

Ruth Nettles

From: Keating, Beth [beth.keating@akerman.com]
Sent: Friday, October 05, 2007 4:47 PM
To: Filings@psc.state.fl.us
Attachments: 20071005172236924.pdf

Attached for filing in the referenced Docket, please find Neutral Tandem's Supplemental Brief addressing Issues 1 - 3a. Thank you for your assistance, and please do not hesitate to let me know if you have any questions.

Sincerely,

Beth Keating
Akerman Senterfitt
(850) 224-9634
(850) 521-8002 (direct)
beth.keating@akerman.com

A.
Beth Keating
Akerman Senterfitt
106 East College Ave., Suite 1200
Tallahassee, FL 32301
(850) 224-9634
(850) 521-8002 (direct)
(850) 222-0103 (fax)
beth.keating@akerman.com

b. 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

C. On behalf of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC

D. Number of Pages: Total with attachment - 26

E: Supplemental Brief on Issue 1 - 3a



www.akerman.com | Bio | V Card

CONFIDENTIALITY NOTE: The information contained in this transmission may be privileged and confidential information, and is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this transmission in error, please immediately reply to the sender that you have received this communication in error and then delete it. Thank you.

CIRCULAR 230 NOTICE: To comply with U.S. Treasury Department and IRS regulations, we are required to advise you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail, including attachments to this e-mail, is not intended or written to be used, and cannot be used, by any person for the purpose of (i) avoiding penalties under the U.S. Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this e-mail or attachment.

DOCUMENT NUMBER-DATE

09169 OCT-5 8

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*

October 5, 2007

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 Supplemental Brief addressing Issues 1 – 3a.

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

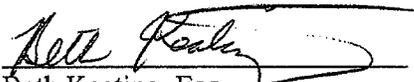
Sincerely,



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

Enclosures

Respectfully submitted,

By: 
Beth Keating, Esq.

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

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

Attorney for Neutral Tandem, Inc.

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

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 5th day of October, 2007:

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

**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: October 5, 2007
with Level 3 Communications and Request)	
for Expedited Resolution)	

**NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-FLORIDA, LLC'S
SUPPLEMENTAL BRIEF REGARDING ISSUES 1-3a
ON THE PROPOSED ISSUES LIST**

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

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

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

Dated: October 5, 2007

Pursuant to the September 21, 2007 Order Allowing Supplemental Briefs, petitioner Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC (hereinafter “Neutral Tandem”) respectfully submits its supplemental brief addressing Issues 1-3a on the Proposed Issues List.

INTRODUCTION

Issues 1-3a are: (1) whether, and upon what basis, the Commission has jurisdiction over Neutral Tandem’s Petition; (2) whether Neutral Tandem has standing to seek relief under Sections 364.16 and 364.162, Florida Statutes; and (3) whether the Commission can require direct interconnection between Level 3 and Neutral Tandem, for the purpose of terminating transit traffic from originating carriers, delivered by Neutral Tandem to Level 3. These issues already have been briefed at length by the parties. Thus, rather than repeat arguments already made, this supplemental brief will focus on two points pertinent to Issues 2 and 3a:

First, a finding that Neutral Tandem lacks standing to bring this action would be contrary to Florida law. As discussed in prior briefs, Neutral Tandem respectfully believes it has standing to bring this action under the plain language of Section 364.16, Florida Statutes, because Neutral Tandem is a “provider of local exchange telecommunications services” under Florida law. Further, even if the Commission finds that Neutral Tandem does not have standing on its own, Neutral Tandem plainly has standing to bring this action on behalf of the originating carriers that use Neutral Tandem’s services. It is well-established under Florida law that where a plaintiff brings an action on behalf of another party, its complaint cannot be dismissed on the ground that the plaintiff lacks standing. It cannot be the case, and it is not the case, that Neutral Tandem lacks standing under Florida law to bring this action.

