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To: Filings@psc.state.fl.us
Subject: Docket No. 070408
Attachments: PDF_Scan.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,

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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 - 32

E: Notice of Additional Supplemental Authority



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DOCUMENT NO. DATE

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11/8/2007

**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: November 8, 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 Findings of Fact, Conclusions, and Recommendation by a Minnesota Administrative Law Judge in Minnesota PUC Docket Nos. P-5733/C-07-296, P-5733, 6403/M-07-354, and OAH Docket No. 7-2500-18018-2: **In the Matter of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc., Against Level 3 Communications/ In the Matter of the Application of Level 3 Communications, LLC, to Terminate Services to Neutral Tandem, Inc.** This recommended decision, which was issued November 7, 2007, is subject to approval by the Minnesota Public Utilities Commission, and is provided in further support of Neutral Tandem's position set forth in these proceedings.

Respectfully submitted this 8th day of
November,

NEUTRAL TANDEM, INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail and Hand Delivery to Martin McDonnell, Esquire, and Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301, and that an electronic copy has also been provided to the persons listed below on November 8, 2007:

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7-2500-18018-2
P-5733/C-07-296
P-5733,6403/M-07-354

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of a Complaint and Request
for Expedited Hearing of Neutral Tandem,
Inc., Against Level 3 Communications

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

In the Matter of the Application of Level 3
Communications, LLC, to Terminate
Services to Neutral Tandem, Inc.

This matter came on for hearing before Administrative Law Judge Richard C. Luis at 9:30 a.m. on July 31, 2007. The hearing concluded on August 1, 2007. The hearing record remained open for posthearing briefs. The hearing record closed on October 8, 2007 with the filing of the reply by the Minnesota Department of Commerce.

Appearances:

Gregory Merz and Lesley Lehr, Attorneys at Law, Gray, Plant, Mooty, Mooty & Bennett, 80 South Eighth Street, Suite 500, Minneapolis, Minnesota 55402; Hank Kelley and Brett Freedson, Attorneys at Law, Kelley, Drye & Warren, LLP, 333 W. Wacker Drive, Chicago, Illinois 60606; and Greg L. Rogers, Director, State Regulatory Affairs, Level 3 Communications, LLC, 1025 Eldorado Boulevard, Broomfield, Colorado 80021, appeared on behalf of Level 3 Communications, LLC (Level 3).

William E. Flynn, Attorney at Law, Lindquist & Vennum, PLLP, 80 South Eighth Street, Suite 4200, Minneapolis, Minnesota 55402, and John R. Harrington and Matthew Basil, Attorneys at Law, Jenner & Block, LLP, 330 North Wabash, Suite 4700, Chicago, Illinois 60611, appeared on behalf of Neutral Tandem, Inc. (Neutral Tandem).

Julia Anderson, Assistant Attorney General, 1400 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the Minnesota Department of Commerce (Department).

Lillian Brion, Rates Analyst, appeared on behalf of the staff of the Minnesota Public Utilities Commission (MPUC or Commission).

ISSUES

1. Whether Level 3 may disconnect its network from that of Neutral Tandem, pursuant to the contract between the two companies under Minn. Stat. § 237.12, subp. 2?
2. If disconnection of the networks of Level 3 and Neutral Tandem is not in accord with the public convenience under Minn. Stat. §237.12, what terms and conditions are appropriately imposed on the continued connection of those two networks?
3. Whether Level 3 may impose a fee on Neutral Tandem to terminate traffic on Level 3's network where that traffic originates on a third party's network?
4. Whether Level 3's request for a termination fee to be paid by Neutral Tandem for traffic originating on a third party's network is discriminatory, since Level 3 has made no similar demand of Qwest for termination of the same type of traffic?

Based on all the files and proceedings in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Background

1. On March 6, 2007, Neutral Tandem, Inc. and its subsidiaries (collectively "Neutral Tandem") filed a complaint against Level 3 Communications, LLC and its subsidiaries (collectively "Level 3") alleging, among other things, that Level 3 improperly threatened to disconnect service with Neutral Tandem without Commission approval as required by Minn. Stats. §§ 237.12, subd. 2, and 237.74, subd. 9, and Minnesota Rules part 7812.2210, subp. 11. In addition, Neutral Tandem alleged that Level 3 had demanded payment as a requirement to avoid disconnection. Neutral Tandem asserted that such demand constituted price discrimination, in violation of Minn. Stat. § 237.74 and Minnesota Rules part 7812.2210, subp. 5. Neutral Tandem sought expedited proceedings on the matter.¹

2. On March 20, 2007, Level 3 filed a Request to Dismiss Complaint and Dismiss Without Further Commission Action, in which Level 3 denied that it planned to discontinue service with Neutral Tandem before securing Commission approval. Level 3 asserted that Neutral Tandem's complaint was not ripe for

¹ Verified Complaint and Request for Expedited Hearing of Neutral Tandem, Inc. Against Level 3 Communications, LLC, (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3880031>).

decision because Level 3 would only discontinue service upon Commission approval, and Level 3 had not yet filed an application to disconnect.²

3. On March 22, 2007, Level 3 filed an application for Commission approval to discontinue service to Neutral Tandem as of June 25, 2007.³

4. The Minnesota Public Utilities Commission ("Commission") assigned Docket No. P-5733/C-07-296 to Neutral Tandem's complaint filing ("Complaint Docket"). The Commission assigned Docket No. P-5733, 6403/M-07-354 to Level 3's disconnection filing ("Disconnection Docket").

5. On April 5, 2007, Neutral Tandem filed Reply Comments opposing Level 3's request to dismiss the relief requested in the Complaint Docket; proposing to consolidate that docket with the Disconnection Docket; asking the Commission to address both matters on an expedited basis; and, proposing that the Commission refer both dockets to the Minnesota Office of Administrative Hearings ("OAH") to conduct a contested case proceeding before an administrative law judge ("ALJ") to resolve disputed factual matters.

6. The Commission heard arguments on these matters on April 26, 2007. On May 9, 2007, the Commission issued a Notice and Order for Hearing finding jurisdiction for addressing both the Complaint and Disconnection Dockets. The Commission consolidated both Dockets and referred the matter to OAH for hearing before ALJ Richard Luis.

7. On May 31, 2007, the ALJ conducted a prehearing conference that was attended by representatives of Level 3 and Neutral Tandem.

8. On June 1, 2007, the Minnesota Department of Commerce ("Department") filed a letter stating its intention to participate in the case due to the requirement (set out in Minn. Stat. § 237.12, subd. 2) that the Department make a determination as to whether disconnection is in the public interest.⁴

9. On June 7, 2007, the ALJ issued the First Prehearing Order in this proceeding which identified the parties, set out procedures for the contested case, and established the schedule for various events in the proceeding.

