

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** May 8, 2008

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Competitive Markets & Enforcement (Lee, King)  
Office of the General Counsel (Mann, Teitzman)

**RE:** Docket No. 070408-TP – Petition by Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for resolution of interconnection dispute with Level 3 Communications, LLC, and request for expedited resolution.

**AGENDA:** 05/20/08 – Regular Agenda – Motion for Interim Compensation – Oral Argument Not Requested

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** McMurrian

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\CMP\WP\070408.RCM.DOC

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### Case Background

On February 26, 2007, Neutral Tandem, Inc. (Neutral Tandem) filed its First Petition for Interconnection with Level 3 Communications (Level 3) and Request for Expedited Resolution and/or Interim Relief (First Petition, Docket No. 070127-TX). Neutral Tandem requested that the Commission: (1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 and its subsidiaries; (2) resolve its Petition on an expedited basis; and (3) issue an interim order directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while its Petition is pending.

On May 3, 2007, Order No. PSC-07-0392-PCO-TX (Procedural Order) was issued. The Procedural Order required the parties to file briefs on the legal issues (1-3a), as set forth in Attachment A of the Procedural Order. Additionally, Oral Argument took place on May 24, 2007.

After filing a Motion for Leave to Amend its First Petition, Neutral Tandem filed its Notice of Voluntary Dismissal of Petition for Interconnection with Level 3, without prejudice, on July 9, 2007.

On July 11, 2007, Neutral Tandem filed its Second Petition for Interconnection with Level 3 and Request for Expedited Resolution and/or Interim Relief (Second Petition). Docket No. 070408-TP was opened to consider Neutral Tandem's Second Petition. On July 25, 2007, Level 3 filed its Response and Motion to Dismiss Neutral Tandem's Second Petition. On August 3, 2007, Neutral Tandem filed its Response to Level 3's Motion to Dismiss.<sup>1</sup> On September 21, 2007, Order No. PSC-07-0772-PCO-TP was issued, allowing the parties to file supplemental briefs addressing Issues 1-3a. Each party filed a legal brief on October 5, 2007.

On January 30, 2008, Order No. PSC-08-0073-FOF-TP was issued wherein the Commission found it has jurisdiction pursuant to Section 364.16(2), Florida Statutes, to ensure that a Competitive Local Exchange Company (CLEC) provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services in Florida. However, the Commission concluded that additional information was needed before a determination could be made whether Neutral Tandem has standing to petition for interconnection with Level 3. Consequently, the Commission denied Level 3's Motion to Dismiss and ordered that this docket remain open to conduct an administrative hearing.

On February 1, 2008, Level 3 filed a Motion for Interim Compensation Pending Final Agency Action (Motion for Interim Compensation) seeking relief based on the provisions of the Traffic Exchange Agreement dated July 6, 2004, between Level 3 and Neutral Tandem (Level 3 Contract). On February 8, 2008, Neutral Tandem filed its Response in Opposition to Level 3's Motion for Interim Compensation. On April 17, 2008, Level 3 filed its Amended Motion for Interim Compensation Pending Final Agency Action (Amended Motion for Interim Compensation) to expressly reference Section 11.3 of the Level 3 Contract as the basis for its requested interim compensation. On April 24, 2008, Neutral Tandem filed its Response in Opposition to Level 3's Amended Motion for Interim Compensation (Response in Opposition). Level 3 failed to move for leave to file its Amended Motion for Interim Compensation, pursuant to Rule 1.190, Florida Rules of Civil Procedure, and Rule 28-106.202, Florida Administrative Code, both of which the Commission relies on for guidance. Accordingly, staff did not rely upon the Amended Motion for Interim Compensation or Neutral Tandem's Response in Opposition in formulating the recommendation below.

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<sup>1</sup> Order No. PSC-07-0698-FOF-TP, issued August 27, 2007, merged the record of Docket No. 070127-TX, Neutral Tandem's First Petition, into Docket No. 070408-TP, Neutral Tandem's Second Petition.

Docket No. 070408-TP

Date: May 8, 2008

This recommendation addresses Level 3's original Motion for Interim Compensation. The Commission is vested with jurisdiction over this matter pursuant to Chapter 364, Florida Statutes.

