

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

|                                  |   |                    |
|----------------------------------|---|--------------------|
| Neutral Tandem, Inc.             | ) |                    |
| and Neutral Tandem-Illinois, LLC | ) |                    |
|                                  | ) |                    |
| vs.                              | ) | Docket No. 07-0277 |
|                                  | ) |                    |
| Level 3 Communications, LLC      | ) |                    |
|                                  | ) |                    |

**POST-HEARING REPLY BRIEF OF LEVEL 3 COMMUNICATIONS, LLC**

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## **POST-HEARING REPLY BRIEF OF LEVEL 3 COMMUNICATIONS, LLC**

The Defendant, Level 3 Communications, LLC (“Level 3”), through counsel, submits this Post-Hearing Reply Brief on the Complaint and Request for Declaratory Ruling of Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (together “Neutral Tandem”).

### **I. INTRODUCTION**

There are three primary issues in this case:

(1) did Level 3 violate any state or federal laws or statutes when it notified Neutral Tandem of its desire to terminate the parties’ commercial agreement and provide indirect, as opposed to, direct interconnection to Neutral Tandem’s carrier customers;

(2) can the Illinois Commerce Commission (“Commission”) establish a complete interconnection agreement between CLECs that have, by agreement, terminated their commercial agreement; and

(3) is indirect interconnection an inefficient form of interconnection that will adversely affect end users’ telephone calls. As evidenced by Neutral Tandem’s request for relief, this is not a case where Neutral Tandem requests the Commission to make a declaration about the “calling party pays principle.”

Neutral Tandem requests that the Commission order direct physical interconnection with Level 3 on terms and conditions that Neutral Tandem could not secure in a commercial agreement, notwithstanding extensive negotiations between the parties. In its Post-Hearing Brief (hereinafter cited as “NTI Br. at \_\_”), the only substantive request for relief that Neutral Tandem requests is that the Commission order the Traffic Termination Agreement between Time Warner and Neutral Tandem to “be executed and filed [by both Level 3 and NTI] within 30 days from the issuance of the Commission’s Order in this proceeding.” NTI Br. 55; 59; Level 3 Ex. 10.<sup>1</sup> According to Neutral Tandem, the Commission should force Level 3 to execute this Agreement because the

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<sup>1</sup> Neutral Tandem’s request for relief has changed from the filing of the complaint. In its complaint, Neutral Tandem requests that the Commission order, pursuant to Section 9-250 of the Illinois Act, that Level 3 to maintain interconnection with Neutral Tandem at terms “no less favorable than the terms in place between Level 3 and AT&T.” Complaint ¶ 65. Regardless of which agreement NTI seeks, the Time Warner Agreement shows that the terms (i.e. trunk forecasts) are actually complex, unique to each carrier, and must still be negotiated between the parties.

terms and conditions of this direct interconnection arrangement between Time Warner and Level 3 would “serve as an appropriate contractual model”:

The [Time Warner] agreement’s terms govern the same relationship as the relationship between Neutral Tandem and Level 3 here – direct interconnection for the receipt of traffic from Neutral tandem and *not* for traffic originating from Time Warner. . . . for example, (1) Level 3’s obligation to receive and terminated from Neutral Tandem; (2) Neutral Tandem’s duty to pass sufficient call detail to Level 3 so that Level 3 can identify the originating carrier for intercarrier compensation purposes, (3) Level 3’s obligation to directly interconnect with Neutral Tandem, and (4) Neutral Tandem’s duty to provide traffic forecasts to Level 3. . . . ***Thus the negotiation process is greatly simplified.***

NTI Br. at 54-55 [emphasis added.] For the record, Level 3 opposes the terms of the Time Warner agreement. Staff concurs with Level 3 that the Commission has no authority to impose contract terms on Level 3: “Level 3 is further correct in asserting that Neutral Tandem seeks to ‘pick and choose,’ or ‘opt into’ another carrier’s - in this case, AT&T’s agreement with Level 3, which, as between CLECs, is clearly not something that state Commission’s are authorized to require by Section 252 of the Telecommunications Act.” Staff Br. at 26.