10. On June 25, 2007, the ALJ issued an Order on Discovery denying Level 3's motion for a protective order and granting Neutral Tandem's motion to compel, finding that Neutral Tandem met its burden under Minn. R. 1400.6700, subp. 2, by demonstrating that the discovery is needed and is supported by the significance of the underlying issues and, that the limitations on the deposition

² Request to Dismiss Complaint and Close Docket without Further Commission Action (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3932022>).

³ Application of Level 3 Communications, LLC to Terminate Services to Neutral Tandem, Inc. (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=3932022>).

⁴ Department Letter, June 1, 2007 (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4106659>).

are sufficient to render the deposition of Sureel Choksi, President of Level 3's Wholesale Division, reasonable and not burdensome.⁵

11. On July 13, 2007, a prehearing conference was held to address a dispute over whether Sara Baack, Vice-President of Level 3's Wholesale Division, could be deposed for a further hour by Neutral Tandem in addition to her prior deposition. An Intervention Petition by Qwest seeking nonparty participant status was also to be considered. The day before the prehearing conference, Level 3 filed a motion to compel more complete answers to discovery from Neutral Tandem. Level 3 also filed a motion seeking to preclude Neutral Tandem from further discovery of the files of officers of Level 3's Wholesale Division. Due to the timing of Level 3's motions, consideration of those issues was deferred to July 19, 2007.

12. After the July 19, 2007 prehearing conference, the ALJ issued a prehearing order on July 27, 2007 which addressed the discovery issues, admitted Qwest as a nonparty participant, and addressed the scope of the consolidated proceeding.⁶

Tandem Transit Service Background

13. Tandem transit service is the intermediary switching of local and other non-access traffic that originates and terminates on the networks of different telecommunications providers within a local calling area or major trading area (MTA).⁷ The FCC has recently described tandem transit service, or "transiting" as:

Transiting occurs when two carriers that are not directly interconnected exchange nonaccess traffic by routing the traffic through an intermediary carrier's network. Typically, the intermediary carrier is an incumbent LEC and the transited traffic is routed from the originating carrier through the incumbent LEC's tandem switch to the terminating carrier. The intermediary (transiting) carrier then charges a fee for use of its facilities. Although many incumbent LECs, mostly BOCs, currently provide transit service pursuant to interconnection agreements, the Commission has not had occasion to determine whether carriers have a duty to provide transit service. The reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier and a terminating carrier, but the Commission's

⁵ ALJ Order, June 25, 2007
(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4344786>).

⁶ ALJ Order, July 27, 2007
(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4737242>).

⁷ MTAs are geographic divisions used by wireless providers in describing their coverage areas.

reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider.⁸

14. As the foregoing language suggests, the current compensation regime has the originating carrier purchasing transiting to complete each call on a terminating network for which the originating carrier lacks a direct connection. That approach to compensation is further reinforced by the FCC's statement that:

Finally, we recognize that the ability of the originating and terminating carriers to determine the appropriate amount and direction of payments depends, in part, on the billing records generated by the transit service provider. Thus, we ask carriers to comment on whether the current rules and industry standards create billing records sufficiently detailed to permit the originating and terminating carriers to determine the appropriate compensation due. For instance, although current billing records include call detail information, it is unclear whether and to what extent these billing records include carrier identification information. We seek further comment on the extent to which billing information in a transiting situation may be inadequate to determine the appropriate intercarrier compensation due, and we ask carriers to identify possible solutions to the extent that billing problems exist today. **Specifically, we request comment about whether to impose an obligation on the transiting carrier to provide information necessary to bill, including both the identity of the originating carrier, and the nature of the traffic.** Parties should explain whether this obligation to exchange information is necessary if we move to a bill-and-keep regime. In the absence of such information, it may be difficult for carriers exchanging traffic indirectly to identify each other and to determine the type and quantity of traffic that they exchange with each other. This may affect not only the exchange of compensation between the parties, but also may hinder the ability to establish direct connections. Parties should address whether such solutions are best implemented by this Commission, industry organizations, or some combination of the two.⁹

15. There is no indication from the FCC's statements on the various compensation issues that, as a general matter, there has been any contemplation of allowing a terminating carrier to charge a transiting carrier for traffic originating from another network lacking a direct connection to the terminating network.

⁸ *ITMO Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, Federal Communications Commission, 20 FCC Rcd 4685; 2005 FCC LEXIS 1390, FCC 05-33, rel. March 3, 2005 ("*FCC ICF FNPRM*"), ¶ 120, (http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-05-33A1.pdf).

⁹ *FCC ICF FNPRM*, ¶ 133 (emphasis added).

Level 3 Background

16. Level 3 is an international communications company that was founded in 1998. Level 3 provides communications and Internet backbone services using advanced Internet Protocol (IP)-enabled networks. Level 3 owns and operates a network with more than 47,500 route miles and offers services that include IP services, broadband transport, collocation, Softswitch managed modem services, and Voice over IP ("VoIP") services. Level 3 bundles these services to provide enterprise telecommunications solutions for individual customers. These customers fall within a wide array of companies and business enterprises, including 18 of the world's top 20 telephone companies, eight of the 10 largest carriers in Europe; eight of the largest 10 Internet service providers; nine of the 10 largest cable companies in the United States, three of the four top telecommunications companies in Asia; and four of the five largest wireless service providers in the United States, as well as federal and state government agencies.¹⁰

17. Level 3 is authorized to operate in Minnesota as a Competing Local Exchange Carrier (CLEC).¹¹ Between the summer of 2005 and 2006, Level 3 completed several acquisitions which included the purchase of ICG Communications (ICG) and Broadwing Communications (Broadwing).

Neutral Tandem Background

18. Neutral Tandem is a telephone company that provides tandem transit services to third party carriers. This service provides a means to indirectly interconnect and exchange traffic between third party carriers, without those carriers' using Incumbent Local Exchange Carriers' (ILECs') tandem transit services.¹² Neutral Tandem is licensed as a CLEC in Minnesota.¹³

19. Neutral Tandem offers tandem traffic services to CLECs, wireless carriers, and cable companies throughout Minnesota and in over 74 Local Access Transport Areas (LATAs) nationwide. In Minnesota, Neutral Tandem provides tandem transit service to thirteen different competitive carriers. Overall, Neutral Tandem delivers over 177 million minutes of traffic per month on behalf of the thirteen carriers in Minnesota that utilize Neutral Tandem's tandem transit services. Of that total, Neutral Tandem directs more than 21.5 million minutes of traffic each month in Minnesota from its 12 originating carriers to Level 3, and 4 million minutes of traffic each month in Minnesota to Level 3's subsidiary

¹⁰ Ex. 1, Baack Direct, at 3

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4162414>).

¹¹ *Id.* at 4; Ex. 4, Gates Direct, at 7

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4162416>).

¹² Ex. 6, Wren Direct, at 3

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4217721>).

