

Fort Lauderdale
Jacksonville
Los Angeles
Madison
Miami
New York
Orlando
Tallahassee
Tampa
Tysons Corner
Washington, DC
West Palm Beach

Suite 1200
106 East College Avenue
Tallahassee, FL 32301
www.akerman.com
850 224 9634 *tel* 850 222 0103 *fax*

February 8, 2008

VIA ELECTRONIC FILING

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

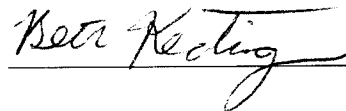
**Docket No. 070408-TP - Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC
for Resolution of Interconnection Dispute with Level 3 Communications and Request for
Expedited Resolution**

Dear Ms. Cole:

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

If you have any questions whatsoever, please do not hesitate to contact me.

Sincerely,



Beth Keating
AKERMAN SENTERFITT
106 East College Avenue, Suite 1200
Tallahassee, FL 32302-1877
Phone: (850) 224-9634
Fax: (850) 222-0103

Enclosures

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Neutral Tandem, Inc. and)	Docket No. 070408-TP
Neutral Tandem-Florida, LLC)	
for Resolution of Interconnection Dispute)	Filed: February 8, 2008
with Level 3 Communications and Request)	
for Expedited Resolution)	

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

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

INTRODUCTION

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

Of course, Level 3 has good reason to try to distract the Commission from the merits of this dispute. Each and every state commission that has ruled on the merits of this dispute has ruled in Neutral Tandem's favor. A number of those commissions have found that Level 3's conduct, including its attempt to extract the same discriminatory payments from Neutral Tandem that Level 3 seeks here, is anticompetitive and detrimental to the development of local telecommunications competition. State commissions uniformly have rejected Level 3's request that Neutral Tandem be required to pay Level 3 for the termination of transit traffic. And in this

case, as the Commission's Staff has pointed out, the Commission's precedent is consistent with the other states' decisions on this point.¹

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

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

Nonetheless, to ensure that the Commission has no concerns about Neutral Tandem's ability to fulfill its obligations should the Commission disagree with Neutral Tandem's position after a full hearing on the matter, Neutral Tandem is prepared to post a letter of credit. In Michigan, where the volume of traffic at issue is approximately 60% of the volume in Florida, the state commission, without objection from Level 3, accepted a letter of credit for \$10,000 as sufficient to address the "interim" period prior to the commission's final decision on the merits

¹ Dec. 26, 2007 Revised Staff Rec., at 11.

of Neutral Tandem's complaint in that state. Neutral Tandem is prepared to post a substantially larger letter of credit in Florida.

Most importantly, the best way to resolve the "interim" issues in this case is to hear and decide the case as quickly as possible. Neutral Tandem respectfully urges the Commission to deny Level 3's motion and to set a schedule for prompt hearing and decision on all issues raised in Neutral Tandem's Petition.

BACKGROUND²

With respect to Level 3's claim for "interim" payments, as noted in Level 3's motion, Neutral Tandem and Level 3 previously exchanged traffic pursuant to multiple contracts, including a contract dated July 6, 2004. Level 3 terminated that contract in January 2007. Immediately thereafter, Level 3 began threatening to unilaterally disconnect the parties' existing interconnections, unless Neutral Tandem agreed to begin paying reciprocal compensation to Level 3. As a result of these threats, Neutral Tandem was forced to file its Petition with this Commission and in several other state commissions around the country.

² Before addressing the factual background relevant to Level 3's motion, Neutral Tandem must take issue with two inaccurate (and irrelevant) claims in Level 3's motion. First, Level 3 claims that Neutral Tandem's position with respect to 911 services has been altered. To the contrary, at the May 24, 2007 Agenda Conference, Neutral Tandem's counsel pointed out that Neutral Tandem does not "provide" services, such as 911 services, to end-users. However, as Commissioner Argenziano in particular noted at the January 8, 2008 Agenda Conference, Fl. Stat. § 364.337 requires only that a carrier provide "access to" 911 services, not that a carrier actually provide 911 services to end-user customers.² Although Neutral Tandem does not concede that the requirements of Fl. Stat. § 364.337 have any bearing on Neutral Tandem's standing to bring its Petition, as Neutral Tandem's counsel made clear during the January 8, 2008 Agenda Conference, Neutral Tandem can and will demonstrate that it has "access to" 911 services in Florida. *E.g.*, Transcript of the January 8, 2008 Agenda Conference, at 42.

