

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

PETITION FOR REVIEW OF LEVEL 3 COMMUNICATIONS, LLC

ORAL ARGUMENT REQUESTED

Henry T. Kelly
Kelley Drye & Warren LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 857-7070 (telephone)
(312) 857-7095 (facsimile)

Brett Heather Freedson
Kelley Drye & Warren LLP
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)

Counsel to Level 3 Communications, LLC

Dated: July 2, 2007

BACKGROUND	3
ARGUMENT.....	8
I. THE ORDER ERRS BY CONCLUDING THAT LEVEL 3’S TERMINATION OF THE AGREEMENT WAS DONE TO GAIN A COMPETITIVE ADVANTAGE	8
II. THE FCC HAS NOT DECLARED THAT DIRECT INTERCONNECTION IS APPROPRIATE WHERE MORE THAN 200,000 MINUTES OF TRAFFIC ARE DELIVERED.....	13
III. SECTION 13-406 OF THE ILLINOIS ACT DOES NOT REQUIRE LEVEL 3 TO DIRECTLY INTERCONNECT WITH NEUTRAL TANDEM.....	15
IV. SECTION 13-514 DOES NOT REQUIRE LEVEL 3 TO DIRECTLY INTERCONNECT WITH NEUTRAL TANDEM OR ANY OTHER CARRIER.....	17
V. SECTION 13-702 DOES NOT COMPEL LEVEL 3 TO MAINTAIN DIRECT PHYSICAL INTERCONNECTION	21
VI. THE COMMISSION LACKS AUTHORITY TO IMPOSE CONTRACT TERMS BETWEEN CLECS	26
VII. IF THE COMMISSION CREATES NEW LAW AND REQUIRES INTERCONNECTION UNDER SECTION 9-250, IT MAY NOT APPLY THAT NEW OBLIGATION RETROACTIVELY TO CONCLUDE THAT LEVEL 3 VIOLATED SECTION 13-514	31
VIII. THE COMMISSION DID NOT AWARD THE RELIEF REQUESTED BY NEUTRAL TANDEM SO THE COMMISSION SHOULD NOT IMPOSE ANY ATTORNEYS FEES TO LEVEL 3	34
CONCLUSION.....	37

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

PETITION FOR REVIEW OF LEVEL 3 COMMUNICATIONS, LLC

Level 3 Communications, LLC (“Level 3”), through its undersigned counsel and pursuant to Section 3-515(d)(8) of the Public Utilities Act (“PUA”), 220 ILCS 5/315(d)(8), submits this Petition for Review and requests that the Commission reverse the conclusions by Administrative Law Judge Ian Brodsky (“ALJ”) that Level 3 violated the Illinois Public Utilities Act (“Illinois Act”).

ALJ Brodsky’s findings in his Order of June 22, 2007, are inconsistent with the federal Telecommunications Act, 47 U.S.C. §§ 251, 252, and the Illinois Act,¹ and are not supported by the facts of record. The Commission should conclude that Level 3 acted consistent with federal law, consistent with its rights under contract, and did not violate Sections 13-514 and 13-702 of the Illinois Act when it terminated its negotiated, commercial agreement with Neutral Tandem, Inc. and Neutral Tandem-IL, Inc. (“Neutral Tandem”). Level 3 has, at all times, remained interconnected with the public switched telephone network in Illinois, and has taken no action that jeopardizes the public interest. Moreover, the Commission should review and vacate the Order because it concludes that Level 3 violated sections of the Illinois Act, but then concludes that the Commission lacks authority to compel the parties to establish terms and conditions for

¹ See 220 ILCS 5/13-514, 5/13-702.

direct interconnection, as Neutral Tandem demands. In support of this Petition, Level 3 states as follows.

BACKGROUND

During the period from 2004 through January 30, 2007, Level 3 and Neutral Tandem had a commercial agreement that created direct, physical interconnection arrangements between the parties to allow Neutral Tandem to terminate traffic to end users served by Level 3. The traffic terminated by Level 3 was originated by Neutral Tandem's originating carrier customer, not by Neutral Tandem.. Neutral Tandem provides an intermediary switching function for local traffic that commonly is referred to as "transit." This service allows the carrier customers of Neutral Tandem to maintain indirect interconnection with Level 3. The one-way traffic from Neutral Tandem's carrier customers to the customers of Level 3 is the type of traffic at issue in this proceeding.

