

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Neutral Tandem, Inc. and	:	
Neutral Tandem-Illinois, LLC	:	
-vs-	:	
Level 3 Communications, LLC	:	
	:	Docket No. 07-0277
Verified Complaint and Request for	:	
Declaratory Ruling pursuant to	:	
Sections 13-515 and 10-108 of the	:	
Illinois Public Utilities Act.	:	

**REPLY BRIEF OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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June 8, 2007

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The Staff of the Illinois Commerce Commission (hereafter “the Staff”), by and through its counsel, and pursuant to Section 766.300 of the Commission’s Rules of Practice (83 Ill. Adm. Code 766.300), respectfully submits its Reply Brief in the above-captioned matter.

In general, the Staff is prepared to stand on its Initial Brief, and sees the need to file only a limited reply. Nonetheless, Level 3 advances certain arguments in its Initial Brief which demand response.

I. The Commission Can and Should Order the Maintenance of Direct Interconnection

Central to this dispute is Level 3’s position that it is authorized by law to dictate the manner in which it interconnects with other carriers. Level 3 contends that it has an unqualified right to refuse to interconnect directly with Neutral Tandem to exchange traffic for termination on Level 3’s network. Level 3 IB at 23, *et seq.* It urges the Commission to read the duty “to interconnect directly or indirectly with the facilities and equipment of [an]other telecommunications carrier[,]” as conferring upon Level 3 the *right* to interconnect directly or indirectly, at Level 3’s sole election. Id. It makes the ancillary contention that the federal Telecommunications Act preempts the Commission from enforcing Sections 13-514 and 13-702 in CLEC-to-CLEC interconnection disputes. Id. The Commission should vigorously reject this narrow and self-interested position.

At a very basic level, the creation - through interconnection - of a network of networks is an undertaking that requires certain compromises on the part of all

carriers that participate.¹ The federal Telecommunications Act of 1996 reflects this, requiring carriers to interconnect, exchange traffic, pay one another for services rendered, and make telephone numbers portable, to name a few of the duties and obligations contained in Section 251. *See, generally*, 47 U.S.C. §251.

Interconnection is, inherently, a co-operative undertaking: difficult to accomplish, and easily frustrated. The standards enunciated in Sections 251(a) and (b) reflect this. These provisions speak not of *rights*, but specifically of *duties* and of *obligations* to other carriers and to the network. What this means in practice – and what the Congress understood – is that carriers must, in many cases, compromise to some extent their immediate or perceived interest to comport with their duties and obligations, so that the entire system will function more effectively and competitively.

The co-operative nature of interconnection is exemplified in Section 251(a)(1) of the federal Act, requiring all carriers “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]” 47 U.S.C. §251(a)(1). This section, properly read, states that interconnection need not be indirect or direct, but more importantly, makes clear that interconnection, by some means, must take place. Ideally, carriers will attempt to work out the nature and details of interconnection issues between themselves, on the “play nice in the sandbox” theory.

It is evident, however that where, as here, carriers have failed to reach agreement regarding how interconnection is to be accomplished, regulators can and should involve themselves in the matter. Interconnection – and the exchange

¹ A “network of networks” is the *sine qua non* of competitive telecommunications markets.

of traffic which is the only reason for interconnection – is a matter far too crucial to the effective functioning of the network, and thus to the public interest, to be compromised by a commercial dispute. And interconnection is indeed being compromised here.

As noted above, Level 3's position amounts, essentially, to the flat assertion that: "We have the legal right to dictate the manner in which we interconnect with other people and they with us," a claim Level 3 argues is authorized by Section 251(a)(1)'s requirement that carriers "interconnect directly or indirectly" with one another.

However, the shortcomings of, and fallacies inherent in, this reading of Section 251(a)(1), are profound. First, Level 3 fails to understand that it is not, in the most fundamental sense, interconnecting with Neutral Tandem here – rather, it is interconnecting with the CLECs to which Neutral Tandem provides tandem transit services, at those CLECs' request. These CLECs - 18 in number – are the carriers with which Level 3 is interconnecting for the exchange of traffic. These CLECs have quite obviously chosen to interconnect with Level 3 indirectly, through Neutral Tandem, and to exchange the traffic they originate with Level 3 indirectly, through Neutral Tandem.

Level 3, based on its conduct as manifest in the events underlying this proceeding, has no objection to interconnecting indirectly with CLECs through Neutral Tandem; it elected to do so itself for the traffic it originates and that terminates to these CLECs. Neutral Tandem Ex. 1 at 8-11; Level 3 Ex. 1 at 9-14. As such, it has no real objection to direct connection with Neutral Tandem; again,

it elected to connect directly with Neutral Tandem in order to achieve its own ends, the routing of traffic it originates for termination by those CLECs. Level 3 objects, nonetheless, to other carriers using the precise (if inverse) method to interconnect with it that it uses to interconnect with them. The lack of consistency and principle, pursuit of self-interest and indeed blatant hypocrisy in Level 3's position are obvious, and palpable.