There is also no state or federal law that gives Neutral Tandem the right to compel Level 3 to establish or maintain a direct physical interconnection under the terms of a written contract or otherwise.<sup>2</sup> See e.g. NTI Br. at 50 – 54. Neutral Tandem claims that § 9-250 of the Illinois Act may provide authority to require the parties to enter into a contract because this section:

“empowers the Commission to prevent a public utility from establishing ‘rates or other charges’ or from implementing ‘. . . contracts or practices . . . that are unjust, unreasonable, discriminatory or preferential.’ If the Commission finds rates or practices by a public utility to be unjust or discriminatory, ‘the Commission shall determine the . . . contracts or practices to be thereafter observed.. . .’”

NTI Br. at 41-42. However, Staff agrees that Level 3’s conduct did not violate § 9-250, and that the Commission may not rely on § 9-250 to impose direct physical interconnection: “Neutral

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<sup>2</sup> Mr. Wren acknowledges that an actual written contract would have to be established between Level 3 and Neutral Tandem to govern the terms and conditions of interconnection. Tr. at 120.

Tandem’s invocation of Section 9-250 of the Public Utilities Act . . . is of little utility here . . . **it is not easy to assess what constitutes just, reasonable, and nondiscriminatory rates, terms and conditions in a competitive context.**” Staff Br. at 27 [emphasis added.]

While Staff recommends that the Commission order Level 3 and Neutral Tandem to maintain *direct interconnection* until further Commission order to allow the parties to engage in negotiations for a commercial agreement (Staff Br. at 25, 28), the Commission cannot compel parties to negotiate a commercial agreement,<sup>3</sup> nor can the Commission order direct interconnection while waiting for the parties to again negotiate a contract that the Commission cannot compel. Staff claims that “[r]egulators properly can and must weigh all relevant competing considerations to determine which type of interconnection is consistent (or most consistent) with applicable rules and regulations, and which would best serve the public interest.” However, Staff cites to no regulation or rule that compels direct interconnection. In addition, Staff witness Hoagg could not identify a single factor that the Commission could rely upon to require direct interconnection. Tr. at 445-448. Level 3 does not dispute that it has an obligation to interconnect, but Level 3 is not required to *directly* interconnect with Neutral Tandem, and Staff’s witness provided no basis for such an order. Section 251(a) of the 1996 Act gives carriers the option to interconnect “either directly or indirectly.” 47 U.S.C. § 251(a).<sup>4</sup> Any action by the Commission that eliminates a CLECs *federal* right to indirect interconnection runs afoul of the federal Telecommunications Act and is pre-empted.

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<sup>3</sup> Only Incumbent Local Exchange Carriers are required by federal law to negotiate interconnection agreements. 47 U.S.C. § 252.

<sup>4</sup> Staff argues that interconnection is a two-way street, and that Level 3’s interpretation of Section 251(a) would give “indirect interconnector” effective veto power over a CLEC requesting direct interconnection. Staff Br. at 20. Staff’s argument is inconsistent because staff argues the opposite – that every originating carrier can demand direct interconnection. In fact, both originating and terminating carriers are required to interconnect – it is up to them to agree on the method.

Finally, end users will not be affected by the use of indirect, versus direct, interconnection. Neutral Tandem is in the business of providing indirect interconnection. The fact that originating carriers would be indirectly interconnecting to Level 3 using AT&T as the transit provider is proof that indirect interconnection is an acceptable and reasonable method for interconnection. In fact, indirect interconnection is often the preferred method of interconnection for transit traffic today. Gates Direct at 29.

Because the Commission is precluded from ordering Level 3 to directly interconnect, and because Level 3 is, and will remain, indirectly interconnected in compliance with its duties under federal law, 47 U.S.C. § 251(a), the Commission may not conclude that Level 3 has violated Section 13-514, 13-702 or 9-250. Level 3 is in compliance with federal law, has committed no violation of state law, and thus the Commission cannot impose the relief requested by Neutral Tandem. The Commission must deny the relief requested by Neutral Tandem and enter judgment in favor of Level 3.

