

Dorothy Menasco

From: Keating, Beth [beth.keating@akerman.com]
Sent: Tuesday, October 16, 2007 1:52 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 070408
Attachments: 20071016143937175.pdf

Attached for filing in the referenced Docket, please find Neutral Tandem's Notice of Additional Supplemental Authority. 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 - 39

E: Notice of Additional Supplemental Authority



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

October 16, 2007

VIA ELECTRONIC FILING

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

Re: 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 on behalf of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC, please find Neutral Tandem's Notice of Filing Additional Supplemental Authority.

Your assistance in this matter is greatly appreciated, and if you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Beth Keating", written over a horizontal line.

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

{TL138746;1}Enclosures

DOCUMENT NUMBER-DATE
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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|--|----------------------------|---|
| In re: Petition of Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for Resolution of Interconnection Dispute with Level 3 Communications and Request for Expedited Resolution |)))))) | Docket No. 070408-TP Filed: October 16, 2007 |
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**NEUTRAL TANDEM INC.'S NOTICE OF FILING
ADDITIONAL SUPPLEMENTAL AUTHORITY**

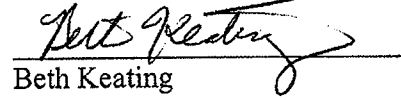
Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC ("Neutral Tandem"), by and through its undersigned counsel, hereby files the following as supplemental authority:

A copy of the Proposal for Decision by a Michigan Administrative Law Judge in Case Number U-15230: **In the matter of the Complaint and Action for Emergency Relief by Neutral Tandem, Inc. for Interconnection with Level 3 Communications.** This Proposal for Decision, which was issued October 8, 2007, is subject to approval by the Michigan Public Service Commission, and is provided in further support of Neutral Tandem's position set forth in these proceedings.

Respectfully submitted,

NEUTRAL TANDEM, INC.

By:



Beth Keating
Thomas A. Range
Akerman Senterfitt
106 East College Avenue, Suite 1200
Tallahassee, Florida 32301
(850) 521-8002
beth.keating@akerman.com

Attorneys for Neutral Tandem, Inc

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

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


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 October 16, 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
Tel : (850) 521-8002
Fax: (850) 222-0103
beth.keating@akerman.com

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Complaint and)
Action for Emergency Relief by **Neutral**)
Tandem, Inc. for Interconnection with)
Level 3 Communications.)
_____)

Case No. U-15230

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on October 8, 2007.

Exceptions, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on all other parties of record on or before October 19, 2007, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before October 29, 2007. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing of exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for

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Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

Sharon L.
Feldman

Digitally signed by Sharon L.
Feldman
DN: cn=Sharon L. Feldman, c=US,
email=sfeldm@michigan.gov
Date: 2007.10.08 13:15:18 -04'00'

Sharon L. Feldman
Administrative Law Judge

October 8, 2007
Lansing, Michigan
dmp

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Complaint and)
Action for Emergency Relief by **Neutral**)
Tandem, Inc. for Interconnection with)
Level 3 Communications.)
_____)

Case No. U-15230

PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

This case involves a dispute between two Competitive Local Exchange Carriers (CLECs), Neutral Tandem, Inc. (Neutral Tandem) and Level 3 Communications (Level 3). Neutral Tandem initiated the case by filing a complaint on March 1, 2007 seeking emergency relief to prevent Level 3 from terminating the direct or physical interconnection between the two companies. Neutral Tandem, while licensed as a CLEC, does not provide basic local exchange service to end users, but provides "tandem transit" service, transiting local traffic from its originating carrier customers to the various terminating carriers it interconnects with. In Michigan, Neutral Tandem primarily provides tandem transit service in the Detroit area. At least until recently, Neutral Tandem both transited traffic from Level 3 and transited traffic to Level 3 in Michigan pursuant to various contracts. Neutral Tandem's direct interconnection with Level 3 and its subsidiary Broadwing Communications (Broadwing) were established pursuant to two of these contracts, which Level 3 terminated in early 2007.

Neutral Tandem's complaint alleges that Level 3's negotiating positions and its decision to terminate the direct interconnection with Neutral Tandem violate provisions of the Michigan Telecommunications Act (MTA),¹ in particular sections 305 (a) and (b), and that remedies are available to Neutral Tandem under sections 203, 204 and 205.²

In its March 21, 2007 order, the Commission denied Neutral Tandem's request for emergency relief based on representations by Level 3 that it would not terminate interconnection with Neutral Tandem before June 25, 2007, and directed the parties to pursue alternative dispute resolution. In accordance with the Commission's March 21, 2007 order and by an April 11, 2007, memorandum from Administrative Law Judge James N. Rigas, a mediator was appointed for alternative dispute resolution pursuant to section 203a of the MTA.

While the parties were pursuing alternative dispute resolution, on April 19, 2007, Neutral Tandem filed a motion asking me to determine the form and adequate security required to satisfy section 203(13) of the MTA, which I denied by letter dated April 24, 2007. On April 20, 2007, Neutral Tandem sought rehearing of the Commission's March 21, 2007 order, also requesting that the Commission determine the amount and form of security pursuant to section 203(13). In its May 22, 2007 order, the Commission granted rehearing and found that a letter of credit in an amount not less than \$10,000 would be adequate security. On June 22, 2007, Neutral Tandem posted a letter of credit in this form. The parties agree that on this basis, Neutral Tandem continues to transit traffic to Level 3 while this proceeding is pending.

¹ MCL 484.2101 *et seq.*; various sections of the MTA are discussed throughout without further formal citation.

² See Neutral Tandem Complaint, paragraphs 8-10; note that Neutral Tandem's complaint also cites section 359, but it does not address section 359 in its briefs.

A mediator's recommended settlement was filed under seal in this docket on May 21, 2007, and the parties' confidential responses were filed under seal on May 23, 2007 (Neutral Tandem) and May 29, 2007 (Level 3).³ By letter of May 30, 2007, the parties were advised that the prehearing conference would take place as previously scheduled on June 6, 2007. Just prior to the prehearing conference, on May 25, 2007, Level 3 filed an emergency motion for a cease and desist order, seeking to stop Neutral Tandem from distributing the mediator's recommended settlement to commissions in other states. Neutral Tandem filed a response on May 30, 2007.

At the prehearing conference, I heard argument on and ultimately denied Level 3's motion.⁴ Also at the prehearing, a schedule was set that the parties agreed would permit this matter to be decided within the statutory timeframe. *Pro hac vice* motions were granted for attorneys John R. Harrington, Matt Basel, and Henry T. Kelly.