¹³ Ex. 4, Gates Direct, at 21.

Broadwing. This traffic is transited over Neutral Tandem's tandem switches for delivery to Level 3.¹⁴

Contracts Between Level 3 and Neutral Tandem

20. Level 3 had multiple commercial agreements with Neutral Tandem that covered the terms and conditions for the completing connections, which may be either voice or internet service provider (ISP) traffic between Level 3's end users and the customers of other network providers. One contract was entitled "Agreement for Wireline Network Interconnection" between Level 3 and Neutral Tandem dated July 6, 2004 (the "Level 3 Agreement"). The Level 3 Agreement set forth terms and conditions (including payment terms) whereby transit traffic from other networks would be terminated on Level 3's network. By its terms, the Level 3 Agreement was effective for interconnection in New York, Michigan, and Illinois. Level 3 also signed a separate agreement to purchase transit services from Neutral Tandem for traffic originating from Level 3's network.¹⁵

21. While the Level 3 Agreement does not explicitly include Minnesota, both Level 3 and Neutral Tandem have adopted its terms for the exchange of traffic in Minnesota.¹⁶ This process (described by Level 3 as "ordering creep") has been the basis for the contractual expansion of interconnection between Level 3 and Neutral Tandem in most of the states where the two have direct interconnections.¹⁷

22. Neutral Tandem's arrangement with Level 3 did not require Neutral Tandem to pay Level 3 for terminating traffic on Level 3's network. There was a fee adjustment to the contract described by Neutral Tandem as follows:

Neutral Tandem's contract with Broadwing did not provide that Neutral Tandem would make any payments to Broadwing for terminating traffic, and Neutral Tandem does not make any payment to any other carrier for terminating traffic. Neutral Tandem did agree to provide Level 3 with a transitional promotional credit on an interim basis. However, that privately-negotiated arrangement was agreed to by Neutral Tandem in consideration of establishing a two-way business relationship with Level 3, under which it was contemplated that Level 3 would begin to originate traffic to Neutral Tandem for transit services. The promotional credit was designed to phase down to zero as Level 3's usage of Neutral Tandem's transit service increased. When Neutral Tandem initially interconnected with Level 3, Level 3 lacked the technical ability to

¹⁴ Ex. 6, Wren Direct, at 4, 8; Tr. Vol. 1, at 88 (Baack).

¹⁵ Ex. 1, Baack Direct, at 6-7.

¹⁶ Tr. Vol. 1, at 93 (Baack).

¹⁷ Ex. 1, Baack Direct, at 10.

segregate and route local traffic, therefore it was unable to originate transit traffic to Neutral Tandem.¹⁸

23. Neutral Tandem provides to Level 3 the "signaling information that Neutral Tandem receives from the originating carrier, just as Qwest does when it terminates transit traffic to Level 3, so that Level 3 can bill the originating carrier appropriate termination charges." Neutral Tandem has noted that it is willing to continue providing this information to Level 3 as part of the continuing connection of their networks.¹⁹

24. Broadwing had contracted with Neutral Tandem to accept traffic flows from Broadwing for termination on other networks. Broadwing's contract was in the form of a standard Master Services Agreement (MSA) that included exhibits that were pricing schedules for the particular services used by Broadwing.²⁰

25. Both ICG and Broadwing, through Broadwing's purchase of Focal Communications (Focal), had executed commercial agreements with Neutral Tandem. Both the ICG and the Focal agreements were styled as Master Services Agreements (MSAs) based on Neutral Tandem's standard form customer agreement, and these MSAs established the terms and conditions for ICG's and Focal's purchase of services from Neutral Tandem. Neither agreement required Neutral Tandem to pay a fee for the termination of transit traffic delivered to Focal or ICG. The Focal agreement and the ICG agreement each had initial terms of two years, and each agreement is terminable by either party upon expiration by providing 30 days notice of termination. The ICG agreement remains in force (in Ohio and Colorado).²¹

Existing Interconnection

26. In Minnesota, Neutral Tandem transports calls to the switch site of Level 3's subsidiary, Broadwing. Level 3 designated this location as the point of interconnection ("POI"). At that location, Neutral Tandem connects to one Broadwing switch and two Level 3 switches. Neutral Tandem pays for 100% of the cost to transport calls to the switch site. Neutral Tandem expressed its willingness to terminate traffic to Level 3's switch site (rather than Broadwing's) for no additional cost, if requested by Level 3.²²

27. In its existing interconnection with Level 3, Neutral Tandem pays both the cost of the transport facilities to deliver traffic to the POI and the cost of

¹⁸ Ex. 6, Wren Direct, at 9.

¹⁹ *Id.* at 14.

²⁰ Tr. Vol. 1, at 94-95 (Baack).

²¹ Ex. 1, Baack Direct, at 8-9.

²² Ex. 17, Saboo Rebuttal, at 5

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4736914>); Errata to Saboo Rebuttal (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4762122>).

the equipment necessary to complete the interconnection. Neutral Tandem also performs the supervision, monitoring, and maintenance of these transport facilities and equipment. Neutral Tandem monitors these facilities on a 24 hours per day, seven days per week basis through Neutral Tandem's Network Operations Center located in Chicago. Neutral Tandem maintains that this investment in transport and interconnection equipment saves Level 3 substantial costs while adding diversity to Level 3's network.

28. The transport and equipment costs borne by Neutral Tandem include the optical fiber linking Neutral Tandem's switch site and the designated POI. Neutral Tandem also provides the electronics at the POI. The electronics include a fiber distribution panel, fiber optic terminals, and DSX-3 panels.²³ Neutral Tandem maintains that, when Level 3 is connecting to the ILEC, all of this equipment must be purchased by Level 3.²⁴ If so, this would indicate that Level 3's costs to accept transited traffic from Qwest (the ILEC in Minnesota) would be higher than the cost to accept that traffic from Neutral Tandem.

29. Level 3 did not offer any evidence that would identify any particular cost that Level 3 incurs through its interconnection with Neutral Tandem. Neutral Tandem demonstrated that inherent costs incurred by Level 3 (excluding the equipment costs described in the foregoing Finding) in terminating traffic on its network are the same whether the traffic is transited by Neutral Tandem or the ILEC.²⁵

Level 3's Reasons for Disconnection

30. Level 3 advances a number of reasons for renegotiating its contract or terminating the connection with Neutral Tandem. First, the terms under which Neutral Tandem provided remuneration to Level 3 were based on a complicated formula that only Neutral Tandem could calculate, inhibiting transparency to Level 3 and making Level 3's billing difficult. Second, Level 3 maintains that it was required to expend considerable time and effort to perform augments on its network to support the contract with Neutral Tandem, beyond the original commercial boundaries contemplated between the parties. Third, the "out-of-balance" traffic flows between the two parties, resulting in economic costs and resource burdens on Level 3, was cited as creating a "need to rationalize agreements and commercial relationships across Level 3's various acquired entities" For these reasons, Level 3 asserted that "continued management of a transit termination network for Neutral Tandem did not make sense because, even without that network, Level 3 would still be able to receive traffic from Neutral Tandem's customers through the mutual interconnection arrangements with the ILECs."²⁶

²³ Ex. 17, Saboo Rebuttal, at 6-7 and Attachment 3 (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4736915>).