Second, Level 3 claims that Neutral Tandem has sought to "postpone these proceedings" in order to continue allegedly "free use of Level 3's services." (Mot., ¶ 1.) In profound contrast to this claim, Neutral Tandem twice has requested expedited consideration of its Petition. On both occasions, Level 3 has resisted Neutral Tandem's requests for expedited treatment. Nevertheless, Neutral Tandem still believes that prompt resolution of its Petition is appropriate, and it is fully prepared to proceed in accordance with any hearing schedule established by the Commission.

Notably, the parties' prior contract was a two-way agreement under which Level 3 was to begin purchasing services from Neutral Tandem.³ In consideration for Level 3's agreement to begin purchasing services, Neutral Tandem agreed to an interim credit arrangement that was specifically tied to Level 3's purchase of services from Neutral Tandem. As Neutral Tandem's CEO has testified in other states and in this proceeding, the entire point of that interim credit was to provide an inducement to convince Level 3 to purchase Neutral Tandem's transiting service to deliver traffic to other carriers.⁴ Critically, as Neutral Tandem's CEO has testified, the contract also provided that the promotional credit was designed to phase down to zero as Level 3's usage of Neutral Tandem's transit service increased. It should go without saying that Neutral Tandem's current Petition does not seek to require Level 3 to become a customer of Neutral Tandem, or to purchase any services from Neutral Tandem. It also should go without saying that Neutral Tandem does not seek reinstatement of the contract that Level 3 chose to terminate. Neutral Tandem merely seeks interconnection with Level 3 under nondiscriminatory terms and conditions.

As noted above, in addition to the contract mentioned in Level 3's motion, the parties also exchanged traffic pursuant to a number of other contracts. None of these other contracts included similar promotional credits.⁵ Moreover, Neutral Tandem does not make any payments for the delivery of local tandem transit traffic to any other carrier. It is important to note that Level 3 does not receive payments from other tandem transit carriers, such as AT&T and Verizon, when those carriers deliver local transit traffic to Level 3. Thus, Level 3's suggestion

³ At Staff's request, Neutral Tandem filed a confidential copy of the parties' contract in March 2007 in Docket No. 070127-TP.

⁴ See, e.g., 07/11/07 Wren Pre-Filed Direct Testimony, at 9.

⁵ *Id.*

that Neutral Tandem be forced to re-route traffic back to the incumbent LEC on an interim basis would not even benefit Level 3.

ARGUMENT

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

As the party seeking a Commission order, Level 3 bears the burden to provide the basis upon which the Commission can and should act.⁶ Here, Level 3 has failed to point to any legal or factual basis upon which the Commission reasonably could require Neutral Tandem to pay “interim compensation” to Level 3. The reason is simple -- Level 3’s request for payment under one provision plucked from a contract Level 3 alone chose to terminate is discriminatory, unlawful, and without support for several reasons.

First, as noted above, commissions in other states uniformly have held that Level 3’s claim for compensation from Neutral Tandem is contrary to federal law, which requires Level 3 to seek compensation for terminating traffic from originating carriers, not transiting carriers such as Neutral Tandem. For instance, the Georgia Commission noted that “[u]nder 47 C.F.R. § 51.701(e), ... ‘carriers receive compensation from the other carrier for the transport and termination on each carrier’s network facilities of telecommunications traffic that *originates* on the network facilities of the other carrier.’”⁷ The Georgia Commission refused to shift this obligation from the originating to the transiting carrier, because “[i]mposing reciprocal compensation costs on the transit provider would be inconsistent with this federal regulation.”⁸

⁶ See, e.g. *Dep’t of Banking and Finance v. Osborne Stern and Co.*, 670 So.2d 932, 934 (Fla.1996).

⁷ Docket No. 24844-U, *Petition of Neutral Tandem Inc. for Interconnection with Level 3 and Request for Emergency Relief*, Georgia Pub. Serv. Comm’n, Final Order, at 10-11 (Aug. 27, 2007) (emphasis added) (hereinafter the “Georgia Order”).