Pursuant to the schedule established at the prehearing conference, on June 8, 2007, Neutral Tandem filed its motion to file supplemental testimony, and on June 12, 2007, Level 3 filed its opposition. A hearing was held and a ruling issued granting the motion in part and denying the motion in part on June 15, 2007. Subsequently, Neutral Tandem filed its supplemental testimony, Level 3 filed its testimony, and Neutral Tandem filed rebuttal testimony in accordance with the established schedule. On July 24, 2007, hearings were held on Neutral Tandem and Level 3 motions to compel discovery. Motions to strike the testimony of each of the witnesses were heard on

³ I have not reviewed either the mediator's recommended settlement or the parties' responses, although as discussed below, an issue arose regarding Neutral Tandem's disclose of the recommended settlement to agencies in other states.

⁴ As reflected in the transcript, I concluded as presiding officer I lacked authority to grant the requested relief, but cautioned Neutral Tandem that disclosure to other commissions could result in disclose to the Commission. See Tr 6-52. Level 3's June 20, 2007 application for leave to appeal is pending before the Commission.

August 8, 2007, with rulings issued as reflected in the record, and arguments were also presented regarding the admissibility of certain evidence pursuant to a motion filed by Level 3.⁵ Evidentiary hearings were held on August 9 and 10, 2007, at which all witnesses appeared and were cross-examined.⁶

The evidentiary record is contained in 619 pages of transcribed testimony and 36 exhibits. By letter dated August 16, 2007, Neutral Tandem filed proposed transcript corrections to the transcript of Dr. Saboo's testimony; no party opposed these corrections, and I find they should be adopted.

Briefs were filed on August 27, 2007 and replies on September 5, 2007 in accordance with the established schedule.

II.

OVERVIEW OF THE DISPUTED ISSUES

As indicated above, the dispute arose following Level 3's termination of two "commercially negotiated agreements" between the parties that provided for direct interconnection and the two-way exchange of traffic between the companies.⁷ The Level 3 contract, executed in July of 2004, was terminated on January 31, 2007, effective March 2, 2007. The Broadwing contract, executed in February of 2004, was terminated on February 14, 2007, effective March 23, 2007. Level 3 subsequently extended the termination date of the July 2004 contract to March 23, 2007.

⁵ A motion to practice pro hac vice was also granted for Gregg Strumberger at the hearing on August 8, 2007.

⁶ The parties also agreed on a protective order governing "confidential" and "highly confidential" information.

⁷ See Saboo, Tr 5-6; Exhibit R-9(Confidential).

Level 3 terminated the contracts pursuant to express termination provisions. The agreements were not subject to Commission approval and had not been filed with the Commission. Neutral Tandem also accepts traffic for transit from Level 3 pursuant to an August 2005 contract, but this contract is a "one-way" agreement that does not provide for Level 3 to accept traffic transited by Neutral Tandem for its other customers. Of concern to Neutral Tandem, Level 3 terminated the 2004 "two-way" contracts shortly after executing the January 31, 2007 amendment of this 2005 contract. As of May or June of 2007, however, Level 3 no longer delivers any traffic to Neutral Tandem.⁸

Although the parties discussed the potential for successor agreements, Level 3 disputed Neutral Tandem's contention that Level 3 was required to maintain a direct connection to receive Neutral Tandem's tandem transit traffic, and told Neutral Tandem it would terminate the connection after March 23, 2007.⁹ Initial letters exchanged by the companies are Exhibits C-1 through C-4.

The terminated contracts involved relationships between the companies in other states in addition to Michigan. Neutral Tandem and Level 3 are involved in similar disputes in various other states, as discussed in more detail below. Also, in some states, Neutral Tandem chose to allow termination of its interconnection with Level 3, and no longer transits traffic to Level 3 in those states.

Neutral Tandem does not seek to reinstate the July 2004 Level 3 or February 2004 Broadwing contracts, but acknowledges that these contracts have been validly

⁸ Saboo, Tr 335.

⁹ After Neutral Tandem filed its complaint in this case, Level 3 agreed to retain the interconnection until June 25, 2007; as explained above, the Commission order of May 22, 2007 preserved the interconnection during the pendency of this case.

terminated. Instead, Neutral Tandem seeks relief in the form of the following orders from the Commission:

Level 3 shall maintain direct connections with Neutral Tandem for the sole purpose of delivering traffic from carriers that have chosen Neutral Tandem to deliver their originating traffic to Level 3;

Level 3 shall not require Neutral Tandem to pay any fee or other compensation, either on a per-minute basis or otherwise, for transit traffic delivered to Level 3 by Neutral Tandem;

Level 3 and Neutral Tandem shall interconnect on terms and conditions no less favorable to Neutral Tandem than the terms and conditions that Level 3 currently offers to the ILEC tandem transit provider for delivery of transit traffic to Level 3;

Neutral Tandem shall provide all the necessary caller identification information regarding the originating carrier to Level 3, as required by MTA Section 305a, to enable Level 3 to collect reciprocal compensation payments from those originating carriers;

If Neutral Tandem and Level 3 cannot agree on non-discriminatory terms and conditions within 45 days of the Commission's decision, the parties shall report the same to the Commission which shall take appropriate action at that time.¹⁰

Neutral Tandem also asks for any other relief the Commission determines just and reasonable, but although its complaint seeks attorney fees and penalties, Neutral Tandem does not expressly request this relief in its brief or reply brief.

Level 3 disputes the Commission's authority to grant Neutral Tandem relief, and asks the Commission to hold that Level 3 may terminate its connection to Neutral Tandem. Level 3 contends that its legal obligations are satisfied if it provides "indirect" interconnection with Neutral Tandem or its originating carrier customers, in which they must use the Incumbent Local Exchange Carrier (ILEC) tandem to deliver calls to Level 3. Level 3 also seeks compensation under the July 2004 agreement during the

¹⁰ Neutral Tandem Brief, p. 45

pendancy of this case, and further seeks attorney fees under section 601, alleging that it suffered economic harm by having to defend itself against Neutral Tandem's erroneous complaint.¹¹ Additionally, Level 3 seeks to be relieved of any responsibility for costs or attorney fees relating to the alternative dispute resolution under section 203a. This request is also the subject of Level 3's pending appeal regarding Neutral Tandem's disclosure to other state agencies of the mediator's recommended settlement.¹²

Neutral Tandem asserts and Level 3 denies that termination of the connection will harm Neutral Tandem, its originating carrier customers, and the public interest. Staff, in its brief and reply brief, concludes that the Commission has authority to act in this matter, and should grant Neutral Tandem some of the relief it seeks, including an order directing the parties to negotiate a non-discriminatory interconnection agreement.