Level 3, of course, does not couch matters in these terms. It attempts to argue that, inasmuch as the Commission cannot find indirect interconnection to be improper, unreliable or inferior as a general matter and under all circumstances, it cannot find Level 3 to be in violation Section 13-514 by requiring Neutral Tandem to route traffic to it indirectly. Level 3 IB at 12. This argument is facially defective, for several reasons.

First, what Level 3 seeks is not indirect interconnection – it is already indirectly interconnected with the 18 CLECs that exchange traffic with it through Neutral Tandem. What Level 3 is suggesting is, for want of a better term, “double indirect interconnection”, which is to say that the CLEC traffic transits the Neutral Tandem network to the AT&T network, and thereafter transits the AT&T network to Level 3 for termination. Level 3 Ex. 2 at 12-18. Level 3's argument is that, inasmuch as interconnection in this manner is technically possible, it is all that Level 3 is required to do. Level 3 IB at 10, *et seq.*

This is true that such “double indirect interconnection” is technically possible. It is possible to exchange traffic in this manner, just as it is possible to drive from Chicago to Springfield by way of Toronto. The point is that both

courses of action are self-evidently less efficient in terms of cost, time, and reliability. Moreover, no one who is simultaneously (a) concerned about cost, reliability and time; and (b) in his right mind, will actually do either.

Second, contrary to Level 3's assertions, the Commission can indeed find that, requiring the 18 CLECs that exchange traffic with Level 3 through legitimate indirect interconnection (having chosen Neutral Tandem to provide transit services) to use an entire additional level of transit clearly would foist upon them an "inferior connection" within the meaning of Section 13-514(1). Such "double-indirect interconnection" would clearly impair the speed, quality, or efficiency of services used by them, within the meaning of Section 13-514(2), and would have a substantial adverse effect on their ability to provide service to their customers, within the meaning of Section 13-514(6).

Third, no rational CLEC will willingly engage in double-indirect interconnection, with its inherent inefficiency, increased potential for failure, and doubled transit costs. If the choices available to a CLEC are: (a) an artificial double-indirect interconnection, with double tandem switching, through Neutral Tandem and AT&T; or (b) indirect interconnection with tandem switching through AT&T, the CLEC will unquestionably elect to use the latter. This will impede the development of competition in this telecommunications service market, within the meaning of Section 13-514. Level 3's actions are therefore certain to have a "substantial adverse effect on the ability of another telecommunications carrier [Neutral Tandem] to provide service to its customers [CLECs]", within the meaning of Section 13-514(6). Further, Level 3's relative insignificance in the

marketplace (as a single CLEC among many) does not matter; if a CLEC cannot use a competitive transit provider to deliver all of its non-AT&T traffic, it will not use that service at all. Level 3 in effect will be given a “heckler’s veto”.

The Commission should completely disregard Level 3’s preemption argument. Whatever its merits – and the Staff believes it is without merit – the preemption argument cannot be successfully raised before the Commission. As this Commission has repeatedly held, it has no authority to preempt an act of the General Assembly, regardless of the state of the federal law. *See, e.g., Order, ¶42, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (June 11, 2002).* If Level 3 considers the Commission’s enforcement of a valid state law to be preempted by federal statute, it certainly has remedies, but not before the Commission.

Level 3 attempts to draw a false distinction between Neutral Tandem as a transit provider, and the originating CLECs as “carriers.” *See, e.g., Level 3 IB at 13* (Level 3 describes Neutral Tandem as a “third-party intermediate transit provider”). This is an utterly fruitless exercise with no basis whatever in law. Level 3 makes no attempt to argue that Level 3 is anything but a “telecommunications carrier” within the meaning of Section 153(44) of the federal Telecommunications Act, 47 U.S.C. §153(44), or within the meaning of Section 13-202 of the Illinois Public Utilities Act, 220 ILCS 5/13-202, because Neutral Tandem self-evidently is a telecommunications carrier. Accordingly, under Section 251(a)(2), interconnection is required.

II. Neutral Tandem is Not Using Level 3's Network for Free

Level 3 characterizes the relief sought by Neutral Tandem as requiring Level 3 to engage in, and permitting Neutral Tandem to enjoy the benefit of “free [to Neutral Tandem]”, “direct physical interconnection in perpetuity.” Level 3 IB at 1, 7, 14, 19. This is utterly without support in the record or the applicable law.