### **Discussion of Issues**

**Issue 1:** Should Level 3 be granted interim compensation pending the final decision in this proceeding?

**Recommendation:** Yes. Staff recommends that for traffic subject to the Level 3 Contract, Level 3 is entitled to compensation for traffic termination and Neutral Tandem is entitled to compensation for transit services, to the extent these services are rendered.<sup>2</sup> Level 3 should not be compensated for any of the traffic subject to the Broadwing Contract. These compensation measures follow the surviving on-going obligations contained in the Level 3 Contract and maintain the status quo in the interim, pending the Commission's final decision in this proceeding. (Lee)

#### **Staff Analysis:**

As noted in the Case Background above, staff does not use either Level 3's Amended Motion for Interim Compensation or Neutral Tandem's Response in Opposition in formulating this recommendation. However, staff notes that the parties have provided essentially the same information and arguments in responses to staff discovery and the original pleadings.

### **PARTIES' ARGUMENTS**

#### **Level 3:**

In its Motion for Interim Compensation, Level 3 relies on the provisions in the Level 3 Contract as the basis for its requested relief. In support of its Motion for Interim Compensation, Level 3 asserts:

- The Level 3 Contract obligates Neutral Tandem to compensate Level 3 for terminating transit traffic originated by Neutral Tandem's third-party carrier customers, even after the contract has expired or is terminated.
- On March 7, 2007, Level 3 voluntarily agreed to continue to accept and terminate Neutral Tandem's transit traffic under the Level 3 Contract and the Broadwing Contract<sup>3</sup> until June 25, 2007, to allow sufficient time for the Commission to rule on Level 3's Motion to Dismiss in the First Petition, Docket No. 070127-TX.
- Neutral Tandem continues to send traffic to Level 3, but has not paid Level 3 for the continued use of its services.

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<sup>2</sup> Although the compensation obligation is interim, it should not be subject to true-up because the obligation is simply following an on-going surviving provision in the Level 3 Contract.

<sup>3</sup> The Broadwing Contract covered the exchange of traffic between Neutral Tandem and Broadwing Communications, a recently purchased subsidiary of Level 3. Under this contract, Neutral Tandem transited traffic originated from Broadwing and Broadwing terminated transit traffic from Neutral Tandem that originated from third-party carriers.

- At the January 8, 2008 Agenda Conference, the Commission raised the issue of how to address the status quo pending final agency action in this docket; i.e., whether Level 3 should be required to maintain the direct interconnection with Neutral Tandem and, if so, whether Level 3 should receive compensation for that interconnection.
- Neutral Tandem has “gamed” the system for nearly one year through voluntary dismissals and refileing essentially the same petition, deferrals, requests for oral argument, and a verbal allegation that it provides access to 911 services while continuing to use Level 3’s services for free.
- Justness and fairness dictate that Neutral Tandem be required to compensate Level 3 for the interconnection service it is providing. It is no longer reasonable to continue providing interconnection services to Neutral Tandem for free when Neutral Tandem is reselling the service to its carrier and Voice over Internet Protocol (VoIP) customers.
- Establishing interim compensation will set an “appropriate signal in the market” and end Level 3 subsidizing Neutral Tandem’s profits.
- Neutral Tandem is being compensated by its customers; Level 3 should be compensated by Neutral Tandem.

Neutral Tandem:

Neutral Tandem opposes Level 3’s Motion for Interim Compensation and believes it should be denied. Neutral Tandem argues the following points:

- Level 3 has provided no legal or factual basis for the Commission to require interim compensation.
- Level 3’s request for interim compensation is based on one provision in one contract that Level 3 chose to terminate is discriminatory, unlawful, and without support.
- None of the parties’ prior contracts have any relevance to this case. The Level 3 Contract, selectively relied on by Level 3, was a two-way contract under which the interim promotional credits to Level 3 were tied to Level 3’s purchasing transit service from Neutral Tandem. None of the other parties’ contracts included any promotional credits.
- Level 3’s claim that it is providing “direct interconnection services” to Neutral Tandem is nothing more than a restatement of Level 3’s legal obligation to terminate traffic that is originated by third parties and routed to Level 3 by Neutral Tandem.
- Level 3 is entitled to and should seek compensation for its traffic termination services from the carriers originating the traffic, not from Neutral Tandem.
- Level 3’s claim that Neutral Tandem is seeking interconnection with Level 3 for free is not true. Neutral Tandem pays 100 percent of the costs to deliver the transit traffic to Level 3, including all costs associated with the facilities used to deliver the traffic.