Section 251(a) of the federal Communications Act provides:

[E]ach telecommunications carrier has the duty . . . **to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . .**"²

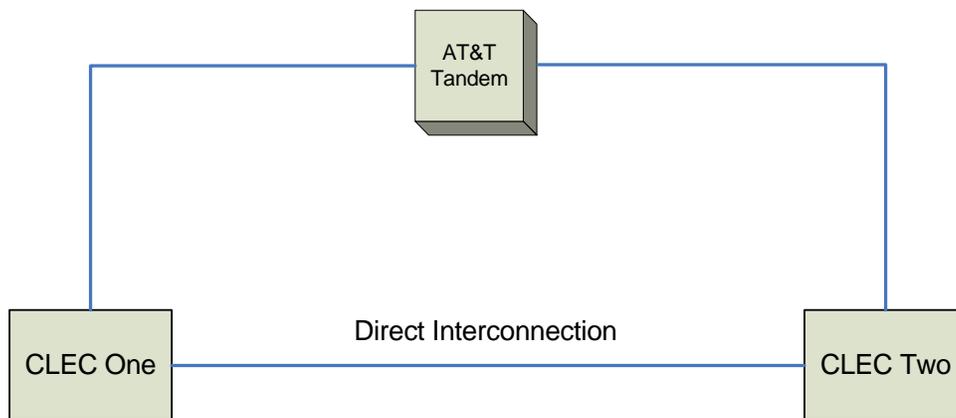
See also 83 Ill.Adm.Code § 790.210. The Federal Communications Commission ("FCC") characterized "indirect interconnection" as "a form of interconnection explicitly recognized and supported by the [federal Telecommunications Act]."³ Therefore, consistent with the federal Telecommunication Act, carriers generally exchange traffic through either through "direct" or "indirect" interconnection.

² 47 U.S.C. § 251(a) (emphasis added).

³ In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 at ¶ 125 (rel. Mar. 3, 2005).

Direct interconnection occurs where physical circuits, trunks or fiber connect two carriers' switches, under circumstances in which both carriers agree that there is sufficient traffic between them to justify the additional expense of establishing and managing the direct connection and business relationship. Gates at 10. Carriers seeking direct interconnection will enter into an agreement setting out the terms and conditions, including the length of time they will exchange traffic. These compacts are called traffic exchange agreements.

By contrast, indirect interconnection occurs where two carriers need to exchange traffic, but do not have direct, physical interconnection between their switches. This is the most common type of interconnection between competitive local exchange carriers ("CLECs"). *Id.* Because facilities-based CLECs all interconnect to the incumbent local exchange carrier ("ILEC", *i.e.* AT&T) through direct arrangements, the ILEC has been ordered by the FCC, and by the majority of state commissions, including the Illinois Commerce Commission, to act as the intermediary to route traffic between carriers that do not otherwise interconnect through direct arrangements. Gates at 11.

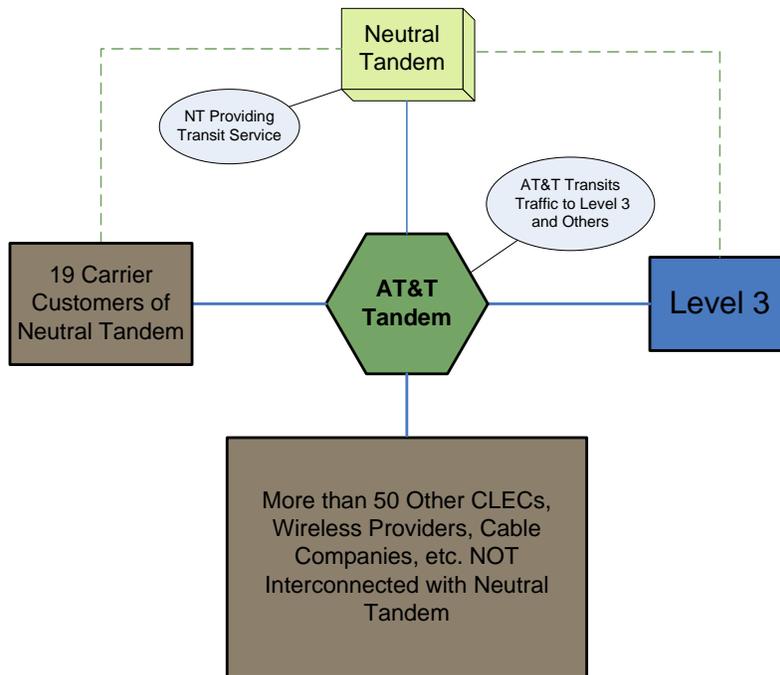


Direct Interconnection
Between Two CLECs

Examples of direct and indirect interconnection were described in the testimony of Mr. Gates, on behalf of Level 3. When a customer of CLEC One calls a customer of CLEC Two and the carriers do not have a direct interconnection governed by a negotiated traffic exchange agreement, the call traverses the transit facilities of the ILEC. *Id.* According to the FCC:

“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 ILEC and the transited traffic is routed from the originating carrier through the ILEC’s tandem switch to the terminating carrier. The intermediary (transiting) carrier then charges a fee for use of its facilities.”⁴

In Illinois, Neutral Tandem has established a network that provides an alternative to AT&T’s network for transit traffic in certain locations for some carriers. Gates at 9. The diagram below shows how a CLEC might interconnect with Neutral Tandem to utilize their tandem transit services.