In support of its complaint, Neutral Tandem presented the testimony of two witnesses, Surendra Saboo¹³ and Rian J. Wren.¹⁴ Dr. Saboo is Chief Operating Officer and Executive Vice President of Neutral Tandem, with a PhD in operations research. The purpose of his direct testimony was to describe the relationship between the companies, to explain his position that direct interconnection between Neutral Tandem and Level 3 is in the public interest, and to describe the impact disconnection by Level 3 would have on Neutral Tandem, third-party customers, and end users, and the public switched telephone network or "PSTN". Mr. Wren is President and Chief Executive Officer of Neutral Tandem. His direct testimony focused on the negotiations and

¹¹ See Level 3 Brief, pp. 47-48.

¹² See Level 3 Brief, pp. 46-47.

¹³ Dr. Saboo's testimony is at Tr 285-432.

¹⁴ Mr. Wren's testimony is at Tr 435-499.

dealings between the parties following Level 3's termination of the contracts, including his testimony that Level 3 was seeking reciprocal compensation from Neutral Tandem.

Level 3 presented the testimony of Timothy J. Gates¹⁵ and Sara Baack.¹⁶ Mr. Gates is a Senior Vice President and partner in QSI Consulting. Mr. Gates presented his opinions and recommendations regarding Neutral Tandem's role in the telecommunications market, the public interest and the steps needed to ensure that calls from Neutral Tandem's originating carrier customers intended for Level 3 customers were not blocked but rerouted through the ILEC tandems. Mr. Gates disputed Neutral Tandem's claims that the public and its customers benefit from the competitive tandem transit service it provides, disputed Neutral Tandem's claims that it would be difficult for it and its customers to reroute traffic to the ILEC tandems, and testified generally regarding the costs to Level 3 of maintaining an interconnection with Neutral Tandem. Ms. Baack manages the product and network strategy organization with the Wholesale Markets Group at Level 3; she has an undergraduate degree in economics and an MBA. Ms. Baack testified regarding the negotiations between the parties, explaining her understanding that Level 3 terminated the contracts with Neutral Tandem because of the difficulty monitoring all its contracts, and what she characterized as "order creep". She disputed Neutral Tandem's contention that Level 3 was seeking reciprocal compensation in the negotiations.

Dr. Saboo and Mr. Wren also presented rebuttal to the testimony of Level 3's witnesses, contending that Neutral Tandem did pay all the costs of constructing and maintaining the interconnection with Level 3, and challenging Level 3's claim that

¹⁵ Mr. Gates's testimony is at Tr 501-568.

¹⁶ Ms. Baack's testimony is at Tr 574-616.

terminating the interconnection would not cause harm. Cross-examination of Mr. Gates and Ms. Baack was limited largely to presentation of prior statements the company made regarding positions taken during the course of its dispute with Neutral Tandem in Michigan and in other states. Cross-examination of Dr. Saboo and Mr. Wren focused on Neutral Tandem's claims regarding the harm to itself, its customers and the public interest if its connection with Level 3 were terminated, and its claim that it pays virtually all costs associated with the interconnection. Specific factual disputes are discussed in more detail below.

Level 3 contends that any Commission authority to require direct interconnection between Neutral Tandem and Level 3 is preempted by federal telecommunications law. See section III below. The parties also disagree on the proper interpretation of state law, and ultimately whether Level 3 has an obligation to interconnect with Neutral Tandem under section 305 of the Michigan Telecommunications Act, MCL 484.2305. See section IV below. A recommendation for disposition of this matter, considering the parties' requests for relief and competing legal, factual and policy claims, is presented in section V.

III.

PREEMPTION

Level 3 argues that federal telecommunications law precludes the Commission from compelling it to continue interconnection with Neutral Tandem.¹⁷ The primary basis for Level 3's preemption claim is section 251(a)(1) of the Telecommunications Act

¹⁷ See Level 3 Brief, pp. 18-24.

of 1996 (1996 Act)¹⁸, which imposes on each telecommunications carrier "the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." Level 3 argues that under this section, as a matter of federal law, Level 3 can choose whether to interconnect directly or indirectly: a "direct" interconnection would be the interconnection Level 3 currently has in place with Neutral Tandem, an "indirect" interconnection would require all traffic to go through the ILEC tandem before reaching Level 3.¹⁹ In support of its position, Level 3 also cites to the FCC's "First Report and Order" implementing the 1996 Act,²⁰ in which the FCC discusses the obligations imposed on all telecommunication providers, relying particularly on the following two paragraphs:

997. Regarding the issue of interconnecting "directly or indirectly" with the facilities of other telecommunications carriers, we conclude that telecommunications carriers should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices. The interconnection obligations under section 251(a) differ from the obligations under section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power. Given the lack of market power by telecommunication carriers required to provide interconnection via section 251(a), and the clear language of the statute, we find that indirect connection (e.g. two non-incumbent LECs interconnecting with an incumbent LEC's network) satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a). We decline to adopt, at this time, Metricom's suggestion to forbear under section 10 of the 1996 Act from imposing any interconnection requirements upon non-dominant carriers. We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. Nothing in this record

¹⁸ 47 USC 251 *et seq.*

¹⁹ For a more detailed description and diagrams, see Gates, Tr 512-518; Saboo, Tr 290-292.

²⁰ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order)*, 11 FCC Rcd 15499 (CC Docket No. 95-185, Released August 8, 1996), paras. 997, 1408.

convinces us that we should forbear from imposing the provisions of section 251(a) on non-dominant carriers. In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs. Similarly, we also do not agree with the Texas Commission's argument that the obligations of section 251(a) should apply equally to all telecommunications carriers. Section 251 is clear in imposing different obligations on carriers depending upon their classification (i.e. incumbent LEC, LEC, or telecommunications carrier). For example, section 251(c) specifically imposes obligations upon incumbent LECs to interconnect, upon request, at all technically feasible points. This direct interconnection, however, is not required under section 251(a) of all telecommunications carriers.

* * *

1408. We decide that competitive telecommunications carriers that have the obligation to interconnect with requesting carriers may choose, based upon their own characteristics, whether to allow direct or indirect interconnection This should allow significant flexibility for small entities to choose the most efficient and economical arrangement for their particular strategy. As set forth in Section IX, we reject an argument to forbear, under section 10 of the Communications Act, from imposing any interconnection requirements on non-dominant carriers.

The 1996 Act expressly preserves state regulatory authority in sections 251 and 261.²¹ In Section 251(d)(3), the 1996 Act limits FCC authority to preempt state regulation of access and interconnection obligations of local exchange carriers:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.²²

²¹ 47 USC 251, 261

Section 261(c) similarly provides:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.²³

Level 3 asserts that the duty imposed on it under section 251(a)(1) to interconnect "directly or indirectly" gives it a federal right to interconnect only indirectly, that cannot be modified by state law. Neutral Tandem disputes this characterization, concluding that state regulation of CLEC to CLEC interconnection is not preempted by the 1996 Act.²⁴ Staff likewise does not find that Commission authority to regulate CLEC to CLEC interconnection is preempted.²⁵

I conclude that Staff and Neutral Tandem have correctly analyzed the preemption question. Level 3 has not established that section 251(d)(3) creates a federal "right" to be free of all other interconnection requirements. On its face, the preemption savings language of the Act makes clear congressional intent only to preempt state regulation that is inconsistent with the act or frustrates a purpose of the act. A state law is not inconsistent with the act merely because it imposes additional obligations on a CLEC. Level 3 has not shown that freeing it and other CLECs from any obligation to interconnect directly with another CLEC under any circumstance is an integral or important part of the federal regulatory scheme. Level 3 relies on two U.S. Court of

²² 47 USC 251(d)(3)

²³ 47 USC 261(c)

²⁴ See Neutral Tandem Reply Brief, pp. 22-26.

