic, by allowing originating carriers to select the most cost-efficient route for delivery of their calls to Level 3. Competition for tandem transit services exerts downward pressure on transit charges, while fostering market competition and entry into the telecommunications industry. Thus, the service provided by Neutral Tandem is, in all respects, consistent with the stated policy objectives set forth in Section 4927.02, Revised Code.

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[10] *See In the Matter of TelCove Operations, Inc.'s Petition for Arbitration Rates, Terms, and Conditions of Interconnection with the Ohio Bell Telephone Company d/b/a SBC Ohio*, Case No. 04-1822-TP-ARB, 2006 Ohio PUC Lexis 54, *73-*74 (Jan. 25. 2006); *see also In the Matter of AT&T Communications and TCG Ohio's Petition for Arbitration*, Case No. 00-1188-TP-ARB, 2001 PUC Lexis 366, *15 (Jun. 21, 2001) (transiting carrier is not "required to act as a clearinghouse or billing agent").

[11] *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701(e).

53. The FCC long has recognized the substantial benefits of competition in the market for tandem switching services:

> 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 jobs. In addition, these measures should increase access to diverse facilities, which could improve network reliability.[12]

54. In addition, competitive tandem switching capacity builds redundancy into the telecommunications transport and switching infrastructure. Lack of tandem capacity is a recurring problem in numerous tandem offices throughout the country. Indeed, in several markets, incumbent LEC tandem capacity has been reported to be exhausted.

55. As a result, several carriers have asked Neutral Tandem to accept overflow traffic to and from the incumbent LECs' tandems, because the competitive carriers are unable to obtain sufficient trunk capacity. Continued deployment of Neutral Tandem's offerings will decrease the level of tandem congestion at incumbent LEC tandems, thereby diminishing the threat of tandem exhaustion.

56. Moreover, lack of tandem redundancy directly impacts homeland security and disaster recovery. 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

[12] Expanded Interconnection with Local Tel. Co. Facilities, Transport Phase II, 9 FCC Rcd. 2718, ¶ 2 (rel. May 27, 1994).

> critical and vulnerable. ***Katrina highlighted the need for diversity of call routing and avoiding strict reliance upon a single routing solution.***[13]

57. Neutral Tandem does not collocate with any ILEC in Ohio and utilizes six different transport providers to transit traffic into Ohio. Neutral Tandem's operations thus facilitate transport redundancy and tandem redundancy, both of which the FCC found would have been extremely helpful in response to Hurricane Katrina.

58. Granting the relief requested herein thus will result in enhanced competition to the benefit not only of Neutral Tandem, but also to the competitive service providers that use Neutral Tandem's tandem transit services, as well as those providers' end-user customers.[14]

59. Thus, Neutral Tandem requests that the Commission order the parties to adopt the following general interconnection terms:

- Level 3 should be ordered to maintain interconnection with Neutral Tandem for the purpose of receiving tandem transit traffic originated by third party carriers and delivered to Level 3's network by Neutral Tandem; and
- The terms for interconnection between Level 3 and Neutral Tandem should be no less favorable than the terms in place between Level 3 and the ILECs for the delivery of transit traffic from the ILECs to Level 3, including that Neutral Tandem will not be required to make any payments to Level 3 for the delivery of tandem transit traffic originated by third party carriers.
- To facilitate Level 3's ability to bill originating third party carriers for tandem transit traffic, Neutral Tandem will pass all signaling information received from originating third party carriers to Level 3.

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[13] Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks Effect of Hurricane Katrina on Various Types of Communications Networks, FCC Docket No. 06-83, at 8 (2006) (emphasis added).

[14] Notably, Level 3 itself has argued in favor of broad interconnection rights for wholesale telecommunications carriers. *See, e.g., Ex Parte Letter in Support of Petition of Time Warner Cable for Declaratory Ruling that CLEC May Obtain Interconnection under Section 251 of the Comm. Act of 1934, as Amended, to Provide Wholesale Telecomm. Svcs. to VOIP Providers*, WC Docket No. 06-55, Letter at 4 (filed February 13, 2007). (Exhibit 6).

60. To be clear, Neutral Tandem is not asking the Commission to order Level 3 to originate any traffic through Neutral Tandem or otherwise become a customer of Neutral Tandem. To the contrary, Neutral Tandem merely seeks an order directing Level 3 to comply with its obligation under Ohio law to interconnect Neutral Tandem for the purpose of receiving tandem transit traffic originated by third party carriers and delivered to Level 3 by Neutral Tandem on nondiscriminatory and reasonable terms.[15] Upon adoption of the nondiscriminatory interconnection terms set forth above, Neutral Tandem and Level 3 should be able to enter into a new agreement promptly.[16]

61. On June 19, 2007, the Georgia Public Service Commission adopted the recommendation of its Staff in favor of Neutral Tandem's petition against Level 3. Neutral Tandem's petition in that proceeding raised, in all material respects, the exact same issues raised in its Counterclaim here. By adopting its Staff's recommendation, the Georgia Commission (1) ordered Level 3 to maintain its direct interconnection with Neutral Tandem for the purpose of accepting terminating traffic, (2) found that Neutral Tandem should not be required to pay Level 3 reciprocal compensation or an additional fee as a condition of direct interconnection, and (3)

[15] This arrangement is similar to the April 20, 2005 Traffic Termination Agreement between Neutral Tandem and various Time Warner Telecom entities. The agreement between Neutral Tandem and Time Warner provides a model for appropriate terms and conditions of one-way interconnection between a tandem transit provider and a terminating carrier. A copy of this agreement is attached hereto as Exhibit 8.

[16] Ironically, as noted above, Level 3 signed the Originating Amendment on the same day it notified Neutral Tandem that it was terminating the Level 3 Contract. Level 3 thus seeks to benefit from the competitive tandem transit services (including lower transit rates and improved service) provided by Neutral Tandem for its own originating traffic, while denying those same benefits to other competitive carriers, by refusing to receive tandem transit traffic Neutral Tandem delivers from other third party carriers.

concluded that there was no reasonable basis for Level 3 to discriminate against Neutral Tandem as compared to the ILEC tandem transit service provider.[17]

62. On June 4, 2007, Staff of the Illinois Commerce Commission filed an initial brief on the merits of Neutral Tandem's complaint against Level 3 in that proceeding, which also raises the identical issues raised in this Counterclaim.[18] In its brief, Staff recommended that the Illinois Commerce Commission find in Neutral Tandem's favor because, among other reasons, "Neutral Tandem is, as a matter of law, not liable to pay reciprocal compensation to Level 3 for traffic originated by third-party CLECs."[19] In addition, Staff stated that "Level 3's conduct is clearly unreasonable inasmuch as its grievance here -- failure to receive adequate compensation for use of its network -- is of its own making, and its threat of unilateral disconnection . . . indicates a greater interest in commercial advantage than the maintenance of uninterrupted exchange of traffic that should be of primary importance to all carriers in a network of interconnected networks."[20]

63. On June 8, 2007, Illinois Staff filed a reply brief stating, among other things, that "the lack of consistency and principle, pursuit of self-interest and indeed blatant hypocrisy in Level 3's position are obvious, and palpable."[21]

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[17] *See* Docket No. 24844-U, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief*, Georgia Public Service Commission, Consideration of Staff's Recommendation (June 12, 2007). A copy of the decision is attached hereto as Exhibit 9.

[18] *See* Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Illinois Commerce Commission, *Initial Brief of the Staff of the Illinois Commerce Commission* (June 4, 2007). A copy of this initial brief is attached hereto as Exhibit 10.

[19] *Id.* at 4-5.

[20] *Id.* at 5.

[21] *See* Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Illinois Commerce Commission, Reply Brief of the Staff of the Illinois Commerce Commission (June 8, 2007). A copy of this reply brief is attached hereto as Exhibit 11.

II. The Commission Should Not Allow Level 3 to Disrupt the Flow of Traffic Over the PSTN in Ohio.

64. Level 3 has notified Neutral Tandem and the Commission that it plans to disconnect its existing interconnections with Neutral Tandem on or after June 25, 2007. If that occurs, it is possible that end-users in Ohio could experience service deprivation and call blockage.

65. Specifically, if Neutral Tandem's existing interconnections with Level 3 are removed, the third party carriers that currently use Neutral Tandem's services would have to seek to augment their interconnection trunks with AT&T in order to seek to terminate this traffic indirectly to Level 3. These alternative routes may not have sufficient capacity to send all of the blocked traffic.

66. This capacity shortage could result in the blockage of traffic destined for termination to Level 3 end-users. In other words, some calls to Level 3 end-users from third party carriers may be blocked and receive a fast busy signal due to lack of trunk capacity.

67. Notably, Level 3 has shown in the past that it will follow-through on threats to disrupt service to other carriers' end-users. For example, in October 2005, Level 3 apparently blocked internet users of Cogent Communications from accessing the internet for three days during a compensation dispute between the parties.[22] As a result of Level 3's conduct in that dispute, its President apologized to both Level 3's and Cogent's customers.[23] Yet even now, Level 3 candidly acknowledges that it views blocking traffic as "a critical part of the negotiating

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[22] *See* Arshad Mohammed, *Internet Access Dispute Cut off Some Businesses*, Washington Post, Oct. 14, 2005, at D04; Jeff Smith, *Level 3, Cogent Resolve Dispute; Feud Disrupted Internet Traffic*, Rocky Mountain News, Oct. 29, 2005, at 3C. A copy of these articles is attached hereto as Exhibit 12.

[23] *Id.*

toolkit[.]"[24] Such a practice by Level 3 violates the prohibition against unjust or unreasonable practices by common carriers under Sections 4905.22 and 4905.35, Revised Code. The Commission should not abdicate its regulatory oversight over the PSTN at the behest of a carrier such as Level 3, which has an unfortunate history of using the blocking of traffic as a negotiating tactic in the past, and makes no secret of its willingness to do so again.

REQUESTED RELIEF

68. Under Sections 4905.22 and 4905.35, Revised Code, Level 3 has an obligation to accept terminating traffic from Neutral Tandem on nondiscriminatory and reasonable terms through its existing interconnection with Neutral Tandem. Sections 4905.04, 4905.05, and 4905.06, Revised Code, grant the Commission the authority to order Level 3 to maintain its interconnection with Neutral Tandem for the purpose of accepting terminating traffic on nondiscriminatory, just and reasonable terms.

69. Level 3's obligation to accept terminating traffic from Neutral Tandem is also consistent with the long-standing principle embraced by the Commission and the FCC that the originating carrier -- not the terminating carrier -- has the power to determine the most cost-effective and efficient call route.

70. Continued interconnection between Neutral Tandem and Level 3 also furthers the policy goals of competition, as well as network redundancy and reliability, and homeland security and disaster recovery.

WHEREFORE, for the reasons set forth herein, Neutral Tandem, Inc. and Neutral Tandem-Michigan, LLC respectfully requests that the Commission:

1) Dismiss Level 3's Complaint and deny the relief requested therein;

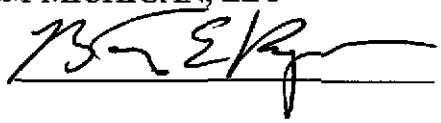
[24] Level 3's Corrected Mot. to Dismiss and Resp. to Pet. of Neutral Tandem, Florida Pub. Serv. Comm'n, at 7.

2) Find that Level 3's request for unreasonable terms and conditions of interconnection violates Sections 4905.22 and 4905.35, Revised Code, and order Level 3 (including its affiliate, Broadwing) to accept terminating traffic from Neutral Tandem on just, reasonable, and nondiscriminatory terms and conditions pursuant to Section 4905.22 and 4905.35, Revised Code; and

3) Award Neutral Tandem the relief requested herein and all relief the Commission may deem just and reasonable, including attorneys' fees.

Respectfully submitted,

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

By: 

Barth E. Royer
Bell & Royer Co., L.P.A.
33 South Grant Avenue
Columbus, Ohio 43215-3900
(614) 228-0704
(614) 228-0201 (fax)
barthroyer@aol.com

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

Ronald Gavillet
Executive Vice President &
General Counsel
Neutral Tandem, Inc.
One South Wacker, Suite 200
Chicago, IL 60606
(312) 384-8000
(312) 346-3276 (fax)
rongavillet@neutraltandem.com

John R. Harrington
Jenner & Block LLP
330 N. Wabash Ave.
Suite 4700
Chicago, IL 60611
(312) 222-9350
(312) 840-7791 (fax)
jharrington@jenner.com

EXHIBIT 1

Level(3)
COMMUNICATIONS

January 30, 2007

NTI Communications, Inc.
Two North La Salle, Suite 1515
Chicago, IL 60602

Attention: Executive Vice President and General Counsel

RE: Agreement for Wireline Network Interconnection
Between Neutral Tandem Inc. and Level 3 Communication L.L.C.

Dear Sir/Madam:

Pursuant to Section 11 of the above named Agreement, I am writing to provide written request for termination of the above named Agreement between Neutral Tandem Inc. (NTI) and Level 3 Communications, L.L.C. (Level 3), which was executed on June 25, 2004 and July 6, 2004 respectively.

Accordingly on March 2, 2007, this agreement is terminated and no longer in effect.

If you have any questions regarding this letter or any other matter associated with such, please contact me at 720-888-3785.

Sincerely,

Scott E. Beall, Vice President
Carrier Relations

EXHIBIT 2

Level(3)
COMMUNICATIONS

February 14, 2007

Mr. Ron Gavillet, EVP and General Counsel
Neutral Tandem, Inc.
2 North La Salle, Suite 1615
Chicago, IL 60602

Re: February 16, 2007 Meeting

Dear Mr. Gavillet:

In anticipation of our discussions this Friday, February 16th, we wanted to provide Neutral Tandem with some additional background regarding Level 3's intentions and goals for establishing a new commercial relationship.

As you know, Level 3 already has provided written notice of its intent to terminate the agreement between Neutral Tandem and Level 3 Communications, LLC. Fundamentally, this agreement provides no material benefit to Level 3's shareholders and is not commercially balanced between the two parties. Due to recent acquisition activities, Level 3 has, in many cases, acquired duplicative contracts with the same vendors. In order to better manage these relationships, Level 3 has undertaken a process to review all major vendor relationships and negotiate new agreements, as appropriate.

Our review of the various agreements between the acquired Level 3 companies and Neutral Tandem, including the agreement with Broadwing Corporation, has served to further highlight the current imbalance that exists between Neutral Tandem and the combined Level 3 companies. As such, pursuant to the Term Section of the MASTER SERVICE AGREEMENT between Neutral Tandem Inc. and Focal Communications Corporation, dated February 2, 2004, we are providing notice to terminate this contract effective March 23, 2007.

Continuing the relationship with Neutral Tandem under the current combined Level 3 agreements, therefore, is not a commercially reasonable or manageable option. As such, Level 3 hopes to be able to reach a single agreement with Neutral Tandem to correct the current commercial imbalance and allow Level 3 to more easily manage its relationship with Neutral Tandem. We expect that a new agreement would supersede the current agreements and, moving forward, provide a single set of terms and conditions for the benefit of both parties.

In furtherance of the goals stated herein, Level 3 has agreed to extend the termination effective date of the agreement between Level 3 Communications, LLC and Neutral Tandem to March 23, 2007, with a desire to renegotiate a suitable commercial relationship. To the extent that Level 3 and Neutral Tandem are not able to reach mutually agreeable terms, Level 3 intends to exercise its contractual rights to terminate the remaining existing agreements with Neutral Tandem and the combined Level 3 companies in accordance with our contractual rights and to otherwise manage the traffic exchanged under these legacy agreements. Under this scenario, Level 3 would work closely with Neutral Tandem in order to affect an orderly transition to mitigate any risks associated with Neutral Tandem customer traffic.

We look forward to our upcoming discussions and hope we can reach a new agreement that more appropriately balances the interests of our respective companies.

Sincerely,

Scott E. Beer
Vice President, Carrier Relations

EXHIBIT 3

NEUTRAL TANDEM

One South Wacker, Suite 200
Chicago, IL 60606
phone 312.384.8000
fax 312.348.3274

February 19, 2007

Scott E. Beer
Vice President, Carrier Relations
Level 3 Communications
1025 Eldorado Blvd.
Broomfield, CO 80021

Re: Neutral Tandem's Request for Interconnection with Level 3

Dear Mr. Beer:

Thank you for taking the time to meet with Ron Gavillet, Dave Lopez and me last Friday. I write to you in response to that meeting and your letter of February 14, 2007.

As you know, Neutral Tandem, Inc. (together with its applicable affiliates, "Neutral Tandem") provides tandem switching and transit services ("Tandem Services") in a number of states where Level 3 Communications, LLC (together with its applicable affiliates, "Level 3") also operates. In addition to providing these Tandem Services to Level 3, Neutral Tandem also provides Tandem Services to other carriers, such as CLECs, wireless carriers, and cable companies.

Level 3 and Neutral Tandem currently interconnect pursuant to two contracts – a July 6, 2004 Agreement for Wireline Network Interconnection (the "July 2004 Contract") and a February 2, 2004 Master Services Agreement (originally executed by Focal Communications, which is now part of Level 3) (the "February 2004 Contract"). Pursuant to these two-way interconnection agreements, Neutral Tandem provides Tandem Services to (i) Level 3 for traffic that originates with Level 3 and terminates to third party terminating carriers, and (ii) third party carriers for traffic that originates with those carriers and terminates with Level 3.[1]

On the evening of January 31, 2007, Level 3 sent a fax to Neutral Tandem terminating the July 2004 Contract effective March 2, 2007. By way of your February 14 letter, Level 3 (i) agreed to extend the termination date of the July 2004 Contract to March 23, 2007, to allow negotiations for a new two-way agreement to take place and (ii) terminated the February 2004 Contract effective March 23, 2007.

Let me reiterate what we said during the meeting on Friday: Neutral Tandem is willing to work with Level 3 to reach a commercial agreement for two-way interconnection which will enable Level 3 to enjoy the benefits of our competitive Tandem Service. We therefore look forward to our call tomorrow.

[1] On January 31, 2007, before Level 3 sent the fax to Neutral Tandem terminating the two-way July 2004 Contract, Neutral Tandem and Level 3 executed a new contract under which Neutral Tandem will provide certain termination services for certain traffic originated by Level 3. That agreement does not provide for termination of traffic to Level 3 from Neutral Tandem that originates with third party carriers and indeed its rates and terms were predicated on the existence of the July 2004 Contract.