⁸ *Id.*

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

- “The evidence establishes that [Neutral Tandem] does not originate traffic. Furthermore, [47 C.F.R. § 57.101] does not impose reciprocal compensation obligations with respect to transiting the traffic... Therefore, [Neutral Tandem] is not obligated to pay reciprocal compensation to Level 3.”⁹
- “The ALJ correctly found that those costs properly recovered through reciprocal compensation should not also be charged to Neutral Tandem, as they must be recovered from the originating carrier.”¹⁰
- “Level 3 is not entitled to bill Neutral Tandem for termination of traffic on Level 3’s network. Level 3 is obligated to bill the originating network to see payment of any applicable termination fee. The cost of that billing is appropriately borne by Level 3.”¹¹

Notably, the Commission’s Staff has recognized in this case that this Commission’s precedent is consistent with this rule:

Staff notes that the Commission has already established [in the *TDS Telecom Order*¹²] that (1) the originating carrier, not the terminating carrier, chooses how the originating call is routed to the end user; (2) the originating carrier is obligated to compensate the transit provider; (3) the originating carrier is responsible for delivering traffic to the transit provider in such a manner that it can be identified, routed, and billed; and, (4) *the originating carrier*,

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

¹⁰ Case No. U-15230, *In the matter of the complaint and request for emergency relief of Neutral Tandem, Inc. against Level 3 Communications, LLC*, Mich. Pub. Serv. Comm’n, Final Order, at 16 (issued Nov. 26, 2007) (hereinafter the “Michigan Order”).

¹¹ Docket No. P5733/C-07-296 and P5733, 6403/M-07-354, *In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc. Against Level 3 Commc’ns and the Application of Level 3 Commc’ns LLC to Terminate Services to Neutral Tandem, Inc.*, Minn. Pub. Utils. Comm’n, Administrative Law Judge’s Findings of Fact, Conclusions, and Recommendations of Law, at 22 (issued Nov. 7, 2007) (hereinafter the “Minnesota ALJ Order”).

¹² See *In re Joint Petition by TDS Telecom*, Docket Nos. 050119-TP, D050125-TP; Order No. PSC-06-0776-FOF-TP, 2006 Fla. PUC LEXIS 543, at *36-45 (Sept. 18, 2006).

*not the transit provider, should compensate the terminating carrier for terminating traffic to the end user.*¹³

Notably, testimony from Level 3 executives in other states shows that Level 3 has not even attempted to obtain such compensation from originating carriers, even though its own business personnel have testified that Level 3's subsidiary Broadwing does receive such compensation from numerous carriers.¹⁴ As to traffic bound for Broadwing, an award of "interim compensation" would result in Level 3 being compensated twice for the delivery of the same traffic. Staff in other states have even offered publicly to help Level 3 in the event it believes it is having any difficulty obtaining reciprocal compensation payments from originating carriers.¹⁵

Second, Level 3's claim that it is providing "direct interconnection services" to Neutral Tandem is a red herring. (Mot., ¶ 1.) This so-called "service" is nothing more than a restatement of Level 3's legal obligation to terminate traffic that has been initiated by originating carriers' end-users, and is bound for Level 3's end-users. Level 3 already is entitled to receive reciprocal compensation from those originating carriers for complying with this obligation. Notably, Level

¹³ See Dec. 26, 2007 Revised Staff Rec., at 11 (emphasis added). "[A]lthough the *TDS Telecom Order* dealt with an ILEC's transit service", Staff noted that "these obligations are applicable whether transit service is provided by an ILEC or an alternative transit service provider. The Commission found that these obligations are consistent with the 'originating carrier pays' regime currently in place in the industry." *Id.* at 11 n. 5.

¹⁴ For example, Ms. Sara Baack, a Level 3 Senior Vice-President, admitted during an evidentiary hearing in another state that she has "no knowledge of efforts by Level 3 to enter into contracts with parties to receive compensation for transited traffic that those parties originate." Docket No. P5733/C-07-296 and P5733, 6403/M-07-354, *In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc. Against Level 3 Commc'ns and the Application of Level 3 Commc'ns LLC to Terminate Services to Neutral Tandem, Inc.*, Minn. Pub. Utils. Comm'n, Tr. of 07/31/07 Evid. Hrg., at 63. Yet, she was aware of four instances where "Broadwing [Level 3's subsidiary] receives compensation for that traffic from originating carriers." *Id.* at 61.