- Level 3 receives no compensation from AT&T and Verizon when they deliver tandem transit traffic to Level 3. Neutral Tandem should be treated in a like fashion.
- Imposing interim compensation would result in immediate cost increases to the carriers that have chosen to use Neutral Tandem's transit services to deliver their originating traffic.
- Imposing interim compensation as Level 3 requests will result in Level 3 being compensated twice for traffic bound for Broadwing, because Broadwing (Level 3's subsidiary) receives compensation for that traffic from originating carriers and would now receive additional compensation from Neutral Tandem.
- Imposing interim compensation will compromise the debate on the central issue in this proceeding of whether, as a matter of law and sound public policy, Neutral Tandem should compensate Level 3 as a condition of interconnection.
- Neutral Tandem is a strong, financially viable public company with cash holdings and other assets that can easily satisfy any payment obligation the Commission might order. There is no need to order interim compensation prior to final agency action.

#### ANALYSIS

Staff observes that the traffic exchanged between Neutral Tandem and Level 3 has been governed by several contracts, two of which the parties have included in their respective arguments regarding interim compensation – the Level 3 Contract and the Broadwing Contract. Staff observes that both contracts were two-way agreements and contained different compensation arrangements. Neutral Tandem's compensation obligation under the Level 3 Contract was based on a formula that was dependent on the amount of traffic originated by Level 3. As Level 3 originated more traffic, Neutral Tandem's compensation to Level 3 for traffic terminated by Level 3 decreased. In contrast, the Broadwing Contract did not provide for any compensation to be paid by Neutral Tandem; compensation for call termination was to be paid by the carrier originating the traffic.<sup>4</sup> Level 3 no longer uses Neutral Tandem to route its originated traffic or Broadwing's originated traffic to third parties.

In response to staff discovery, Level 3 contends that the compensation provisions of the Level 3 Contract remain in effect even though the contract has been terminated. Specifically, Level 3 claims that Section 11.3 of the Level 3 Contract legally obligates Neutral Tandem to continue to compensate Level 3 for the traffic termination services it receives:

In the case of the expiration or termination of this Agreement for any reason, each of the Parties shall be entitled to payment for all services performed and expenses accrued or incurred after such expiration or termination.

In contrast, Neutral Tandem, in response to staff discovery, contends that Section 11.3 only obligated the parties to compensate each other for services provided prior to the termination of

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<sup>4</sup> Broadwing paid Neutral Tandem for its transit service when originating traffic. When Neutral Tandem terminated transit traffic to Broadwing, Broadwing billed the originating carriers for call termination.

the Level 3 Contract; it does not present a surviving on-going compensation obligation. Further, asserts Neutral Tandem, the Broadwing Contract did not require compensation from Neutral Tandem to Broadwing, a recent subsidiary of Level 3, for call termination. Staff observes that under Level 3's Motion for Interim Compensation, Level 3 would impose compensation obligations on this traffic as well resulting in Level 3 being compensated for the delivery of the same traffic from Neutral Tandem and also from the carriers originating the traffic.

Both Level 3 and Neutral Tandem agree that the Level 3 Contract and the Broadwing Contract were lawfully terminated on March 23, 2007. Neutral Tandem acknowledges that it continues to terminate transit traffic to Level 3 and its subsidiary, Broadwing, pending a final Commission decision in this proceeding. Level 3 affirms that it continues to accept this traffic.

Neutral Tandem argues that imposing compensation obligations on an interim basis, pending the Commission's final decision, will compromise the debate on an issue raised in the proceeding. Neutral Tandem asserts that such action forces the Commission to make findings prematurely concerning the merits of the case before hearing testimony, reviewing the evidence submitted, or receiving briefs on this issue. An interim decision, argues Neutral Tandem in response to staff discovery, rewards Level 3 for its threat of disconnection as part of its "negotiating tool-kit."

Staff believes that imposing compensation obligations on an interim basis, pending the Commission's final decision, does not compromise the debate regarding whether Neutral Tandem should compensate Level 3 as a condition of interconnection. This issue will be heard at the scheduled hearing in this proceeding, and the parties can present evidence supporting their respective positions. Staff believes in this instance, compensation for maintaining the existing interconnection arrangement until the Commission makes a final decision is a matter governed by any surviving obligations contained in the Level 3 Contract and Broadwing Contract,<sup>5</sup> nothing more. While the Commission has previously established that the originating carrier, not the transit provider, should compensate the terminating carrier for terminating traffic to the end user,<sup>6</sup> staff believes the Level 3 Contract requires something different in the interim. Neither party should construe this recommendation to mean anything other than simply following a provision that survives the contract's termination. The fact that the Level 3 Contract and the Broadwing Contract were terminated makes little difference with respect to the Section 11.3 language in the Level 3 Contract that specifically obligates the parties to pay compensation for

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<sup>5</sup> There are no on-going surviving obligations regarding Broadwing traffic.