However, as we also stated in our meeting, Level 3 is required by law to interconnect with Neutral Tandem in all of the states where the parties operate. For example, applicable state law requires Level 3 to interconnect with Neutral Tandem upon request in each of Illinois, New York, Florida, and Georgia. *See* 220 ILL. COMP. STAT. 5/13-514; N.Y. COMP. CODES R. & REGS. 16, § 605.2; N.Y. PUB. SERV. LAW §§ 91, 92, 94, 97; FL. STAT. ANN. § 364.16; GA. CODE ANN. § 46-5-164. Therefore, any refusal by Level 3 to interconnect with Neutral Tandem would violate both state and federal law.[2]

Accordingly, Neutral Tandem hereby formally requests interconnection with Level 3 in all of the states in which our respective companies operate in order for Neutral Tandem to terminate to Level 3 traffic originated by third party carriers on terms no less favorable than those made available to the incumbent local exchange carrier for the termination of tandem services. This request includes, but is not limited to, the following states: Illinois, New York, Florida, and Georgia.

To be clear, Neutral Tandem is *not* seeking interconnection with Level 3 under applicable law for the purpose of compelling Level 3 to originate traffic to Neutral Tandem. Rather, Neutral Tandem requests interconnection with Level 3 solely for the purpose of delivering traffic originated by third party carriers utilizing Neutral Tandem's Tandem Service.

We look forward to our call tomorrow.

Sincerely,

Surendra Saboo
Chief Operating Officer

cc: John Harrington, Jenner & Block LLP

[2] In addition to being required by law, Neutral Tandem presumes that Level 3 will comply with this request given that it is entirely consistent with the numerous public positions regarding interconnection taken by Level 3, including positions supporting the right of wholesale carriers to interconnect, the need for competitive transit services, and the need for interconnection to support the development of competitive transit services. Moreover, such interconnection furthers general public policies supporting competition and network redundancy.

EXHIBIT 4

Level(3)
COMMUNICATIONS

John M. Ryan
Senior Vice President
Assistant General Counsel

TEL: (720) 888-5156
FAX: (720) 888-5134
John.Ryan@Level3.com

February 22, 2007

Mr. Surendra Saboo
Chief Operating Officer
Neutral Tandem
One South Wacker, Suite 200
Chicago, Il 60606

Re: Request for Interconnection dated February 19, 2007

Dear Mr. Saboo,

The purpose of this letter is to respond to your formal request for interconnection that you believe is required by state statutes in Illinois, New York, Georgia and Florida. We are pleased by your pledge to work with us to reach an appropriate and mutually beneficial commercial arrangement, the terms of which have been discussed between our teams. In fact, under separate cover, we are delivering tomorrow a revised proposal describing commercial terms for a services agreement between Neutral Tandem and Level 3. Our team is working to modify our initial proposal to address specific commercial concerns raised by Neutral Tandem during business discussions over the last few days.

In your letter, you indicate that you desire to interconnect with Level 3 on non-discriminatory rates, terms and conditions. There is apparently, however, a misunderstanding on your part concerning the nature of, and the terms and conditions contained in, the interconnection agreements that Level 3 has executed with competitive local exchange carriers ("CLECs") such as Neutral Tandem.

The interconnection agreements that Level 3 has signed with CLECs permit the exchange of traffic that is generated directly by each carrier's end user customers. Our standard form interconnection agreement *does not allow, and in fact expressly prohibits,* each party from sending "transit traffic" over the interconnection trunks. "Transit traffic" is generally defined as "any traffic that originates from one telecommunications carrier's network, transits another carrier's network, and terminates to yet another telecommunications carrier."

Neutral Tandem has requested "interconnection with Level 3 solely for the purpose of delivering traffic originated by third party carriers utilizing Neutral Tandem's Tandem Service." Thus, even if we were to concede that Level 3 has a statutory obligation to interconnect with Neutral Tandem containing the financial terms that your team has demanded (which we do not), execution of a fair and non-discriminatory interconnection agreement would not permit Neutral Tandem to send Level 3 its transit traffic for termination.

As previously stated, we remain open to a commercial agreement that would allow Neutral Tandem to deliver its transit traffic to Level 3 with appropriate commercial terms and conditions. Our business teams will continue to work with you on these matters.

While we remain hopeful that rational business discussions can lead to a commercial agreement that is beneficial to both parties, we must reiterate our intention that, in the absence of such agreement, both parties must cooperate to effectuate the termination of the existing agreements without material adverse consequences to our customers. Along those lines, we expect that you are or will be shortly advising customers of the termination of our agreement and making appropriate plans for alternative routing of traffic. If termination is likely to materially impact the flow of traffic for your customers, please let us know and we can work with both you and your impacted customers to assure that there are no interruptions of service associated with the termination of the agreements.

In the meantime, please direct all communication regarding your formal request for statutory interconnection to me.

Sincerely,

John M. Ryan

John M. Ryan
Senior Vice President and Assistant General Counsel

EXHIBIT 5

TANDEM

One South Wacker, Suite 200
Chicago, IL 60606
phone 312.384.8000
fax 312.346.3276

February 26, 2007

John M. Ryan
Senior Vice President,
Assistant General Counsel
Level 3 Communications, LLC
Broomfield, CO 80021

Re: Neutral Tandem's Request for Interconnection with Level 3 and Notice of Level 3's Violation of the Illinois Public Utilities Act

Dear Mr. Ryan:

I write as follow-up to your February 22, 2007 letter, in which you responded to Neutral Tandem's February 19, 2007 request for interconnection with Level 3 Communications, LLC (together with its applicable affiliates, "Level 3"). As discussed in more detail below, Level 3's refusal to acknowledge its interconnection obligations under applicable law, along with its ongoing threat to disrupt Neutral Tandem's service by blocking terminating traffic over the parties' existing interconnections, leave Neutral Tandem with no choice but to enforce Level 3's interconnection obligations through formal proceedings. As further discussed below, this letter will serve as notice that Level 3 is in violation of several provisions of the Illinois Public Utilities Act.

At the outset, your letter correctly states that Neutral Tandem seeks interconnection with Level 3 for the sole purpose of delivering transit traffic originated by third party carriers. Your letter also correctly states that Neutral Tandem seeks such interconnection on nondiscriminatory terms and conditions compared to the incumbent LEC transit carrier, as required by applicable law. However, your letter claims that, because Level 3's contracts with certain CLECs apparently do not allow those carriers to deliver traffic originated by third party carriers, "execution of a fair and non-discriminatory interconnection agreement would not permit Neutral Tandem to send Level 3 its transit traffic for termination."

This statement reflects a fundamental misunderstanding of Level 3's interconnection obligations. As shown in Neutral Tandem's February 19 request for interconnection, Level 3 is required by applicable law to interconnect with Neutral Tandem in all of the states where the parties currently operate. We are not aware of any authority, and your letter cites no authority, that allows Level 3 to refuse interconnection with Neutral Tandem simply because (i) Level 3's contracts with certain CLECs apparently do not allow those carriers to deliver traffic originated by third party carriers; or (ii) Neutral Tandem delivers traffic from third party carriers rather than

end-user customers. Indeed, Level 3 itself has argued that carriers serving other carriers are entitled to enforce statutory interconnection obligations.[1]

Thus, the fact that some CLECs may choose to enter into contracts with Level 3 that restrict those carriers' ability to deliver transited traffic has no bearing on Level 3's legal obligations to interconnect with Neutral Tandem. Simply put, Level 3's contracts with certain CLECs do not trump Level 3's lawful interconnection obligations.

Your letter similarly misunderstands or misstates the nature of the non-discriminatory interconnection obligations Neutral Tandem seeks to enforce. To be clear, Level 3 is required to provide Neutral Tandem with interconnection on the same terms and conditions as Level 3 provides to other carriers providing terminating transiting services. To Neutral Tandem's knowledge, the only other carriers that provide such transiting services are incumbent LECs. Thus, Neutral Tandem is entitled to interconnect with Level 3 to deliver transited traffic to Level 3 on the same terms and conditions under which Level 3 receives transited traffic from incumbent LECs.

Level 3's position leaves Neutral Tandem with no choice but to enforce Level 3's interconnection obligations through formal proceedings. Thus, Neutral Tandem is filing Petitions for Interconnection today with the Florida Public Service Commission and the New York Public Service Commission. Neutral Tandem will be filing similar petitions in other states where the parties operate. Per your request, copies of these Petitions will be sent to your attention as they are filed.

In light of Level 3's clear interconnection obligations, Neutral Tandem must reject Level 3's threat to block terminations from third party carriers using Neutral Tandem's transiting services. Your letter demands that Neutral Tandem advise these carriers about Level 3's planned termination of the parties' contracts. Your letter further demands that Neutral Tandem "cooperate" with Level 3 to ensure that that there are no "interruptions of service" to those carriers.

Level 3's lawful interconnection obligations will continue beyond March 23, 2007 irrespective of whether Level 3 chooses to terminate the parties' contracts as of that date. Any attempt by Level 3 to disrupt service to Neutral Tandem and/or the carriers that use Neutral Tandem's

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[1] *See, e.g.*, Level 3's *Ex Parte Letter in Support of Petition of Time Warner Cable*, WC Docket No. 06-55, Letter at 4 (filed February 13, 2007).

NEUTRAL TANDEM

service would violate Level 3's lawful interconnection obligations. Please be advised that Neutral Tandem will seek all available redress from Level 3 if that occurs.

Please be further advised that any attempt by Level 3 to contact Neutral Tandem's customers concerning this dispute would constitute unlawful interference with Neutral Tandem's existing and prospective business relationships. Neutral Tandem will seek all available redress from Level 3 in the event Level 3 attempts to interfere with Neutral Tandem's business relationships and/or reputation.

Finally, Level 3's continued unwillingness to interconnect with Neutral Tandem on reasonable terms and conditions, combined with Level 3's continued threat to disrupt service to the carriers that use Neutral Tandem's services, constitute violations of several provisions of the Illinois Public Utilities Act, including but not limited to, 220 ILCS 5/13-514(1), (2), and (6). Pursuant to 220 ILCS 5/13-515, this letter constitutes formal notice that Level 3 is in violation of the above-referenced provisions of Illinois law, as well as a request that Level 3 cease violating those provisions within 48 hours. Specifically, Neutral Tandem requests that Level 3 confirm within 48 hours that, in the event the parties have not established terms and conditions for continuing interconnection by March 23, 2007, Level 3 will not disconnect or otherwise interfere with the parties' existing interconnections.

Sincerely,

Ronald W. Gavillet
General Counsel

cc: John Harrington, Jenner & Block LLP

EXHIBIT 6

HARRIS, WILTSHIRE & GRANNIS LLP

1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

February 13, 2007

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Petition of Time Warner Cable for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55.

Dear Ms. Dortch:

Level 3 Communications, LLC ("Level 3") urges the Commission to grant Time Warner Cable's ("TWC") Petition for Declaratory Ruling. As Level 3 demonstrated in its Comments and Reply Comments,[1] nothing in Sections 251 and 252 carves wholesale carriers out of the rights granted to requesting carriers under those sections; grant of TWC's Petition is necessary to ensure that consumers throughout the United States enjoy the benefits of competition as intended by the 1996 Act. Further, to give effect to its decision and forestall RLEC efforts to avoid their obligations under Sections 251(a) and (b) and Section 252, the Commission should confirm that the Section 251(f)(1) rural exemption does not relieve RLECs of their obligations under Sections 251(a), 251(b), and 252, including the duty to arbitrate with respect to the Section 251(a) and (b) duties.

Recently, the South Carolina Telephone Coalition ("SCTC") has argued that TWC's Petition should be denied because a grant would invest TWC with "benefits" under Title II.[2] This argument fundamentally misconstrues TWC's Petition, which seeks to reaffirm a wholesale telecommunications carriers' rights under Title II. There is nothing in the statute to support SCTC's novel limitation of Sections 251(a), 251(b), and

[1] *Comments of Level 3Communications, LLC In Support of Petition for Declaratory Ruling*, WC Docket No. 06-55 (filed April 10, 2006); *Reply Comments of Level 3 Communications, LLC*, WC Docket No. 06-55 (filed April 25, 2006) ("Level 3 Reply Comments").

[2] *Ex Parte Notice of the South Carolina Telephone Coalition*, WC Docket No. 06-55, Attachment at 8 (filed January 30, 2007).

252 to apply only to requests for interconnection by retail telecommunications carriers or, in the case of Section 251(b), retail LECs. The Act contains no such qualifier, and thus, according to the plain language of the Act, Section 251(a) and (b) and 252 apply to requests by wholesale, as well as retail, telecommunications carriers. Moreover, the implementation issues that SCTC raises could be addressed in any negotiation and, if necessary, arbitration between the ILEC and the wholesale carrier.

The Western Telecommunications Alliance's ("WTA") recent ex parte correctly recognizes that rights and obligations under Section 251(b) and (c) are intertwined with and inseparable from the arbitration and negotiation provisions of Section 252.[3] As explained by WTA, these provisions apply to all CLECs, and enable CLECs to "enter into Section 251(b) agreements with ILECs."[4] While WTA would prefer that CLECs not sell wholesale services, that anti-competitive position finds no support in the statute or Commission precedent. But what even WTA acknowledges is that the rights and obligations granted under Section 251(b) can be enforced under Section 252.

Section 251(a) unequivocally imposes a duty on all telecommunications carriers to interconnect with other carriers: "Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[5] Despite this clear language, some RLECs have responded to Level 3's attempts to negotiate interconnection and bring interconnection disputes before state commissions for arbitration by arguing that their Section 251(f)(1) rural exemption frees them from any obligation to negotiate or arbitrate in response to Level 3's requests.

In Washington, for example, CenturyTel argued that Level 3 "cannot make a valid request to negotiate with [CenturyTel] because it is exempt from the provisions of Section 251(c)."[6] The Washington Commission rejected CenturyTel's arguments, explaining that "[t]he rural exemption set forth in 47 U.S.C. 251(f) applies only to the requirements of Section 251(c)" and that "[r]ural companies remain obligated to comply with the provisions of Sections 251(a) and (b)."[7] In Wisconsin, CenturyTel likewise attempted to avoid its interconnection obligations by arguing that the state commission was without jurisdiction to direct it to interconnect with Level 3's network.[8] The state

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[3] *Ex Parte Notice of the Western Telecommunications Alliance*, WC Docket No. 06-55, Attachment at 4 (filed February 6, 2007).
[4] *Id.*
[5] 47 U.S.C. § 251(a)(1).
[6] *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc. Pursuant to 47 U.S.C. § 252*, Third Supplemental Order Confirming Jurisdiction, Docket No. UT-023043, at 2 (WUTC Oct. 25, 2002).
[7] *Id.* at 3.
[8] *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms and Conditions With CenturyTel of Wisconsin*, Arbitration Award, Wisconsin Public Service Commission, Docket No. 05-MA-130, at 8-13 (Dec. 2, 2002).

commission resoundingly rejected this argument as well, explaining that Section 251(a)(1) "does not except any carrier from the reach of this provision."[9]

Unfortunately, not every state commission faced with these arguments has correctly applied the Communications Act. In Colorado, CenturyTel again claimed that the state commission lacked jurisdiction over Level 3's 251(a) interconnection request, a claim that the commission accepted.[10] Because CenturyTel was not required to negotiate interconnection under Section 251(c) by virtue of its rural exemption, the Commission's statutory misinterpretation left Level 3 without a means of directly interconnecting with CenturyTel.

Level 3's experience with CenturyTel was part of a broader business effort to expand the reach of its network into the territories of independent and rural carriers. During a three-month period in 2002, Level 3 made approximately 225 requests for interconnection negotiations under Section 251(a) and (b). Level 3's intention was to expand the markets available to its ISP customers. (It's worth noting that in most of the rural territories, the rural carrier also maintained an ISP affiliate that would face competition from Level 3's customers). Less than 20 percent of the companies engaged in negotiations with only a handful resulting with a non-arbitrated agreement. Most companies simply refused to acknowledge the request for negotiation. Unable to engage the companies in negotiations and unable to spend the money needed to litigate the question with more than 200 companies, Level 3 was forced to dramatically scale back its network expansion efforts.

Level 3 is not the only carrier that has been forced to overcome arguments that the Section 251(f)(1) rural exemption somehow trumps the general duty to interconnect.[11] Indeed, one rural carrier has been so bold as to file a petition for declaratory ruling at the FCC to establish that an exempt rural carrier's duties under Section 251(a) are not subject

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[9] *Id.*

[10] *Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with CenturyTel of Eagle, Inc. Regarding Rates, Terms, and Conditions for Interconnection*, Decision Denying Exceptions, Docket No. 02B-404T, C03-0117, at ¶ 34 (Col. Public Utilities Comm'n Jan. 17, 2003).

[11] *See, e.g., Cambridge Telephone Co. et al. Petitions for Declaratory Relief and/or Suspension or Modification Relating to Certain Duties under Sections 251(b) and (c) of the Federal Telecommunications Act, pursuant to Section 251(f)(2) of that Act; and for any other necessary or appropriate relief*, Order, Docket No. 05-0259 (Ill. Commerce Comm'n July 13, 2005) (explaining RLECs exempt from Section 251(c) are nonetheless obligated to negotiate terms and conditions for interconnection with requesting telecommunications carrier); [concluding state commission has no arbitration authority over requests to negotiate under Section 251(a)]; *Sprint Communications Co. L.P. v. Public Utility Comm'n of Texas*, Case No. A-06-CA-65-SS, Slip Op. 9-10 (W.D. Tex. Aug. 14, 2006) (holding rural exemption allows RLEC to refuse negotiation and arbitration); *see also ExParte Notice of Sprint Nextel*, WC Docket 06-55, at 2 & n.4 (filed January 30, 2007) (detailing RLEC refusals of requests for interconnection under Section 251(a) and for arbitration under Section 252).

to the negotiation and arbitration procedures specified in Section 252.[12] These efforts delay[13] (and sometimes deny) competition in rural areas, impose unnecessary costs on new entrants, and slow the deployment of advanced services in remote areas, outcomes that are plainly inconsistent with the procompetitive aims of the 1996 Act.