¹⁵ For example, the Staff of the Illinois Commerce Commission suggested that if Level 3 attempts to collect reciprocal compensation from originating carriers without success, the Commission likely would get "involve[d]." Docket No. 07-0277, *Neutral Tandem. v. Level 3*, Ill. Comm. Comm'n, Tr. of 05/23/07 Hearing, at 489.

3 does not seek or receive payment for this alleged “service” from the incumbent providers of transiting services in Florida, such as AT&T and Verizon.¹⁶ Thus, although Level 3 complains that Neutral Tandem did not acquiesce to Level 3’s unilateral demand for payment in May 2007, the Illinois Commerce Commission correctly observed that the very same Level 3 demand for compensation from Neutral Tandem was “little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT under a different label.”¹⁷

Third, Level 3’s claim that Neutral Tandem is seeking to maintain interconnection with Level 3 “for free” is specious. (Mot., ¶ 13.) As multiple commissions have found following full evidentiary hearings, Neutral Tandem already pays ***100% of the costs*** to deliver transit traffic to Level 3, including all costs associated with the facilities used to deliver that traffic:

- “The evidence of record demonstrates that NT pays 100% of the cost of the facilities of the interconnection, leaving no room for Level 3 to argue that there is any unrecovered or additional cost per minute for transited calls terminated on the Level 3 network.”¹⁸
- “The Commission is not persuaded that direct interconnection has been or will be a significant cost to Level 3[.]”¹⁹
- “Level 3 is not entitled to bill Neutral Tandem for termination of traffic on Level 3’s network...Level 3 has not shown that any differences in the cost of providing a service market conditions, or ILEC pricing practices exist to justify charging a termination fee to Neutral Tandem and not to the [incumbent].”²⁰

By contrast, incumbents such as BellSouth require Level 3 to ***share the cost*** of their interconnection facilities when the incumbent is performing the transiting function.²¹ As such, it

¹⁶ See, e.g., 07/11/07 Wren Pre-Filed Direct Testimony, at 14-15.

¹⁷ See Illinois Order, at 10.

¹⁸ *Id.*

¹⁹ Michigan Order, at 11.

²⁰ Minnesota ALJ Order, at 22-23.

²¹ See, e.g., 07/11/07 Wren Pre-Filed Direct Testimony, at 19.

is false and disingenuous for Level 3 to argue that Neutral Tandem seeks “free” termination. To the contrary, it costs Level 3 less to receive transit traffic from Neutral Tandem than it does for Level 3 to receive the very same traffic from AT&T or Verizon.

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

Adopting Level 3’s position could [] create extra costs for Neutral Tandem’s CLEC customers... The only manner in which competitive tandem transit service will have a market is if the requesting providers have the right to request direct interconnection on a reasonable, non-discriminatory basis.²²

Fifth, Level 3’s suggestion that the Commission could simply adopt what Level 3 claims was the “effective rate owed by Neutral Tandem” under the parties’ prior contract is without merit. (Mot., ¶ 11.) As noted above, none of the parties’ prior contracts has any relevance to this case. The one contract on which Level 3 selectively has relied was a two-way contract under which the interim promotional credits to Level 3 were expressly tied to Level 3’s purchasing of services from Neutral Tandem -- an issue not presented in Neutral Tandem’s Petition. Moreover, as noted above, the parties’ other contracts did not include any such promotional credit. Thus, even if the Commission did find (wrongly) that any of the parties’ prior contracts had any

²² Michigan Order, at 13.

relevance, Level 3 has provided no basis, and no such basis exists, upon which the Commission could incorporate any of the requirements of any of the parties' now-terminated prior contracts into this case.²³

Lastly, as stated herein, Neutral Tandem's position in this case is that no payments are owed from Neutral Tandem to Level 3 in Florida as a condition of continued interconnection. However, even if the Commission ultimately disagrees and orders any such payments, Neutral Tandem is a strong, financially viable public company with substantial cash holdings and other assets.²⁴ Since Neutral Tandem could easily satisfy any payment obligation the Commission might order, there is no need to order "interim compensation" prior to the resolution of Neutral Tandem's Petition on the merits.