²⁴ Ex. 17, Saboo Rebuttal, Attachment 4.

²⁵ Ex. 17, Saboo Rebuttal, Attachment 11.

²⁶ Ex. 1, Baack Direct, at 10-11.

Level 3's Compensation Demand

31. On May 8, 2007, Level 3 sent a letter ("May 8 letter") to Neutral Tandem stating that it would terminate any traffic it received from Neutral Tandem after that date at the rate of \$.001 per minute. The letter referenced two earlier notices that purported to terminate the agreements between the carriers. The letter further provided that Level 3 would refuse to accept any traffic from Neutral Tandem for termination as of June 25, 2007, unless the proposed termination charge was accepted. The deadline set in the May 8 letter was described as allowing time for Neutral Tandem to notify its customers of the discontinuance of traffic routing to Level 3 via Neutral Tandem.²⁷

32. Level 3 described the basis for its compensation demand in its May 8 letter as follows:

The nationwide rate that we propose, on a blended basis, represents a significant discount to the ILEC transit rates otherwise available to Neutral Tandem or its customers. In addition, we note that Neutral Tandem will be able to recover these fees from the originating carrier pursuant to terms and conditions in Neutral Tandem's relevant state tariffs or the Master Services Agreement contained as part of Neutral Tandem's S-1 filing. Of course, it is up to Neutral Tandem as to whether it will seek any recovery from its customers. Level 3 is not asking Neutral Tandem to act as a clearinghouse with respect to compensation that might be owed by originating carriers, but instead is assessing a market based charge for the use of a terminating network by a transiting provider.²⁸

33. The compensation requested, \$.001 per minute of use (MOU) for each call terminated, was described as a "market-based rate."²⁹ Level 3 acknowledged that Neutral Tandem is not an "originating carrier" of the traffic that would be subject of the requested compensation.³⁰

34. Level 3 did not provide any information that would indicate that Level 3 incurred higher costs to terminate traffic transited by Neutral Tandem than that transited by Qwest. Level 3 did not describe any mechanism used to calculate the termination charge of \$.001 per minute per call requested from Neutral Tandem.³¹

35. Level 3 did not identify any Federal Communications Commission (FCC) order, PUC order, or other basis on which Neutral Tandem could require

²⁷ Ex. 1, Baack Direct, at 4, Attachment SB-1.

²⁸ Ex. 1, Baack Direct, Attachment SB-1.

²⁹ Tr. Vol. 1, at 69 (Baack).

³⁰ *Id.* at 98.

³¹ Ex. 18, Rebholz Reply, at 14

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4727178>).

payment of the \$.001 per minute termination fee (imposed by Level 3) from originating carriers. The Department pointed out that a significant portion of the transited traffic terminated on Level 3's network is ISP-bound traffic that is limited to a maximum termination rate of \$.0007 per MOU.³²

36. Level 3 has not attempted to impose a termination fee in any amount from Qwest on traffic transited to Level 3's network by Qwest, nor did Level 3 not indicate that it had any intention to impose such a fee on Qwest at any time in the future. Level 3 has not petitioned to disconnect its direct connection to Qwest, nor evidenced any intention to do so in the future.

Cost to Originating Carriers

37. Under the existing compensation regime, the originating carrier pays for delivery of traffic to the terminating carrier. Where no direct connection exists, indirect connection is used to terminate the traffic, using some form of tandem switching. Neutral Tandem relies upon its pricing for tandem switching services to provide an incentive for originating carriers to use Neutral Tandem, rather than an ILEC, for that function. Neutral Tandem estimates that its pricing results in a savings to originating carriers of approximately \$50 million annually when compared to ILEC pricing of transiting services.³³

Re-Routing Traffic

38. In the event that Level 3's disconnection petition were to be granted, traffic would need to be re-directed away from the 29 switches of the 12 different carriers transiting to Level 3 by way of Neutral Tandem. That traffic would need to be directed through the ILEC tandems to reach Level 3. Moving that traffic would require the addition of interconnection trunks with Qwest (the ILEC directly connected with Level 3 in Minnesota), thereby imposing costs on the originating carriers.³⁴ Neutral Tandem estimated that a single carrier may require an average of 60 days to re-route its traffic to a new tandem. This estimate is based in part on Neutral Tandem's experience when its own customers re-route traffic from ILEC tandems to Neutral Tandem. The impact of all 12 carriers re-routing traffic at the same time was expected to result in longer time periods to complete re-routing, up to several months, due to the complexity of the move, the large volume of traffic delivered by all twelve affected carriers, and the pressure on the ILEC to respond to such requests. This estimate of additional time to complete re-routing assumes that trunking capacity is already available. Inadequate trunk capacity could result in even longer delays.³⁵

³² Ex. 18, Reholz Reply, at 18.

³³ Ex. 17, Saboo Rebuttal, Attachment 1.

³⁴ Ex. 16, Saboo Direct, at 4

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4217720>).

³⁵ Ex. 17, Saboo Rebuttal, at 11-12.

39. Level 3 did not offer affirmative evidence to show that its proposal to disconnect would not result in the interruption of traffic or that adequate trunk capacity was in place to handle the volume of traffic now delivered by Neutral Tandem. In the absence of such evidence, Level 3 asserted that each carrier's alternative routing plan would continue to deliver the traffic indirectly. Neutral Tandem noted that where an originating carrier's call to Level 3 transiting via Neutral Tandem's switch is blocked by Level 3 from terminating, the originating carrier will have no way of knowing why the call has been blocked. As a result, Neutral Tandem maintained that the originating carrier could not use alternative routing plans to automatically re-direct any blocked calls to Level 3.³⁶

Trunk Capacity and Tandem Exhaust

40. Neutral Tandem pointed out that tandem exhaustion is a recurring problem in several states. Carriers in Minnesota and in other states have asked Neutral Tandem to accept overflow traffic to ILECs because the carriers cannot obtain sufficient trunk capacity to the tandem designated in the Local Exchange Routing Guide (LERG). Neutral Tandem pointed out that in the second quarter of 2006, Level 3 ran out of capacity to the ILEC tandem in the Chicago market (operated by SBC Communications through Ameritech). Level 3 was unable to receive traffic from AT&T (since AT&T's traffic was routed through the SBC (Ameritech) tandems due to a merger). As a result, traffic to Level 3 effectively was blocked. Neutral Tandem worked with AT&T and Level 3 to move the traffic back to Neutral Tandem's switches until Level 3 had time to augment its trunks with SBC. The trunk augmentation process took approximately four months before Level 3 was able to receive AT&T traffic from SBC.³⁷

41. The FCC has expressed recent concern over the issue of tandem exhaust (in the context of considering whether to make access to ILEC tandems obligatory), stating:

For instance, if a transit service obligation is imposed, indirectly interconnected carriers may lack the incentive to establish direct connections even if traffic levels warrant it. As mentioned above, some incumbent LECs currently limit the availability of transit services in order to prevent traffic congestion and tandem exhaust, and to encourage carriers to establish direct interconnection when traffic volumes warrant it.³⁸

42. The process of reconfiguring the network connections to handle traffic currently delivered to Level 3 by Neutral Tandem was described as follows:

The third party carriers might need several months just to coordinate a complete move of all Level 3 traffic. The bulk of this

³⁶ Ex. 17, Saboo Rebuttal, Attachment 11.