Arguments that Section 251(a) imposes no enforceable interconnection obligation on exempt rural LECs fundamentally misconstrue Sections 251 and 252. As discussed above, Section 251 unambiguously imposes a duty on *all telecommunications carriers*, thus including rural ILECs, to interconnect with other telecommunications carriers. Certain subsections of Section 251 impose additional obligations on particular subclasses of telecommunications carriers. Section 251(b) imposes additional obligations—resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation—on *all* LECs.[14] And Section 251(c) imposes additional obligations—a duty to negotiate, more detailed interconnection requirements, unbundled access, more detailed resale requirements, notice of changes, and collocation—on incumbent LECs.[15] But these Section 251(c) obligations are in addition to the general duty to interconnect, pursuant to Section 251(a). Section 252 provides a mechanism for negotiation, mediation, and arbitration of requests to negotiate made "pursuant to Section 251" – without any limitation to specific subsections of Section 251.[16]

Section 251(f)(1), which exempts rural carriers from Section 251(c) touches only on the issue of *which obligations* enumerated in Section 251 apply to a rural incumbent LEC.[17] It does not in any way limit the authority of a state commission to arbitrate an interconnection dispute pursuant to 252 to implement the still applicable provisions of Section 251(a) and (b). Moreover, a valid Section 251(f)(1) "rural exemption" by its terms does not exempt an incumbent LEC from interconnection obligations under Section 251(a) or (b). In explaining the scope of the rural exemption, the Commission has articulated this limit: "Section 251(f)(1) applies only to rural LECs, and offers an exemption only from the requirements of Section 251(c)."[18]

The Commission should act now to put an end to RLECs' misplaced arguments. The declaratory relief that Time Warner seeks will have little meaning if a rural LEC can refuse to negotiate interconnection and exchange of traffic with the wholesale CLEC

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[12] *Developing a Unified Intercarrier Compensation Regime*, Oklahoma Western Telephone Company Petition for Clarification of Declaratory Ruling and Report and Order, CC Docket 01-92 (filed Nov. 27, 2006).

[13] Even where RLECs do not ultimately succeed in denying entry, their reliance on arguments under Section 251(f) without invoking the 251(f) process or being subject to the relevant 251(f) time frames. *See* Level 3 Reply Comments at 10 & n.12 (detailing four years of proceedings before Iowa Utilities Board granted Level 3 authority to provide services to VoIP providers).

[14] 47 U.S.C. § 251(b).

[15] 47 U.S.C. § 251(c).

[16] 47 U.S.C. § 252.

[17] *See* 47 U.S.C. § 251(f)(1).

[18] *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd. 7236, 7303 (1997).

serving Time Warner. The states that have considered the issue have split. Consequently, the Commission should make clear for the whole country what the law, in fact, is – that the negotiation and arbitration provisions of Section 252 apply to requests for interconnection under Section 251(a) and (b), including requests made to RLECs subject to the rural exemption under Section 251(f)(1).

For the foregoing reasons, in any Order addressing the TWC Petition, the Commission should make clear that competitive carriers are free to request interconnection from all ILECs, including RLECs, pursuant to Sections 251(a) and (b), and that such requests are subject to the negotiation and arbitration procedures contained in Section 252.

Sincerely yours,

John T. Nakahata
Counsel to Level 3 Communications, LLC

cc: Thomas Navin, Chief, Wireline Competition Bureau, Federal Communications Commission

EXHIBIT 7

Level(3)
COMMUNICATIONS

John M. Ryan
Senior Vice President
Assistant General Counsel

TEL: (720) 888-6150
FAX: (720) 888-5134
John.Ryan@Level3.com

March 14, 2007

Mr. John Harrington
Jenner & Block, LLP
3300 N. Wabash Avenue, Suite 4700
Chicago, IL 60611

Re: Agreement for Wireline Network Interconnection dated June 2004 between Neutral Tandem, Inc. and Level 3 Communications, LLC

Master Services Agreement dated February 2004 between Neutral Tandem, Inc. and Focal Communications Corporation

Dear Mr. Harrington:

This letter responds to your correspondence dated March 6, 2007.

As we have communicated to you and to the state commissions where Neutral Tandem filed proceedings, Level 3 has unilaterally determined to leave the existing interconnections in place until June 25, 2007, so as to allow Neutral Tandem (and its customers, if necessary) sufficient time to prepare for disconnection of the trunks between Level 3 to Neutral Tandem. Our decision was necessitated by Neutral Tandem's refusal to work with us to assure an orderly migration of service following termination of the contract between our companies.

In your letter and in previous communications, you have implied or asserted that Level 3's conduct constitutes tortious interference with Neutral Tandem's existing and prospective business relationships. The theory, as we understand it, is that *notwithstanding the express language contained in the agreements between the parties*, Level 3 may not under any circumstances disconnect the existing transit termination services. In later emails, you imply that Level 3 is obligated to augment and add to its network in order to permit Neutral Tandem to use even more transit termination service from Level 3 for free, and that Level 3's unwillingness to deliver future transit termination services to Neutral Tandem also constitutes tortious interference.

Neutral Tandem's position seems to be that Level 3 is obligated to provide transit termination services on economic terms dictated by Neutral Tandem, and that Level 3's unwillingness to accept those financial terms constitutes tortious interference with Neutral Tandem's business. This position is indefensible and appears to be asserted to gain some kind of competitive advantage over Level 3 in connection with Neutral Tandem's transit service offering. Level 3

has made no secret of its intentions to offer its own competitive transit service and we believe that Neutral Tandem is misusing the regulatory process in order to establish through regulation that which it has not been able to secure through balanced commercial negotiations.

You have also demanded that Level 3 cease from "publicizing the parties' dispute." Neutral Tandem – and not Level 3 – elected to commence public proceedings before multiple state commissions. Further, Neutral Tandem has refused to provide any migration plan to assure that its customers' traffic will not be impacted upon termination. We believe that each of us has a responsibility to inform our customers of the pending disconnection of transit termination service, and that Level 3 is free to share any public information regarding our dispute with potentially impacted carriers. We reserve the right to do so either in response to a customer inquiry or at an appropriate time to assure that customers can take actions to protect their traffic.

Sincerely,

John M. Ryan
Senior Vice President and Assistant General Counsel

EXHIBIT 8

LeBoeuf, Lamb, Greene & MacRae
L.L.P.
A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

NEW YORK
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Albany, NY 12210-2820
(518) 626-9000
FACSIMILE: (518) 626-9010

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RIYADH
TASHKENT
BISHKEK
ALMATY
BEIJING

May 13, 2005

VIA HAND DELIVERY

Honorable Jaclyn A. Brilling
Secretary
New York State Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Traffic Termination Agreement Between Neutral Tandem-New York, LLC and Time Warner Telecom – NY, L.P.

Dear Secretary Brilling:

On behalf of Time Warner Telecom – NY, L.P., enclosed please find an original and five copies of a Traffic Termination Agreement Between Neutral Tandem-New York, LLC and Time Warner Telecom – NY, L.P.

If you have any questions regarding this filing, please contact me.

Sincerely,

Noelle M. Kinsch

BTF/mb
Enclosures
cc: Ms. Rochelle D. Jones
Ms. Surayya Yahaya
Brian T. FitzGerald, Esq.

AL 30902.1

TRAFFIC TERMINATION AGREEMENT

Dated as of APR 21 2005 **, 2005**

By and Between

NEUTRAL TANDEM-NEW YORK, LLC
NEUTRAL TANDEM-GEORGIA, LLC
NEUTRAL TANDEM-INDIANA, LLC
NEUTRAL TANDEM-ILLINOIS, LLC
NEUTRAL TANDEM-CALIFORNIA, LLC
NEUTRAL TANDEM-MINNESOTA, LLC
NEUTRAL TANDEM-MICHIGAN, LLC

And

TIME WARNER TELECOM - NY, L.P.
TIME WARNER TELECOM OF GEORGIA, L.P.
TIME WARNER TELECOM OF INDIANA, L.P.
TIME WARNER TELECOM OF WISCONSIN, L.P.
TIME WARNER TELECOM OF CALIFORNIA, L.P.
TIME WARNER TELECOM OF MINNESOTA LLC
TIME WARNER TELECOM OF OHIO LLC

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TRAFFIC TERMINATION AGREEMENT

This Traffic Termination Agreement ("Agreement"), by and between Time Warner Telecom - NY, L.P., Time Warner Telecom of Georgia, L.P., Time Warner Telecom of Indiana, L.P., Time Warner Telecom of Wisconsin, L.P., Time Warner Telecom of California, L.P., Time Warner Telecom of Minnesota LLC and Time Warner Telecom of Ohio LLC with offices located at 10475 Park Meadows Drive, Littleton, CO 80124, (collectively "TWTC") and Neutral Tandem-New York, LLC, Neutral Tandem-Georgia, LLC, Neutral Tandem-Indiana, LLC, Neutral Tandem-Illinois, LLC, Neutral Tandem-California, LLC, Neutral Tandem-Minnesota, LLC, and Neutral Tandem-Michigan, LLC, with offices located at 1 S. Wacker Drive, Suite 200, Chicago, IL 60606 (collectively "NT"), (TWTC and NT being referred to collectively as the "Parties" and individually as "Party") is effective as of this 29th day of April, 2005 (the "Effective Date").

RECITALS

WHEREAS, the Parties are duly authorized Telecommunications Carriers (as defined below) providing local exchange and other services in the State of New York, Georgia, Indiana, Wisconsin, California, Minnesota and Ohio; and

WHEREAS, the Parties wish to enter into an Agreement pursuant to which NT may deliver Transit Traffic (as defined below) originated by providers of Telecommunications Services (as defined below) that are Customers of NT ("NT's Carrier Customers") for termination on the TWTC's network; and

WHEREAS, TWTC intends to continue delivering its originating traffic either directly or through a transiting arrangement with the Incumbent Local Exchange Carrier ("ILEC"); and

WHEREAS the Parties are entering into this Agreement to set forth the respective obligations of the Parties and the terms and conditions under which NT will deliver traffic to and, if applicable, compensate TWTC for the transport facility if ordered through TWTC; and

WHEREAS compensation for termination of Local Traffic, EAS Traffic, ISP Traffic and any Intra-LATA Toll Traffic (as defined below) on TWTC's network shall be billed to NT's Carrier Customers, and NT shall take all responsible steps to ensure that NT's Carrier Customers transmit to NT and NT passes along to TWTC all call detail information necessary for billing.

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS AND RECITALS

Each of the above Recitals is incorporated into the body of this Agreement as if fully set forth herein for all intents and purposes. The capitalized terms used in this Agreement shall have the meanings specified below in this Section or as specifically otherwise defined elsewhere within this Agreement.

1.1. "Act" means the Communications Act of 1934 (47 U.S.C. § 151 et seq.), as amended by the Telecommunications Act of 1996, and as from time to time interpreted in the duly authorized rules and regulations of the FCC or the Commission having authority to interpret the Act within its state of jurisdiction.

1.2. "Automatic Number Identification" ("ANI") shall mean the process that identifies the telephone number of the line initiating a call in order to send this information to the automatic message accounting system.

1.3. "Calling Party Number" ("CPN") is a Common Channel Interoffice Signaling ("CCIS") parameter which refers to the number transmitted through a network identifying the calling party.

1.4. "Central Office Switch" means a switch used to provide Telecommunications Services, including, but not limited to:

(a) "End Office Switches" which are used to terminate Customer station Loops for the purpose of Interconnection to each other and to trunks; and

(b) "Tandem Office Switches" or "Tandems" which are used to connect and switch trunk circuits between and among other Central Office Switches.

(c) "Tandem Switching" is defined as the function that establishes a communications path between two switching offices through a third switching office through the provision of trunk side to trunk side switching.

1.5. "Commission" means the applicable state administrative agency to which the state legislature has delegated the authority to regulate the operations of LECs within the state of New York, Georgia, Indiana, Wisconsin, California, Minnesota and Ohio.

1.6. "Common Channel Interoffice Signaling" or "CCIS" means the signaling system, developed for use between switching systems with stored-program control, in which all of the signaling information for one or more groups of trunks is transmitted over a dedicated high-speed data link rather than on a per-trunk basis and, unless otherwise agreed by the Parties, the CCIS used by the Parties shall be SS7.

1.7. "Confidential Information" shall mean confidential or proprietary

information (including without limitation technical and business plans, specifications, drawings, computer programs, network configurations, facilities deployment information, procedures, orders for services, usage information, Customer Service Records, Customer account data, and CPNI) that one Party ("Owner") may disclose to the other Party ("Recipient") in connection with the performance of this Agreement and that is disclosed by an Owner to a Recipient in document or other tangible form (including on magnetic tape) or by oral, visual or other means, and that the Owner prominently and clearly designates as proprietary and confidential whether by legends or other means.

1.8. Customer Proprietary Network Information ("CPNI") as defined by 47 U.S.C. § 222 and the rules and regulations of the Federal Communications Commission.

1.9. "Customer" or "End User" means a third-party residence or business that subscribes to Telecommunications Services provided by a Telecommunications Carrier, including either of the Parties.

1.10. "Exchange Access" is as defined in the Act.

1.11. "Exchange Area" means an area, defined by the Commission, for which a distinct local rate schedule is in effect.

1.12. "Extended Area Service Traffic" ("EAS Traffic") means those calls that fall within a type of calling arrangement as generally defined and specified in the general subscriber service tariff of the ILEC, but excluding calls that would rate as InterLATA local calls.

1.13. "FCC" means the Federal Communications Commission.

1.14. "Incumbent Local Exchange Carrier" ("ILEC") is as defined in the Act.

1.15. "Intellectual Property" means copyrights, patents, trademarks, trade secrets, mask works and all other intellectual property rights.

1.16. "Intra-LATA Toll Traffic" means all intra-LATA calls other than Local Traffic calls.

1.17. "Internet Service Provider Traffic" ("ISP Traffic") mean any traffic that is transmitted to or returned from the Internet at any point during the duration of the transmission.

1.18. "Local Access and Transport Area" ("LATA") is as defined in the Act.

1.19. "Local Exchange Carrier" ("LEC") is as defined in the Act.

1.20. "Local Traffic" means those calls that originate from an End User's use of local or foreign exchange service in one exchange and terminate in either the same exchange or another calling area associated with the originating exchange, as generally defined and specified in the general subscriber

service tariff of the ILEC.

1.21. "Loss" or "Losses" means any and all losses, costs (including court costs), claims, damages (including fines, penalties, and criminal or civil judgments and settlements), injuries, liabilities and expenses (including reasonable attorneys' fees), except incidental, consequential, indirect, and special losses or damages.

1.22. "North American Numbering Plan" ("NANP") means the numbering plan used in the United States that also serves Canada, Bermuda, Puerto Rico and certain Caribbean Islands. The NANP format is a 10-digit number that consists of a 3-digit NPA code (commonly referred to as the area code), followed by a 3-digit NXX code and 4-digit line number.

1.23. "NXX" means the 3-digit code that appears as the first 3-digits of a 7-digit telephone number.

1.24. "SS7" means Signaling System 7.

1.25. "Telecommunications" is as defined in the Act.

1.26. "Telecommunications Carrier" is as defined in the Act.

1.27. "Telecommunications Service" is as defined in the Act.

1.28. "Telephone Exchange Service" is as defined in the Act.

1.29. "Transit Traffic" means Local or non-Local traffic that is originated on a third party Telecommunications Carrier's network, transited through a Party's network, and terminated to the other Party's network.

2. INTERPRETATION AND CONSTRUCTION

All references to Sections, Exhibits and Schedules shall be deemed to be references to Sections of, and Exhibits and Schedules to, this Agreement unless the context specifically otherwise requires. In the event of a conflict or discrepancy between the provisions of this Agreement and the Act, the provisions of the Act shall govern.

3. TERMINATION OF TRAFFIC

3.1 TWTC agrees, in accordance with the terms of this Agreement, to terminate Transit Traffic delivered from NT that is destined for TWTC's subscribers, including without limitation, Local, EAS, intrastate Intra-LATA Toll Traffic, and calls to internet service providers and other enhanced service providers. The Point of Interconnection ("POI") shall be the TWTC Central Office Switch designated in the attached Appendix 1. NT agrees its Transit Traffic shall be routed to TWTC's network in accordance with

Appendix 1. Pursuant to Section 4.6, TWTC agrees to provision a connection for terminating traffic from NT within sixty (60) days of a request of NT. TWTC agrees to provision additional facilities as ordered by NT to sufficiently trunk the network for traffic volumes consistent with the Industry Blocking Standard identified below.

3.2 The Parties may determine subsequent to the Effective Date of this Agreement that services other than those contemplated by this Agreement are desired, in which event, the Parties may amend this Agreement or enter into a separate agreement as the Parties mutually agree.

3.3 Upon a written request from NT to TWTC for the termination of Transit Traffic for a state not covered by this Agreement, the Parties will enter into an amendment within thirty (30) days of the request to add the new state to this Agreement.

4. TRUNK FORECASTING, ORDERING AND PROVISIONING FOR TERMINATION OF TRAFFIC

4.1 NT shall establish direct trunking with TWTC for the purpose of solely delivering terminating traffic.

4.2 NT shall provision, at its sole cost and expense, an appropriate number of T1s and/or DS3 trunks ("Trunk" or "Trunks") for the transport and delivery of its Transit Traffic in accordance with the traffic engineering standards stated in Section 5.1 or in the alternative NT must ensure that NT's Carrier Customers have established and maintain an alternative route via the ILEC for the delivery of overflow traffic for termination by TWTC.

4.3 Trunks shall be provided, at a minimum, over a DS1 line with B8ZS and 64 Clear Channel Capability ("CCC").

4.4 Each Party shall be responsible for engineering and maintaining its network on its side of the POI.

4.5 All direct Trunks installed pursuant to this Agreement shall carry Local, EAS and Intra-LATA Toll traffic.

4.6 NT shall be responsible for all the transport costs of delivering its Transit Traffic to TWTC's Central Office Switches for services under this Agreement. NT may either purchase trunks from TWTC at the same price as NT could purchase such trunks from the ILEC, or NT may negotiate individual sales contracts or a master service agreement with TWTC

through the appropriate TWTC channels and procedures.

4.7 Trunk Forecasts For Direct Connections

4.7.1 NT shall provide TWTC with Trunk quantity forecasts in a mutually agreed upon format once every six (6) months, commencing on the date NT establishes a direct connection. The forecasts shall include all information necessary to allow TWTC to manage its trunking facilities.

4.7.2 NT shall provide forecasted Trunk quantity requirements for a period that is no less than one (1) year from the date of the forecast and no more than two (2) years from the date of the forecast. The forecast shall be itemized by switch location. Each switch location shall be identified by the use of Common Language Location Identifier ("CLLI") Codes, which are described in Telecordia documents BR 795-100-100 and BR 795-400-100.

4.8 Review and Update of Trunk Forecasts

4.8.1 At the time the direct connection is established, each Party shall provide the other with a point of contact regarding Trunk forecasts. If NT becomes aware of any factors that would materially modify the forecast it has previously provided, it shall promptly provide written notice of such modifications to TWTC.