²⁵ See Staff Reply Brief, p. 1.

Appeals decisions to support its preemption claims,²⁶ but in those cases, the courts concluded not merely that the tariff requirements at issue were additional to the interconnection obligations indicated in the act, but that they constituted a significant interference with the detailed negotiation and arbitration scheme crafted by Congress. Thus the Seventh Circuit in *Bie* concluded the state tariff requirement was equivalent to “putting a thumb on the negotiating scales by requiring one of the parties to the negotiation . . . to state its reservation price, so that bargaining begins from there”.²⁷ Similarly, the Sixth Circuit in *Strand* concluded that the tariff requirement “completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents’ services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review.”²⁸

While Level 3 argues that a “right” to insist on indirect interconnection is a critical component of the 1996 Act,²⁹ a review of sections 251 and 252 does not support that claim. Requiring a CLEC to accept a direct connection from a tandem transit provider for the purpose of terminating its customers’ calls is not inimical to the federal statutory scheme. The state commissions that have considered Level 3’s preemption claim, New York, Illinois, Georgia and Florida, have rejected it.³⁰

²⁶ *Wisconsin Bell, Inc v Bie*, 340 F3d 441 (CA 7 2003); *Verizon North Inc v Strand*, 309 F 3d 935 (CA 6 2002).

²⁷ *Wisconsin Bell, Inc v Bie*, 340 F3d 441, 444 (CA 7 2003).

²⁸ *Verizon North Inc v Strand*, 309 F 3d 935, 941 (CA 6 2002).

²⁹ See Level 3 Brief at p. 22.

³⁰ See Attachments 1, 2, 3 and 6 to Neutral Tandem’s Brief.

IV.

MICHIGAN TELECOMMUNICATIONS ACT

Level 3 also argues that the Michigan Telecommunications Act (MTA) does not authorize the Commission to provide the requested relief, further contending that "indirect" interconnection through the ILEC tandem satisfies all of Level 3's obligations under the MTA. As explained above, Neutral Tandem brings its complaint under sections 203, 204 and 305.³¹ While Neutral Tandem alleges that Level 3 has violated section 305, on its face section 204 authorizes a telecommunications provider to file a complaint when it has been unable to resolve a dispute related to the prohibitions of section 305:

If 2 or more telecommunication providers are unable to agree on a matter relating to a regulated telecommunication service or a matter prohibited by section 305, then either telecommunication provider may file with the commission an application for resolution of the matter.

There is no dispute that Neutral Tandem is a telecommunication provider, defined in section 102(ff). Nor is there any doubt that the "commission" charged with resolution under this section, and more broadly with administration of the Michigan Telecommunications Act, is the Michigan Public Service Commission. Section 203 provides the procedural mechanism for the Commission to address an application filed under section 204:

³¹ Neutral Tandem also cites section 205(2) as a basis for Commission authority:

If the commission finds, after notice and hearing, that the rates, quality, general availability, or conditions for a regulated service violate this act, an order of the commission under this act, or is adverse to the public interest, the commission may require changes in how the telecommunication services are provided. The commission's authority includes, but is not limited to, the revocation of a license and issuing cease and desist orders.

Upon receipt of an application or complaint filed under this act, or on its own motion, the commission may conduct an investigation, hold hearings, and issue its findings and order under the contested hearings provisions of the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

Thus, the Commission clearly has jurisdiction to address Neutral Tandem's complaint.

The parties' remaining legal and factual arguments regarding the application of section 305 are discussed below.

A. Termination provisions of the 2004 contracts

Level 3 first argues that Neutral Tandem cannot use the MTA to compel interconnection because Level 3 lawfully terminated the interconnection agreement providing for Neutral Tandem to terminate its customers' Level 3-bound traffic.³² Level 3 notes that the agreements were commercially negotiated, were not subject to state or federal regulatory approval, and were not filed with the Commission or with the FCC. Level 3 also notes that Neutral Tandem recognized the potential for contract termination as a business risk.³³ Level 3 cites Michigan case law holding that courts cannot inquire into motives underlying a decision to terminate an agreement where the agreement contains an express provision governing such termination.³⁴

Neutral Tandem responds that it does not challenge the validity of Level 3's termination of the July 2004 contract and the February 2004 Broadwing contract, and is not seeking to reinstate those contracts. Instead, Neutral Tandem seeks to compel Level 3 to retain its connection with Neutral Tandem only for the purpose of receiving

³² See Level 3 Brief, pp. 15-17.

³³ See Gates, Tr 542-543; Exhibit R-2, p. 46.

³⁴ See *Eastway & Blevins Agency v Citizens Insurance Co of America*, 206 Mich App 299; 520 NW2d 640, 642 (1994); *United States v County of Muskegon*, 33 F Supp 614, 626 (WD Mich 1998).

incoming traffic from Neutral Tandem's customers.³⁵ Essentially, Level 3 argues that to the extent the MTA requires "direct" interconnection, Neutral Tandem waived any such claim by agreeing to contracts with provisions that expressly permitted Level 3 to terminate them.³⁶ Without determining whether Neutral Tandem has the ability to waive any of the protections afforded under the MTA, I find Neutral Tandem has not done so in this case. Its agreement to a contract with a termination provision does not constitute a waiver of the protections contained in section 305. Moreover, Neutral Tandem has articulated a valid distinction between the two-way agreements Level 3 terminated and the limited interconnection the company is now seeking. Likewise, the company's Form S-1 statements regarding the risks the company faces do not preclude Neutral Tandem from seeking relief under state law or constitute a waiver.

B. Terms of interconnection

Level 3 also contends the Commission lacks authority to grant relief to Neutral Tandem because the Commission lacks authority to determine the terms of interconnection between CLECs.³⁷ Level 3 notes that the MTA provides express provisions for the Commission to arbitrate and determine the terms of interconnection agreements with ILECs. Neutral Tandem insists that it is not seeking to have the Commission create a contractual relationship between the parties.³⁸ While it did present a contract with Time Warner, Exhibit C-6, Neutral Tandem says this is simply provided to illustrate a nondiscriminatory agreement.³⁹

³⁵ See Exhibit C-3; Saboo, Tr 426-427; Neutral Tandem Reply Brief, pp. 26-28.