³⁷ Ex. 16, Saboo Direct, at 5.

³⁸ FCC ICF FNPRM, ¶ 131.

time would be spent augmenting capacity of both the third party carriers and Level 3 with Qwest. Indeed, Level 3 must first augment its capacity with Qwest, before any of the carriers can route their traffic through Qwest's tandem. After the capacity augmentations have been made, the third party carriers would have to implement routing changes in their switches so as to direct their traffic to Qwest's tandem. This would necessitate that all 28 switches of the thirteen third party carriers be carefully re-programmed to update its internal routing translations tables for re-routing traffic to the multiple Qwest tandems. Moreover, for the volumes of traffic involved here, a collocation alternative point of termination ("APOT") augment to the ILEC tandems likely is required. This quantity of trunks will require a project status by Qwest.³⁹

43. Level 3 has not offered any information to show that the network reconfiguration described by Neutral Tandem is either unnecessary or will not result in additional costs to originating carriers, Qwest, or Level 3 itself.

Redundancy

44. Neutral Tandem indicated that reliability, survivability, and resiliency are important aspects of a telephone network. Redundancy was identified as an important means of achieving those aspects in a network. As described by Neutral Tandem:

These three characteristics are the backbone of a strong telecommunications network. A reliable network is able to carry and complete its normal volume of traffic during normal hours, including anticipated surges during certain days and times when traffic is higher than normal, such as Christmas. Survivability measures the ability of the network to respond to an emergency by: (1) providing emergency telecommunications services for emergency responders such as firefighters, police, and medical personnel; (2) providing network customers with valid network status announcements and message updates; and (3) during the emergency, being capable of carrying some level of non-emergency traffic over the network. After a disaster or emergency ends, a resilient network rebounds back to a reliable network, as defined above, in the shortest period of time.⁴⁰

45. Neutral Tandem maintained that redundancy was a benefit that supported continued connection, stating:

Competitive tandem switching inherently builds redundancy into the telecommunications transport and switching infrastructure, which, in

³⁹ Ex. 16, Saboo Direct, at 7.

⁴⁰ Ex. 16, Saboo Direct, at 9-10.

turn, provides diversity, efficiency, and increased reliability to the PSTN [publicly switched telephone network]. This allows for faster disaster recovery and provides more robust homeland security. Neutral Tandem does not collocate its switching facilities with the ILEC and utilizes several different transport providers in Minnesota to provide diversity and redundancy.⁴¹

46. By not collocating switching facilities with Qwest, Neutral Tandem has decreased the risks associated with the potential for "single point-of-failure."⁴² Level 3 presented no evidence to indicate that redundancy was unimportant when considering benefits of interconnection or that this factor was unaffected by the proposed disconnection from Neutral Tandem.

Public Convenience

47. Level 3 has brought its discontinuance petition under Minn. Stat. § 237.12, subp. 2, which states:

Subd. 2. Discontinuance. Wherever a physical connection or connections exist between any telephone exchange system operated by a telephone company and the toll line or lines operated by another telephone company or between its toll line or lines and the telephone exchange system of another telephone company, or between its toll line and the toll line of another telephone company, neither of the companies shall cause such connection to be severed or the service between the companies to be discontinued without first obtaining an order from the commission upon an application for permission to discontinue such physical connection. Upon the filing of an application for discontinuance of such a connection, the department shall investigate and ascertain whether public convenience requires the continuance of such physical connection, and if the department so finds, the commission shall fix the compensation, terms and conditions of the continuance of the physical connection and service between the telephone companies.

48. Level 3 maintains that Commission action to require continued interconnection with Neutral Tandem is inappropriate, stating:

First of all, the parties were able to negotiate a mutually acceptable agreement without regulatory intervention. This is what competitive providers do in a market where neither provider has leverage or other market advantages. Second, neither the Act nor Minnesota law provides for arbitration between two competitive providers. Instead, those rights and responsibilities are necessary for and unique to CLEC to ILEC arbitrations where the two parties are not

⁴¹ Ex. 6, Wren Direct, at 6.

⁴² Ex. 16, Saboo Direct, at 9.

similarly situated as explained in the Act and the FCC's implementing orders. Finally, since the Commission was not involved in the establishment of the agreement, it is neither necessary nor required for the Commission to be involved in the dismantling of the agreement.⁴³

49. Neutral Tandem and the Department contend that Level 3's position does not accurately describe the obligations of CLECs or the role of the Commission in applying the statutes regulating telecommunications in Minnesota.⁴⁴ The Department maintains that the statutory obligation to determine whether the public convenience requires continued connection recognizes the potential impact on customers as a meaningful consideration.⁴⁵

50. Level 3 asserts that the *Arvig* decision supports its position in this matter.⁴⁶ Level 3 maintains that the controlling language from the decision is:

Considering § 237.12 first, we observe that it was initially enacted in 1915. The legislature's interest at that time was plain - it sought to ensure that the existence of numerous small, independent telephone companies would not hamper the flow of communications between the customers of different companies. The statute accomplishes its purposes by virtually requiring that any requested connection be allowed, and making it difficult to effect any disconnection thereafter. Accordingly, we conclude that the statute must be construed to affect only those connections and disconnections which would substantially alter the flow of communications between neighboring telephone systems.⁴⁷

51. Level 3 argues that its proposed disconnection does not "substantially alter the flow of communications" within the meaning of *Arvig*, since calls can be completed by indirect connection, through the transiting provided by Qwest.

52. Neutral Tandem noted that the factual situation in *Arvig* is distinguishable from the instant dispute and that the then-existing market structure authorized and encouraged monopoly providers for provision of local service.⁴⁸ The Department agreed that the factual situation in *Arvig* is

⁴³ Ex. 4, Gates Direct, at 6

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4162416>).

⁴⁴ Neutral Tandem Reply, at 2

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4786198>); Ex. 18, Rebholtz Rebuttal, at 6 (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4727178>).