Second, to the extent the Commission finds it appropriate to consider events in other states, it will see that the concerns Neutral Tandem has raised regarding the impact of Level 3’s

anticompetitive conduct on the development of local telecommunications competition in Florida, and on the PSTN in general, have been borne out in other states.

ARGUMENT

I. **A Finding that Neutral Tandem Lacks Standing to Bring This Action Would be Contrary to Florida Law.**

Neutral Tandem's prior briefs explained at length that Neutral Tandem has direct standing to bring this action, for two reasons. First, Section 364.16 directly confers Neutral Tandem, as a "provider of local exchange telecommunications services," with standing to bring this action. Second, Neutral Tandem also has standing because it will suffer direct injury unless it is allowed to seek relief, and the injury Neutral Tandem will suffer is of the type the statute was intended to address. (NT's Resp., at 24-36.)

In addition to having standing on its own, Neutral Tandem also has authority to act as an agent for originating carriers in negotiating and reaching traffic termination arrangements, as demonstrated through Letters of Agency ("LOAs") signed by several customers. The LOAs give Neutral Tandem explicit authority to act on those customers' behalf "for the purpose of making arrangements for the termination of transit traffic routed through Neutral Tandem to other carriers," including "all matters pertaining to the traffic exchange agreement." (*Id.*, at 29-30.)

In light of the LOAs granted to Neutral Tandem by its carrier customers, Florida law compels the conclusion that Neutral Tandem has standing to bring this action on behalf of its customers, even if the Commission finds that Neutral Tandem cannot bring this action on its own behalf. It is black-letter Florida law that "where a plaintiff is either the real party in interest or is maintaining the action on behalf of the real party in interest, *its action cannot be terminated on the ground that it lacks standing.*" *Kumar Corp. v. Nopal Lines, LTD.*, 462 So.2d 1178, 1183 (Fla. 3d DCA 1985) (emphasis supplied); *see also Rauch, Weaver, Millsaps, Bigelow & Co. v.*

Central Bank & Trust Co., 453 So.2d 459, 460-61 (Fla. 4th DCA 1984). At a minimum, Neutral Tandem either has standing to bring this action on its own behalf, or it has standing to bring this action on behalf of its customers. In order to grant Level 3's motion to dismiss, the Commission would have to find that Neutral Tandem lacks standing under both theories as a matter of law. There is no basis for the Commission to make such a finding, and there is no basis in Florida law to conclude that Neutral Tandem lacks standing to bring this action.

Level 3 has argued that Neutral Tandem is not a "telecommunications company" as that term is defined in Section 364.02, Florida Statutes, because Neutral Tandem only provides services to other certificated telecommunications carriers. That claim is both incorrect and irrelevant. Level 3's claim is incorrect because Neutral Tandem does not provide services only to other certificated telecommunications carriers.¹ More importantly, Level 3's claim is irrelevant because, even if Neutral Tandem were not a "telecommunications company" under Florida law (which it is), Neutral Tandem is a "provider of local exchange telecommunications services" under Section 364.16(2). The Florida Legislature specifically extended the reach of Section 364.16(2) to all "providers of local exchange telecommunications services." It did not limit the statute's reach to "telecommunications companies," or for that matter, only to providers of "basic local telecommunications services."

II. The Concerns Neutral Tandem has Raised Regarding Level 3's Anticompetitive Conduct Have Been Borne Out in Several Other States.

In a recent supplemental submission, Level 3 attached motions Neutral Tandem filed in other states, and accused Neutral Tandem of making claims of irreparable harm before this Commission that "have always been false." (8/10/07 Notice, at 2.) The Commission should

¹ Neutral Tandem provides service to non-certificated enterprise customers in Florida as well. (NT's Resp., at 29.) Neutral Tandem also maintains tariffs on file with the Commission, pursuant to which any entity can purchase Neutral Tandem's services, and Neutral Tandem pays Regulatory Assessment Fees on the revenues derived from telecommunications services provided in Florida. (*Id.*, at 27-28.)

look past these erroneous claims to the underlying facts of those cases. Contrary to Level 3's assertions, experiences in other states reinforce the concerns Neutral Tandem has raised regarding Level 3's anticompetitive conduct.