4.9 Provisioning Responsibilities for Direct Connections; Trouble Reporting and Management

4.9.1 Each Party shall provide to the other Party the contact number(s) to its control office which shall be accessible and available 24 hours a day, 7 days a week, for the purpose of, without limitation, (a) coordinating Trunk orders (e.g., notifying the other Party of delays in Trunk provisioning), (b) maintaining service (e.g., notifying the other Party of any trouble or need for repairs), and (c) notifying the other Party of any equipment failures which may affect the interconnection Trunks. Any changes to either Party's operational contact currently listed in Exhibit A shall be shall be promptly provided to the other Party in writing pursuant to the procedures in Section 22, below.

4.9.2 Each Party shall coordinate and schedule testing activities of its own personnel, and others as applicable, to ensure that Trunks are installed in accordance with the Access Service Request ("ASR"),

meet agreed-upon acceptance test requirements, and are placed in service by the in-service date.

4.9.3 Prior to reporting any trouble with interconnection facilities to the other Party, each Party shall perform sectionalization to determine if trouble is located in its facility or in its portion of the Trunks.

4.9.4 The Parties shall cooperatively plan and implement coordinated repair procedures for the interconnection facilities in order to ensure that trouble reports are resolved in a timely manner and that the trouble is promptly eliminated.

4.9.5 Prior to the placement of any orders for direct connection Trunks, the Parties shall meet and mutually agree upon technical and engineering parameters, including Glare and other control responsibilities.

4.9.6 Overflow traffic carried on the direct Trunks will be routed to LEC tandems.

5. NETWORK TRAFFIC MANAGEMENT

5.1 Blocking Standard. NT shall maintain a blocking standard of no more than one percent (1%) during the bouncing busy hour, i.e., the peak busy time each day, based upon mutually agreed engineering criteria ("Industry Blocking Standard".

6. SIGNALING

6.1 NT shall pass the call detail information required to permit billing of access and reciprocal compensation charges on all calls originating from carriers interconnected to the NT tandem and terminating traffic to TWTC. NT agrees not to change, manipulate, or in any way intentionally and fraudulently modify traffic line records, including CPNI and ANI.

7. COMPENSATION FOR TERMINATION

7.1 TWTC will terminate NT's Transit Traffic without compensation from NT. NT agrees to pass to TWTC all signaling received by NT from the originating carrier. In the event that an originating carrier passing traffic to TWTC through NT is not sending adequate signaling information, TWTC may request call record detail on such traffic and NT shall identify to TWTC the originating carrier for such traffic. Nothing in this Agreement will alter the manner in which TWTC bills NT's Carrier Customers for terminating traffic. NT will bill NT's Carrier Customers for sending Transit

Traffic to TWTC through NT for termination, and NT will not bill TWTC for the originating Carrier Customer's Transit Traffic.

7.2 Traffic Recording, Exchange of Necessary Factors and Audits

7.2.1 In order to accurately bill traffic exchanged, the Parties shall each perform traffic recording and identification functions necessary to provide the services contemplated hereunder, regardless of whether or not this Agreement results in a flow of compensation between the Parties. NT agrees that either it or its Carrier Customers shall perform Local Number Portability ("LNP") queries and that TWTC shall in no way be required to perform this function. Each Party agrees to use commercially reasonable efforts to accurately capture and transmit the actual MOU associated with the Intra-LATA Toll, Local and ISP Traffic it terminates for the other Party in order to properly calculate the necessary compensation between TWTC and NT's Carrier Customers.

7.2.3 Audits. NT agrees to participate in any TWTC audit initiated with NT's Carrier Customers to ensure the proper billing of traffic. TWTC may review records of call detail and supporting network information relevant to the exchange of traffic under this Agreement and request that such network information include switch translations for call routing data, which can be used to determine the jurisdiction in which the call originated. If such a request for switch translation verification is made, the NT must submit the necessary information, or, allow the audit to be accomplished on the NT premises within a reasonable time period. The audit must be accomplished during normal business hours. Audit requests may not be submitted more frequently than once per calendar year. The Parties agree to work together cooperatively to resolve any problems uncovered as the result of an audit performed in accordance with this Section 7.2.3 TWTC and NT must retain records of call detail and other information subject to audit under this Section for a minimum of twelve (12) months from the date the records are established.

7.3 Billing

7.3.1 All terminating traffic will be billed to NT's Carrier Customers in accordance with TWTC's applicable tariffs or interconnection agreement.

7.3.2 Transport facility costs shall be billed either at the rate charged by the ILEC in the serving area or at the rate negotiated with the TWTC Sales organization, in accordance with Section 4.6 above.

8. DEFAULT

8.1 In the event of Default, either Party may terminate this Agreement in whole or in part provided that the non-defaulting Party has first advised the defaulting Party in writing ("Default Notice") of the alleged Default and the defaulting Party fails to cure the alleged Default within sixty (60) days after receipt of the Default Notice. Default is defined as:

8.1.1 Either Party's insolvency or initiation of bankruptcy or receivership proceedings by or against the Party;

8.1.2 Failure to perform any of the material terms of this Agreement.

9. GENERAL RESPONSIBILITIES OF THE PARTIES

9.1 Contact with Subscribers (End Users). TWTC shall be the primary contact and account control for all interactions with its own subscribers. Nothing in this agreement will prevent TWTC from contacting and or contracting with NT's Carrier Customers.

9.2 Escalation Contact Lists and Service Recovery Procedures. Each Party shall provide the other Party with all network escalation contact lists and service recovery procedures (including, without limitation, the procedures for opening of trouble tickets) necessary to facilitate the rapid resolution of disputes and service issues in a mutually agreed upon format and in a timely and reasonable manner. The Parties shall provide each other with as much advance notice as possible of any changes in their respective escalation contact lists and service recovery procedures. This escalation contact list is attached hereto and made a part hereof as Exhibit A.

9.3 Collocation. Except as specifically provided herein, nothing in this Agreement shall obligate either Party to provide collocation space, facilities or services to the other Party. Any such collocation arrangement shall be entered into by each Party in its sole discretion. The terms and conditions for any agreed-upon collocation shall be set forth in a separate written agreement between the Parties.

10. TERM AND TERMINATION OF AGREEMENT

10.1 The initial term of this Agreement shall commence on the Effective Date and shall continue thereafter for a period of two (2) years (the "Initial Term").

10.2 Following expiration of the Initial Term, this Agreement shall automatically renew for successive one (1) year terms unless either Party requests

re-negotiation or gives notice of termination at least sixty (60) days prior to the expiration of the then-current term.

10.3 In the event that any requested re-negotiation does not conclude prior to expiration of the then-current term, this Agreement shall continue in full force and effect until replaced by a successor agreement.

10.4 The Parties shall use their best endeavours to resolve all outstanding issues in the renegotiation process. However, if the Parties are unable to come to a resolution of certain issues during the renegotiation process, either Party may at any time during the renegotiation, request arbitration, mediation or assistance from the Commission or, if applicable, the FCC, to resolve the remaining issues in the renegotiation process, in accordance with the Commission's or FCC's, as appropriate, prescribed procedures.

11. DISCLAIMER OF REPRESENTATIONS AND WARRANTIES

11.1 DISCLAIMER OF WARRANTIES. EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES, AND EACH PARTY HEREBY SPECIFICALLY DISCLAIMS, ANY REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, REGARDING ANY MATTER SUBJECT TO THIS AGREEMENT, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR IMPLIED WARRANTIES ARISING FROM COURSE OF DEALING OR COURSE OF PERFORMANCE.

12. INDEMNIFICATION

12.1 Each Party (the "Indemnifying Party") shall indemnify, defend and hold harmless the other Party ("Indemnified Party") from and against all Losses arising out of any claims, demands or suits ("Claims") of a third party against the Indemnified Party to the extent arising out of the negligence or willful misconduct of the Indemnifying Party or out of the failure of the Indemnifying Party to perform, or cause to be performed, its obligations under this Agreement, including but not limited to, services furnished by the Indemnifying Party or by any of its subcontractors, under worker's compensation laws or similar statutes.

12.2 Each Party, as an Indemnifying Party, agrees to indemnify, defend, and hold harmless the other Party from any third party Claims that assert any infringement or invasion of privacy or confidentiality of any person or persons caused or claimed to be caused, directly or indirectly, by the Indemnifying Party's or its employees, agents and contractors, or by the Indemnifying Party's equipment, associated with the provision of any service provided under this Agreement. This provision includes but is not

limited to Claims arising from unauthorized disclosure of the End User's name, address or telephone number, from third party Claims that the equipment provided by one Party to the other Party or the manner in which either Party configures its network violates any third party intellectual property right.

12.3 The Indemnified Party shall notify the Indemnifying Party promptly in writing of any Claim by third parties for which the Indemnified Party alleges that the Indemnifying Party is responsible under this Section 12. The Indemnified Party shall tender the defense of such Claim to the Indemnifying Party and shall cooperate in every reasonable manner with the defense or settlement of such Claim.

12.4 The Indemnifying Party shall, to the extent of its obligations to indemnify under this Agreement, defend with counsel any Claim brought by a third party against the Indemnified Party. The Indemnifying Party shall keep the Indemnified Party reasonably and timely appraised of the status of the Claim. The Indemnified Party shall have the right to retain its own counsel, at its expense, and participate in but not direct the defense; provided, however, that if there are reasonable defenses in addition to those asserted by the Indemnifying Party, the Indemnified Party and its counsel may raise and direct such defenses, which shall be at the expense of the Indemnifying Party.

12.5 The Indemnifying Party shall not be liable under the indemnification provisions of this Agreement for a settlement or compromise of any Claim unless the Indemnifying Party has approved the settlement or compromise in advance. The Indemnifying Party shall not unreasonably withhold, condition or delay such approval. If the defense of a Claim has been tendered to the Indemnifying Party in writing and the Indemnifying Party has failed to promptly undertake the defense, then the Indemnifying Party shall be liable under the indemnification provisions of this Agreement for a settlement or compromise of such Claim by the Indemnified Party, regardless of whether the Indemnifying Party has approved such settlement or compromise.

12.6 The indemnification obligations of the Parties under this Section 12 shall survive the expiration or termination of this Agreement for a period of three (3) years.

13. LIMITATION OF LIABILITY

13.1 Except as otherwise provided in Section 12 Indemnification, each Party shall be responsible only for service(s) and facility(ies) which are provided by that Party, its authorized agents, subcontractors, or others retained by such parties, and neither Party shall bear any responsibility for the

service(s) and facility(ies) provided by the other Party, its agents, subcontractors, or others retained by such parties. Neither Party will be liable to the other for any Loss relating to or arising out if any ordinary negligent act or omission by a Party, except involving cases of infringement of a third party's intellectual property rights or the improper disclosure of Confidential Information. In no event will either Party be liable to the other Party for any indirect, special, incidental or consequential damages, including, but not limited to loss of profits, income or revenue, even if advised of the possibility thereof, whether such damages arise out of breach of contract, breach of warranty, negligence, strict liability, or any other theory of liability and whether such damages were forseeable or not at the time this Agreement was executed.

13.2 With respect to any claim or suit for damages arising out of mistakes, omissions, interruptions, delays or errors, or defects in transmission occurring in the course of furnishing service hereunder, the liability of the Party furnishing service, if any, shall not exceed an amount equivalent to the proportionate charge to the other Party for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission or service occurs and continues. However, any such mistakes, omissions, interruptions, delays or errors, or defects in transmission or service which are caused or contributed to by the negligent or wilful act of the other Party, or which arise from the use of the other Party's provided facilities or equipment, the liability of the Party furnishing service, if any, shall not exceed an amount equivalent to the proportionate charge to the other Party for the period of service during which such mistake, omission, interruption, delay, error or defect in transmission or service occurs and continues. This limitation of liability provision does not restrict or otherwise affect a Party's indemnification obligations under this Agreement.

14. COMPLIANCE

14.1 Each Party shall comply with all applicable federal, state, and local laws, rules, and regulations applicable to its performance under this Agreement.

15. INDEPENDENT CONTRACTORS

15.1 No partnership, joint venture, fiduciary, employment or agency relationship is established by entering into this Agreement. Each Party shall perform services hereunder as an independent contractor and nothing herein shall be construed as creating any other relationship between the Parties.

16. FORCE MAJEURE

16.1 In no event shall either Party have any claim or right against the other Party for any delay or failure of performance by such other Party if such delay or failure of performance is caused by or is the result of causes beyond the reasonable control of such other Party and is without such Party's fault or negligence (a "Force Majeure Event"), including, but not limited to, acts of God, fire, flood, epidemic or other natural catastrophe; unusually severe weather; explosions, nuclear accidents or power blackouts; terrorist acts; laws, orders, rules, regulations, directions or actions of governmental authorities having jurisdiction over the subject matter of this Agreement or any civil or military authority; the condemnation or taking by eminent domain of any of a Party's facilities used in connection with the provision of services to its subscribers; national emergency, insurrection, riot or war; labor difficulties or other similar occurrences.

16.2 In the event that a Force Majeure Event causes a Party to delay or fail to perform any obligation(s) under this Agreement, the delaying Party shall resume performance of its obligations as soon as practicable in a nondiscriminatory manner that does not favor its own provision of services over that of the non-delaying Party.

17. CONFIDENTIALITY

17.1 By virtue of this Agreement, TWTC and NT may have access to or exchange Confidential Information belonging to the other Party. A recipient of such Confidential Information shall not disclose any Confidential Information to any person or entity except recipient's employees, contractors and consultants who have a need to know and who agree in writing to be bound by this Section 17 to protect the received Confidential Information from unauthorized use or disclosure. Confidential Information shall not otherwise be disclosed to any third party without the prior written consent of the owner of the Confidential Information. The recipient shall use Confidential Information only for the purpose of this Agreement and shall protect such Confidential Information from disclosure to others, using the same degree of care used to protect its own confidential or proprietary information, but in no event less than a reasonable degree of care.

17.2 The restrictions of this Section 17 shall not apply to information that: (i) was publicly known at the time of the owner's communication thereof to the recipient; (ii) becomes publicly known through no fault of the recipient subsequent to the time of the owner's communication thereof to the recipient; (iii) was in the recipient's possession free of any obligation

of confidence at the time of the owner's communication thereof to the recipient, and, the recipient provides the owner with written documentation of such possession at the time the owner makes the disclosure; (iv) is developed by the recipient independently of and without reference to any of the owner's Confidential Information or other information that the owner disclosed in confidence to any third party; (v) is rightfully obtained by the recipient from third parties authorized to make such disclosure without restriction; or (vi) is identified in writing by the owner as no longer proprietary or confidential.

17.3 In the event the recipient is required by law, regulation or court order to disclose any of the owner's Confidential Information, the recipient will promptly notify the owner in writing prior to making any such disclosure in order to facilitate the owner seeking a protective order or other appropriate remedy from the proper authority to prevent or limit such disclosure. The recipient agrees to cooperate with the owner in seeking such order or other remedy. The recipient further agrees that if the owner is not successful in precluding or limiting the requesting legal body from requiring the disclosure of the Confidential Information, the recipient will furnish only that portion of the Confidential Information which is legally required and will exercise all reasonable efforts to obtain reliable written assurances that confidential treatment will be accorded the Confidential Information.

17.4 All Confidential Information disclosed in connection with this Agreement shall be and remain the property of the owner. All such information in tangible form shall be returned to the owner promptly upon written request and shall not thereafter be retained in any form by the recipient.

17.5 The Parties acknowledge that Confidential Information is unique and valuable, and that disclosure in breach of this Section 17 will result in irreparable injury to the owner for which monetary damages alone would not be an adequate remedy. Therefore, the Parties agree that in the event of a breach or threatened breach of confidentiality, the owner shall be entitled to seek specific performance and injunctive or other equitable relief as a remedy for any such breach or anticipated breach without the necessity of posting a bond. Any such relief shall be in addition to and not in lieu of any appropriate relief in the way of monetary damages.

17.6 CPNI related to a Party's subscribers obtained by virtue of this Agreement shall be such Party's Confidential Information and may not be used by the other Party for any purpose except performance of its obligations under this Agreement, and in connection with such performance, shall be disclosed only in accordance with this Section 17, unless the Party's subscriber expressly directs such Party in writing to disclose such information to the other Party pursuant to the requirements of 47 U.S.C.

Section 222(c)(2). If the other Party seeks and obtains written approval to use or disclose such CPNI from the Party's subscribers, such approval shall be obtained only in compliance with Section 222(c)(2) and, in the event such authorization is obtained, the requesting Party may use or disclose only such information as the disclosing Party provides pursuant to such authorization and may not use information that the requesting Party has otherwise obtained, directly or indirectly, in connection with its performance under this Agreement.

17.7 Except as otherwise expressly provided in this Section 17, nothing herein shall be construed as limiting the rights of either Party with respect to its subscriber information under applicable law, including without limitation 47 U.S.C. Section 222.

17.8 The provisions of this Section 17 shall survive the termination or expiration of this Agreement for a period of two years.

18. GOVERNING LAW

18.1 This Agreement shall be governed by the laws of the state in which services provided under this Agreement are performed , without giving effect to the principles of conflicts of law thereof, except that if federal law, including the Act, applies, federal shall control.

19. TRANSFER AND ASSIGNMENT

19.1 Neither Party may assign or transfer this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party, which consent shall not be unreasonably conditioned, withheld or delayed, provided however, either Party may assign this Agreement to a parent, subsidiary, affiliate, or to an entity that acquires all or substantially all the equity or assets by sale, merger or otherwise without the consent of the other Party, provided the assignee agrees in writing to be bound by the terms of this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns. No assignment or delegation hereof should relieve the assignor of its obligations under this Agreement.

20. TAXES

20.1 In the event NT purchases transport facilities from TWTC in accordance with Section 4.6 above, NT agrees that it shall be subject to all applicable

taxes as specified under the relevant sales contracts or tariffs.

21. NON-WAIVER

21.1 No release, discharge or waiver of any provision hereof shall be enforceable against or binding upon either Party unless in writing and executed by the other Party as the case may be. Neither the failure of either Party to insist upon a strict performance of any of this agreements, nor the acceptance of any payments from either Party with knowledge of a breach of this Agreement by the other Party in the performance of its obligations hereunder, shall be deemed a waiver of any rights or remedies.

22. NOTICES

22.1 Notices given by one Party to the other Party under this Agreement shall be in writing and shall be (a) delivered personally, (b) delivered by nationally recognized overnight delivery service, (c) mailed by, certified US mail postage prepaid, return receipt requested or (d) delivered by telecopy to the following addresses of the Parties or to such other address as either Party shall designate by proper notice:

TWTC:

Tina Davis

Vice President and Deputy General Counsel

Time Warner Telecom

10475 Park Meadows Drive

Littleton, CO 80124

Tel: (303) 566-1279

Fax: (303) 566-1010

With a copy to:

Rochelle Jones

Vice President, Regulatory Northeast

14 Wall St, 9th Floor

New York, NY 10005

Tel: (212) 364-7319

Fax: (212) 364-2355

NTI:

NT Tandem, Inc.