⁴⁵ Ex. 18, Rebholtz Rebuttal, at 7-8 (citing Minn. Stat. §§ 237.12, subd. 2, and 237.74, subd. 9, and Minnesota Rules part 7812.2210, subp. 11).

⁴⁶ *Arvig Tel. Co. v. N.W. Bell Tel. Co.*, 270 N.W.2d 111 (Minn. 1978) ("*Arvig*").

⁴⁷ *Arvig*, 270 N.W.2d at 115.

⁴⁸ Neutral Tandem Reply, at 7-9.

distinguishable. Further, the Department asserted that the Commission's authority is broader than the limited scope described in *Arvig*.⁴⁹

53. The *Arvig* standard is "substantially alter[ing] the flow of communications between neighboring telephone systems." The evidence in the record shows a large volume of traffic, up to 21.5 million MOU per month, would be routed differently if disconnection were allowed. The remaining question is whether this would be a significant change in tandem traffic flow. The FCC addressed the tandem traffic issue between the ILEC (Verizon) and several other carriers in Virginia, stating:

Instead, we direct the parties to insert language directing AT&T, as soon as it receives notice from Verizon that its traffic has exceeded the DS-1 cut-off (i.e., as soon as what Verizon calls the transition period begins), to exercise its best efforts to enter into a reciprocal telephone exchange service traffic arrangement with the relevant carrier, for the purpose of seeking direct interconnection....⁵⁰

54. The DS-1 cut-off level was clarified by the FCC to mean "200,000 combined minutes of use ... for any consecutive three (3) months."⁵¹ At 21.5 million MOU per month, Neutral Tandem's level of traffic to Level 3 far exceeds the threshold at which the FCC sought to require direct connection between an ILEC unwilling to provide transiting and a CLEC. The relatively low FCC threshold is sufficient, under the facts of his case, to demonstrate that disconnection here, involving multiple times more usage, will "substantially alter the flow of communications" within the meaning of *Arvig*.

55. Level 3 maintains that "that there is no sort of requirement that CLECs interconnect But typically there are lots of attractive economic reasons for doing so".⁵² This position is contradicted by subdivision 1 of Minn. Stat. § 237.12, which states:

Subdivision 1. Interconnection. When public convenience requires the same, every telephone company shall, for a reasonable compensation, permit a physical connection or connections to be made, and telephone service to be furnished between any telephone exchange system operated by it, and the telephone toll line or lines operated by another company, or between its telephone toll line or lines and the telephone exchange system of another telephone company, or between its toll line and the toll line of another company, whenever such physical connection or

⁴⁹ Department Reply, at 24-26.

⁵⁰ *ITMO Interconnection Disputes with Verizon Virginia, Inc.*, DA 02-1731, CC 00-218, 00-249, 00-251, Memorandum Opinion and Order, 17 FCC Rcd. 27,039, ¶ 116 (Rel. July 17, 2002) ("*Verizon Virginia*").

⁵¹ *Verizon Virginia*, footnote 384.

⁵² Hearing Tr. Vol 1, at 101 (Baack).

connections are practicable and will not result in irreparable injury to the telephone system so compelled to be connected. The term "physical connection," as used in this section, means such number of trunk lines or complete wire circuits and connections as may be required to furnish reasonable and adequate service between such telephone lines and exchanges and shall not be deemed to provide for any connection whereby one line or circuit is to be bridged upon another line or circuit. In case of failure of the telephone companies concerned to allow or agree upon such physical connection or connections, or the terms and conditions upon which the same shall be made, application may be made to the commission for an order requiring such connection and fixing the compensation, terms and conditions thereof, and if after investigation and hearing the commission shall find that such physical connections will not result in irreparable injury to such telephone properties, the commission shall by order direct that such connections be made, and prescribe reasonable conditions and compensation therefor and for the joint use thereof, and by whom the expense of making and maintaining such connection or connections shall be paid. When application is made requesting physical connection it shall be presumed that such connection is necessary, and that the public convenience will be promoted thereby, and the burden of overcoming such presumption shall be upon the party resisting such application. The telephone companies so connecting shall give service over the connecting line or lines without preference to or discrimination against any service or telephone company whatever.

56. As CLECs, Neutral Tandem and Level 3 each qualify as "telephone compan(ies)" within the meaning of the statute.⁵³ The legal obligation to establish direct interconnection is stated plainly in Minn. Stat. § 237.12, as is the Commission's role to determine the terms of such interconnection where the parties cannot resolve the issues between themselves. The importance of direct interconnection is established in the statute, since promotion of the public interest is presumed, subject to rebuttal by an objecting telephone company.

57. Level 3 and Neutral Tandem are currently interconnected. To disconnect Neutral Tandem and Level 3 would substantially alter the flow of communications currently being terminated on Level 3's network.

58. The ultimate conclusion in *Arvig* was that the proposed alteration would not further the public convenience since the "proposal would result in increased costs for Minnesota telephone customers without any meaningful

⁵³ Minn. Stat. § 237.01, subd. 7. In the event that either company did not meet the definition, that company would constitute a "telecommunications carrier" under Minn. Stat. § 237.01, subd. 6. Minn. Stat. § 237.74, subd. 9, and Minn. Rule 7812.2210, subp. 10, impose very similar interconnection requirements on telecommunications carriers.

improvement in service.”⁵⁴ Applying the Minnesota Supreme Court’s ultimate conclusion to the facts of this matter, Level 3’s proposed disconnection would result in increased costs to customers terminating traffic on Level 3’s network and result in potentially significant impairment of service through indirect connection to Level 3’s network and a loss of redundancy in transiting traffic. Under the holding in *Arvig*, Level 3’s proposed disconnection does not further the public convenience.

Department’s Public Interest Determination

59. Under Minn. Stat. § 237.12, subd. 2, the Department is directed to determine whether disconnection is in the public interest. On September 21, 2007, the Department filed its determination, stating:

Based on the specific facts presented, the Department finds that granting Level 3’s request for disconnection of the direct connection at this time likely would have a negative impact on competition for local tandem transit service in Minnesota. The Department also concludes that Level 3 failed to demonstrate that it would be harmed by continuation of the direct connection at this time. Thus, the Department determines that the public convenience requires continuance of the direct connection between Neutral Tandem and Level 3 at this time.⁵⁵

60. The Department’s public interest determination is supported by the record.

Commission’s Role in the Public Interest Determination

61. Level 3 maintains that there is no basis for the Commission to require Level 3 to contract with Neutral Tandem under “federal Section 252 procedures (negotiation, arbitration, approval of agreements, etc.) for interconnection agreements and negotiations.”⁵⁶ The Federal law allowing “direct or indirect connection” is asserted by Level 3 to preempt the Commission from ordering a direct connection be maintained or established. Level 3 maintained that the only available mechanism for interconnection was voluntary agreement between contracting parties.⁵⁷ The Department disagreed with this position, stating:

Minnesota law clearly defines the Commission as providing a forum for resolution of disputes between CLECs. Silence on the part of

⁵⁴ *Arvig*, 270 N.W.2d at 117.