First, it is critical to recall that before Neutral Tandem filed this Petition and similar petitions around the country, Level 3 had made clear that it intended to unilaterally disconnect the parties' interconnections on March 23, 2007. (See, e.g., NT's Pet., Exs. 2, 4.) Without a doubt, the unilateral disconnection absolutely would have caused severe and irreparable harm to Neutral Tandem's business. It was only after Neutral Tandem filed petitions in Florida and several other states that Level 3 opted not to unilaterally disconnect the parties' interconnections.

Second, the fact that Neutral Tandem was forced to stop delivering traffic to Level 3 in some states simply reinforces the anticompetitive impact of Level 3's actions. As a small company, Neutral Tandem could not fight Level 3's anticompetitive conduct in each of the 15 states where the parties exchange traffic. As a result, Neutral Tandem was forced to re-route traffic in certain smaller states where it only delivers a few million minutes of traffic per month to Level 3, so that Neutral Tandem could continue to fight in larger states like Florida, where Neutral Tandem delivers more than 65 million minutes of traffic per month to Level 3.

In a recent evidentiary hearing before an ALJ of the Michigan Public Service Commission, Neutral Tandem's Chief Operating Officer testified that Neutral Tandem's customers in the states where Neutral Tandem has been forced to migrate traffic have been harmed in several ways because of the loss of Neutral Tandem's services. They have been harmed as a result of significantly increased transiting costs, as well as through the loss of their preferred manner of routing their originating traffic to Level 3. (Ex. 1, at 355.) They also have been harmed as a result of having less diverse and reliable network routing of their customers'

traffic. (*Id.*) This is the result Neutral Tandem has been able to avoid in each of the states where it has been able to fight Level 3's anticompetitive actions thus far.²

Third, as Neutral Tandem has pointed out, state commissions in Illinois, Georgia, and New York uniformly have found in Neutral Tandem's favor. These commissions not only have recognized the benefits Neutral Tandem's services bring to local telecommunications competition in their states, but also the benefits Neutral Tandem's alternative transit services bring to the PSTN as a whole, and the harm that would result if Level 3's anti-competitive actions were allowed to go unchecked. (*See* NT's Resp., at 11-13.) Indeed, the Illinois Commission has held that Level 3's conduct constituted an attempt to "knowingly impede the development of competition" in that state. (*Id.*, at 35.) In addition to these commissions, the Minnesota Department of Commerce and the Staff of the Michigan Public Service Commission also have recommended that Neutral Tandem's similar petitions in those states be granted. To the extent the Commission finds consideration of matters in other states useful, those proceedings overwhelmingly support allowing this case to proceed on the merits in Florida.³

² Notably, the testimony of Neutral Tandem's Chief Operating Officer in Michigan also shows that Neutral Tandem's ability to re-route a small amount of traffic in each of those states has no bearing on the massive and disruptive effort that would be required to migrate the 65 million minutes of traffic Neutral Tandem sends to Level 3 each month in Florida. (*Exhibit 1* at 409.) Neutral Tandem's experience in attempting to re-route just a few million minutes of traffic in each of those smaller states reinforced his view that it could take six months to re-route the 30 million minutes of traffic Neutral Tandem delivers to Level 3 each month in Michigan. (*Id.*) Neutral Tandem delivers more than twice the traffic to Level 3 each month in Florida than it does in Michigan. Thus, a re-routing effort in Florida not only would be disruptive to Neutral Tandem's operations, it would be disruptive to the operations of Neutral Tandem's carrier customers, and possibly the operations of affected ILECs, as well.