1 S. Wacker Drive, Suite 200

Chicago, IL 60606

Attn: Ron Gaviliet

22.2 Notices will be deemed given as of the date of actual receipt or refusal to accept, as evidenced by the date set forth on the return receipt, confirmation, or other written delivery verification.

23. PUBLICITY AND USE OF TRADEMARKS OR SERVICE MARKS

23.1 Neither Party nor its subcontractors or agents shall use the other Party's trademarks, service marks, logos or other proprietary trade dress in any advertising, press releases, publicity matters or other promotional materials without such Party's prior written consent, which consent may be granted in such Party's sole discretion.

24. USE OF LICENSES

24.1 No license under patents, copyrights or any other intellectual property right (other than the limited license to use consistent with the terms, conditions and restrictions of this Agreement) is granted by either Party or shall be implied or arise by estoppel with respect to any transactions contemplated under this Agreement.

25. INSURANCE

25.1 Each Party shall retain appropriate insurance necessary to cover its services and obligations under this Agreement.

26. SURVIVAL

26.1 Except as otherwise specifically stated, the Parties' obligations under this Agreement which by their nature are intended to continue beyond the

termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

27. ENTIRE AGREEMENT

27.1 The terms contained in this Agreement and any Schedules, Exhibits, Appendices, tariffs and other documents or instruments referred to herein, which are incorporated into this Agreement by this reference, constitute the entire agreement between the Parties with respect to the subject matter hereof, superseding all prior understandings, proposals and other communications, oral or written. Neither Party shall be bound by any preprinted terms additional to or different from those in this Agreement that may appear subsequently in the other Party's form documents, purchase orders, quotations, acknowledgments, invoices or other communications. This Agreement does not in any way affect either Party's obligation to pay the other Party for any goods or services provided by the other Party pursuant to a separate agreement or under tariff.

28. COUNTERPARTS

28.1 This Agreement may be executed in several counterparts, each shall be deemed an original, and all of such counterparts together shall constitute one and the same instrument.

29. AUTHORITY

29.1 Each Party represents and warrants to the other that (a) it has full power and authority to enter into and perform this Agreement in accordance with its terms, (b) the person signing this Agreement on behalf of each Party has been properly authorized and empowered to enter into this Agreement, and (c) it has authority to do business in each of the jurisdictions in which it provides local exchange services to subscribers under this Agreement, and has obtained and will maintain all licenses, approvals and other authorizations necessary to provide such services and to perform its obligations under this Agreement, and (d) it is an entity, duly organized, validly existing and in good standing under the laws of the state of its origin.

30. GENERAL

30.1 Changes in Law; Reservation of Rights. The Parties acknowledge that the respective rights and obligations of each Party as set forth in this

Agreement are based in part on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date. In the event of (a) any legislative, regulatory, judicial or other legal action that materially affects the ability of a Party to perform any material obligation under this Agreement, or (b) any amendment to the Act or the enactment or amendment to any applicable FCC rule, including but not limited tothe FCC's First Report and Order in CC Docket Nos. 96-98 and 95-185, and CS Docket No. 96-166 that affects this Agreement, or (c) the enactment or amendment to any applicable Commission rule, Local Service Guideline, or Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, a "Change in Law"), either Party may, on thirty (30) days' written notice to the other Party (delivered not later than thirty (30) days following the date on which the Change in Law has become legally binding); require that the affected provision(s) be renegotiated, or that new terms and conditions be added to this Agreement, if applicable, and the Parties shall renegotiate in good faith such mutually acceptable new provision(s) as may be required; provided that the new provisions shall not affect the validity of the remainder of this Agreement not so affected by the Change of Law. In the event such new provisions are not renegotiated within ninety (90) days after such notice, either Party may request that the dispute be resolved in accordance with the dispute resolution procedures set forth in this Agreement. If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its rights and remedies with respect to the collection of such rates or charges; including the right to seek a surcharge before the applicable regulatory authority.

30.2 Remedies. In the event of a dispute between the Parties hereunder, unless specifically delineated in another Section of this Agreement, either Party may, at its option, exercise any remedies or rights it has at law or equity, including but not limited to, filing a complaint with the state commission, termination, or any service under this Agreement, or termination of this Agreement. No remedy set forth in this Agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter existing under applicable law or otherwise. However, any other rights or remedies now or hereafter existing under applicable law or otherwise shall continue to be available only to the extent such right or remedy has not been excluded or modified by the terms of this Agreement.

30.3 Severability. If any provision of this Agreement shall be held to be illegal, invalid or unenforceable, each Party agrees that such provision shall be enforced to the maximum extent permissible so as to effect the intent of

the Parties, and the validity, legality and enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired thereby. However, the Parties shall negotiate in good faith to amend this Agreement to replace, with enforceable language that reflects such intent as closely as possible, the unenforceable language and any provision that would be materially affected by vacation of the unenforceable language.

30.4 No Third Party Beneficiary, No Agency Relationship. This Agreement is for the sole benefit of the Parties and their permitted assigns, and nothing herein express or implied shall create or be construed to create any third-party beneficiary rights hereunder. Except for provisions herein expressly authorizing a Party to act for another, nothing in this Agreement shall constitute a Party as a joint venturer, partner, employee, legal representative or agent of the other Party, nor shall a Party have the right or authority to assume, create or incur any liability or any obligation of any kind, express or implied, against or in the name or on behalf of the other Party unless otherwise expressly permitted by such other Party. Except as otherwise expressly provided in this Agreement, no Party undertakes to perform any obligation of the other Party, whether regulatory or contractual, or to assume any responsibility for the management of the other Party's business.

30.5 Joint Work Product. This Agreement is the joint work product of TWTC and NT. Accordingly, in the event of ambiguity, no presumption shall be imposed against either Party by reason of document preparation.

30.6 Non-exclusive. This Agreement between TWTC and NT is non-exclusive. Nothing in this Agreement shall prevent either Party from entering into similar arrangements with any other entities.

30.7 Regulatory Filing. The Parties acknowledge that this Agreement, and any or all of the terms hereof, may be subject to filing with, and regulatory approval by, various state and/or federal agencies. Should such filing or approval be required from time to time, or at any time, the Parties shall cooperate, to the extent reasonable and lawful, in providing such information as is necessary in connection with such filing or approval.

30.8 Amendments. Unless otherwise expressly permitted herein, this Agreement cannot be modified except in writing signed by a duly authorized officer of both Parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the day and year first written above.

Time Warner Telecom - NY, L.P.	Neutral Tandem-New York, LLC
By : Time Warner Telecom General Partnership,	
its general partner	
By : Time Warner Telecom Holdings Inc.,	
its managing general partner	
By: Tina Davis	By: John Brunelle
Name: Tina Davis	Name: John Brunelle
Title: Vice President and Deputy General Counsel	Title: President
Date: APR 20 2005	Date: 4-20-05

Time Warner Telecom of Georgia, L.P.	Neutral Tandem-Georgia, LLC
By : Time Warner Telecom General Partnership,	
its general partner	
By : Time Warner Telecom Holdings Inc.,	
its managing general partner	
By: Tina Davis	By: John Brunelle
Name: Tina Davis	Name: John Brunelle
Title: Vice President and Deputy General Counsel	Title: President
Date: APR 20 2005	Date: 4-20-05

Time Warner Telecom of Indiana, L.P.	Neutral Tandem-Indiana, LLC
By : Time Warner Telecom General Partnership,	
its general partner	
By : Time Warner Telecom Holdings Inc.,	
its managing general partner	
By: Tina Davis	By: John Brunelle
Name: Tina Davis	Name: John Brunelle

Title: Vice President and Deputy General Counsel
Date: APR [illegible] 2005

Title: PRESIDENT
Date: 4-20-05

Time Warner Telecom of Wisconsin, L.P.
By : Time Warner Telecom General Partnership,
its general partner
By : Time Warner Telecom Holdings Inc.,
its managing general partner
By: Tina Davis
Name: Tina Davis
Title: Vice President and Deputy General Counsel
Date: APR [illegible] 2005

Neutral Tandem-Illinois, LLC
By: [signature]
Name: JOHN BRANIGAN
Title: PRESIDENT
Date: 4-20-05

Time Warner Telecom of California, L.P.
By : Time Warner Telecom General Partnership,
its general partner
By : Time Warner Telecom Holdings Inc.,
its managing general partner
By: Tina Davis
Name: Tina Davis
Title: Vice President and Deputy General Counsel
Date: APR [illegible] 2005

Neutral Tandem-California, LLC
By: [signature]
Name: JOHN BRANIGAN
Title: PRESIDENT
Date: 4-20-05

Time Warner Telecom of Minnesota LLC
By: Time Warner Telecom Holdings Inc.,
its sole member
By: Tina Davis
Name: Tina Davis
Title: Vice President and Deputy General Counsel
Date: APR [illegible] 2005

Neutral Tandem-Minnesota, LLC
By: [signature]
Name: JOHN BRANIGAN
Title: PRESIDENT
Date: 4-20-05

Time Warner Telecom of Ohio LLC	Neutral Tandem-Michigan, LLC
By: Time Warner Telecom Holdings Inc.,	
its sole member	
By: Tina Davis	By: John Barnicle
Name: Tina Davis	Name: John Barnicle
Title: Vice President and Deputy General Counsel	Title: President
Date: [illegible] 2005	Date: 4-20-05

Appendix 1

Network Arrangements Schedule - Exchange of Traffic

Traffic subject to this Agreement is to be exchanged between the noted TWTC office CLLIs below, and to be updated based upon the utilization of the latest version of CLLIs contained in the LERG:

NT CLLI	TWTC CLLI
ATLNGAQS08T	ATLNGAGADS0
CLEVOHK01T	CLMDOH44DS0
CLEVOHK01T	CLMCOH1BDS0
IPLWIN7500T	IPLTINSDDS0
IPLWIN7500T	IPLTINSDDS2
LSANCARC57T	IRVECAJTDS0
LSANCARC57T	LSANCAJQDS0
LSANCARC57T	RUSDCAMLDS0
CHCGIL2495T	BRFDWIJZDS0
CHCGIL2495T	MTLSWIJXDS0
MPLSMNCD07T	MNNTMNICDS0
NYCMNYBX41T	NYCLNYJWDS0
NYCMNYBX41T	NYCMNYTGDS0
NYCMNYBX41T	NYCLNYJWDS2

	Connecticut POI		212.809.0510		646.307.1500
Mark Vicin	LA. Operations Manager		213.624.6402	626-716-1042	213.340.0500
Jeff Wells	Vice President Operations		312.384.8020	312.543.1666	866.776.1761
Executive			phone	mobile	pager
John Barnicle	Chief Operating Officer		312.384.8010	312.543.1660	866.590.7846
Jim Hynes	Chief Executive Officer		312.384.8012		

Trouble Reporting

To report a trouble (24x7), please contact us at: 1-866-388-7258

How to open a trouble ticket:

1. Contact Neutral Tandem at 1-866-388-7258.
2. Provide the following information:
   a. Customer name and contact information.
   b. Circuit ID
   c. Brief description of the problem.
3. You will be provided a trouble ticket number for tracking purposes.
4. Our on-call switch technician will be immediately notified of the trouble ticket and will contact you shortly.

In the event that you would like to escalate a trouble ticket, please follow these guidelines.

How to escalate an open trouble ticket:

1. Contact Neutral Tandem at 1-866-388-7258, or use the escalation table.
2. Please remain in the established time periods, unless the trouble warrants immediate attention.

Use This Table to Escalate on an Open Existing Trouble Ticket.

Level	Interval	Contact	Phone
1st Level	0 to 2 Hours	On-Call Technician	See contact Sheet
2nd Level	2 to 4 Hours	Switch Manager	See contact Sheet
3rd Level	4 to 6 Hours	Jeff Wells	312-384-8020 (w)

		EVP Operations	312-543-1666 (c)		
			866-776-1761 (p)		
4th Level	8 Hours	John Barnicle	312-384-8010 (w)		
		COO	312-543-1660 (c)		
			888-590-7046 (p)		

TWTC:

NAME	TITLE	PHONE	EMAIL
Mike Koster	Sr. Engineer Translation	(303)566-5825	michael.koster@twtelecom.com
Lori Morris	Sr. Manager, Switch Traffic	(303) 542-4111	lori.morris@twtelecom.com
Sheri Lamkin	Switch Traffic Analyst	(303)542-4190	sheri.lamkin@twtelecom.com
Bill Mueller	Switch Traffic Analyst	(303)542-4470	william.mueller@twtelecom.com

EXHIBIT 9

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

I. Background

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

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

II. Summary of Staff's Recommendation

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

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

III. Positions of the Parties

A. NEUTRAL TANDEM

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

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

B. LEVEL 3

Level 3 rebuts the Petition with the following arguments:

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

IV. Staff's Recommendation

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

1. *Preemption*

The Eleventh Circuit recently explained:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. *Reasonable Interconnection*

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

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

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

3. *Unreasonable Discrimination*

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

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

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

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

4. *Interconnection Service*

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

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

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

5. *Cost Recovery*

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

EXHIBIT 10

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Neutral Tandem, Inc. and	:	
Neutral Tandem-Illinois, LLC	:	
-vs-	:	
Level 3 Communications, LLC	:	
	:	**Docket No. 07-0277**
Verified Complaint and Request for	:	
Declaratory Ruling pursuant to	:	
Sections 13-515 and 10-108 of the	:	
Illinois Public Utilities Act.	:	

INITIAL BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Matthew L. Harvey
Stefanie R. Glover
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Staff of the Illinois Commerce Commission

June 4, 2007

TABLE OF CONTENTS

The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 766.300 of the Commission's Rules of Practice (83 Ill. Adm. Code 766.300), respectfully submits its Initial Brief in the above-captioned matter.

I. Procedural History

On April 25, 2007, Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (hereinafter "Neutral Tandem") filed its Complaint and Request for Declaratory Ruling with the Commission, seeking remedies against Level 3 Communications, LLC (hereafter "Level 3") for violations of the Public Utilities Act, 220 ILCS 5/1-101, *et. seq. See, generally,* Complaint. Neutral Tandem's Complaint is brought pursuant to Sections 10-108 and Section 13-515's enforcement provisions for those prohibited activities enumerated in Section 13-514; specifically alleged by Neutral Tandem are violations of Section 13-514(1), (2), and (6). Neutral Tandem's *Complaint* also alleges that Level 3's conduct violates Section 13-702's requirement that carriers "receive, transmit and deliver" transmissions from a carrier with whom a physical connection may have been made. The *Complaint* further contains allegations that Level 3's actions are in violation of Section 9-250.

On May 3, Level 3 filed its Answer to Neutral Tandem's Complaint, in which it denied all material allegations. On May 8, 2007, a status hearing was convened and a schedule established. Thereafter, the parties and the Staff filed direct, response, and reply testimony that was admitted into evidence at hearings

held on May 22 and 23, 2007, where witnesses were subject to cross-examination and the matter continued generally. This Initial Brief follows.

II. Statement of the Case

The dispute at issue in this matter arises from a set of facts that remain largely undisputed. Neutral Tandem is a provider of tandem transit services to third-party CLECs. Complaint, ¶16; Answer, ¶16. Neutral Tandem states that it originates no traffic, Complaint, ¶36, and Staff understands this not to be a disputed matter. See, e.g., Level 3 Ex. 1 at 5. Neutral Tandem currently delivers traffic to Level 3 in Illinois over direct interconnection facilities. Complaint, ¶23; Neutral Tandem Ex. 3 at 3-4; Level 3 Ex. 1 at 8. Neutral Tandem and Level 3 have been interconnected for over two years pursuant to a series of negotiated contracts: a July 6, 2004 contract governed traffic from Neutral Tandem to Level 3; a February 2, 2004 contract governed traffic to Broadwing (a Level 3 subsidiary; and an August 18, 2005 contract governed traffic in the reverse, from Level 3 to Neutral Tandem. Complaint, ¶¶21-24; Answer, ¶¶21-24. Of the three contracts, only a contract governing the flow of traffic from Level 3 to Neutral Tandem is agreed by both Neutral Tandem and Level 3 to be currently effective, having been subject to Amendment by the parties on January 31, 2007. Complaint, ¶24; Answer, ¶24.

On February 14, 2007 Level 3 directed a letter to Neutral Tandem, purporting to terminate the other two contracts and pursue negotiation of a single agreement. Complaint, ¶¶26, 28; Answer, ¶¶26, 28; *see also*, Complaint, Ex. 3.

Level 3 stated that termination of the parties' interconnection facilities was to occur if accord was not reached. Id.

Neutral Tandem filed the present Complaint with this Commission following an April 24 letter to this Commission confirming Level 3's intent to disconnect on June 25, 2007. Complaint, ¶34 and Ex. 6. In its *Complaint*, Neutral Tandem avers that the inability to resolve the dispute is due in large part to Level 3's demand that Neutral Tandem pay Level 3 compensation for traffic that is originated by the end-users of Neutral Tandem's third-party carrier customers. Complaint, ¶36.

III. Burden and Standard of Proof

A. Burden of Proof

The party seeking relief generally bears the burden of proof. People v. Orth, 124 Ill. 2d 326, 337 (1988). The term "burden of proof" includes the burden *of going forward with the evidence, and the burden of persuading the trier of fact.* People v. Zlitz, 98 Ill. 2d. 38, 43 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 690 (1st Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995); Chicago Board of Trade v. Dow Jones & Co., 108 Ill. App. 3d 681, 686 (1st Dist. 1982). It is clear, therefore, that Neutral Tandem, as complainant here, bears the burden of proof.

The Staff notes, however, that Section 13-514 of the Illinois Public Utilities Act, 220 ILCS 5/13-514, states that certain types of conduct, specifically

enumerated in subsections (1) through (12) of that Section, constitute *per se* impediments to competition, and consequently proscribed practices within the meaning of that Section. 220 ILCS 5/13-514(1)-(12). Accordingly, if Neutral Tandem demonstrates that Level 3 engaged in any of the enumerated conduct, it is entitled to judgment, regardless of whether it has suffered or might suffer harm as a result of such conduct.

B. Standard of Proof

Section 10-15 of the Illinois Administrative Procedure Act provides that "[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15. The Commission has observed that the Administrative Procedure Act standard appears to be: "the appropriate standard in all contested cases[.]" *Order* at 4, Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200, ICC Docket No. 92-0024 (April 29, 1992). Consequently, the standard of proof in this case is the preponderance of the evidence standard.