⁵⁵ Department Reply, at 26 (citing Minn. Stat. §§ 237.12, subd. 2; and 237.74, subd. 9, and Minn. Rules 7812.2210, subp. 11) (<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4780795>).

⁵⁶ Ex. 4, Gates Direct, at 7.

⁵⁷ Level 3 Brief, at 12-15 (citing 47 U.S.C. § 251(a)).

(<https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=4763473>).

the federal Act does not mean, as Level 3 argues, that CLECs have no forum other than the "market." Rather, the Minnesota Commission is available for resolution of local service disputes between CLECs, as long as doing so is not inconsistent with the Act.⁵⁸

62. The FCC has expressed concern over the potential for terminating carriers (such as Level 3 in this case) to distort the economics in negotiated agreements. The FCC recently stated:

Exacerbating the issue of inefficient rates is the problem of terminating access monopolies. Even when an end user takes service from two providers, e.g., wireless and wireline, the originating carrier must deliver the call to the terminating carrier with the telephone number dialed by the calling party. Other carriers seeking to deliver calls to that end user have no choice but to purchase terminating access from the called party's LEC. Originating carriers generally have little practical means of affecting the called party's choice of access provider, and the called party's LEC may take advantage of the situation by charging excessive terminating rates to a competing LEC. To address the terminating access monopoly problem, the Commission generally has determined that carriers should not be permitted unilaterally to impose termination charges that are not subject to regulation.⁵⁹

63. The foregoing language demonstrates that the freedom to negotiate access agreements is tempered by regulatory oversight. Regulatory involvement is contemplated where, as here, a party's negotiating position reflects the monopoly position of a carrier, not true market forces. The Department also cited a very recent statement by the FCC, noting that:

If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through. We are particularly concerned with preventing such a degradation of the country's telecommunications network.⁶⁰

64. Level 3 is correct in asserting that the ILEC-CLEC arbitration process does not apply to the dispute between Level 3 and Neutral Tandem. But, under Minn. Stat. § 237.12, subd. 2, upon the Department's determination that disconnection does not further the public convenience, the Commission is

⁵⁸ Department Reply, at 26 (citing Minn. Stat. §§ 237.12, subds. 2 and 3; and 237.74, subd. 9, and Minn. Rules 7812.2210, subp. 10).

⁵⁹ *FCC ICF FNPRM*, ¶ 24.

⁶⁰ Rebholtz Reply, at 6 (citing *ITMO Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC Docket No. 07-135, Released June 28, 2007, footnote 15 [quoting *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, 9932-33, ¶ 24 (2001)]).

obliged to "fix the compensation, terms and conditions of the continuance of the physical connection and service between the telephone companies."

65. Level 3 maintains that direct connection could be appropriate between carriers, but that "the circumstances under which direct interconnection makes operational and economic sense to a particular carrier vary from carrier to carrier and on a case-by-case basis and are not readily susceptible to a particular threshold, e.g., 1 DS-I, 3 DS-Is, a DS-3, etc."⁶¹

66. In the *Verizon Virginia* order, the FCC established a benchmark of 200,000 MOU for any consecutive three month period as triggering an obligation for an originating CLEC to establish a direct connection with a terminating CLEC.⁶² Level 3 has not demonstrated that it is experiencing any economic or operational burden to maintain the current interconnection with Neutral Tandem. The 21.5 million MOU transited each month by Neutral Tandem for termination on Level 3's network vastly exceeds the traffic volume that the FCC has found sufficient to require direct connection.

67. Level 3 maintains that allowing continued connection between its network and Neutral Tandem somehow inhibits other CLECs from establishing a direct connection to Level 3's network. But originating carriers must pay Neutral Tandem for transiting traffic. When the economic burden of establishing a direct connection to Level 3's network falls below Neutral Tandem's charges, CLECs are free to use that option for delivering traffic.

Price Discrimination

68. Neutral Tandem asserts that Level 3's demand for a termination fee constitutes price discrimination, since no such demand was made of the ILEC, Qwest. This conduct, Neutral Tandem maintains, is in violation of Minn. Stat. § 237.74, subd. 2, and Minnesota Rules part 7812.2210, subp. 5. Both the statute and rule prohibit unreasonable discrimination in the pricing of services, but allow that "prices unique to a particular customer or group of customers ... may be allowed for services when differences in the cost of providing a service or a service element justify a different price"⁶³

⁶¹ Ex. 1, Baack Direct, at 12-13.

⁶² The FCC noted that this trigger did not apply where the transiting was being purchased as a UNE. *Verizon Virginia*, supra, ¶ 121 ("Although we adopt Verizon's language, we emphasize that Verizon's proposed terms for transit service should not be interpreted or applied to restrict the petitioners' rights to access UNEs. (These network elements could include, for example, tandem switching and interoffice transport.) . . . we remind the parties of the petitioners' rights to access UNEs independent of Verizon's terms for transit service. Furthermore, we caution Verizon not to apply its terms for transit service as a restriction on the petitioners' rights to access UNEs for the provision of telecommunications services, including local exchange service involving the exchange of traffic with third-party carriers.").

⁶³ Minn. Stat. § 237.74, subd. 2.

69. Level 3 maintains that its decision to charge a fee to Neutral Tandem for termination of transited traffic, while not charging Qwest a similar fee, does not constitute discrimination, stating:

There is no discrimination because Neutral Tandem is not an ILEC and is not similarly situated to Qwest. Qwest as the incumbent is providing transit services - among hundreds of other services -- because of its historical position as the carrier of last resort. This responsibility is tied to its hundred year history of building out a public switched telephone network with monopoly rents in the absence of competition. When the Act was written, the market power and vestiges of monopoly associated with the ILEC were specifically identified and recognized. In order to eliminate economic and operational barriers to entry, the Act required very specific things of the ILECs. I have described the interconnection responsibilities for the ILEC earlier in this testimony. To eliminate barriers to entry the ILECs were required to unbundle their networks, provide interconnection, provide services for resale at discounted rates, price their interconnection services at Total Element Long Run Incremental Costs ("TELRIC"), and satisfy a lengthy competitive checklist, to name just a few.