**II. INDIRECT INTERCONNECTION WILL NOT AFFECT SERVICE TO ANY END USER. (Responding to Staff Brief at 8-9, 22; NTI Brief at 8, 21-29.)**

Staff asserts that the Commission has authority to ensure that “telecommunications traffic is appropriately exchanged between carriers” and that the “public interest concern implicated here is the exchange of traffic” between end users. Staff Br. at 8, 9. Level 3 agrees that the Commission can take action to ensure that telecommunications traffic is exchanged between originating and terminating carriers. However, it is undisputed that Level 3 is, and will remain, interconnected with every facilities-based CLEC in Illinois, including Neutral Tandem customers. Gates Direct at 14, 38; Staff Br. at 27. It is important to remember that the calls involved in this case are destined for the end users of Level 3’s customers. Level 3 simply has no incentive to let calls fail. Staff witness Hoagg also acknowledges that indirect interconnection is a reasonable form of interconnection. Tr.

at 430; 130. Each of the 18 carriers will still be able to route traffic to each other through Neutral Tandem and Level 3's continued indirect interconnection.

While Neutral Tandem claims that traffic destined for Level 3 may fail, there is no support in the record. Neutral Tandem witness Mr. Saboo stated that its carrier customers (Neutral Tandem serves no end users) may have insufficient capacity in their interconnection trunks with AT&T. NTI Br. at 8, citing Saboo Direct at 4,5. However, Mr. Saboo testified that Neutral Tandem has no knowledge of what capacity its customers have with AT&T. Tr. at 269-270. Staff does not support Neutral Tandem's claims that calls will fail. Staff Br. at 10. Staff's refusal to support Neutral Tandem's claim that there is a public interest impact is based on Staff witness Hoagg's testimony, wherein he acknowledges that not only is he unaware of whether there are limitations in any carrier's ability to exchange traffic, even if there are, those limitations are temporary. Tr. at 427.

Indirect interconnection, with calls being routed through the ILEC (AT&T) as a transit provider, is not only the typical method of interconnection between CLECs, but is often the preferred method. Gates Direct at 29. Neutral Tandem agrees that the majority of traffic exchanged between carriers in AT&T's territory is interconnected using AT&T as the transit provider. Tr. at 179.

Staff argues that Level 3's notice to Neutral Tandem that Level 3 would be disconnecting "existing interconnection facilities is, in the Staff's view, a gravely serious matter." Staff Br. at 22. According to Staff, it was unreasonable for Level 3 to notify Neutral Tandem to disconnect the direct interconnection arrangement with Neutral Tandem, and to expect that Neutral Tandem could provision substitute facilities in approximately one month. *Id.* Staff's argument ignores two undisputed points: First, the direct interconnection arrangement between Level 3 and Neutral Tandem was created exclusively through the terms of a traffic exchange agreement that started on July 6, 2004 (the "Level 3 Agreement"). Baack Direct at 9-10. It is undisputed that that

agreement was lawfully terminated. Tr. at 135-136. Level 3 cannot be criticized, or held in violation of a state statute, for terminating an agreement that both parties agree was lawfully terminated. Any finding to the contrary is arbitrary and capricious. Level 3 was not required to seek Commission approval of the termination of the direct interconnection arrangement that was created by commercial negotiations. Second, Staff's claim that Level 3 acted unreasonably by terminating the agreement ignores § 731.905 of the Commission's rules, which specifically authorizes Level 3 to disconnect service upon 35 days notice:

Except where otherwise agreed to, in writing, by the carriers, no provisioning carrier offering or providing wholesale service to a requesting carrier shall terminate, discontinue, or abandon the service once initiated except upon at least 35 days prior written notice (the termination notice) to the Commission and the requesting carrier.