³ Level 3 may try to claim that a recent staff recommendation in Maryland regarding a proceeding relating to certain changes to Neutral Tandem's tariffs in that state somehow supports Level 3's position. Any such argument would be utterly misplaced, as the legal and policy issues presented in this case and Neutral Tandem's similar cases around the country were not part of the tariff proceeding in Maryland.

EXHIBIT 1

1 STATE OF MICHIGAN
2 BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION
3 In the matter of the complaint
and application for emergency
4 relief by Neutral Tandem, Inc. Case No. U-15230
for interconnection with Level 3
5 Communications. Volume 5

6 CROSS-EXAMINATION

7 Proceedings held in the above-entitled matter
8 before Sharon L. Feldman, J.D., Administrative Law
9 Judge with SOAHR, at the Michigan Public Service
10 Commission, 6545 Mercantile Way, Room C, Lansing,
11 Michigan, on Thursday, August 9, 2007, at 9:00 a.m.
12

13 APPEARANCES:

14 MICHAEL S. ASHTON, ESQ.
Fraser, Trebilcock, Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
15 Lansing, Michigan 48933

16 -and-

17 JOHN R. HARRINGTON, ESQ.
MATT BASIL, ESQ.
18 Jenner & Block, LLP
One IBM Plaza
19 Chicago, Illinois 60611-7603

20 On behalf of Neutral Tandem, Inc.
21
22
23
24

25 (Continued)

- 1 A That's correct.
- 2 Q And those states would be Maryland, Indiana,
3 Massachusetts, New Jersey, Wisconsin and Ohio, correct?
- 4 A Yeah, I think so. Those seem to be right.
- 5 MR. KELLY: Your Honor, if I may have
6 this document marked as Exhibit R-5.
- 7 JUDGE FELDMAN: Yes.
- 8 (Document marked for identification as Exhibit No.
9 R-5.)
- 10 Q (By Mr. Kelly): Dr. Saboo, let me show you what's been
11 marked as Exhibit R-5; and this is a copy of the
12 affidavit that you submitted to the Wisconsin Public
13 Service Commission, correct?
- 14 A Yes.
- 15 Q Now, here you say in paragraph 3 that as of August 3rd,
16 2007, Neutral Tandem no longer delivers tandem transit
17 traffic to Level 3 in Wisconsin through the parties'
18 existing direct interconnections. Do you see that?
- 19 A Yes.
- 20 Q When did Neutral Tandem decide it would no longer deliver
21 tandem transit traffic to Level 3 in Wisconsin?
- 22 A That's seven months ago.
- 23 Q When did Level 3 -- when did Neutral Tandem stop
24 delivering traffic to Level 3 in Wisconsin?
- 25 A As of August 3rd.
- Metro Court Reporters, Inc. 248.426.9530

- 1 Q Did Neutral Tandem provide notice to its customers in
2 Wisconsin that it would no longer be delivering traffic
3 to Level 3 in Wisconsin?
- 4 A Well, we worked with our customers, if that's considered
5 notice. We worked with our customers up to --
- 6 Q When did you provide notice to the customers? I'm sorry.
- 7 JUDGE FELDMAN: Mr. Kelly, please don't
8 cut the witness off while he's speaking.
- 9 Had you finished?
- 10 A Yes.
- 11 JUDGE FELDMAN: O.K.
- 12 Q (By Mr. Kelly): O.K. I'm sorry. When did you provide
13 notice to your customers?
- 14 A Again, I don't know about notice, but it was several
15 weeks ago.
- 16 Q So in July?
- 17 A I don't know the exact date when we got started with
18 letting customers know that they need to start to reroute
19 traffic.
- 20 Q Did you advise customers that in Wisconsin, Level 3
21 telephone numbers would, that calls could no longer be
22 delivered to Level 3's telephone numbers?
- 23 A Yes. We had to give them Level 3's codes.
- 24 Q The NPA-NXX's?
- 25 A That's correct.