<sup>6</sup> Order No. PSC-06-0776-FOF-TP, issued September 18, 2006, in Docket No. 050119-TP, In Re: Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ["Joint Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc. and Docket No. 050125-TP, In Re: Petition and complaint for suspension and cancellation of Transit Traffic Service Tariff No. FL2004-84 filed by BellSouth Telecommunications, Inc., by AT&T Communications of the Southern States, LLC; Order No. PSC-05-0075-FOF-TP, issued October 11, 2005, Docket No. 040130-TP, In Re: Joint petition by NewSouth Communications Corp., NuVox Communications Inc., and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc.

services rendered after expiration or termination of the contract. In response to staff discovery, Neutral Tandem asserts that Section 11.3 restricts compensation to services used prior to the associated contract's termination. Staff disagrees; the language indicates that compensation obligations expressly survive the termination of the contract until a new agreement is reached, or until traffic is no longer exchanged. While not attempting to revive selective portions of a terminated contract, staff believes Neutral Tandem should adhere to a provision that extends beyond the contract's termination. Staff is not espousing a position on the appropriateness of the compensation mechanism but simply believes that this is the compensation mechanism required by the Level 3 Contract for traffic termination as long as Neutral Tandem uses Level 3's termination services. The obligation would end once a final decision by the Commission is issued, another contract is effective, or the exchange of traffic ends. In this way, staff believes the status quo is maintained in the interim.

Because the Level 3 Contract was a two-way contract, it was anticipated that traffic would flow both ways. The contract provided compensation from Level 3 to Neutral Tandem for traffic originated by Level 3 and routed to third parties using Neutral Tandem's transit service. Just as Section 11.3 obligates Neutral Tandem to compensate Level 3 for traffic termination, it also obligates Level 3 to compensate Neutral Tandem for its transit service. It is staff's understanding that Level 3 no longer originates any traffic that uses Neutral Tandem's transit service. Nonetheless, to the extent Level 3 utilizes Neutral Tandem's transit service from March 24, 2007, until a final Commission decision is issued in this proceeding, another contract is effective, or the exchange of traffic ends, staff believes it is obligated to compensate Neutral Tandem as set forth in the Level 3 Contract.

For the traffic terminated to Broadwing, there was never an obligation for Neutral Tandem to compensate Broadwing for call termination; there is no obligation after the contract's termination either. In keeping with the above and to maintain the status quo until a final Commission decision is rendered, staff thus believes that no compensation is owed for Broadwing traffic during the interim period.

#### CONCLUSION

Staff recommends that for traffic subject to the Level 3 Contract, Level 3 is entitled to compensation for traffic termination and Neutral Tandem is entitled to compensation for transit services, to the extent these services are rendered. Level 3 should not be compensated for any of the traffic subject to the Broadwing Contract. These compensation measures follow the surviving on-going obligations contained in the Level 3 Contract and maintain the status quo in the interim, pending the Commission's final decision in this proceeding.



**Issue 2:** How should interim compensation be determined and when should it be paid?

**Recommendation:** If the Commission approves the staff recommendation in Issue 1, staff recommends that compensation obligations should be determined using the formula included in the Level 3 Contract for traffic exchanged by the parties on an interim basis, pending the Commission's final decision. For Broadwing traffic, no compensation is due. These compensation measures apply to any services rendered under the Level 3 Contract, effective March 24, 2007, and extend through the date the Commission makes a final decision in this proceeding, the date a new agreement is effective, or the date the exchange of traffic ceases. Staff recommends that payment for services already received since March 24, 2007, should be made within 45 days after receipt of a bill (using the compensation formula in the Level 3 Contract) and thereafter in accord with the payment terms in Section 7 of the Level 3 Contract.