83 Ill. Adm. Code §731.905. On April 24, 2007, Level 3 served notice on the Commission and on Neutral Tandem pursuant to § 731.901 that Level 3 would be terminating the interconnection arrangement as of June 25, 2007, more than the 35 days required. Neutral Tandem Complaint, Ex. 6. Because the Commission's rules permit Level 3 to discontinue interconnection, and because the direct interconnection that was being terminated was established by contract in the first place (which was also terminated) the Commission cannot conclude that Level 3 acted unreasonably, or put end user traffic at risk. Notably, even though it acted properly to terminate the direct interconnection, Level 3 maintains interconnection to allow Neutral Tandem to notify its carrier customers to make arrangements to ensure that calls will not fail. Level 3 Ex. 1.1.<sup>5</sup>

**IV. LEVEL 3 DID NOT VIOLATE THE PUBLIC UTILITIES ACT. (Responding to NTI Br. at 14-33; Staff Br. at 16 – 24.)**

Because Level 3 lawfully terminated the Level 3 Agreement, and because Level 3 followed the Commission's rules that permit Level 3 to terminate interconnection services upon notice, the

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<sup>5</sup> Level 3 agrees that if the Commission orders Neutral Tandem to notify its customers that the Level termination route is no longer available, Level 3 will maintain the interconnection arrangement to allow the NTI customers to reroute traffic.

Commission cannot conclude that Level 3's threatened disconnection violated the Illinois Public Utilities Act. Any such finding would be arbitrary and capricious. Neutral Tandem claims that Level 3's demand, in a commercial negotiation, for compensation as a condition to establish direct physical interconnection, was unreasonable and in violation of Sections 13-514, 13-702 and 9-250 of the Illinois Act. However, the Commission cannot conclude that Level 3 acted in violation of the Act for seeking payment, in a commercial negotiation,<sup>6</sup> as a condition to directly interconnect with Neutral Tandem where the Commission cannot compel direct physical interconnection anyway. There is no rule that prohibits Level 3 from seeking compensation from Neutral Tandem. In a statement that is fatal to Neutral Tandem's claims (and Staff's arguments) Staff witness Hoagg testified, and Staff argues in its brief, that Level 3 is entitled to payment from Neutral Tandem. Tr. at 495. If Level 3 is entitled to receive some compensation in a commercial negotiation, it cannot be a violation of Section 13-514 to negotiate for that compensation.

The facts do not support that Level 3 acted in an unreasonable manner during the course of its negotiations for new interconnection terms and conditions with Neutral Tandem. Level 3 demonstrated, and Staff agreed, that indirect interconnection is reasonable and consistent with the requirements of the Illinois Act. As Level 3 notes in its initial brief, § 251(a) of the federal Act permits Level 3 to indirectly interconnect with Neutral Tandem. Level 3 cannot violate the Illinois Act by doing what the federal act permits it to do. Finally, Staff argues that Level 3 should be held to be in violation of § 13-514 because "Level 3 does not proactively pay reciprocal compensation to third-party carriers" for calls originated by Level 3 and terminated to another carrier. Staff Br. at 13. However, Level 3 indicated that it does not pay because it is not billed for compensation by originating carriers. Tr. at 359. Failing to pay something that is not billed cannot be a basis for a ruling that Level 3 has violated § 13-514.

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<sup>6</sup> The negotiations were not pursuant to Section 252 of the federal Act.

**A. Section 13-514 does not require direct physical interconnection.**

Section 13-514(1) prohibits a carrier from “unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier.” Section 13-514(2) makes it unlawful to impair the speed, accuracy or efficiency of services used by another telecommunications carrier. Section 13-514(6) prohibits a carrier from “unreasonably acting or failing to act in a manner that has an adverse effect on the ability of another” carrier to serve its customers. While Neutral Tandem segregates its argument into each subcategory of § 13-514 that it claims Level 3 to have violated, the arguments for a violation are essentially the same for each subsection (as NTI acknowledges, NTI Br. at 30.) Level 3 will address each claim in order, measured against the standards of Sections 13-514(1), (2) and (6). 220 ILCS 5/13-514.