IV. Argument

A. Summary of Staff Recommendations

The Commission should find in favor of Neutral Tandem. The Commission has specific authority to address and resolve this complaint under Section 13-515 of the Public Utilities Act, and should do so as a matter of sound policy. Neutral Tandem is, as a matter of law, not liable to pay reciprocal compensation to Level

3 for traffic originated by third-party CLECs. Level 3 cannot, in any case be heard to complain about not receiving reciprocal compensation from CLECs whose traffic Neutral Tandem delivers to it, when Level 3 itself has made no attempt or effort to either bill originating CLECs for traffic it has terminated on their behalf, or to pay reciprocal compensation that it initiates and such CLECs terminate. Moreover, Illinois law clearly favors the maintenance of direct interconnection where, as here, it has been established, and the severance of the direct interconnection facilities at issue here would constitute (a) refusal or delay of interconnections or collocation or providing inferior connections to another telecommunications carrier; (b) impairment of the speed, quality, or efficiency of services used by another telecommunications carrier; and (c) acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.

Moreover, Level 3's conduct is clearly unreasonable inasmuch as its grievance here – failure to receive adequate compensation for use of its network – is of its own making, and its threat of unilateral disconnection, considered along with its apparently having engaged in such conduct in the past, indicates a greater interest in commercial advantage than the maintenance of uninterrupted exchange of traffic that should be of primary importance to all carriers in a network of interconnected networks. Likewise, Level 3, by rejecting the agreement by which Neutral Tandem delivers traffic to it, hours after executing agreements pursuant to which it delivers traffic to Neutral Tandem, has engaged in conduct difficult to reconcile with good faith.

Accordingly, Level 3's threat to sever direct interconnection with Neutral Tandem constitutes a violation of Section 13-514(1), (2), and (6), and Section 13-702.

The Commission should not require Level 3 to interconnect with Neutral Tandem on the same terms that it interconnects with AT&T Illinois, the incumbent LEC. The Commission should order Level 3 to maintain direct interconnection with Neutral Tandem until further order of the Commission. The Commission should direct Level 3 and Neutral Tandem to negotiate in good faith regarding the sharing of costs directly related to the maintenance of direct interconnection facilities between their networks, and to reach an agreement regarding the sharing of such facilities. This Commission should retain jurisdiction over the matter should additional intervention be needed to effectuate the intent of its final Order.

B. Policy Considerations and Decisional Principles

From a policy perspective, the Staff recommends that the Commission's make its determinations in this proceeding based upon the following basic propositions:

- The Commission can and should, where necessary, review interconnection and traffic exchange arrangements between CLECs to ensure these are consistent with the public interest, and that these do not violate provisions of any applicable statute or regulation;
- The public interest is served by Commission review of interconnection and traffic exchange arrangements between Level 3 and Neutral Tandem to

ensure pertinent terms and conditions are just and reasonable (and consistent with applicable statute or regulation); and

- The "calling party network pays" principle that governs ILEC traffic exchange also properly applies to traffic exchanged between CLECs.

Staff Ex. 1.0 at 5

The Commission should hear and resolve this dispute, notwithstanding that it is between CLECs. Section 13-103 of the Public Utilities Act, 220 ILCS 5/13-103, declares the establishment and maintenance of competitive telecommunications markets to be a fundamental policy of the state of Illinois (subject to considerations such as reasonable and non-discriminatory rates and charges). To help advance this general policy, Section 13-514 of the Public Utilities Act prohibits telecommunications carriers from acting in a manner that would impede the development of competition in any telecommunications market. 220 ILCS 5/13-514. Section 13-515 of the Act grants a right of action to any telecommunications carrier aggrieved by the anticompetitive actions of any other telecommunication carrier, without reference to whether either or both carriers are CLECs. 220 ILCS 5/13-515. Section 13-702 of the Act further promotes this competitive policy by requiring that traffic be exchanged between carriers without delay or discrimination, pursuant to the physical interconnection arrangements made between carriers. 220 ILCS 5/13-702.

Without question, the services at issue in this proceeding are "telecommunications services" as defined in Section 13-203 of the Public Utilities Act, 220 ILCS 5/13-203, and are subject to Commission review. Accordingly,

Sections 13-103, 13-514, 13-701 (and other applicable provisions of the PUA) are fully applicable to the resolution of this dispute.

In Staff's view, the only reason the Commission should decline to rule on the terms and conditions of interconnection and traffic exchange between Level 3 and Neutral Tandem in this dispute is if it is explicitly precluded from doing so by applicable state or federal statute or regulation. Staff Ex. 1.0 at 7. It is not Staff's understanding, however, that any such legitimate preclusion has yet been raised in this proceeding, and Staff is unaware of any such preclusion by statute or regulation. Staff Ex. 1.0 at 7.

It may be argued, see Level 3 Ex. 2.0 at 5, that the Commission should, as a policy matter, decline to involve itself in disputes between competitive carriers regarding their interconnection. The Staff agrees that, to the extent the terms and conditions of so-called "commercially negotiated agreements" between carriers do not raise public interest issues (such as whether the rates involved are just and reasonable), Commission review is not necessary. Staff Ex. 1.0 at 7-8. However, where a dispute between carriers involves precisely such matters, Commission review is in the public interest. Id. at 8. Indeed, Commission review may be required to ensure that telecommunications traffic is appropriately exchanged between carriers. Id.

The Staff is cognizant that, as a general (and practical) matter, the Commission does not review the terms and conditions governing interconnection and traffic exchange arrangements between CLECs. Staff Ex. 1.0 at 8. Unlike instances involving ILECs, bargaining power in arrangements between two

CLECs generally is regarded as roughly equal, and neither party is generally thought able to wield undue market power. Id. Accordingly, federal law does not prescribe state Commission review of such agreements. Id. However, it does not follow from this that the Commission should not review such arrangements between CLECs when specific issues of concern arise, as in this instance. Id.

The public interest concern implicated here is the exchange of traffic. The agreement per se between carriers (two CLECs in this instance) is not of central importance, but rather the interconnection and traffic exchange arrangements (and the terms and conditions thereof) that are central to competitive policy. Staff Ex. 1.0 at 8. The purpose of interconnection between carriers is, of course, to enable exchange of traffic. Id. Interconnection is pointless for any reason other than traffic exchange. Id. Traffic exchange, subject to appropriate terms and conditions, is essential to competitive telecommunications markets and services. Id. at 8-9. Without reliable and efficient traffic exchange, the "network of multiple interconnected networks" essential to competitive telecommunications markets will either function poorly or not at all. Id. at 9. It follows that, from a policy perspective, regulatory oversight, where required, of terms and conditions governing interconnection and traffic exchange between all carriers is necessary and appropriate. Id.

Level 3 insists that it is "not in the public interest" for the Commission to "force two competitive providers into a regulated agreement". Level 3 Ex. 2 at 5. The fallacies of Level 3's position are apparent and unmistakable. The first is the obvious hyperbole; as already acknowledged, the Commission only reviews

agreements involving two CLECs when intractable issues arise, and only reviews and oversees those portions such agreements necessary to ensure consistency with the public interest. The second is Level 3's failure to recognize ***any*** circumstance between CLECs where Commission oversight is appropriate. To illustrate, Level 3 would have the Commission sit idly by even when a dispute between CLECs regarding interconnection and traffic exchange would cause calls to be blocked or not otherwise completed.[1] This is patently erroneous and contrary to the Commission's authorities and responsibilities to protect the public interest.

C. Neutral Tandem is Not Obligated to Pay Reciprocal Compensation to Level 3, and Level 3 May Not Require Neutral Tandem to Do So.

Section 251(b) of the federal Telecommunications Act of 1996 provides, in relevant part that: "[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications[.]" 47 U.S.C. §251(b)(5). FCC rules promulgated to implement Section 251(b)(5) state in relevant part that:

> [A] reciprocal compensation arrangement between two carriers is *one in which each of the two carriers receives compensation from* the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic **that originates on the network facilities of the other carrier.**
>
> 47 C.F.R. §51.701(e)

[1] Whether the instant dispute actually would cause traffic to be blocked or otherwise not completed is immaterial to the matter at hand. The Commission ultimately will assess the facts and merits of the two parties' positions concerning this possibility.

Further, FCC rules provides that "[a] LEC **may not assess charges on any other telecommunications carrier** for telecommunications traffic **that originates on the LEC's network.**" 47 C.F.R. §51.703(b)(emphasis added). As such, it is clear that the duty to pay reciprocal compensation lies exclusively with the originating carrier – the carrier whose customer makes the call.

There is no specific requirement that a reciprocal compensation *arrangement be reduced to writing, or take any specific form.* The U.S. Congress required carriers to have "reciprocal compensation arrangements" rather than the "agreements". 47 U.S.C. §251(b)(5). The Congress' differentiation between these different terms was clearly intentional, since it used the word "agreement" in the next statutory subsection, Section 251(c)(1), to refer to the duty it imposed upon ILECs to negotiate in good faith the terms and conditions of interconnection agreements, and to enter into such agreements. 47 U.S.C. §251(c)(1). Clearly, then, a reciprocal compensation arrangement is not necessarily the same thing as an agreement, and is not required to have the same requisites as a formal agreement.

Further, the FCC definition of "reciprocal compensation arrangement" does not require any formal requisites, writings or memorials before a reciprocal compensation arrangement will exist. 47 C.F.R. §51.701(e). Indeed, it does not even require negotiations. Id. The rule merely requires that each carrier receive "compensation" from the other for the transport and termination of traffic. Id.

In addition, the FCC promulgated a regulation which permits parties to "bill and keep", which is to say that carriers neither pay reciprocal compensation to

carriers for traffic terminated on their networks, nor seek reciprocal compensation for traffic terminated on their own networks. *See, generally,* 47 C.F.R. §51.713. This section further provides that:

> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, and no showing has been made pursuant to Sec. 51.711(b).
>
> (c) Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.
>
> 47 C.F.R. §51.713(b-c)

The Commission, interpreting these provisions, has correctly determined that the fact that a transiting carrier carries traffic between its origination and termination is irrelevant to the question of reciprocal compensation, ruling that:

> [ILEC] [r]espondents disingenuously argue that there can be no reciprocal compensation because there is no reciprocal traffic. Contrary to FCC rules, they assert that all of the outgoing traffic is interexchange carrier traffic for which they are not responsible. That is, calls initiated on their networks that terminate with CMRS carriers are not reciprocal traffic because intervening exchange carriers transport the calls. We reject this argument.
>
> ....
>
> The rural ILEC argument that none of their traffic terminates with CMRS carriers because of intervening interexchange carriers is patently spurious. **The relevant fact is where the traffic is initiated and where it terminates.**

Order at 7-8, Verizon Wireless, LLC, et al., v. Adams Telephone Co-Operative, et al., ICC Docket No. 04-0040 (April 7, 2004) (emphasis added)

To the extent that this dispute is one about reciprocal compensation, it must therefore be decided in favor of Neutral Tandem. The record demonstrates the following:

1. Neutral Tandem does not originate any of the traffic that it transits on behalf of other carriers to Level 3 for termination. Rather, this traffic is originated by these third-party carriers, which pay Neutral Tandem for transiting services. Neutral Tandem Ex. 1 at 3-5, 12-13; Tr. 149.

2. Level 3 does not attempt to bill or collect for termination services it provides to such carriers. Neutral Tandem Ex. 1 at 13-14; Neutral Tandem Ex. 2 at 4-5, Attachment A at 5-6; Neutral Tandem Ex. 6 (Level 3 Response to Staff DR JZ 1.04(A)); Tr. 324, 354, 359.

3. Level 3 does not proactively pay reciprocal compensation to these third-party carriers for traffic it originates that is terminated on their networks. Tr. 359.

4. The evidence generally supports the proposition that Neutral Tandem provides all signaling information and call detail necessary for Level 3 to bill originating carriers. Complaint, ¶37; Neutral Tandem Ex. 2 at 6; Tr. 149.[2]

The legal implications of this are:

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[2] Level 3 denies this allegation in its answer, asserting that it "lacks knowledge or information sufficient to form a belief" regarding this assertion, Answer, ¶37, but, to Staff's knowledge, offers no further evidence on the question.

First, Neutral Tandem, as a carrier proving in this instance transit services only, is not obliged to pay reciprocal compensation to Level 3, nor is Level 3 entitled to demand it from Neutral Tandem. The rules regarding reciprocal compensation are clear: the originating carrier is liable to pay it to the terminating carrier.

Second, the obligation to pay reciprocal compensation is not nomadic. The FCC has promulgated a rule that prohibits the originating carrier – the entity that owes reciprocal compensation – from attempting to make any other carrier pay that obligation. 47 C.F.R. §51.703(b). It follows that, if the carrier that owes reciprocal compensation cannot require other carriers to pay it, the carrier that is owed reciprocal compensation a fortiori cannot do so.

Third, it appears to the Staff that both those CLECs indirectly interconnected with Level 3 (via Neutral Tandem's transiting services), and Level 3, have effectively adopted, however tacitly and informally, a *de facto* bill-and-keep regime. These carriers apparently neither pay nor collect reciprocal compensation, which is the hallmark of such arrangements. Indeed, Level 3 may have concluded that the cost of attempting to collect reciprocal compensation in such circumstances exceeds the value of the reciprocal compensation that it would collect. Level 3, likewise, apparently makes no particular affirmative effort to pay reciprocal compensation to such carriers, who in turn apparently do not bill Level 3. While these arrangements may lack formality, they are nonetheless perfectly lawful, acceptable ways of dealing with the duty to pay reciprocal compensation.

Fourth, state Commissions are authorized by FCC rules to (a) set reciprocal compensation rates, authority which *a fortiori* include the authority to determine that reciprocal compensation is not due and owing under a given set of circumstances; and (b) impose bill and keep arrangements on parties where the traffic exchanged by those parties is "roughly balanced"; indeed, a state Commission is to presume that that traffic is indeed "roughly balanced" unless such presumption is rebutted. 47 C.F.R. §51.713(b-c).

Accordingly, as a matter of law, Level 3's cannot obtain "compensation", however characterized, for its termination services from Neutral Tandem. Level 3 can obtain such compensation, in the form of mandated reciprocal compensation, from those carriers (indirectly interconnected with Level 3) that originate the traffic terminated by Level 3. However, Level 3 has apparently made no effort formalize reciprocal compensation arrangements with such carriers, or to collect reciprocal compensation due it, notwithstanding the fact that all of the evidence shows that Level 3 includes in the traffic it passes to Level 3 all call detail necessary to enable Level 3 to bill such carriers for reciprocal compensation. Neither has Level 3 made any attempt to pay reciprocal compensation to carriers that terminate Level 3's originated traffic.

Level 3 has attempted to frame the dispute here as relating to something other than reciprocal compensation. Tr. 357. However, the conclusion is inescapable that Level 3 is, as Neutral Tandem suggests, Neutral Tandem Ex. 2 at 5, attempting to force Neutral Tandem to becoming Level 3's collection agent for reciprocal compensation – reciprocal compensation that it does not itself

attempt to collect. Neutral Tandem Ex. 2 at 5. That Level 3 appears to have made no similar attempt with AT&T Illinois for its provision of transit services is telling. AT&T apparently is not subject to coercion through threats of disconnection by Level 3.

D. Level 3 May Not Refuse to Interconnect Directly with Neutral Tandem

Neutral Tandem has alleged that Level 3's stated intent to unilaterally block or sever its existing direct interconnection with Neutral Tandem constitutes violations of Sections 13-514(1), (2) and (6), and 13-702. Complaint, ¶¶49, 50. Staff agrees that disconnection under the circumstances of this case is contrary to Illinois law.

1. Neutral Tandem's Stated Intent to Deny Direct Interconnection Violates Section 13-514

As noted, Section 13-514 provides that: "[a] telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market[,]" and further provides, in relevant part, that:

> The following prohibited actions are considered per se impediments to the development of competition:
>
> (1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;
>
> (2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier; [or]
>
> ...

> (6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers[.]
>
> 220 ILCS 5/13-514(1), (2), (6)

Neutral Tandem provides tandem switching and transport services to at least 18 CLECs other than Level 3, and delivers 56 million minutes of traffic per month to Level 3 on behalf of those CLECs. Neutral Tandem Ex. 1 at 4, Neutral Tandem Ex. 3 at 4. The CLECs in question, although not parties to this proceeding, can be presumed to have affirmatively selected Neutral Tandem to provide this service because of a preference for Neutral Tandem's service, either as to price, quality, or some other factor. Neutral Tandem Ex. 2 at 6; Tr. 434. There appears to be no dispute that obtaining identical services from AT&T would impose additional costs upon these CLECs. Neutral Tandem Ex. 1 at 6. In any case, as Staff witness Hoagg observed, these CLECs' "revealed preference" is to have Neutral Tandem deliver their traffic to Level 3. Tr. 434.

Furthermore, were Level 3 to block direct interconnection between it and Neutral Tandem for delivery of traffic originated on the third-party CLECs' networks and destined for Level 3, the traffic then would travel by one of two routes. First, if the third-party CLECs were forced to choose AT&T as their transit service provider in place of Neutral Tandem, this traffic would transit AT&T tandem facilities. Alternatively, if the third-party CLECs were not so compelled, traffic from these CLEC's end users customer would travel by a circuitous path from the CLEC, to Neutral Tandem, to the AT&T tandem switch, and from there to Level 3 for termination to Level 3's end user. Level 3 Ex. 2 at 12-18. It is not

clear why a CLEC would deliver traffic in this manner, inasmuch as it adds an additional and entirely unnecessary layer of complexity and cost.[3] Neutral Tandem Ex. 2 at 11.

In either instance, Level 3's plan to unilaterally block direct interconnection with Neutral Tandem would certainly constitute refusal or delay of interconnection, or the provision of inferior connections, to another telecommunications carrier within the meaning of Section 13-514(1), inasmuch as the indirect interconnection proposed is clearly less efficient and more costly, and therefore by definition inferior. Likewise, such conduct would impair the speed, quality, or efficiency of services used by other telecommunications carriers (both Neutral Tandem and the CLECs on whose behalf Neutral Tandem delivers traffic to Level 3) within the meaning of Section 13-514(2). Further, Level 3's plan to unilaterally block direct interconnection with Neutral Tandem would constitute an act or failure to act in a manner that has a substantial adverse effect on the ability of other telecommunications carriers - both Neutral Tandem and the CLECs on whose behalf Neutral Tandem delivers traffic to Level 3 - to provide service to their customers, within the meaning of Section 13-514(6).