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

For all the reasons set forth above, Level 3's request for "interim compensation" is meritless and should be denied. If the Commission nonetheless has some concern about ensuring that any payment obligation would be satisfied, Neutral Tandem is prepared to post a letter of credit or similar guarantee. Although no other commission has ordered Neutral Tandem to make payments to Level 3, in a parallel proceeding between Neutral Tandem and Level 3 in Michigan, Neutral Tandem submitted a letter of credit for \$10,000 as a condition of the commission requiring Level 3 to maintain its connection with Neutral Tandem pending resolution of the

²³ Neutral Tandem does not concede that, even if the contract had any relevance, which it does not, Level 3's Motion accurately characterizes any facets of the contract, including but not limited to what Level 3 incorrectly calls the "effective rate" under the contract.

²⁴ See, e.g., Neutral Tandem's February 5, 2008 Earnings Release.

dispute in that state.²⁵ Level 3 never claimed that a \$10,000 letter of credit was insufficient to provide adequate security in Michigan.

Even though the volume of traffic at issue in Michigan is approximately 60% of the traffic at issue in Florida, Neutral Tandem is prepared to post a substantially larger \$50,000 letter of credit in Florida. As noted above, Level 3 is a multi-billion dollar company, it had no objection to a \$10,000 letter of credit in Michigan, and it has not even attempted to show why or how it needs any “interim” payments prior to the conclusion of this proceeding. Level 3 thus has no basis to assert that a \$50,000 letter of credit is insufficient to provide Level 3 with adequate security in Florida.

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

CONCLUSION

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

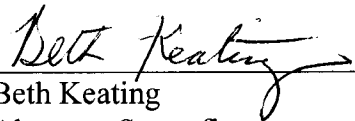
²⁵ Ex. A, Case No. U-15230, *In the matter of the complaint and request for emergency relief of Neutral Tandem, Inc. against Level 3 Communications, LLC*, Mich. Pub. Serv. Comm’n, Order Granting Rehearing on Request for Emergency Relief, at 3 (issued May 22, 2007).

Respectfully submitted,

NEUTRAL TANDEM, INC.

Christopher M. Kise
Foley & Lardner, LLP
106 East College Ave., Suite 900
Tallahassee, FL 32301
(850) 513-3367
ckise@foley.com

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

By: 
Beth Keating
Akerman Senterfitt
106 East College Avenue, Suite 1200
P.O. Box 1877 (32302)
Tallahassee, Florida 32301
(850) 521-8002
beth.keating@akerman.com

*Attorneys for Neutral Tandem, Inc. and
Neutral Tandem-Florida, LLC*

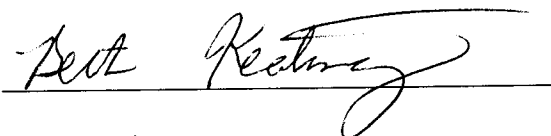
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail First Class and Electronic Mail to Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301 (ken@reuphlaw.com), and that a copy has also been provided to the persons listed below this 8th day of February, 2008:

Gregg Strumberger, Esquire*
Gregory Rogers, Esquire*
Level 3 Communications, Inc.
1025 El Dorado Boulevard
Broomfield, CO 80021
gregg.strumberger@level3.com

Adam Teitzman, Staff Counsel
Florida Public Service Commission,
Office of the General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ateitzma@psc.state.fl.us

Beth Salak, Director/Division of Competitive Markets and Enforcement
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
bsalak@psc.state.fl.us

By: 

Beth Keating
Akerman Senterfitt
106 East College Avenue, Suite 1200
P.O. Box 1877 (32302)
Tallahassee, Florida 32301
(850) 521-8002
Fax: (850) 222-0103
beth.keating@akerman.com

EXHIBIT A

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint and request for)
emergency relief of NEUTRAL TANDEM, INC.,)
against LEVEL 3 COMMUNICATIONS, LLC.)
_____)

Case No. U-15230

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

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

ORDER GRANTING REHEARING

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

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

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

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

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

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

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

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

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

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*
- b. The motion for rehearing should be granted.

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

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

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

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Laura Chappelle
Commissioner

/s/ Monica Martinez
Commissioner

By its action of May 22, 2007.

/s/ Mary Jo Kunkle
Its Executive Secretary