- 1 Q NPA-NXX's. You sent them an e-mail telling them that
2 Level 3's NPA-NXX's would no longer be routed or
3 transitted by Neutral Tandem in Wisconsin?
- 4 A I don't exactly know the logistics, but it's probably an
5 e-mail with a phone call as well with the specifics of
6 the NPA-NXX's.
- 7 Q And the customers rerouted their traffic?
- 8 A Actually, yes, some of them have completed, some of them
9 haven't completed rerouting the traffic.
- 10 Q So the calls that, for those companies that have not
11 rerouted traffic -- strike that.
- 12 When you say rerouted traffic, you mean
13 that they are no longer delivering calls destined to
14 Level 3, they are no longer delivering those calls to
15 Neutral Tandem for transit, correct?
- 16 A Yes. Some portions of -- they haven't completed entirely
17 moving the traffic.
- 18 Q O.K. When they are moving the traffic, though, you're
19 talking about how they are finding another route to
20 deliver traffic destined to Level 3, perhaps the ILEC?
- 21 A Yes.
- 22 Q For those calls that have not been rerouted, how are
23 those calls being delivered to Level 3, if at all?
- 24 A We are using our connections with the LEC to transport
25 that call through the ILEC tandem to give time for our
Metro Court Reporters, Inc. 248.426.9530

1 customers to complete the rerouting.

2 Q Did you solicit from your originating carriers their
3 consent to no longer deliver traffic directly through
4 Level 3?

5 MR. HARRINGTON: Objection. Vague, your
6 Honor.

7 JUDGE FELDMAN: If the witness
8 understands the question, I'll allow him to answer it.

9 A I'm not sure what you mean by solicit, but, you know, we
10 worked with them and gave them Level 3's codes and asked
11 them to not route those calls to us and to start finding
12 other ways; and as I said, some of them have done some
13 amount of the work and some of them have not, and for
14 those that have not, we are tandeming through the ILEC
15 tandem.

16 Q (By Mr. Kelly): Did you ask them permission to do that?

17 A Well, they have to do a lot of the work, so I'm not sure
18 the permission aspect of it, but we work with them
19 because they have to do the work in terms of rerouting.

20 Q Did Neutral Tandem inform Level 3 that it would be
21 advising, that Neutral Tandem would be advising its
22 customers that calls would no longer be delivered to
23 Level 3 through the direct interconnection arrangement in
24 Wisconsin?

25 A No, we did not. But we had testimony from Level 3 that
Metro Court Reporters, Inc. 248.426.9530

1 they had capacity already augmented with a LEC before we
2 did this.

3 Q Are originating carriers being harmed in Wisconsin by
4 Neutral Tandem's election to no longer deliver traffic to
5 Level 3 through the direct interconnection?

6 A Let me just answer by saying that, are the originating
7 carriers' costs going up and they're getting harmed
8 because of lesser, less reliability; yes, they are having
9 to pay more to go through the ILEC tandem, and it's in
10 some sense not a free election to go to that, it's
11 because of the petitions that Level 3 put in place in
12 these states to disconnect and force us to incur
13 additional costs. So from a cost benefit analysis, for
14 the amount of traffic it was, we had no other choice, we
15 were left with no other choice other than to ask our
16 customers to do that. And other than fighting these
17 cases and incurring legal costs that are very high, we
18 had to ask our customers to do that.

19 Q And you say this decision to do that was made seven
20 months ago?

21 MR. HARRINGTON: Objection, your Honor.

22 A I said several.

23 MR. HARRINGTON: He said several.

24 MR. KELLY: I'm sorry.

25 MR. HARRINGTON: You misstated his

1 testimony. Dr. Saboo testified several months ago, not
2 seven.