As set forth elsewhere, Level 3 has at all relevant times been entitled to, but has failed or refused to collect, reciprocal compensation from carriers that originate traffic delivered by Neutral Tandem to Level 3 for termination. Level 3 responds that the physical aspects of direct interconnection result in costs being incurred, without reference to the specifics of direct interconnection with Neutral Tandem. Level 3 Ex. 2 at 12-17. As nearly as the Staff can determine, therefore, the evidence supports Neutral Tandem's position that it pays all direct costs associated with the common interconnection facilities. Level 3 contributes collocation space, and, it would appear negotiates and signs agreements with Neutral Tandem, and then must “monitor and implement” those agreements. Level 3 Ex. 2 at 17. It is not clear why Level 3 considers this to be “free” to Neutral Tandem.

With respect to “in perpetuity”, Staff merely notes that direct physical interconnection is, where appropriate, required by law, in addition to being a condition precedent to participating in the market in a significant way. Level 3's argument here is similar to an individual complaining that it is unjust that he is required, in perpetuity, to stop at red lights and file income tax returns.

III. Level 3 Cannot Require Neutral Tandem to Pay Reciprocal Compensation

Throughout its Initial Brief, Level 3 refers to the “calling party pays” principle” as if it were a guideline, vaguely advisable from a policy standpoint, not generally applicable. Level 3 IB at 27, *et seq.* This constitutes a particularly egregious misrepresentation of the state of the law.

As the Staff demonstrated in its Initial Brief, Staff IB at 10, *et seq.*, and as Neutral Tandem observed in its, Neutral Tandem IB at 41, *et seq.*, the “calling party pays” principle is not a guideline or a casual industry practice. Rather, the “calling party pays” principle is a federal law, embodied in Section 251(b)(5) of the Telecommunications Act of 1996, which provides that: “[e]ach local exchange carrier has ... [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications[.]” 47 U.S.C. §251(b)(5). As so codified, “calling party pays” is not some sort of voluntary compact between carriers, as Level 3 suggests; instead, Section 251(b)(5) imposes a concrete legal duty upon LECs to pay reciprocal compensation to other LECs for the traffic originated by one and terminated by another.² Level 3’s casual assertion that this statutorily defined obligation can somehow be shifted at whim is a glaring defect in its argument.

Level 3 further asserts, along similar lines, that indirect interconnection somehow frustrates the calling party pays *law*, as we shall henceforth call it.

² Federal rules permit LECs to exchange traffic on a “bill and keep” basis. 47 C.F.R. §51.713.

Level 3 IB at 30, *et seq.* Level 3's assertion is that the use by a CLEC of an intervening transit provider such as Neutral Tandem effectively shields the originating CLEC from efforts by the terminating CLEC to collect mandated reciprocal compensation. Id.

This argument is relentlessly defective, for any of several reasons. First, it assumes that the identities of the CLECs, and of the traffic they originate, are somehow hidden from the terminating LEC by the intervening tandem provider. This assumption, however, is: (a) not true as a general matter; and (b) absolutely contrary to the known facts of record in this proceeding. The unchallenged evidence here is that Neutral Tandem provides all signaling information and call detail necessary for Level 3 to bill originating carriers. Complaint, ¶137; Neutral Tandem Ex. 2 at 6; Tr. 149.

The second defect in Level 3's argument is that Level 3 cannot argue that it is infeasible or impossible to collect reciprocal compensation from those CLECs using Neutral Tandem's transit services, because Level 3 has, by its own admission, never attempted to collect such compensation. Neutral Tandem Ex. 1 at 13-14; Neutral Tandem Ex. 2 at 4-5, Attachment A at 5-6; Neutral Tandem Ex. 6 (Level 3 Response to Staff DR JZ 1.04(A)); Tr. 324, 354, 359. Level 3's argument, therefore, is that indirect interconnection frustrates it in exercising rights that it never exercises, or even attempts to exercise. Level 3 has failed to demonstrate one single instance where a CLEC using Neutral Tandem refused to pay Level 3 reciprocal compensation that it sought. Its assertion that indirect

interconnection somehow frustrates the collection of reciprocal compensation is therefore baseless.

Finally, Level 3 admits to having paid no reciprocal compensation to CLECs that use Neutral Tandem's services. Tr. 359. It therefore has no grievance at this point, inasmuch as "bill-and-keep" arrangements, whereby carriers terminate other carriers' traffic for free, in exchange for similar accommodation of the traffic they originate, are perfectly lawful, and may be imposed by state Commissions. 47 C.F.R. §51.713. Level 3 has received compensation in the form of termination services, whether it likes it or not. It can continue to do so, or it can employ the call detail with which Neutral Tandem provides it to bill those carriers. What it cannot do is claim that it has been harmed by anything but its own failure to exercise its rights.

In short, there is no evidence here that Level 3 is in fact prevented from collecting reciprocal compensation from those CLECs that utilize Neutral Tandem's services, or even that it has suffered any cognizable harm from its own failure to do so. Level 3's assertion to the contrary is the reddest of herrings, and should be ignored.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

/s/ _____

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