1. Neutral Tandem claims that Level 3 has violated Section 13-514(1) because “as of June 25, 2007, [Level 3] will no longer allow Neutral Tandem to interconnect to its network for purposes of delivering transit traffic originated by third party carriers destined for Level 3’s end users. . . .” NTI Br. at 19. This is a false accusation. Level 3 will continue to interconnect with Neutral Tandem and each of Neutral Tandem’s customers through indirect interconnection arrangements, using AT&T as the indirect transit provider. Nothing in state or federal law, and no words in § 13-514 in particular, require Level 3 to *directly* interconnect with Neutral Tandem; § 13-514 only requires interconnection, not direct physical interconnection. Moreover, the termination of the interconnection arrangement was done lawfully, and in compliance with the parties’ traffic exchange agreement that created the interconnection in the first place.

2. Neutral Tandem also claims that because Neutral Tandem pays 100% of the transport cost to bring traffic to Level 3, Level 3’s refusal to directly interconnect is based on an “anticompetitive motive.” NTI Br. at 19-20 (alleging violation of § 13-514(1)). Level 3 had

sufficient business justification for the decisions it made in its commercial negotiations with Neutral Tandem. Baack Direct at 10-12; Tr. at 359, 361. However, regardless of Level 3's motives or business justification, § 13-514 does not require Level 3 to directly interconnect with Neutral tandem. Because Level 3 remains indirectly interconnected with Neutral Tandem and each of its customers, and because there is no law, regulation, duty or obligation on Level 3 to directly physically interconnect to Neutral Tandem for free, Level 3 did not violate § 13-514.

3. Neutral Tandem also claims that Level 3's choice to indirectly interconnect "would unreasonably delay" interconnections with originating carriers because originating carriers would need up to six months to rearrange transport capacity and reprogram their switch to reroute the traffic. NTI Br. at 20-21 (§ 13-514(1); 25 (§ 13-514(2)), 28 (§ 13-514(6)). Level 3's election to maintain its indirect interconnection arrangements with each of NTI's customers, and NTI itself, will not delay traffic exchange, and does not delay another carrier's ability to manage its network to route traffic to AT&T. In the unlikely event that customers experience any impairment, Neutral Tandem has only its own inaction to blame. Level 3 notified Neutral Tandem on numerous occasions, but Neutral Tandem never advised its customers that Level 3 was no longer a carrier to which Neutral Tandem would have physical interconnection after June 25, 2007.. Regardless of whether Neutral Tandem did or did not notify its customers, Level 3's willingness to accept traffic from originating carriers through AT&T will ensure that no traffic is delayed.

4. Neutral Tandem claims that forcing originating carriers to route traffic through AT&T forces originating carriers "through inferior connections not of their choosing." NTI Br. at 20 (§ 13-514(1)). In what may be the most hyperbolic argument ever made to the Commission, Neutral Tandem claims, but did not provide a single shred of evidence, that forcing carriers to use their existing interconnection arrangement with AT&T to route traffic to Level 3

would impair the speed and quality of the transiting traffic . . . by causing the Illinois telecommunications infrastructure to lose out on the benefits of reliability, survivability, and resiliency that having an independent tandem transit provider provides to the state's telecommunications infrastructure.”

NTI Br. at 21 (§13-514(1)), 23 (§13-514(2)). An originating carrier using AT&T as its transit provider for calls bound to Level 3 will not impair the speed of traffic in Illinois, will not deny the Illinois telecommunications infrastructure of anything, and will not impair the “survivability and resiliency” of the Illinois telecommunications infrastructure. Neutral Tandem’s customers have an existing interconnection with AT&T through which they currently exchange traffic. If the Illinois telecommunications infrastructure was going to fail as a result of XO Communications and other carriers routing traffic through AT&T, it would have failed many years ago. If originating carriers are forced to route traffic through AT&T because NTI cannot do so directly with Level 3, no traffic will be delayed, and the quality of the calls will remain the same. Gates Direct at 22-23. In addition, while Level 3 does not advocate that originating carriers route traffic first through Neutral Tandem, and then through AT&T, there is no evidence that such a route would delay calls. In fact, Neutral Tandem’s Interconnection Agreement with Verizon, contemplates double-tandem transiting arrangement. NTI Ex. 6, § 6.2. If double-transiting traffic (calls being routed from originating carrier to NTI, then to AT&T, then to Level 3) would cause damage to the telecommunications infrastructure, neither Verizon nor Neutral Tandem would have agreed on how to compensate each other for that method for exchanging traffic.