3 JUDGE FELDMAN: And that's correct,
4 Dr. Saboo?

5 A Yes.

6 JUDGE FELDMAN: Thank you for the
7 clarification.

8 MR. KELLY: O.K. I apologize.

9 Q (By Mr. Kelly): When you say several months ago, when
10 was the decision made to do that in Wisconsin?

11 A We looked at all those states, six states or so that you
12 mentioned as a group, and those are the states that we
13 did not file in, they were the smaller states for us in
14 terms of traffic; and so the intent was if Level 3 was
15 going to push those cases, which Level 3 did, then, you
16 know, we'd, through the -- so we've been -- we did not
17 petition in these states with the plan that if we were
18 required to, this amount of traffic was small enough, or
19 if we were required to or forced to, then we would have
20 to do that, so.

21 Q So the decision to terminate the exchange of traffic with
22 Level 3 in Wisconsin was made before Level 3 actually
23 filed the petition in Wisconsin, correct?

24 A Well, that was what triggered it. We had not filed in
25 Wisconsin ourselves, like we have done here in Michigan,

1 because of there's a lot of more traffic here, but we had
2 not done it; and then when, I believe when Level 3
3 finally filed their petition to disconnect in Wisconsin
4 is when it became more of an active issue for us.

5 MR. KELLY: Excuse me a second, your
6 Honor. Your Honor, could I just have a second? I have
7 other -- let me just tell you why. I have other
8 affidavits. I would prefer to just go through all of
9 them sort of as a single set, given his answers with
10 respect to Wisconsin, rather than go through each of the
11 individual states and ask the same questions. So what
12 I'd like to do is aggregate my exhibits.

13 JUDGE FELDMAN: Let's go off the record
14 so that you have an opportunity to get your exhibits
15 marked.

16 (At 10:05 a.m., there was a brief in-place recess.)

17 (Document marked by the court reporter as Exhibit
18 No. R-6.)

19 (Document was marked for identification by the Court
20 Reporter as Exhibit No. R-7.)

21 JUDGE FELDMAN: Anytime you're ready,
22 Mr. Kelly.

23 Q (By Mr. Kelly): Dr. Saboo, let me direct your attention,
24 if you would please, to what's been handed to you and
25 marked by the court reporter as Exhibit No. R-6.

 Metro Court Reporters, Inc. 248.426.9530

1 A Yes.

2 Q Let me ask you: These are the affidavits that you had
3 signed for submission to the Indiana, Ohio, Maryland, New
4 Jersey, and Massachusetts commissions?

5 A Yes.

6 Q Let me just for brevity sort of go through the same
7 questions I just asked you with respect to Wisconsin.
8 Your answers may be the same based on your prior
9 testimony, but just so that the record is clear.

10 For each of these states did you decide
11 several months ago that you would terminate the exchange
12 of traffic with Level 3 in those states?

13 A Each of these states, I wouldn't say we decided. We held
14 off on petitioning in these states in case -- because of
15 the low amount of traffic, and if we were forced to do
16 this, then we would take the traffic off.

17 Q When you say there was a low amount of traffic, did you
18 do a cost benefit analysis and say or discuss with people
19 at Neutral Tandem that it wasn't worth the cost to
20 maintain the direct interconnection given the amount of
21 traffic with Level 3?

22 MR. HARRINGTON: I'll object to the
23 extent it would require Mr. Saboo to divulge
24 attorney-client privilege. If Mr. Kelly is limiting the
25 question to non-privileged communications, I have no

Metro Court Reporters, Inc. 248.426.9530

1 objection.

2 MR. KELLY: I would not ask him to
3 disclose the subject of attorney-client privileged
4 communications.

5 JUDGE FELDMAN: Thank you.

6 MR. HARRINGTON: Just for clarification
7 I'm not sure Mr. Saboo -- Dr. Saboo, if your Honor could
8 instruct him that he can only answer that question if he
9 is aware of nonprivileged communication. I think that
10 there may be some confusion on Dr. Saboo's part about
11 what he can and can't answer.