If the Commission denies the staff recommendation in Issue 1, this issue is moot. (Lee)

**Staff Analysis:**

**PARTIES' ARGUMENTS**

**Level 3:**

Level 3's recommended interim compensation rate is confidential. Level 3 contends that this rate is appropriate to use for interim purposes, subject to true-up upon final Commission action, for the following reasons:

- The rate is consistent with the compensation provisions contained in the Level 3 Contract that included Neutral Tandem paying a per minute rate.
- The formula contained in the Level 3 Contract to calculate the compensation Neutral Tandem would pay Level 3 created a "complex and impractical method of compensation."
- The recommended rate reflects the effective rate actually paid by Neutral Tandem to Level 3 under the Level 3 Contract.

Alternatively, Level 3 recommends that Neutral Tandem be ordered to re-route traffic to Level 3 through another transit provider that has a direct interconnection with Level 3 during the pendency of the proceeding. This, asserts Level 3, is something Neutral Tandem has done in several states without disturbing the public switched network.

**Neutral Tandem:**

Neutral Tandem opposes interim compensation measures. Neutral Tandem makes the following arguments:

- Neutral Tandem is a strong, financially viable public company with cash holdings and other assets that can easily satisfy any payment obligation the Commission might order. There is no need to order interim compensation prior to final agency action.

- To ensure that the Commission has no concerns about Neutral Tandem's ability to fulfill any payment obligations should the Commission disagree with Neutral Tandem's position after a full hearing, Neutral Tandem is willing to post a \$100,000 letter of credit or similar guarantee as a condition to Level 3 maintaining its interconnection with Neutral Tandem in the interim.
- Level 3's alternative suggestion that Neutral Tandem re-route traffic back to the Incumbent Local Exchange Company (ILEC) on an interim basis would not benefit Level 3. Such action would, however, result in immediate rate increases to Neutral Tandem's CLEC customers.
- Level 3's suggestion to adopt what it claims was the effective rate under the Level 3 Contract is without merit. None of the parties' prior contracts have any relevance to this proceeding. There is no basis upon which the requirements of any of these now-terminated contracts can be incorporated into this proceeding.

### ANALYSIS

There are several options the parties have set forth for interim compensation.

- Level 3 recommends a rate that is confidential. The rate would be effective March 24, 2007, subject to true-up upon final agency action. Level 3 states that its recommended rate is the effective rate paid by Neutral Tandem under the Level 3 Contract.
- Alternatively, Level 3 recommends that Neutral Tandem be ordered to re-route traffic to Level 3 via indirect means during the pendency of this proceeding.
- Neutral Tandem asserts that interim compensation should be zero.
- Alternatively, Neutral Tandem recommends it post a \$100,000 letter of credit or similar guarantee.

#### Level 3's Confidential Rate:

As discussed in Issue 1, Section 11.3 of the Level 3 Contract presents a compensation obligation that extends beyond the termination of the contract "for all services performed and expenses accrued or incurred after such expiration or termination." Level 3 contends that even after terminating the contract, as long as Neutral Tandem routes traffic for termination on Level 3's network, it is subject to the rates underlying that contract. For the traffic subject to the Level 3 Contract, staff agrees and believes that compensation should therefore be based on the formula provided in the contract. While Level 3 may believe the formula is complex and impractical in hindsight, Level 3 nevertheless agreed to it. Staff notes that any alleged complexities inherent in the compensation formula are reduced given that Level 3 is no longer using Neutral Tandem to transit its originating traffic. This compensation is applicable only to the traffic subject to the Level 3 Contract.

Based on staff's recommendation in Issue 1, interim compensation should not be imposed on traffic subject to the Broadwing Contract. This will alleviate Neutral Tandem's concerns that

Level 3 would be compensated both by Neutral Tandem and by the originating carriers if interim compensation were applicable to all traffic.

Re-routing Traffic:

If Neutral Tandem is ordered to re-route traffic destined to Level 3 pending the outcome of this proceeding, Neutral Tandem opines that its originating carrier customers, Florida consumers, the reliability and redundancy of the public switched telecommunications network (PSTN), as well as Neutral Tandem itself, will be irreparably harmed. Such an order, Neutral Tandem claims, would result in increased costs for the originating carriers' end-users, deny those originating carriers the choice of how to route their traffic, could have negative effects on Neutral Tandem's business, hinder transit competition in Florida, and could result in the blocking of traffic due to lack of trunk or tandem capacity of the alternative transit provider.

