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ORIGINAL

June 26, 2007

VIA HAND DELIVERY

Ms. Ann Cole
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32309

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Re: Docket No. 070127-TX - Petition of Neutral Tandem, Inc. For Interconnection with Level 3 Communications and Request for Expedited Resolution

Dear Ms. Cole:

Enclosed for filing on behalf of Neutral Tandem, Inc., please find the original and 15 copies of the following:

1. Neutral Tandem's Notice of Filing Additional Supplemental Authority.

Please acknowledge receipt of this filing by stamping and returning the extra copy of this letter to me. Your assistance in this matter is greatly appreciated, and if you have any questions, please do not hesitate to contact me.

Sincerely,

Thomas A. Range

Thomas A. Range

Enc.

BEFORE
THE FLORIDA PUBLIC SERVICE COMMISSION ORIGINAL

In re: Petition of Neutral Tandem, Inc. for Interconnection with Level 3 Communications and Request for Expedited Resolution.	))))	Docket No. 070127-TX Filed: June 26, 2007

NEUTRAL TANDEM INC.'S NOTICE OF FILING
ADDITIONAL SUPPLEMENTAL AUTHORITY

Neutral Tandem, Inc. ("Neutral Tandem"), through its undersigned counsel, hereby files the following as supplemental authority:

A copy of the final order by an Illinois Administrative Law Judge in Case Number 07-0277: **Verified Complaint and Request for Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act.** This order, which was issued June 25, 2007, is subject to approval by the Illinois Commerce Commission and is provided in further support of Neutral Tandem's position set forth in these proceedings.

Respectfully submitted,

NEUTRAL TANDEM, INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail and Hand Delivery to Martin McDonnell, Esquire, and Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301, and that an electronic copy has also been provided to the persons listed below on June 26, 2007:

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

ORDER

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Consistent with Section 13-515(d)(6) of the Act and pursuant to due notice, a status hearing was convened on May 8, 2007. Also on May 8, 2007, Level 3 sent a letter to NT stating that:

> commencing on June 25, 2007, if and to the extent that Neutral Tandem elects to deliver transit traffic to Level 3 for termination, and if Level 3 elects to terminate such traffic on Neutral Tandem's behalf, Level 3 will charge Neutral Tandem at a rate of $0.001 per minute terminated. Level 3 reserves ... the right to terminate the acceptance and delivery of Neutral Tandem's transit traffic. * * * * By continuing to send traffic to Level 3 for termination from and after June 25, 2007, Neutral Tandem will be evidencing its acceptance of these financial terms.[6]

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

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

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

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

[6] Level 3 ex. 1.1.

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

ANALYSIS

The Public Utilities Act

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

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

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

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

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

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

[8] 220 ILCS 5/13-702.

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

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

Interconnection; Section 13-514

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

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

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

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

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

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

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

[11] *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 13-702

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

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

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

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

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[24] *See id.*

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

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

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

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

Reciprocal Compensation

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

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

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

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

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

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

[31] *Id.*

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

[33] *See id.*

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

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

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

Section 9-250

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Remedies

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

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

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

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

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

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

[47] *Id.*

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

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

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

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

CONCLUSION

Based on the foregoing, we find that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So ordered this 25th day of June, 2007.

Ian Brodsky,
Administrative Law Judge