12 JUDGE FELDMAN: Do you understand the
13 question? And do you understand the point about you are
14 not being required to answer with regard to privileged
15 attorney-client communications?

16 A Yes. Well, the answer to Mr. Kelly's question would
17 require me to divulge information that I have only under
18 attorney-client privilege, with my internal counsel.

19 MR. KELLY: Then I'll withdraw the
20 question.

21 JUDGE FELDMAN: Thank you.

22 Q (By Mr. Kelly): Neutral Tandem informed its customers
23 several weeks ago in each of these states that calls
24 could no longer be routed to Level 3 via a direct
25 physical interconnection between Neutral Tandem and Level
Metro Court Reporters, Inc. 248.426.9530

1 3, correct?

2 A We gave them certain codes and asked them to not route
3 traffic to us, and those certain codes were Level 3
4 codes. I'm trying to answer the question but -- so the
5 way we communicated with them was: Here are the codes
6 that we don't want you to send traffic to us.

7 Q Is it -- just to be clear, I mean you did not identify
8 those codes as particular Level 3 codes; is that true?

9 MR. HARRINGTON: Judge, respectfully,
10 Mr. Kelly has spent a fair amount of time now questioning
11 Dr. Saboo about items in other states, I understand that
12 perhaps there would be some tangential relevance to that
13 in other states, but I think we have gone quite a bit of
14 a way down this line of questioning. I would object to
15 further questions about Neutral Tandem's actions in other
16 states.

17 JUDGE FELDMAN: I'm going to allow
18 Mr. Kelly to continue, but you are free to renew your
19 objections subsequently.

20 MR. HARRINGTON: Thank you, Judge.

21 A What is the question again?

22 Q (By Mr. Kelly): Just to be clear, and I'm just trying to
23 get the record clear -- did you tell the customers that
24 these were Level 3 NPA-NXX's or did you just say: Don't
25 deliver calls destined to these NPA-NXX's to Neutral

1 Tandem?

2 A I think just the NPA-NXX's. We don't mention it, that
3 it's Level 3. It's just -- we just -- it's just these
4 NPA-NXX's.

5 Q Is it true in each of these other states that originating
6 carriers are both routing calls through some other means
7 and also still continuing to route calls to Neutral
8 Tandem for calls that are destined to Level 3?

9 A Yes. I mean -- as I said, they are partially completed
10 moves, so they are partially terminating through the ILEC
11 and still continue to terminate through us. But we are
12 rerouting through the ILEC. So I just want to be clear
13 that we are not routing to Level 3, but they are sending
14 traffic to us that is designated to Level 3 still.

15 Q And when that happens in each of these states, you are
16 rerouting or routing calls through the ILEC so that the
17 ILEC would deliver that call to Level 3?

18 A That's correct.

19 Q How long did it take Neutral Tandem in each of these
20 states to reconfigure its switches so that traffic would
21 not be delivered to Level 3 over the interconnection
22 facilities connecting Neutral Tandem to Level 3?

23 A For Neutral Tandem itself? For us?

24 Q Yes, to reconfigure its switches so that traffic would no
25 longer be delivered over the interconnection trunks

- 1 between Neutral Tandem and Level 3?
- 2 A As I mentioned before, we have -- we already have our
3 switches programmed for emergency situations to, on a
4 realtime basis, to direct traffic to the ILEC if the
5 trunk group is disconnected. So that programming is
6 already in our switches to handle emergency situations,
7 so we utilize that same program.
- 8 Q Did Neutral Tandem disconnect the interconnection
9 facilities, connecting the Neutral Tandem switch to Level
10 3 switch in each of these six states?
- 11 A No, we have not disconnected.
- 12 Q What did you do to route traffic destined to the Level 3
13 NPA-NXX's so that the calls would be routed to the ILEC
14 tandem rather than over those interconnection trunks?
- 15 A Well, we have to instruct the switch to -- in its routing
16 logic -- to not use the existing interconnection that we
17 have with Level 3 that is still up, to use that as part
18 of the routing logic, as the first route. And to
19 instruct the switches not to do that and go to the next
20 route that will route it to the LEC.
- 21 Q And how long did it take you to perform the functions
22 necessary to so instruct the switch?
- 23 A I personally don't know, but it's been done over the same
24 timeframe that we had talked to our customers, so I don't
25 exactly know how long it took.