Neutral Tandem indicates that no true-up mechanism would ensure that Neutral Tandem is made whole or rectify the harm to other non-party carriers and their Florida customers. Carriers using Neutral Tandem's services could begin questioning its viability and reliability in the market, thus impairing Neutral Tandem's ability to attract new customers, not to mention retaining its existing customers.

Staff agrees with Neutral Tandem and believes that re-routing is not a viable alternative. However, re-routing does not and would not relieve Neutral Tandem of the compensation obligation provided in Section 11.3 of the Level 3 Contract from the expiration of the contract until the time of re-routing.

Letter of Credit:

Neutral Tandem believes a letter of credit provides more than adequate assurance that any payment obligation will be met. A letter of credit provides a guarantee that Neutral Tandem has set aside more than adequate funds to cover any compensation the Commission ultimately may find is due for the interconnection between the parties. In fact, asserts Neutral Tandem, it has made clear to Level 3 that it will satisfy any payment obligation ordered by the Commission.

In contrast, Level 3 asserts that a letter of credit is not sufficient because Section 11.3 of the Level 3 Contract entitles it to compensation "for all services performed and expenses accrued or incurred after such expiration or termination." Level 3 contends that even after terminating the contract, as long as Neutral Tandem routes traffic for termination on Level 3's network, it is subject to the rates underlying that contract. Moreover, asserts Level 3, a letter of credit would effectively rewrite the contract provision to receive free service.

A letter of credit would not involve the exchange of any compensation in the interim, but would secure payment based on a final decision. Under normal circumstances, a letter of credit would appear to be a viable interim measure because it would provide a high level of security that compensation would be paid upon final action of the Commission and at relatively little cost to Neutral Tandem in the interim. However, staff's recommendation in Issue 1 is predicated on the fact that Section 11.3 of the Level 3 Contract specifically requires compensation for services

rendered beyond expiration or termination of the contract. Compensation is owed, making a letter of credit simply a mechanism to defer the payment of monies due for services rendered.

Effective Date:

Level 3 asserts that the effective date for interim compensation should be March 24, 2007, the day following the termination of the Level 3 Contract. Neutral Tandem opposes interim compensation in general, but did not specifically address the effective date asserted by Level 3 if interim compensation were to be imposed.<sup>7</sup> The Level 3 Contract and the Broadwing Contract were both terminated on March 23, 2007. It is appropriate that any compensation obligations imposed be effective March 24, 2007, and extend through the date the Commission makes a final decision in this case, a new agreement becomes effective, or the exchange of traffic ceases. Staff believes this action complies with the surviving obligations in the Level 3 Contract. During this interim time, neither party can unilaterally stop accepting or terminating traffic. Staff believes that payment for services already received since March 24, 2007, should be made within 45 days after receipt of a bill (using the compensation formula in the Level 3 Contract). Thereafter, staff believes payment should be made in accord with Section 7 of the Level 3 Contract which requires payment within 30 days from the billing date shown on the received bill.

CONCLUSION

If the Commission approves the staff recommendation in Issue 1, staff recommends that compensation obligations should be determined using the formula included in the Level 3 Contract for traffic exchanged by the parties on an interim basis, pending the Commission's final decision. For Broadwing traffic, no compensation is due. These compensation measures apply to any services rendered under the Level 3 Contract, effective March 24, 2007, and extend through the date the Commission makes a final decision in this proceeding, the date a new agreement is effective, or the date the exchange of traffic ceases. Staff recommends that payment for services already received since March 24, 2007, should be made within 45 days after receipt of a bill (using the compensation formula in the Level 3 Contract) and thereafter in accord with the payment terms in Section 7 of the Level 3 Contract.

If the Commission denies the staff recommendation in Issue 1, this issue is moot.

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<sup>7</sup> Through discovery, staff asked Neutral Tandem what it believes the effective date should be if interim compensation is imposed. In its response, Neutral Tandem reiterated its position that there is no lawful basis for interim compensation, but did not respond to the question posed. Staff surmises that Neutral Tandem has no objection to the March 24, 2007, effective date requested by Level 3.

Docket No. 070408-TP

Date: May 8, 2008

**Issue 3**: Should this docket be closed?

**Recommendation**: No. This docket should remain open pending the hearing scheduled for September 24, 2008, through September 26, 2008. (Mann)

**Staff Analysis**: This docket should remain open pending the hearing scheduled for September 24, 2008, through September 26, 2008.