³⁶ Level 3 does not expressly assert waiver, but its argument is best understood as a claim of waiver.

³⁷ See Level 3 Brief, pp. 13-14, 25.

³⁸ See Neutral Tandem Reply Brief, pp. 27-29.

³⁹ See Neutral Tandem Reply Brief, p. 29 n 102.

I conclude that Level 3's argument is properly considered only in the context of determining the extent of relief that can be afforded to Neutral Tandem if the MTA requires Level 3 to interconnect with Neutral Tandem; it does not foreclose Neutral Tandem's complaint or speak to the interpretation of the requirements of section 305. As explained above, the Commission has authority to address Neutral Tandem's complaint under section 204, and at a minimum can afford relief of the forms specified in sections 204 and 601, even if it does not have authority to write a contract for the parties.

Level 3 next focuses its arguments on the express provisions of section 305, asserting that neither 305(a) nor 305(b) authorizes the Commission to require direct interconnection between the companies. Subsections 305(a) and (b) proscribe the following conduct:

A provider of basic local exchange service shall not do any of the following:

(a) Discriminate against another provider by refusing or delaying access service to the local exchange.

(b) Refuse or delay interconnection or provide inferior connections to another provider.

C. "Direct" vs. "indirect" interconnections

Level 3 acknowledges that some form of "interconnection" is required under section 305, but argues that the interconnection required may be "direct" or "indirect".⁴⁰ Level 3 argues that reading section 305(b) to require "direct" interconnection is to read words into the statute that do not exist. Neutral Tandem does not directly address Level 3's argument, but asserts that the statutory language is clear. The MTA does not

⁴⁰ See Level 3 Brief pp. 24-26, 30.

contain the terms “direct” or “indirect” in the context of interconnection or access service. Instead, section 102(l) defines interconnection as “the technical arrangements and other elements necessary to permit the connection between the switched networks of 2 or more providers to enable a telecommunication service originating on the network of 1 provider to terminate on the network of another provider.” “Access service” is defined in section 102(a) as “access to a local exchange network for the purpose of enabling a provider to originate or terminate telecommunication services within the local exchange.” The distinction Level 3 draws is based on the language of section 251 quoted above in the preemption discussion; in contrast, nothing in the language of the MTA suggests the legislature intended “indirect” interconnection through an ILEC as sufficient to satisfy the duties created under section 305. Rather than Neutral Tandem reading words into the statute, Level 3 appears to be reading words into the statute. Unlike the CLEC duty to interconnect “directly or indirectly” imposed on all CLECs under section 251 of the federal act, the obligations imposed by section 305 of the MTA are only triggered by request—there can be no refusal or delay unless a request is made. In this context, it does not seem sufficient for a telecommunications provider to satisfy its obligation by referring the requester to a different provider, i.e. the ILEC. Use of the active words “shall not . . . refuse or delay . . .” suggests a greater obligation than simple reliance on an existing ILEC interconnection. For these reasons, I conclude that Level 3’s proffered interpretation of section 305 to require “direct or indirect” interconnection is not consistent with the statute.⁴¹

⁴¹ Note, too, section 305(g) also requires that a provider of basic local exchange service shall not: “refuse or delay access service or be unreasonable in connecting another provider to the local exchange whose product or service requires novel or specialized access service requirements.” Again, the focus appears to be on a direct connection.

D. Section 356

Level 3 also argues that section 305 cannot be interpreted to require physical interconnection, because section 356 speaks directly to interconnection and section 356 is not applicable to Neutral Tandem's request.⁴² Section 356 provides:

A provider of local exchange service shall allow and provide for virtual co-location with other providers at or near the central office of the provider of local exchange service of transmission equipment that the provider has exclusive physical control over and is necessary for efficient interconnection of the unbundled services. Providers may enter into an agreement that allows for interconnection on other terms and conditions than provided under this subsection.

356 follows sequentially section 355, and is part of article 3A of the act. Section 355 provides:

(1) A provider of basic local exchange service shall unbundle and separately price each basic local exchange service offered by the provider into the loop and port components and allow other providers to purchase such services on a nondiscriminatory basis.

(2) Unbundled services and points of interconnection shall include at a minimum the loop and the switch port.

Level 3 argues that the "virtual collocation" referred to in section 356 is essentially the same interconnection requested by Neutral Tandem. Neutral Tandem responds that section 356 is irrelevant since it is not seeking relief under section 356.⁴³ I conclude that the interconnection required in Article 3A of the MTA, section 356, is to facilitate the unbundling required in section 355, and does not modify or reduce the obligations imposed on providers under section 305, which focuses on "interconnections" as defined in section 102(I):

⁴² See Level 3 Brief, pp. 28-30.

⁴³ See Neutral Tandem Reply Brief, p. 26 at n91.

[T]he technical arrangements and other elements necessary to permit the connection between the switched networks of 2 or more providers to enable a telecommunication service originating on the network of 1 provider to terminate on the network of another provider.

E. Inferior connections

Level 3 acknowledges that under its interpretation of section 305(b), the Commission may still find an "indirect" connection is "inferior" under section 305(b), but argues that such a conclusion in this case is legally as well as factually impossible because the ILEC tandem is the most common form of interconnection, and a contrary ruling would require all CLECs to interconnect directly.⁴⁴ Neutral Tandem correctly responds that its interpretation of section 305 does not create a rule where all CLECs must interconnect.⁴⁵ As explained above, the requirements of section 305 to interconnect are triggered by a request, and since most CLECs are content to use the ILEC tandem transit service, nothing in an interpretation of section 305 that permits CLECs to request direct interconnection turns section 305 into a requirement that all CLECs interconnect directly.⁴⁶

Neutral Tandem also persuasively argues that the "indirect" interconnection arrangement Level 3 deems adequate, using the ILEC tandem, is inferior to the ILEC interconnection.⁴⁷ That interconnection via an ILEC is the most common form of interconnection does not make it adequate for Neutral Tandem's purposes. Neutral Tandem competes with and duplicates the ILEC tandem transit service. Level 3 would

⁴⁴ See Level 3 Brief, pp. 26-28.

⁴⁵ See Neutral Tandem Reply Brief, p. 28.

⁴⁶ Note that FCC guidance indicates that direct connections are appropriate when traffic volumes reach 200,000 minutes of use per month; Neutral Tandem delivers 3 million minutes of use per month to Level 3. See Staff Brief, p. 5 n20; Neutral Tandem Brief, p. 18 n72.