5. Neutral Tandem also claims that if traffic to Level 3 must be routed through AT&T, then “additional interconnection delays will likely occur due to tandem exhaustion, which could lead to call blocking in Illinois.” NTI Br. at 21 (§ 13-514(1)); NTI Br. at 24 (§ 13-514(2)); 28 (§ 13-514(6)). Neutral Tandem claims that because it has not yet configured its interconnection capacity with AT&T to handle all of the traffic destined to Level 3, Level 3 will cause delays in

the exchange of traffic. NTI Br. at 24. First, as Neutral Tandem acknowledges, there is no evidence in the record of what AT&T's tandem capacity is. NTI Br. 8. Since Neutral Tandem failed to meet its burden of proof, no conclusions can be drawn about whether tandem exhaust exists or not. Second, the amount of traffic at issue, less than 1.5% of the transit traffic in Illinois, is *de minimis*, so tandem exhaust will not occur with 1.5% of the transit traffic in Illinois being shifted to AT&T's tandems. Third, this complaint governs only Level 3's conduct; Level 3 cannot be found to have violated § 13-514 because other carriers' networks, hypothetically, may lack sufficient capacity to handle their own traffic.<sup>7</sup>

6. Neutral Tandem claims that Level 3's demand for compensation as a condition for direct interconnection was unreasonable and discriminatory. NTI Br. at 22 (§ 13-514(1); 26-28 (§13-514(6))). Level 3's request for compensation as a condition for direct physical interconnection, made in the context of a commercial negotiation, is not a violation of § 13-514 unless there is a legal duty under law that requires direct physical interconnection without compensation. Because Level 3 remains indirectly interconnected with Neutral Tandem, and because there is no law, regulation, duty or obligation on Level 3 to directly interconnect to Neutral Tandem for free, Level 3 did not violate § 13-514. Neutral Tandem's claim that it is discriminatory for Level 3 to seek compensation from Neutral Tandem but not AT&T is also not actionable under § 13-514. As Level 3 noted in its initial brief, the FCC rejected the argument that a carrier can "pick and choose" a single term from one agreement and apply that term to the interconnection agreement between other carriers.<sup>8</sup> The FCC found that "in terms of protections against discrimination" allowing carriers to pick and choose a single term of an interconnection

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<sup>7</sup> To be clear, if Neutral Tandem or any of its originating carrier-customers needs additional time to configure its interconnection arrangements with AT&T, Level 3 has offered to work with Neutral Tandem. Level 3 Ex. 1.1.

<sup>8</sup> Level 3 Initial Br. at 17 – 19, *citing Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, FCC 04-164, ¶12 (rel. July 13, 2004) ("*Pick-and-Choose Order*").

agreement does not “outweigh the significant disincentive it creates to negotiated interconnection agreements.” *Pick and Choose Order* at ¶ 24. Notably, Staff concludes that Level 3 has not discriminated against Neutral Tandem by offering terms and conditions for interconnection that are different than the terms that apply with AT&T. Staff Br. at 25.

7. Neutral Tandem’s claims that Level 3 violated § 13-514(1) because Level 3 had previously “blocked” non-telecommunications services traffic (pure internet traffic) with Cogent. NTI Br. at 22 (§ 13-514(1)). Although Neutral Tandem mischaracterizes this event, it is not actionable under § 13-514. First, this event was a commercial agreement, not subject to commission oversight. Moreover, Cogent failed to notify its customers of the impending end of the commercial relationship so they could make alternative arrangements. In the instant case, Level 3 has proactively and repeatedly requested that NTI provide such notification to their customers and make arrangements for that traffic to be rerouted; NTI has continually refused to do so and has taken no steps to date to plan for the potential unwinding of the commercial relationship with Level 3.<sup>9</sup>