However, such conduct does not violate Section 13-514 unless Level 3's acts or omissions are *unreasonable*, an assessment which, in Staff's view, can be conducted by referring to Level 3's stated reasons for engaging in this conduct. Level 3's avowed reason for seeking to terminate its direct connection with Neutral Tandem is, in essence, that directly interconnecting with Neutral

[3] Neutral Tandem alleges – speculatively, it must be said – that Level 3 intends for this to happen, so that Neutral Tandem will be compelled to cease offering its services in Illinois, thereby leaving the field free for Level 3 to provide such services. Neutral Tandem Ex. 2 at 11.

Tandem imposes costs upon it that it would not otherwise incur but for the interconnection with Neutral Tandem, and which Neutral Tandem has refused to defray. Level 3 Ex. 1 at 10-21; Level 3 Ex. 2 at 16-17.

Staff acknowledges that maintaining direct interconnection with Neutral Tandem has undoubtedly caused Level 3 to incur certain costs, but two crucial factors weigh against making too much of this concern. First, Level 3 has always possessed a way to recover the bulk of these costs (which are traffic related) – reciprocal compensation paid by originating carriers. This system of reciprocal payments is intended to compensate Level 3 for every minute of traffic it terminates for originating carriers. As further noted above, Level 3, for reasons of its own, has declined to take advantage of its undoubted legal right to obtain reciprocal compensation from such originating carrier, despite receiving all information from Neutral Tandem necessary to bill originating carriers for termination services.

Second, the fixed costs associated with physical interconnection are – or should be - shared between Level 3 and Neutral Tandem in a manner consistent with applicable federal and state rules and regulations. The fixed costs associated with physical interconnection – whether direct or indirect – are simply the costs Level 3 and other carriers pay to participate (i.e., do business) in an increasingly competitive network industry where interconnection is required between all carriers when traffic flows are exchanged. If Neutral Tandem is not paying its fair share of the costs of the direct physical interconnection with Level 3, the appropriate remedy is not threatened disconnection or refusal to

interconnect, but rather the appropriate regulatory avenues. The Staff is therefore inclined to view Level 3's conduct as unreasonable within the meaning of Section 13-514.

Level 3's position concerning interconnection rights and responsibilities in this proceeding apparently rests on a flawed interpretation of the federal statutory obligation that all carriers must "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers". 47 U.S.C. §251(a)(1). Interconnection with other carriers is the most fundamental and universal duty of all carriers under Section 251 of the Act. Level 3 apparently interprets this to mean that it may choose, at its sole election and under all circumstances, the form of interconnection it maintains with other carriers – i.e., direct or indirect – regardless of all other policy, network or regulatory considerations. Level 3 presumably would acknowledge that this Commission can direct an ILEC to maintain a particular form of interconnection with a CLEC for good cause, but here denies the Commission's authority to do so when two CLECs are involved.

Level 3's position appears to be that indirect interconnection is all that is or can be required of it in this case. This, however, is fallacious. Interconnection is self-evidently a two-way street, from which both interconnecting carriers derive benefits. Level 3's interpretation would give the "indirect interconnecter" effective veto power over any other CLEC carrier desiring direct interconnection, regardless of all other considerations such as efficiency, cost and effective delivery of traffic. Thus, the realization of network efficiencies - for example,

where as here, large volumes of traffic are exchanged between two carriers - could be held hostage to the desires of the indirect interconnecter.

In this case, affording Level 3 such a veto power over direct interconnection will have either of two possible bad outcomes: it will either foist *inferior interconnection upon originating CLECs (the dual tandem* - AT&T and Neutral Tandem option), or will force third-party CLECs to use AT&T's transit services, which it is apparent that they do not wish to use.

As in this case, where CLECs cannot agree on the type of interconnection, one CLEC's desire for indirect interconnection cannot invariably trump direct interconnection, as Level 3 would have it. Regulators properly can and must weigh all relevant competing considerations to determine which type of interconnection is consistent (or most consistent) with applicable rules and regulations, and which would best serve the public interest.

In this case, direct interconnection is the method most consistent with applicable statutes and rules, the public interest, and the circumstances of the case. First, traffic termination is a bottleneck service and function; no carrier other than Level 3 can provide the termination function to Level 3's customers. Second, Illinois law favors maintenance of direct interconnection where, as here, it has already been established. Section 13-702 calls for non-discriminatory exchange of traffic wherever "a physical connection [has] been made". 220 ILCS 5/13-702. Third, the volumes of traffic – 56 million minutes per month – warrants direct interconnection. Fourth, as seen above, Level 3's aversion to direct interconnection is, if its case is to be credited, based on the fact that it is not

recovering the costs of terminating Neutral Tandem's traffic on its network. As has been seen, it is undoubtedly able to do so if it elects.

Finally, Level 3's interpretation of Section 251(a)(1) argues for the following reading: "carriers must interconnect indirectly with the facilities and equipment of other telecommunications carriers. However, if a carrier so chooses, it may accomplish the required interconnection directly rather than *indirectly.*" This, however, is not how the statute reads.

Other factors militate against the conclusion that Level 3 has behaved reasonably here. The disconnection existing interconnection facilities is, in the Staff's view, a gravely serious matter. It ought not to be threatened or undertaken except for the most compelling reasons, and then only after the utmost care has been given to making certain that no customer loses service. Level 3's conduct in this proceeding has not demonstrated such concern or care regarding the repercussions resulting from disconnection. It appears to have notified Neutral Tandem, on or about February 24, 2007, that it would terminate direct interconnection as of March 23, 2007. Complaint, ¶29 and Ex. 3; *see also* Answer, ¶29 (truth and correctness of Complaint Ex. 3, although not Neutral Tandem's characterization thereof, admitted by Level 3). While Level 3 appears to have been prepared to engage in some level of cooperation to avoid customer harm, Level 3's seeming expectation that Neutral Tandem could provision substitute facilities in approximately one month is objectively unreasonable, in light of the unchallenged fact that it took Level 3 four months to provision new facilities under similar circumstances. Neutral Tandem Ex. 3 at 5; Ex. 4 at 14-15.

In addition, Neutral Tandem has presented – and Level 3 has, in Staff's estimation, failed to rebut – evidence that Level 3 has in the past used the threat of disconnection, or disconnection itself, as a bargaining practice. In 2005, Level 3, in the words of a Level 3 Vice President, "de-peered" ("disconnected", in English) Cogent, an internet service provider with which Level 3 was directly interconnected. Tr. 337-341. As is the case here, Level 3 took the view that Cogent was not providing it with adequate compensation for the use of its network. Tr. 340. Without delving into the particulars of the matter – of which, in any case, no witness available to testify in this proceeding has personal knowledge, Tr. 336, 367 – all parties appear to accept that a carrier was disconnected as a result of a business dispute. Staff views this as deeply troubling.

Finally, to the extent it matters, the equities in this proceeding simply do not favor Level 3. Level 3 appears to have made certain that the agreement pursuant to which it originated traffic and passed it on to Neutral Tandem was successfully negotiated and in place, before it advised Neutral tandem that it did not intend to renew the agreement at issue in this proceeding. Neutral Tandem Ex. 1 at 9. This, to the Staff, falls short of good faith.

Accordingly, the Staff recommends that the Commission determine that Level 3 has, through its conduct as set forth herein, violated Sections 13-514(1), (2) and (6) of the Public Utilities Act.

2. Neutral Tandem's Stated Intent to Deny Direct Interconnection Violates Section 13-702

Section 13-702 of the Public Utilities Act, which Neutral Tandem alleges Level 3 to have violated, provides that:

> Every telecommunications carrier operating in this State shall receive, transmit and deliver, without discrimination or delay, the conversations, messages or other transmissions of every other telecommunications carrier with which a joint rate has been established or with whose line a physical connection may have been made.
>
> 220 ILCS 5/13-702

In Staff's view, this statute is unambiguous. A carrier must exchange, without discrimination or delay, traffic with another carrier, provided that the two carriers have (a) a joint rate in place; or (b) a physical interconnection in place. Here, one not need the question of whether a joint rate is in place, or indeed what a joint rate might in fact be, since it is undisputed that the two carriers are currently directly interconnected.

As noted above, Level 3 has legitimate concerns regarding certain of the costs it claims to incur as a result of direct interconnection with Neutral Tandem. Neutral Tandem claims to, and probably does, incur interconnection, as opposed to termination costs. Level 3 Ex. 2 at 14-17. Precise information regarding these costs are, unfortunately, not of record in this proceeding.

Where interconnection facilities are shared, the carriers using the facilities share the costs.

E. The Commission Should Grant Neutral Tandem Certain Relief

The Staff understands Neutral Tandem to seek the following substantive relief:

1. a declaration that "Level 3's request for unreasonable terms and conditions of interconnection violates Section 13-514, ...Section 9-250 and Section 13-702 pf the [Public Utilities Act]";

2. an order directing Level 3 to interconnect with Neutral Tandem on "just, reasonable, and nondiscriminatory terms and conditions no less favorable than those under which Level 3 accepts transit traffic from AT&T [Illinois], for the continued delivery of tandem transit traffic to Level 3 from Neutral Tandem";

3. an order directing Level 3 to pay Neutral Tandem's fees and costs.

The Staff is of the opinion that the Commission should grant some but not all of this relief, and should enter an order:

1. directing Level 3 to maintain direct interconnection with Neutral Tandem; and

2. directing both parties to negotiate in good faith regarding the sharing of costs directly related to the maintenance of direct interconnection facilities between their networks, and to reach an agreement regarding the sharing of such facilities.

Neutral Tandem brings this complaint pursuant to Sections 13-515 and 10-108 of the Public Utilities Act. Complaint, *generally*.

If the Commission finds that a carrier has violated Section 13-514 of the Public Utilities Act, it is specifically authorized by Section 13-516(a) to enter an order that:

1. "direct[s] the violating telecommunications carrier to cease and desist from violating the Act or a Commission order or rule[,]" 220 ILCS 5/13-516(a)(1); and

2. "award[s] damages, attorney's fees, and costs to any telecommunications carrier that was subjected to a violation of Section 13-514." 220 ILCS 5/13-516(a)(3).

The Commission's authority under Section 10-108 is far less specifically delineated. Pursuant to Section 10-110, the Commission is directed, "[a]t the conclusion of [a] hearing [on complaint under Section 10-108] ... [to] make and render findings concerning the subject matter and facts inquired into and enter its order based thereon." 220 ILCS 5/10-110.

These statutory grants of authority do not appear to the Staff to be sufficient to require Level 3 to interconnect with Neutral Tandem on terms that are "no less favorable" that those pursuant to which it interconnects with AT&T Illinois. First, Neutral Tandem's proposal is, as Level 3 points out, effectively a request that the Commission arbitrate an agreement between two CLECs. Level 3 Ex. 2 at 32. Level 3 is further correct in asserting that Neutral Tandem seeks to "pick and choose", or "opt into" another carrier's – in this case, AT&T's – agreement with Level 3, which, as between CLECs, is clearly not something that state Commissions are authorized to require by Section 252 of the *Telecommunications Act of 1996*. Level 3 Ex. 2 at 48-51.

Moreover, AT&T is the incumbent carrier in its service territory, and possesses a ubiquitous network. Level 3 Ex. 2 at 19-20, 24-25. It is, accordingly,

the only carrier capable of providing transiting throughout it service territory, and has been required by the Commission to provide transiting facilities. *Order*, §II(A)(9)(d), Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues, ICC Docket No. 98-0396, 2001 Ill. PUC Lexis 1249 (October 16, 2001) (hereafter "TELRIC II Order"). Thus, AT&T is specifically required by regulation to provide transiting to any carrier that seeks such facilities; carriers, in turn, are compelled by practical necessity to interconnect with AT&T Illinois. Level 3 Ex. 2 at 19-20, 24-25. Accordingly, the terms and conditions under which AT&T interconnects and exchanges traffic with other carriers when carrying out its transiting function are *sui generis*, and do not constitute a template for the terms and conditions of an agreement between two CLECs.

Neutral Tandem's invocation of Section 9-250 of the Public Utilities Act, 220 ILCS 5/9-250, is of little utility here. Section 9-250 undoubtedly applies to the provision of competitive telecommunications service. 220 ILCS 5/13-101 However, it is not easy to assess what constitutes just, reasonable and non-discriminatory rates, terms and conditions in a competitive context. Such an inquiry is best made on a case-by-case basis. Here, the matter comes before the Commission as a complaint, rather than an arbitration proceeding in which the parties and Staff each submits detailed contract proposals. Accordingly, the

record is not ideal for arbitrating just, reasonable and nondiscriminatory interconnection provisions as between these parties. Further, the unique nature of tandem switching transit agreements with AT&T Illinois and the inapplicability of "opt-in" provisions to CLEC-to-CLEC interconnection agreements, militate against imposing specific interconnection terms and conditions in this proceeding. The Staff, accordingly, recommends that the Commission decline to set such terms and conditions at this time[4].

However, the Commission should enter an order requiring Level 3 to remain directly interconnected with Neutral Tandem until further order of the Commission. As noted above, the Commission has the full authority under Section 13-516 of the Public Utilities Act to "direct[] [a] violating telecommunications carrier to cease and desist from violating the Act or a Commission order or rule[.]" 220 ILCS 5/13-516(a)(1). Neutral Tandem is correct in asserting that Level 3 has, or at the very least proposes to, violate the Public Utilities Act within the meaning of Section 13-516(a)(1), in that its threat to disconnect, as shown above, violates Section 13-514(2) and (6). Moreover, to the extent that the parties remain physically interconnected, Level 3 will be obliged under Section 13-702 to exchange traffic with Neutral Tandem. Accordingly, the Commission may grant effective relief to Neutral Tandem by the mandatory direct interconnection order Staff proposes.

[4] Staff is of the opinion that a Commission Order directing the resolution of this dispute in keeping with Commission findings should be sufficient. However, should additional intervention be necessary, Staff acknowledges that such intervention may require the parties' submission of contractual language that is the subject of dispute.

As noted, the question of which carrier is to pay direct costs resulting from maintenance of direct interconnection facilities is at issue here. The Commission should direct Level 3 and Neutral Tandem to negotiate in good faith regarding the sharing of costs directly related to the maintenance of direct interconnection facilities between their networks, and to reach an agreement regarding the sharing of such facilities. This Commission should retain jurisdiction over the matter should additional intervention be needed to effectuate the intent of its final Order.

With respect to Neutral Tandem's request that the Commission award it costs and attorney's fees, the Staff takes no position, apart from noting that Section 13-516(a)(3) provides: "[t]he Commission shall award damages, attorney's fees, and costs to any telecommunications carrier that was subjected to a violation of Section 13-514[.]" Accordingly, if the Commission finds, as the Staff recommends, that Level 3 has violated Section 13-514, Neutral Tandem is entitled to some fee allocation pursuant to statute.

V. Conclusion

The Commission should find in favor of Neutral Tandem, as set forth above. It should determine that Level 3's threat to sever direct interconnection with Neutral Tandem constitutes a violation of Section 13-514(1), (2), and (6), and Section 13-702.

The Commission should not require Level 3 to interconnect with Neutral Tandem on the same terms that it interconnects with AT&T Illinois, the incumbent

LEC. The Commission should order Level 3 to maintain direct interconnection with Neutral Tandem until further order of the Commission. The Commission should direct Level 3 and Neutral Tandem to negotiate in good faith regarding the sharing of costs directly related to the maintenance of direct interconnection facilities between their networks, and to reach an agreement regarding the sharing of such facilities. This Commission should retain jurisdiction over the matter should additional intervention be needed to effectuate the intent of its final Order.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

Matthew L. Harvey
Stefanie R. Glover
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

June 4, 2007

Counsel for the Staff of the
Illinois Commerce Commission

EXHIBIT 11

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Neutral Tandem, Inc. and	:	
Neutral Tandem-Illinois, LLC	:	
-vs-	:	
Level 3 Communications, LLC	:	
	:	**Docket No. 07-0277**
Verified Complaint and Request for	:	
Declaratory Ruling pursuant to	:	
Sections 13-515 and 10-108 of the	:	
Illinois Public Utilities Act.	:	

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

Matthew L. Harvey
Stefanie R. Glover
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Staff of the Illinois Commerce Commission

June 8, 2007

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The Staff of the Illinois Commerce Commission (hereafter "the Staff"), by and through its counsel, and pursuant to Section 766.300 of the Commission's Rules of Practice (83 Ill. Adm. Code 766.300), respectfully submits its Reply Brief in the above-captioned matter.

In general, the Staff is prepared to stand on its Initial Brief, and sees the need to file only a limited reply. Nonetheless, Level 3 advances certain arguments in its Initial Brief which demand response.

I. The Commission Can and Should Order the Maintenance of Direct Interconnection

Central to this dispute is Level 3's position that it is authorized by law to dictate the manner in which it interconnects with other carriers. Level 3 contends that it has an unqualified right to refuse to interconnect directly with Neutral Tandem to exchange traffic for termination on Level 3's network. Level 3 IB at 23, *et seq.* It urges the Commission to read the duty "to interconnect directly or indirectly with the facilities and equipment of [an]other telecommunications carrier[,]" as conferring upon Level 3 the *right* to interconnect directly or indirectly, at Level 3's sole election. Id. It makes the ancillary contention that the federal Telecommunications Act preempts the Commission from enforcing Sections 13-514 and 13-702 in CLEC-to-CLEC interconnection disputes. Id. The Commission should vigorously reject this narrow and self-interested position.

At a very basic level, the creation - through interconnection - of a network of networks is an undertaking that requires certain compromises on the part of all

carriers that participate.[1] The federal Telecommunications Act of 1996 reflects this, requiring carriers to interconnect, exchange traffic, pay one another for services rendered, and make *telephone numbers* portable, to name a few of the duties and obligations contained in Section 251. *See, generally,* 47 U.S.C. §251.

Interconnection is, inherently, a co-operative undertaking: difficult to accomplish, and easily frustrated. The standards enunciated in Sections 251(a) and (b) reflect this. These provisions speak not of *rights*, but specifically of *duties* and of *obligations* to other carriers and to the network. What this means in practice – and what the Congress understood – is that carriers must, in many cases, compromise to some extent their immediate or perceived interest to comport with their duties and obligations, so that the entire system will function more effectively and competitively.

The co-operative nature of interconnection is exemplified in Section 251(a)(1) of the federal Act, requiring all carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]" 47 U.S.C. §251(a)(1). This section, properly read, states that interconnection need not be indirect or direct, but more importantly, makes clear that interconnection, by some means, must take place. Ideally, carriers will attempt to work out the nature and details of interconnection issues between themselves, on the "play nice in the sandbox" theory.