- 1 A Sure. O.K.
- 2 Q Now, you described earlier a situation where in several
3 states you were going to, or Neutral Tandem was going to
4 receive traffic from its originating customers, route the
5 call through the ILEC for delivery to Level 3, right?
- 6 A Yes, to give them time to finish their routing.
- 7 Q O.K. Now, in those circumstances, does Neutral Tandem
8 charge its customers the same amount that it would charge
9 if the traffic was delivered directly to Level 3 without
10 routing it through the ILEC tandem?
- 11 A Yes. I mean we lose money on those calls because you
12 generally lose money on those calls; but yes, we continue
13 to charge the customers the same amount.
- 14 Q And you say you lose money because?
- 15 A We generally discount, typically we discount our services
16 over the ILEC, so the ILEC would charge us their full
17 rate, and we would only be able to charge our customers
18 our discounted rate, so we lose money on every call that
19 we complete through the ILEC. I wanted to finish my
20 sentence.
- 21 Q Now directing your attention to Exhibit No. R-8, Section
22 6.2.
- 23 A Can you point me to the page?
- 24 Q And it's actually page 41 of the document. If you look
25 at the bottom, there are page numbers. I'm sorry. Not
- Metro Court Reporters, Inc. 248.426.9530

1 opinion?

2 A Absolutely.

3 Q And just so the record is clear, how long have you been
4 engineering telecommunications networks?

5 A All my life, 20 plus, or all my professional life, 20
6 plus years.

7 Q O.K. Thank you.

8 A I'm not 20 years old.

9 Q I'm going to move on from that, Dr. Saboo, and refer you
10 now to some questions that Mr. Kelly asked you regarding
11 some affidavits that you submitted in some other states,
12 I believe Wisconsin --

13 A Yes.

14 Q -- Indiana, and a few others.

15 A Yes.

16 Q And you recall that he asked you some questions regarding
17 the traffic migration activities that had to occur in
18 those states?

19 A That's correct.

20 Q Do you have a general understanding of the volume of
21 traffic that Neutral Tandem delivers to Level 3 in those
22 states relative to how much it delivers in Michigan?

23 A Yes.

24 Q What is your understanding?

25 A Significantly lower. We deliver 30 million minutes a
Metro Court Reporters, Inc. 248.426.9530

1 month to Level 3 in Michigan, and almost every state, the
2 six states are significantly less than what we deliver in
3 Michigan.

4 Q O.K. And would that traffic disparity help inform your
5 understanding regarding the steps that need to be taken
6 to perform the kind of migration that had to be
7 undertaken?

8 A As a matter of fact, the current experience itself is,
9 you know, it's been several weeks, as I mentioned, and
10 it's not done yet in smaller states like Wisconsin, so
11 that even gives me even more assurance that it will take
12 six months if we do this in Michigan. So --

13 Q I'm sorry. Go ahead.

14 A Because of the, one, the large amount of traffic, the 30
15 million minutes as opposed to the smaller, the other
16 states, as well as just the number of carriers and
17 customers that we have in Michigan.

18 Q Thank you, Dr. Saboo. Let me direct your attention very
19 briefly to Exhibit R-7, which was the e-mail that we had
20 some colloquy with the judge about from Mr. Emberson.

21 A O.K.

22 Q And can you let me know when you have that in front of
23 you?

24 A Yes.

25 Q And you recall that Mr. Kelly asked you some questions I