8. Finally, Neutral Tandem claims that if originating carriers are forced to transit traffic bound for Level 3 through AT&T, then their costs will increase, those costs will be passed on to consumers, and cost increases to carriers that will have to route traffic through AT&T is against the public interest. NTI Br. at 27-28 (§ 13-514(6)); Staff Br. at 17-19. First, indirect interconnection, is more expensive than direct interconnection because, by definition, it involves an additional intermediate transit carrier. Notwithstanding the additional cost, Neutral Tandem provides, as its sole and exclusive business, indirect interconnection services. The Commission cannot conclude that indirect interconnection is more costly and conclude that § 13-514 has been violated because transit services, whether provided by NTI or AT&T, involve additional costs to

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<sup>9</sup> Level 3 and Cogent resolved their commercial dispute with a new commercial agreement. Tr. at Ex. 16.

the originating carrier. Second, AT&T's transit rates have been set at TELRIC<sup>10</sup> cost-based rates by the Commission. Staff Br. at 27. Even assuming that Level 3 is forcing originating carriers to use AT&T's transit services, it cannot be a violation of § 13-514 that these rates are excessive, because these rates were determined by the Commission.

9. Staff also argues that "traffic termination is a bottleneck service and function" and that Level 3 may be leveraging its bottleneck in its negotiations with NTI. Staff Br. at 21. Staff's argument is based on Mr. Hoagg's testimony that ". . . since an end user typically subscribes to a single LEC, other carriers needing to deliver calls to that end user have no choice but to utilize that single LEC for termination." Hoagg Direct at 13. Staff's argument is baseless; Mr. Hoagg testified that both *originating and terminating carriers have* bottleneck monopolies to each individual end user. Hoagg Direct at 13. Level 3 has no more leverage in its negotiations for terminating traffic than originating customers have on traffic bound for Level 3.<sup>11</sup> As a result, Level 3 cannot be found to be exploiting some hypothetical monopoly power in its negotiations with Neutral Tandem.

**B. Section 13-702 does not require direct interconnection (responding to Staff Br at 24; NTI Br. 29-31)**

Staff argues that Level 3 must continue to receive traffic delivered by Neutral Tandem, under § 13-702, because a physical connection between the parties already has been made. Staff Br. at 24. However, Staff ignores that the contract terms and conditions that were the basis for the direct, physical interconnection between Level 3 and Neutral Tandem was lawfully terminated. Neutral Tandem does not request that the Commission maintain the interconnection under the terms of that agreement. Therefore, the issue to be decided by the Commission is whether the

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<sup>10</sup> Total Element Long Run Incremental Costs.

<sup>11</sup> Because customers may port their telephone number and select an alternative carrier, Level 3 does not control its end users. If Level 3 is not allowing calls to be routed to its customers, the customers will find an alternative carrier.

Commission may fashion an agreement between Level 3 and Neutral Tandem going forward. Section 13-702 does not delegate authority to the Commission to establish agreements, or to fashion interconnection terms and conditions between CLECs. Rather, the Commission may only enforce parties' existing agreements; and here, there is no agreement to enforce. Neutral Tandem claims that the conduct alleged to be in violation of § 13-514 is also a violation of § 13-702. NTI Br. at 30-31. Level 3 disputes this, because the statutory language of § 13-702 is quite different. *See* Level 3 Initial Br. at 13-15. Level 3 has responded above to each of the claims alleged to be in violation of § 13-514.

**C. Section 9-250 (Staff Br. 27)**

Staff asserts, and Level 3 agrees that the Commission cannot determine what constitutes just, reasonable and non-discriminatory rates, terms and conditions of interconnection in a competitive market, and that the Commission can therefore not aware any relief on § 9-250. Staff Br. at 27. Although Level 3 asserts that the Commission does not have authority under the Act to arbitrate such just, reasonable and non-discriminatory rates, terms and conditions between CLECs, as it does between the incumbent LEC and CLECs, Level 3 is satisfied with Staff's recommendation that the Commission not attempt arbitration here.