It is evident, however that where, as here, carriers have failed to reach agreement regarding how interconnection is to be accomplished, regulators can and should involve themselves in the matter. Interconnection – and the exchange

[1] A "network of networks" is the *sine qua non* of competitive telecommunications markets.

of traffic which is the only reason for interconnection – is a matter far too crucial to the effective functioning of the network, and thus to the public interest, to be compromised by a commercial dispute. And interconnection is indeed being compromised here.

As noted above, Level 3's position amounts, essentially, to the flat assertion that: "We have the legal right to dictate the manner in which we interconnect with other people and they with us," a claim Level 3 argues is authorized by Section 251(a)(1)'s requirement that carriers "interconnect directly or indirectly" with one another.

However, the shortcomings of, and fallacies inherent in, this reading of Section 251(a)(1), are profound. First, Level 3 fails to understand that it is not, in the most fundamental sense, interconnecting with Neutral Tandem here – rather, it is interconnecting with the CLECs to which Neutral Tandem provides tandem transit services, at those CLECs' request. These CLECs - 18 in number – are the carriers with which Level 3 is interconnecting for the exchange of traffic. These CLECs have quite obviously chosen to interconnect with Level 3 indirectly, through Neutral Tandem, and to exchange the traffic they originate with Level 3 indirectly, through Neutral Tandem.

Level 3, based on its conduct as manifest in the events underlying this proceeding, has no objection to interconnecting indirectly with CLECs through Neutral Tandem; it elected to do so itself for the traffic it originates and that terminates to these CLECs. Neutral Tandem Ex. 1 at 8-11; Level 3 Ex. 1 at 9-14. As such, it has no real objection to direct connection with Neutral Tandem; again,

it elected to connect directly with Neutral Tandem in order to achieve its own ends, the routing of traffic it originates for termination by those CLECs. Level 3 objects, nonetheless, to other carriers using the precise (if inverse) method to interconnect with it that it uses to interconnect with them. The lack of consistency and principle, pursuit of self-interest and indeed blatant hypocrisy in Level 3's position are obvious, and palpable.

Level 3, of course, does not couch matters in these terms. It attempts to argue that, inasmuch as the Commission cannot find indirect interconnection to be improper, unreliable or inferior as a general matter and under all circumstances, it cannot find Level 3 to be in violation Section 13-514 by requiring Neutral Tandem to route traffic to it indirectly. Level 3 IB at 12. This argument is facially defective, for several reasons.

First, what Level 3 seeks is not indirect interconnection – it is already indirectly interconnected with the 18 CLECs that exchange traffic with it through Neutral Tandem. What Level 3 is suggesting is, for want of a better term, "double indirect interconnection", which is to say that the CLEC traffic transits the Neutral Tandem network to the AT&T network, and thereafter transits the AT&T network to Level 3 for termination. Level 3 Ex. 2 at 12-18. Level 3's argument is that, inasmuch as interconnection in this manner is technically possible, it is all that Level 3 is required to do. Level 3 IB at 10, *et seq.*

This is true that such "double indirect interconnection" is technically possible. It is possible to exchange traffic in this manner, just as it is possible to drive from Chicago to Springfield by way of Toronto. The point is that both

courses of action are self-evidently less efficient in terms of cost, time, and reliability. Moreover, no one who is simultaneously (a) concerned about cost, reliability and time; and (b) in his right mind, will actually do either.

Second, contrary to Level 3's assertions, the Commission can indeed find that, requiring the 18 CLECs that exchange traffic with Level 3 through legitimate indirect interconnection (having chosen Neutral Tandem to provide transit services) to use an entire additional level of transit clearly would foist upon them an "inferior connection" within the meaning of Section 13-514(1). Such "double-indirect interconnection" would clearly impair the speed, quality, or efficiency of services used by them, within the meaning of Section 13-514(2), and would have a substantial adverse effect on their ability to provide service to their customers, within the meaning of Section 13-514(6).

Third, no rational CLEC will willingly engage in double-indirect interconnection, with its inherent inefficiency, increased potential for failure, and doubled transit costs. If the choices available to a CLEC are: (a) an artificial double-indirect interconnection, with double tandem switching, through Neutral Tandem and AT&T; or (b) indirect interconnection with tandem switching through AT&T, the CLEC will unquestionably elect to use the latter. This will impede the development of competition in this telecommunications service market, within the meaning of Section 13-514. Level 3's actions are therefore certain to have a "substantial adverse effect on the ability of another telecommunications carrier [Neutral Tandem] to provide service to its customers [CLECs]", within the meaning of Section 13-514(6). Further, Level 3's relative insignificance in the

marketplace (as a single CLEC among many) does not matter; if a CLEC cannot use a competitive transit provider to deliver all of its non-AT&T traffic, it will not use that service at all. Level 3 in effect will be given a "heckler's veto".

The Commission should completely disregard Level 3's preemption argument. Whatever its merits – and the Staff believes it is without merit – the preemption argument cannot be successfully raised before the Commission. As this Commission has repeatedly held, it has no authority to preempt an act of the General Assembly, regardless of the state of the federal law. *See, e.g.,* Order, ¶42, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (June 11, 2002). If Level 3 considers the Commission's enforcement of a valid state law to be preempted by federal statute, it certainly has remedies, but not before the Commission.

Level 3 attempts to draw a false distinction between Neutral Tandem as a transit provider, and the originating CLECs as "carriers." *See, e.g.,* Level 3 IB at 13 (Level 3 describes Neutral Tandem as a "third-party intermediate transit provider"). This is an utterly fruitless exercise with no basis whatever in law. Level 3 makes no attempt to argue that Level 3 is anything but a "telecommunications carrier" within the meaning of Section 153(44) of the federal Telecommunications Act, 47 U.S.C. §153(44), or within the meaning of Section 13-202 of the Illinois Public Utilities Act, 220 ILCS 5/13-202, because Neutral Tandem self-evidently is a telecommunications carrier. Accordingly, under Section 251(a)(2), interconnection is required.

II. Neutral Tandem is Not Using Level 3's Network for Free

Level 3 characterizes the relief sought by Neutral Tandem as requiring Level 3 to engage in, and permitting Neutral Tandem to enjoy the benefit of "free [to Neutral Tandem]", "direct physical interconnection in perpetuity." Level 3 IB at 1, 7, 14, 19. This is utterly without support in the record or the applicable law.

As set forth elsewhere, Level 3 has at all relevant times been entitled to, but has failed or refused to collect, reciprocal compensation from carriers that originate traffic delivered by Neutral Tandem to Level 3 for termination. Level 3 responds that the physical aspects of direct interconnection result in costs being incurred, without reference to the specifics of direct interconnection with Neutral Tandem. Level 3 Ex. 2 at 12-17. As nearly as the Staff can determine, therefore, the evidence supports Neutral Tandem's position that it pays all direct costs associated with the common interconnection facilities. Level 3 contributes collocation space, and, it would appear negotiates and signs agreements with Neutral Tandem, and then must "monitor and implement" those agreements. Level 3 Ex. 2 at 17. It is not clear why Level 3 considers this to be "free" to Neutral Tandem.

With respect to "in perpetuity", Staff merely notes that direct physical interconnection is, where appropriate, required by law, in addition to being a condition precedent to participating in the market in a significant way. Level 3's argument here is similar to an individual complaining that it is unjust that he is required, in perpetuity, to stop at red lights and file income tax returns.

III. Level 3 Cannot Require Neutral Tandem to Pay Reciprocal Compensation

Throughout its Initial Brief, Level 3 refers to the "'calling party pays' principle" as if it were a guideline, vaguely advisable from a policy standpoint, not generally applicable. Level 3 IB at 27, *et seq.* This constitutes a particularly egregious misrepresentation of the state of the law.

As the Staff demonstrated in its Initial Brief, Staff IB at 10, *et seq.*, and as Neutral Tandem observed in its, Neutral Tandem IB at 41, *et seq.*, the "calling party pays" principle is not a guideline or a casual industry practice. Rather, the "calling party pays" principle is a federal law, embodied in Section 251(b)(5) of the Telecommunications Act of 1996, which provides that: "[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications[.]" 47 U.S.C. §251(b)(5). As so codified, "calling party pays" is not some sort of voluntary compact between carriers, as Level 3 suggests; instead, Section 251(b)(5) imposes a concrete legal duty upon LECs to pay reciprocal compensation to other LECs for the traffic originated by one and terminated by another.[2] Level 3's casual assertion that this statutorily defined obligation can somehow be shifted at whim is a glaring defect in its argument.

Level 3 further asserts, along similar lines, that indirect interconnection somehow frustrates the calling party pays *law*, as we shall henceforth call it.

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[2] Federal rules permit LECs to exchange traffic on a "bill and keep" basis. 47 C.F.R. §51.713.

Level 3 IB at 30, *et seq*. Level 3's assertion is that the use by a CLEC of an intervening transit provider such as Neutral Tandem effectively shields the originating CLEC from efforts by the terminating CLEC to collect mandated reciprocal compensation. Id.

This argument is relentlessly defective, for any of several reasons. First, it assumes that the identities of the CLECs, and of the traffic they originate, are somehow hidden from the terminating LEC by the intervening tandem provider. This assumption, however, is: (a) not true as a general matter; and (b) absolutely contrary to the known facts of record in this proceeding. The unchallenged evidence here is that Neutral Tandem provides all signaling information and call detail necessary for Level 3 to bill originating carriers. Complaint, ¶37; Neutral Tandem Ex. 2 at 6; Tr. 149.

The second defect in Level 3's argument is that Level 3 cannot argue that it is infeasible or impossible to collect reciprocal compensation from those CLECs using Neutral Tandem's transit services, because Level 3 has, by its own admission, never attempted to collect such compensation. Neutral Tandem Ex. 1 at 13-14; Neutral Tandem Ex. 2 at 4-5, Attachment A at 5-6; Neutral Tandem Ex. 6 (Level 3 Response to Staff DR JZ 1.04(A)); Tr. 324, 354, 359. Level 3's argument, therefore, is that indirect interconnection frustrates it in exercising rights that it never exercises, or even attempts to exercise. Level 3 has failed to demonstrate one single instance where a CLEC using Neutral Tandem refused to pay Level 3 reciprocal compensation that it sought. Its assertion that indirect

interconnection somehow frustrates the collection of reciprocal compensation is therefore baseless.

Finally, Level 3 admits to having paid no reciprocal compensation to CLECs that use Neutral Tandem's services. Tr. 359. It therefore has no grievance at this point, inasmuch as "bill-and-keep" arrangements, whereby carriers terminate other carriers' traffic for free, in exchange for similar accommodation of the traffic they originate, are perfectly lawful, and may be imposed by state Commissions. 47 C.F.R. §51.713. Level 3 has received compensation in the form of termination services, whether it likes it or not. It can continue to do so, or it can employ the call detail with which Neutral Tandem provides it to bill those carriers. What it cannot do is claim that it has been harmed by anything but its own failure to exercise its rights.

In short, there is no evidence here that Level 3 is in fact prevented from collecting reciprocal compensation from those CLECs that utilize Neutral Tandem's services, or even that it has suffered any cognizable harm from its own failure to do so. Level 3's assertion to the contrary is the reddest of herrings, and should be ignored.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

/s/_____

Matthew L. Harvey
Stefanie R. Glover
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

June 8, 2007

Counsel for the Staff of the
Illinois Commerce Commission

EXHIBIT 12

21 of 41 DOCUMENTS

The Washington Post
washingtonpost.com
The Washington Post

October 14, 2005 Friday
Final Edition

SECTION: Financial; D04

LENGTH: 791 words

HEADLINE: Internet Access Dispute Cut Off Some Businesses

BYLINE: Arshad Mohammed, Washington Post Staff Writer

BODY:

Last week, the computers in Barbara F. Buckley's office in the District suddenly went blind to parts of the Internet.

A colleague at the Precursor Group, which analyzes the telecommunications industry for institutional investors, couldn't get online to send out the firm's research. Another couldn't download statistics from a government Web site.

"This is a disaster," Buckley, a Precursor vice president, recalled thinking. "A research firm is really only supposed to do two things and that is create the research and sell it, and we can't do either."

After a day of troubleshooting, Buckley finally found the "culprit." It was a dispute between Cogent Communications Group Inc. and Level 3 Communications Inc., two of the companies that move Internet traffic around the world seamlessly but, in this case, cut off many of their clients from parts of the Web.

Broomfield, Colo.-based Level 3 on Oct. 5 ended its agreement to exchange Internet traffic free with Washington-based Cogent. It cut their link, leaving Cogent clients such as Precursor unable to see parts of the Internet served only by Level 3, and vice versa.

With the Internet as vital to many businesses as the telephone, the incident prompted calls for the government to step in if the industry does not prevent such disruptions on its own.

"Does it require regulation? I think if the industry does not show itself to be more mature -- yeah," said David J. Farber, a former chief technologist at the Federal Communications Commission. He said his natural instinct is to avoid regulation "if you can get more sane solutions from the industry."

Communications experts suggested that companies in such disputes should agree to arbitration, have a cooling-off period during which they cannot cut service and warn all customers of any disruption.

Few customers were warned in advance, leaving many people unable to figure out why they could not access Web sites, use Internet phones or send e-mail.

After customers complained, Level 3 restored its link to Cogent on Oct. 7 and agreed to keep it open until Nov. 9, allowing time to negotiate a new agreement.

Level 3 and Cogent have spent the past week blaming each other.

The dispute boils down to Level 3's claim that it was carrying a disproportionate amount of Cogent traffic and should be paid for it. Cogent said it had sent more traffic to Level 3 but only at the other firm's request. A Level 3 executive said he was not aware that his company had made such a request.

Neither side made provisions to arrange connections with other Internet "backbone" providers, which would have kept all their customers connected after the cutoff.

Level 3 appeared chastened by the experience but said government regulation was not needed because the market policed itself.

"It was the customers screaming that got things going again," Level 3 President Kevin J. O'Hara said in an interview. He hopes not to cut off any customers in the future. "We learned a lesson here."

Cogent chief executive David Schaeffer said the government should step in.

"I am a guy who is anti-regulation. . . . I am also a realist," he said. "There is a place for a regulator to ensure the quality and ubiquity of service."

It is unclear how much of the Internet was inaccessible to Cogent and Level 3 customers. Cogent said as many as 5 percent of Web sites may have been affected, while Level 3 put the estimate at roughly 1 percent.

Depending on the site, any loss of service can be devastating for businesses.

"If you take out one of the legs that holds up the chair, it all tumbles down surprisingly quickly," said Paul F. Ryan of Ulysses Financial LLC, a New York investment banker who lost access to the Groove Networks Web site that he and his colleagues use to track deals, send instant messages and coordinate their work across the country. "You get back to the dark ages of having to pick up the telephone."

It took Ryan two days to get his Groove Networks access back.

"I am trained as a Harvard free market economist and should be spouting the party line that the free market solves everything," Ryan said. "There needs to be government policing authority to stop this from happening because at this point too much relies on it to make it just a decision between two guys having a pissing match."

Some Cogent customers remain angry that they were victims of a commercial dispute between two companies that appeared to have played a game of chicken, with Level 3 threatening to cut off Cogent and Cogent all but daring it to do so.

Buckley said she was considering spending $450 more a month to get a backup provider and was wondering whether to leave Cogent altogether. "I am trying to think of a reason to stay," she said.

LOAD-DATE: October 14, 2005

20 of 57 DOCUMENTS

Rocky Mountain News (Denver, CO)

October 29, 2005 Saturday
Final Edition

SECTION: BUSINESS; Pg. 3C

LENGTH: 443 words

HEADLINE: LEVEL 3, COGENT RESOLVE DISPUTE; FEUD DISRUPTED INTERNET TRAFFIC

BYLINE: Jeff Smith, Rocky Mountain News

BODY:

Broomfield-based Level 3 Communications and rival Cogent Communications reached an agreement Friday on carrying each other's traffic, three weeks after a dispute led to computer users being temporarily blocked from portions of the Internet.

In a joint news release, the companies said they had agreed to exchange traffic, subject to specific payments if certain volume and other commitments aren't met.

The issue involved a so-called "peering" agreement that enables networks to connect to each other so Internet traffic can be moved without disruption.

Level 3 claimed Washington, D.C.-based Cogent was sending far more traffic than agreed upon, and on Oct. 5, Level 3 disconnected the peering point, saying it had given Cogent advance notice that would occur.

Internet service for some was disrupted for nearly three days before Level 3 agreed to set a new deadline of Nov. 9. The disconnection affected customers of both companies, and it was serious enough that a federal lawmaker called on the Federal Communications Commission to consider arbitrating the case.

Cogent initially claimed up to 17 percent of Internet traffic was affected, but Cogent Chief Executive Dave Schaeffer said Friday that independent groups have since determined about 4 percent to 5 percent of Internet traffic was affected by the service disruption. Those figures, said by others to be too high, couldn't immediately be verified Friday.

On Friday, Level 3 and Cogent praised the new agreement.

"We're pleased with the modified agreement and believe it is in the best interests of Level 3 and users of the Internet," Jack Waters, Level 3's executive vice president and chief technology officer, said in a statement.

Schaeffer called the agreement a "very equitable solution and, hopefully, other major network operators will think long and hard before disrupting any interconnection."

Schaeffer said the company heard from lawmakers, FCC officials and state attorneys general, "but ultimately this was a business decision made between the two companies."

An FCC official didn't immediately respond to calls for comment.

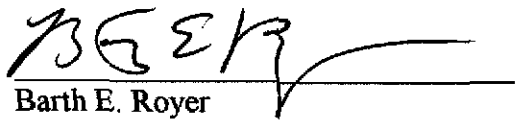
Level 3 didn't comment beyond its statement. But Level 3 President Kevin O'Hara apologized to customers during the company's recent third-quarter conference call as he talked about the company's efforts to make its traffic-exchange agreements more equitable.

"In one instance this quarter, a number of Level 3 customers and Cogent customers were hurt as we pursued this strategy," O'Hara said. "I apologize to both sets of customers. . . . We recognize that we have an obligation to customers of the Internet and, in this instance, we contributed to letting them down."

LOAD-DATE: October 29, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer and Counterclaim has been served on each of the following persons or parties by first class US mail, postage prepaid, this 20th day of June 2007.



Barth E. Royer

David A. Turano
Shoemaker, Howarth & Taylor, LLP
471 East Broad Street, Suite 2001
Columbus, Ohio 43215

Gregg Strumberger
Regulatory Counsel
Level 3 Communications, LLP
1025 Eldorado Blvd.
Broomfield, Colorado 80021