As noted above, one requirement unique to the ILECs is the requirement to offer tandem transit services at TELRIC rates. In most if not all the cases, the ILEC did not want the burden of transiting traffic between third party carriers. Nevertheless, their ownership of the only ubiquitous network made them the only logical choice. To then force the ILEC to be a clearing house for billing issues between those carriers was seen as too burdensome given the other requirements already imposed (unbundling, quality of service standards, carrier of last resort requirements, 911 and E911 requirements, etc.). Neutral Tandem, on the other hand, is a CLEC without the ILEC history which has interjected itself into the market and is soliciting carriers to send their traffic to it for transiting and termination. Given its willful interjection and the fact that its presence hampers the ability of Level 3 and other carriers to negotiate a direct interconnection agreement that would permit reciprocal compensation, it is absolutely appropriate and necessary for Neutral Tandem to pay Level 3 for termination of the traffic from its customers and for the cost of the additional direct interconnection.⁶⁴

70. Level 3's description of the ILEC's obligation to offer tandem transit services at TELRIC rates is an incomplete picture of the FCC's action in this area. The FCC did require ILECs to offer tandem transit services to CLECs as

⁶⁴ Ex. 4, Gates Direct, at 38-39.

unbundled network elements (UNEs). As discussed above, the FCC distinguished between tandem transit offered as a service (like that provided by Neutral Tandem) and transiting offered as a UNE. The FCC's *Verizon Virginia* order placed significant emphasis on direct connection, where the volume of traffic justifies the economic costs of direct connection, and established a threshold for requiring direct connection if the ILEC no longer desired to provide transiting service. There is nothing about Neutral Tandem's business that prevents Level 3 from establishing direct connections with each of the originating networks currently using Neutral Tandem's service, when such connections make economic sense. Maintaining the direct connection between Level 3 and Neutral Tandem has been shown to be in the public interest and convenience.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commission have jurisdiction in this matter under Minn. Stat. §§ 14.50, 216A.05, and 237.02.
2. No FCC or Federal Court ruling regarding the subject matter of this proceeding precludes the Commission from acting on the petitions of the parties or in any way preempts the Commission from addressing the issues in this matter.
3. Under the standards set out in Minn. Stat. § 237.12, subp. 2, Level 3's disconnection petition may only be granted if continued interconnection is not in the public convenience.
4. The Department's determination that continued interconnection between Level 3 and Neutral Tandem is in the public convenience is supported by the record and requires that Level 3's request for disconnection be denied.
5. The determination that continued interconnection between Level 3 and Neutral Tandem is in the public convenience requires the Commission to establish the compensation, terms, and conditions by which the physical connection and service between Level 3 and Neutral Tandem shall continue.
6. The current interconnection conditions, which require Neutral Tandem to pay all equipment and monitoring costs to the Level 3-designated POI, are appropriate. Level 3 is not entitled to bill Neutral Tandem for termination of traffic on Level 3's network. Level 3 is obligated to bill the originating network to seek payment of any applicable termination fee. The cost of that billing is appropriately borne by Level 3. Neutral Tandem must provide call information that is sufficiently detailed to allow Level 3 to bill the appropriate originating carrier.

7. Level 3 has not shown that any differences in the cost of providing a service, market conditions, or ILEC pricing practices exist to justify charging a termination fee to Neutral Tandem and not to Qwest.

8. For Level 3 to charge Neutral Tandem a termination fee for transited traffic and not charge Qwest a similar fee would be discriminatory and constitute a violation of Minn. Stat. §§ 237.09, subd. 2, and 237.74, subd. 2, and Minn. Rule 7812.2210, subp. 5.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

That the Commission **DENY** Level 3's Application to disconnect from Neutral Tandem. It is appropriate for the Commission to set the terms and conditions of continued connection as described in the Conclusions above. It is appropriate for the Commission to order Level 3 to cease and desist from imposing a termination fee on Neutral Tandem.

Dated this 7th day of November, 2007.

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Angie D. Threlkeld, RPR CRR
Shaddix and Associates
Transcript Prepared (Two Volumes)

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 7th Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and

numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation that request such argument. Such request must accompany the filed exceptions or reply.

Pursuant to Minn. Stat. § 216.17, subd. 3, parties shall make these filings with the Commission via the Commission's electronic filing system whenever practicable, but may also file by personal delivery or by mail. Filings by personal delivery or by mail must include the original and 15 copies of each document.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter. Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that the recommendation has no legal effect unless expressly adopted by the Commission as its final order.



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November 7, 2007

Burl W. Haar, Executive Secretary
Minnesota Public Utilities Commission
350 Metro Square Building
121 Seventh Place East
St. Paul, MN 55101-2147

By E-Filing, E-Mail, and U.S. Mail

RE: ITMO of a Complaint and Request for Expedited Hearing of Neutral Tandem, Inc., Against Level 3 Communications and the Application of Level 3 Communications, LLC, to Terminate Services to Neutral Tandem, Inc., PUC Docket Nos. P-5733/C-07-296, P-5733,6403/M-07-354, OAH Docket No. 7-2500-18018-2

Dear Dr. Haar:

This letter notes that the Administrative Law Judge's Findings of Fact, Conclusions, and Recommended Order in the above-entitled matter has been served on the Commission. An Amended Hearing Exhibit List has been e-filed and that document denotes all of the hearing exhibits in the record of this proceeding. A certification of the contested case record accompanies this document, listing any e-filed documents that are excluded from the contested case record. Any documents in the

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November 7, 2007
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contested case record that are not already e-filed (including the original hearing transcript) accompany this letter. The OAH file on this matter is now closed.

Very truly yours,

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Telephone: 612-349-2542

Enclosures

RCL:ml

cc: All Parties on Service List w/ALJ Recommendation

**ITMO a Complaint of Neutral Tandem Against Level 3
and the Application of Level 3 to Terminate Services
Administrative Law Judge's Service List as November 7, 2007**

Persons with the E-File notation can be served electronically using the PUC E-Filing system. Any document not E-filed must be served by mail or courier (with additional copies as noted). No copies of information requests (IRs) are to be served those bearing the **No IRs** notation. Consistent with Commission policy and the First Prehearing Order in this matter, IRs and responses to IRs are **not** to be E-Filed.

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CERTIFICATE OF SERVICE
AND
CERTIFICATE OF CONTESTED CASE RECORD

Case Title: OAH Docket No.: 7-2500-18018-2
In the Matter of a Complaint and
Request for Expedited Hearing of PUC Docket Nos.:
Neutral Tandem, Inc., Against Level 3 P-5733/C-07-296
Communications P-5733,6403/M-07-354

In the Matter of the Application of Level
3 Communications, LLC, to Terminate
Services to Neutral Tandem, Inc.

CERTIFICATE OF SERVICE

Michael Lewis certifies that on November 7 and 8, 2007, he served a true and correct copy of the attached **FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION** by serving it by e-filing, email, and placement in the United States mail, properly enveloped, with postage prepaid, in accordance with the instructions and to the individuals identified on the attached service List.

CERTIFICATE OF CONTESTED CASE RECORD

Michael Lewis certifies that as of November 7, 2007, the contested case record of the above-entitled proceeding includes any paper documents returned to the Commission and all documents e-filed in Docket Numbers 07-296 and 07-297, except for the following documents:

[None excluded]