**III. ORIGINATING CARRIERS CANNOT COMPEL A THIRD-PARTY CLEC TO DIRECTLY INTERCONNECT WITH AN INDEPENDENT TRANSIT PROVIDER (Responding to NTI Br. at 33-41; Staff Br. at 17, 21)**

Neutral Tandem claims that any telecommunications carrier originating traffic on its network may compel any other telecommunications carrier downstream to establish direct, physical interconnection with the tandem transit service provider of its choice. NTI Br. 34. The proposition is not accurate. Originating carriers get to route calls through Neutral Tandem only to those other carriers with whom Neutral Tandem has a termination agreement; originating carriers do not get the option to create downstream direct interconnection by choosing a preferred transit provider. Neutral

Tandem and Staff argue that the “calling party pays” principal permits the originating carrier to dictate the precise routing of calls by its end users to the terminating carrier. NTI Br. at 34; Staff Br. at 17.<sup>12</sup> However, Staff witness Hoagg made clear that the calling party pays principle does not require or mandate direct physical interconnection between Neutral Tandem and Level 3. Tr. at 484, lines 6-9. If direct interconnection cannot be required, then logically, the originating carriers do not get to choose the downstream path of a call. Also, this claim conflicts with Staff argument that the costs of direct interconnection are shared only between Neutral Tandem and Level 3 as the interconnecting carriers, and not by any third party carrier that originates traffic. Staff Br. at 19. Because, according to Staff, originating carriers do not share in the costs of direct interconnection between Neutral Tandem and Level 3, such third party carriers should not be able to determine or share the decision on how to route calls.

More importantly, Neutral Tandem’s argument is logically inconsistent. A carrier may choose over which trunks a call is routed as it leaves its network, but it does not get to choose how other carriers route calls on their networks, or whether they rely on third-party backbone providers to route calls. Tr. at 416-417. An originating carriers’ choice on how a call exits its own network could not give the originating carrier the choice to require downstream carriers to interconnect with each other.<sup>13</sup>

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<sup>12</sup> Staff claims that Neutral Tandem’s customers have revealed their preference on how their traffic should be routed. Staff Br. at 17. However, because none of Neutral Tandem’s customers have appeared to support Neutral Tandem’s case, or to express concern that their traffic will fail, Staff is only speculating what the originating carriers prefer.

<sup>13</sup> Every originating carrier is also a terminating carrier (Neutral Tandem is neither.) What happens if XO originates a call to Level 3, and chooses a route that requires the creation of a new interconnection arrangement involving transit provider B? What happens if Level 3 originates a call to XO at the same moment, and chooses a route than requires the creation of a new interconnection arrangement involving transit provider C? Do both parties’ election require the creation of 2 additional direct interconnection trunks? The answer is obviously no, because the originating carrier only gets to choose the first leg of the route of its call, it does not get the option to manage the terminating carrier’s network. The only logical solution, and the only solution supported by the law, is that XO and Level 3 could reach agreement on the routing of the traffic (whether directly or indirectly), and barring agreement, the parties would exchange their traffic indirectly through the ILEC transit provider.

**IV. THE CALLING PARTY PAYS PRINCIPLE DOES NOT APPLY. (Responding to Staff Br. at 10-17; NTI Br. at 41 – 49.)**

For the reasons set forth in Level 3's initial brief, and because Neutral Tandem does not request any relief related to intercarrier compensation, Level 3 refers the Commission to Level 3's Initial Brief at pages 27 to 32.

**VI. CONCLUSION**

For the foregoing reasons, the Commission should: (1) deny the relief requested by Neutral Tandem; (2) enter judgment in favor of Level 3 and against Neutral Tandem on the allegations of the Complaint and Request for Declaratory Ruling; (3) dismiss, with prejudice, the Complaint and Request for Declaratory Relief; and (4) award to Level 3 all attorneys' fees and costs incurred by Level 3 in defending this action, and grant such further relief as the Commission deems appropriate.

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