⁴⁷ See Saboo, Tr 324-325; Neutral Tandem Brief, pp. 16-19.

provide an inferior connection to Neutral Tandem if it required Neutral Tandem to transit calls only using the ILEC, when it permits the ILEC to transit those calls directly to Level 3. Note that section 103 of the MTA provides: "Except as otherwise provided in this act, this act shall not be construed to prevent a person from providing telecommunication services in competition with another telecommunication provider." Nothing in the act indicates a legislative intent to foreclose competition in tandem transit service.⁴⁸

F. Reciprocity

Level 3 argues, as an equitable matter, that section 305 should not be interpreted to require it to directly interconnect with Neutral Tandem because the obligations would not be reciprocal.⁴⁹ Level 3 contends that because Neutral Tandem does not provide basic local exchange service, Neutral Tandem would not be bound by the provisions of section 305 to interconnect with Level 3. Lack of reciprocity in the statute, however, does not justify an interpretation not supported by the text of the statute. A determination to require providers of basic local exchange service to interconnect with telecommunications providers for the purpose of terminating calls to the basic local exchange service provider's customers does not seem inherently unfair because a tandem transit provider may not be required to provide tandem transit service to all basic local exchange service providers. But the question of Neutral Tandem's obligations to provide interconnection to Level 3 is not at issue in this case because Level 3 is not seeking any additional interconnection, and therefore a determination of

⁴⁸ Note, too, that section 305(g) requires that a provider of basic local exchange service shall not "refuse or delay access service or be unreasonable in connecting another provider to the local exchange whose product or service requires novel or specialized access service requirements."

⁴⁹ See Level 3 Brief pp. 31-32.

the scope of its obligations is not necessary or appropriate. Neutral Tandem's comments to the FCC, attached to Level 3's Brief as Exhibit A, explain the distinction between Level 3's situation as a basic local exchange service provider and Neutral Tandem's situation as a provider of tandem transit service; Level 3 reads this as a concession on Neutral Tandem's part that ILEC tandem service is adequate for all purposes; instead, it explains how basic local exchange service providers uniquely control access to their customers, while tandem transit service providers do not.

G. Other issues

Neutral Tandem and Level 3 also extensively addressed on the record competing claims regarding whether Neutral Tandem's competitive transit service provides public and private benefits, the degree of difficulty and inconvenience associated with terminating the interconnection with Level 3, the motives of each party, and the costs properly associated with the interconnection. These are discussed below.

1. Benefits of competitive tandem transit service

The parties spent a great deal of time on the evidentiary record debating whether and to what extent the competitive tandem transit service provided by Neutral Tandem provides benefits to its customers or to the public interest in a reliable telecommunications infrastructure, and likewise whether there would be any harm to Neutral Tandem, its customers, or the public interest if Level 3 were permitted to disconnect its direct interconnection with Neutral Tandem. This dispute relates largely to the question whether emergency relief should be granted, a question the Commission resolved to this point by requiring Level 3 to maintain a direct connection with Neutral Tandem during the pendency of this case, and requiring Neutral Tandem to post

security in the amount of \$10,000. Nonetheless, it does appear from Neutral Tandem's evidentiary presentation that benefits from fostering a competitive tandem transit service include both the existence of a competitive alternative for CLECs to use in routing traffic, with potential cost savings, as well as redundancy in transit capacity that provides greater flexibility in the event of network problems, national disaster, or other disruption.⁵⁰ This does not mean that Neutral Tandem's system alone is sufficiently vast or placed in such locations that it provides broad redundancy to the entire "PSTN", but instead that the promotion of competitive tandem transit service generally would be expected to bring such benefits. Staff thus concludes that a competitive tandem transit service is necessary to promote a competitive telecommunications market in Michigan.⁵¹

2. Traffic disruption

Dr. Saboo's direct and rebuttal testimony for Neutral Tandem and Mr. Gates's testimony for Level 3 presented differing views on the degree of difficulty in terminating the connection between the companies, and the potential for calls to be blocked. Again, this dispute relates primarily to the question whether emergency relief should be granted, and does not alter the interpretation of section 305. On balance, given Dr. Saboo's technical expertise and the experiences of Neutral Tandem with calls being blocked in Chicago, it appears there are practical difficulties and risks associated with terminating the interconnection.⁵² Dr. Saboo's opinion also is persuasive because Neutral Tandem had experience rerouting traffic to terminate its interconnection with

⁵⁰ See Saboo, Tr 292.

⁵¹ See Staff Reply Brief, p. 1.

⁵² See Neutral Tandem Reply Brief, p. 30-32; Saboo, Tr -297-301, 402-404; Exhibit C-7.

Level 3 in several other states where traffic volumes were smaller.⁵³ Additionally, Neutral Tandem and its customers would be harmed if Neutral Tandem is no longer able to transit calls from its customers to Level 3, or is required to route those calls through the ILEC tandem.

3. Cost

Level 3 asserts that it is justified in refusing to interconnect with Neutral Tandem because it claims Neutral Tandem does not fully compensate it for the costs associated with interconnection.⁵⁴ Level 3 contends that it is being asked to subsidize Neutral Tandem's competitive business, and that it should not be required to provide interconnection on the same terms it provides the ILEC. Neutral Tandem responds that Level 3 has no uncompensated costs,⁵⁵ but instead is wrongly seeking to recover termination costs, referred to as "reciprocal compensation", from Neutral Tandem rather than from originating carriers statutorily assigned responsibility for those costs.⁵⁶

Nothing in section 305 requires Level 3 to subsidize the cost of interconnection with Neutral Tandem, but section 305a and federal law place the burden of the costs of terminating traffic on the originating carrier, with originating and terminating carriers expected to work out reciprocal compensation arrangements.⁵⁷ There is not dispute that Neutral Tandem provides Level 3 the identifying information necessary to determine the originating carrier on each call.

Level 3's brief simultaneously argues that it is not seeking reciprocal compensation, and that it is not foreclosed from recovering termination costs from

⁵³ See Saboo, Tr 350-362, 408-409; Exhibits R-5 and R-6.

⁵⁴ See Level 3 Brief, pp. 34-40; Gates, Tr 540-542, 544-547; Baack, Tr 591-592.

⁵⁵ See Neutral Tandem Brief, pp. 6-7, 23-26; Reply Brief, pp. 10-14; Saboo, Tr 315-20.

⁵⁶ See Neutral Tandem Brief, pp. 10-14, 26-27; Reply Brief, pp. 3-10; Wren, Tr 443-447.

⁵⁷ MCL 484.2305a; 47 CFR 51.701(e)

Neutral Tandem.⁵⁸ Neutral Tandem presents varying admissions from Level 3, including an acknowledgement in the California proceeding that it was seeking reciprocal compensation,⁵⁹ a claim that it was seeking a “market” rate,⁶⁰ and a quoted rate of \$.001 per minute of use, which Neutral Tandem indicates is significantly higher than reciprocal compensation rates and higher than tandem transit rates.⁶¹

Level 3’s analysis of costs relies in part on Mr. Gates’s and Ms. Baack’s testimony, but their direct testimony did not identify concrete costs the company should recover, or distinguish costs that are not termination costs recoverable through reciprocal compensation. Mr. Gates acknowledged that he had not done a cost study, contending no such study was necessary.⁶² Level 3’s brief asserts that Neutral Tandem should not pay only “incremental” costs, and claims that certain switch port costs are not recovered in reciprocal compensation, relying on the Commission’s September 21, 2004 order in Case No. U-13531.

Neutral Tandem’s reply brief refutes Level 3’s analysis, and criticizes its reliance on this order.⁶³ Dr. Saboo presented Exhibits C-9, C-12, C-13 and C-15 showing the facilities Neutral Tandem pays for, and for comparison purposes the facilities the ILEC pays for when it is the tandem transit provider. He explained that Neutral Tandem pays all costs to transport traffic to Level 3’s switch, and pays for the costs of the electronic equipment needed to receive traffic at the switch, including the supervision, monitoring and maintenance costs associated with that equipment.⁶⁴ The remaining costs, Dr.

⁵⁸ See Level 3 Brief, pp. 32, 34-36.

⁵⁹ See Wren, Tr 441.

⁶⁰ See Wren, Tr 464-465; Exhibit C-26, p. 17.

⁶¹ *Id.*, Neutral Tandem Reply Brief, p. 5.

⁶² See Gates, Tr 545-546.

⁶³ See Neutral Tandem Reply Brief, pp. 10-14.

⁶⁴ See Saboo, Tr 315-320; 377-380; 385-388; 413-421.

Saboo testified, are termination costs recoverable through reciprocal compensation.⁶⁵ Dr. Saboo's testimony explained that because traffic volumes are determined by the calls received by Level 3's end users, Neutral Tandem's transit service does not increase the total traffic delivered to Level 3. Accordingly, Level 3 need not acquire additional switch ports or cross-connects to receive Neutral Tandem traffic, because it would need those anyway if the traffic were delivered by the ILEC. Dr. Saboo concluded that the only cost that Level 3 might incur that Neutral Tandem does not pay for is the cost associated with moving a cross-connect on the switch port as traffic flows change between the ILEC and Neutral Tandem. Neutral Tandem rejects Level 3's reliance on the Commission's September 21, 2004 Order in Case No. U-13531, contending that the Commission recognized in that order that the switch port costs at issue did not vary with traffic volume.⁶⁶

Given the history of the dispute between the parties, and the fact that Level 3 should be in the best position as between the parties to have knowledge of its own costs, Level 3 has failed to support its contention that it is justified in refusing to retain the direct interconnection with Neutral Tandem because of uncompensated costs. Instead, on this record, Dr. Saboo's testimony is persuasive that Neutral Tandem pays "virtually all" costs of interconnection. There is no basis in this record to conclude that the cost allocations at issue in Case No. U-13531 are directly applicable to Level 3's costs. Neutral Tandem has also established that Level 3 incurs uncompensated costs when the ILEC transits traffic to it.

4. Motive

⁶⁵ See Saboo, Tr 387-388.

⁶⁶ See Neutral Tandem Reply Brief, pp. 13-14.

There is also some dispute in the record regarding Level 3's motivation for terminating the 2004 agreements, especially since it terminated the July 2004 agreement within hours of renegotiating a one-way transit agreement with Neutral Tandem to provide for its own traffic. Neutral Tandem is not required to establish that Level 3 harbors a discriminatory intent to obtain interconnection under sections 305(a) or (b). By statutory definition, a provider "discriminates" in violation of section 305(a) if it refuses or delays access service to the local exchange.

Ms. Baack claimed that the company was motivated by "ordering creep", the complexity of the reimbursement provisions in the two-way agreements, and concern that managing multiple interconnection agreements was burdensome.⁶⁷ Neutral Tandem cites the timing of the company's decision to terminate the July 2004 contract, hours after renegotiating a contract requiring Neutral Tandem to transit traffic for Level 3.⁶⁸ It does seem unlikely that Level 3 discovered problems with the July 2004 "two-way" contract only after it negotiated amendments to the "one-way" transit contract with Neutral Tandem. If it were concerned about the complexity and burden of multiple contracts, Level 3 could have called this to Neutral Tandem's attention and sought to renegotiate all the agreements. Moreover, Mr. Gates's testimony expresses an inexplicable preference for CLECs to receive all transit traffic through an ILEC tandem, seemingly because he believes CLEC use of the ILEC tandems is consistent with the historical development or natural order of the marketplace.⁶⁹ Mr. Gates does not explain why Level 3 prefers to direct traffic through the ILEC tandem although it is

⁶⁷ See Level 3 Brief, p. 15; Tr 590-591.

⁶⁸ See Neutral Tandem Brief, p. 35.

⁶⁹ See Gates, Tr 519-523, 542.

arguably more expensive.⁷⁰ Mr. Gates indicates that Level 3 has already augmented its facilities with AT&T, and attributes what he believes to be unused capacity on AT&T tandem trunks in part to the existence of competitive tandem transit services.⁷¹ On this record, Level 3's preference for the ILEC, proffered as a basis for Level 3 to refuse to accept traffic directly from Neutral Tandem, appears to lack solid economic justification.

Level 3 also challenges Neutral Tandem's motive and conduct, asserting that the company is seeking to force Level 3 to subsidize its business plan and "interject itself" into the market.⁷² As discussed above, Neutral Tandem does not appear to be seeking a subsidy from Level 3, and while Neutral Tandem clearly does intend to make a profit, a profit motive is a legitimate underpinning of the creation of a competitive marketplace, and does not detract from the value or importance of a service provided.

H. Conclusion

Based on the briefs and arguments of the parties, I conclude that basic local exchange service providers do have a duty under section 305 of the MTA to interconnect with telecommunication providers seeking to terminate telecommunications services. For the reasons explained above, I conclude that the obligations placed on providers by section 305 are not preempted by federal law, or precluded by section 356 of the MTA. Providing a competitive tandem transit provider such as Neutral Tandem only "indirect interconnection" when the ILEC tandem transit provider has a direct connection also constitutes providing an inferior connection under section 305(b). Section 305 does not require reciprocity between basic local exchange providers and

⁷⁰ Ms. Baack suggests Level 3 receives some unspecified additional compensation from the ILEC, Tr 608-609.

⁷¹ See Gates, Tr 538; 534.

⁷² See Gates, Tr 540-542.

other providers seeking interconnection under the section. The provisions of section 305(a) and (b) do not make discriminatory intent a requirement, and do not require a provider such as Neutral Tandem to establish a compelling public interest in the service it provides. Nonetheless, competitive tandem transit service brings benefits to telecommunications providers and provides redundancy to the PSTN. Level 3 has not established a cost-based or other justification for denying Neutral Tandem interconnection.

V.

RELIEF

Based on these conclusions, it is necessary to determine what relief is appropriate. The first step is to determine under which statutory provision relief should be provided. While Level 3's negotiating positions as reflected on this record appear to be inconsistent with its obligations under section 305, Level 3 has not technically violated subsections 305(a) or (b), because it did not carry out its threat to terminate interconnection. Because Level 3 has retained the interconnection with Neutral Tandem through the present, it has not actually "refused" or "delayed" interconnection required by sections 305(a) or (b), although it has been required by Commission order to retain the connection. Level 3 did not violate section 305 by terminating the 2004 interconnection agreements. Neutral Tandem does not dispute that the contracts were validly terminated; it is equally clear that it is not seeking to reinstate those contracts, which provided for the two-way exchange of traffic between the companies. Instead, as Neutral Tandem made clear in its letter of February 19, 2007, Exhibit C-3, it is only

seeking to maintain a direct connection with Level 3 for the purpose of terminating the tandem transit traffic that it receives from its customers.

Thus, I find that any relief awarded in this case should be limited to relief under section 204. The situation presented is clearly one contemplated by the legislature in crafting section 204: the parties have been unable to agree about a matter prohibited by section 305, and Commission resolution is appropriate.

As indicated in section IV above, Level 3 does not believe the Commission has authority to prescribe the terms of interconnection between the parties. In seeking a resolution of this matter, Neutral Tandem is not asking the Commission to craft an interconnection agreement, but asks the Commission to direct Level 3 to negotiate an agreement in compliance with the requirements of section 305. Neutral Tandem asks the Commission to provide 45 days for those negotiations to take place. Staff also asks that similar direction be given, citing the Connecticut PUC decision, Attachment 4 to Neutral Tandem's initial brief.⁷³ This is also generally consistent with orders issued by two other reviewing state regulatory agencies.⁷⁴ Therefore, it appears to be a reasonable recommendation calculated to resolve the matter.

Staff indicates that the parties should be given direction to negotiate a non-discriminatory agreement that includes "a compensation rate that will compensate Level 3 for all reasonable costs of direct interconnection," but excludes costs recoverable through reciprocal compensation.⁷⁵ Neutral Tandem asks that the Commission order include the following explicit provisions:

⁷³ Staff Reply Brief, p. 3.

⁷⁴ See Attachments 1 and 3 to Neutral Tandem's Brief, New York and Illinois commission decisions.

⁷⁵ See Staff Brief, p. 6; Staff Reply Brief, p. 2.

Level 3 shall not require Neutral Tandem to pay any fee or other compensation, either on a per-minute basis or otherwise, for transit traffic delivered to Level 3 by Neutral Tandem;

Level 3 and Neutral Tandem shall interconnect on terms and conditions no less favorable to Neutral Tandem than the terms and conditions that Level 3 currently offers to the ILEC tandem transit provider for delivery of transit traffic to Level 3;

I find these requested instructions confusing. To the extent that they are intended to convey that Level 3 may not seek a "market-based" rate, or seek reciprocal compensation, they are reasonable; to the extent that they preclude Level 3 from seeking a cost-based rate, they would be unfair. While Level 3 may pay costs associated with receiving tandem transit traffic from the ILEC, it is not appropriate to require the exact terms and conditions for Neutral Tandem's transit traffic.

I recognize that Level 3 has failed to substantiate on this record that it has any significant uncompensated costs that are not appropriately considered termination costs, and that permitting the company an opportunity to specify such costs could be considered a "second bite at the apple". Nonetheless, the concept that the parties negotiate a cost-based rate appears inherent in Neutral Tandem's request that the parties be directed to negotiate, and it is therefore appropriate that the Commission refrain from determining Level 3's costs prior to those negotiations.⁷⁶ Therefore, I recommend that the Commission provide the following instructions:

Level 3 shall maintain direct connections with Neutral Tandem for the sole purpose of delivering traffic from carriers that have chosen Neutral Tandem to deliver their originating traffic to Level 3;

Level 3 shall not require Neutral Tandem to pay any fee or other compensation, either on a per-minute basis or otherwise, designed

⁷⁶ As noted above, Neutral Tandem cites section 205 of the MTA as a basis for relief, but because Neutral Tandem is not seeking to have the Commission establish terms and conditions for interconnection, it is not necessary to address the applicability of that section at this point.

to recover termination costs recoverable as reciprocal compensation from originating carriers, or to impose a "market rate" that is not cost-based;

Neutral Tandem shall provide all the necessary caller identification information regarding the originating carrier to Level 3, as required by MTA Section 305a, to enable Level 3 to collect reciprocal compensation payments from those originating carriers;

If Neutral Tandem and Level 3 cannot agree on non-discriminatory terms and conditions within 45 days of the Commission's decision, the parties shall report the same to the Commission.

Level 3 seeks a determination that interconnection between the parties should be considered provided pursuant to the terminated 2004 contracts, with compensation computed accordingly.⁷⁷ Since both parties acknowledge this agreement was validly and lawfully terminated, it does not appear that such a determination is warranted.⁷⁸ The Commission did not make such a determination in ruling on Neutral Tandem's request for emergency relief. Level 3 also seeks attorney fees under section 601, and permission to terminate the interconnection agreement. Level 3 has not identified any violations of the MTA by Neutral Tandem, so I recommend that its request for attorney fees under section 601 be denied. Consistent with the discussion above, I also recommend that Level 3's request to terminate the direct connection with Neutral Tandem be denied.

Level 3 also has pending a request regarding potential mediation sanctions under section 203a: since I determined I lacked authority to grant Level 3's request at the prehearing conference and since the Commission has this matter pending through Level 3's appeal, I don't believe it would be appropriate for me to make any recommendation on that portion of the company's request for relief.

⁷⁷ See Exhibit R-9 (Confidential).

⁷⁸ See Level 3 Brief, p. 2; Exhibit C-2; Exhibit C-26.

VI.

CONCLUSION

Based on the findings of fact and conclusions of law set forth above, and for the reasons stated, I recommend the Commission issue an order providing relief to Neutral Tandem in accordance with section V of this Proposal for Decision, and consider the remaining claims of Level 3 pursuant to its pending appeal of my earlier ruling.

STATE OFFICE OF ADMINISTRATIVE
HEARINGS AND RULES
For the Michigan Public Service Commission

**Sharon L.
Feldman**

Digitally signed by Sharon L.
Feldman

DN: cn=Sharon L. Feldman, c=US,
email=sfeldm@michigan.gov
Date: 2007.10.08 08:34:43 -04'00'

Sharon L. Feldman
Administrative Law Judge

ISSUED AND SERVED: October 8, 2007