⁴ *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740, ¶ 120 (rel. Mar. 3, 2005).

Gates at 16. In this scenario, CLEC One establishes trunking to AT&T and Neutral Tandem, and is then able to route traffic destined to CLEC Two through either AT&T or Neutral Tandem (green lines). Neutral Tandem does not interconnect with every carrier in Illinois. Therefore, in order for CLECs to exchange traffic with other CLECs that do not interconnect with Neutral Tandem, carriers still interconnect with AT&T.

Level 3 seeks to be in the brown box, along with the 50 other CLECs, wireless providers, and cable companies. The Order wrongfully concludes that Level 3, and therefore each of the other CLECS, wireless providers, cable companies and other carriers within Illinois, must establish direct, physical interconnection with Neutral Tandem, for the benefit of 18 carriers that choose to route calls through Neutral Tandem. The Commission should not compel all Illinois carriers to establish direct interconnection arrangements with Neutral Tandem, to accommodate the mere 18 carriers that elect to purchase Neutral Tandem's transit service.

In Illinois and elsewhere, Level 3 and Neutral Tandem have exchanged "transit traffic" subject to the terms and conditions of several privately negotiated commercial agreements, including the parties' now terminated Agreement for Wireline Network Interconnection, dated July 6, 2004 (the "Level 3 Agreement"). Baack at 9-10. In the Level 3 Agreement, Neutral Tandem paid to Level 3 a usage-based charge for all traffic delivered by Neutral Tandem to Level 3, and terminated to Level 3's end user customers. Baack at 13. In 2006 and 2007, Level 3 acquired two other telecommunications carriers, ICG Communications and Broadwing Communications, having commercial agreements in place with Neutral Tandem. Baack at 11-12.

By letter dated January 30, 2007, Level 3 advised Neutral Tandem of its intent to terminate the Level 3 Agreement, effective March 2, 2007. Baack at 19. When discussions

reached an impasse – largely over Neutral Tandem’s rejection of three proposals from Level 3 and its insistence that Level 3 was legally obligated to interconnect with Neutral Tandem even without an agreement -- Level 3 later advised Neutral Tandem of its intent to terminate the commercial agreement between Neutral Tandem and Broadwing Communications (the “Broadwing Agreement”), effective March 23, 2007. At that time, Level 3 unilaterally extended the date of termination of the Level 3 Agreement until March 23, 2007, to pursue further negotiations for mutually agreeable terms and conditions of interconnection between Level 3 and Neutral Tandem. *Id.* The termination notices submitted by Level 3 to Neutral Tandem were in accordance with the terms and conditions of the Level 3 and Broadwing agreements, which Neutral Tandem has not disputed.

Neutral Tandem does not dispute that Level 3 lawfully terminated the Level 3 Agreement. Tr. at 135-136. Neutral Tandem acknowledges that Level 3 had a legal right to terminate the Level 3 Agreement, and that Level 3 lawfully terminated the Level 3 Agreement in accordance with its terms and conditions.

In accordance with Section 731.905 of the Commission’s Rules, on April 24, 2007, Level 3 provided to the Commission its 35-day notice that Level 3 would discontinue the physical interconnection between Neutral Tandem and Level 3, effective June 25, 2007 (“Notice”). Level 3 filed its Notice out of an abundance of caution, because it was concerned that Neutral Tandem did not, and would not take any steps to ensure that the calls originated by Neutral Tandem’s carrier customers would reach end users served by Level 3. Those fears are confirmed by Neutral Tandem’s refusal to unwind the parties’ business relationship across the country and their strategy of resorting to regulatory litigation to avoid commercial negotiations. In light of Level 3’s filing that provided Neutral Tandem with 25 more days notice than the rules require, it is

inconceivable that either Staff, Neutral Tandem or the ALJ could find that providing such notice somehow violates the PUA.

The next day, Neutral Tandem filed with the Commission its Complaint and Request for Declaratory Ruling, alleging that Level 3 violated sections of the Illinois Act by requesting that Neutral Tandem and Level 3 discontinue their direct interconnection arrangements following the expiration date of the contract that created such arrangements in the first instance. Neutral Tandem acknowledges that Level 3 terminated the parties' commercial agreement in accordance with all applicable law, and at the same time, claims that Level 3's request violations Sections 13-514(1), (2) and (6), 13-702 and 9-250 of the Illinois Act.

On May 2, 2007, Level 3 filed with the Commission its Answer to the Complaint and Request for Declaratory Ruling, denying the allegations of Neutral Tandem. Through its Answer, the testimony of its witnesses, Sara Baack and Timothy Gates, and its briefs, Level 3 demonstrates that indirect interconnection arrangements comply with the relevant provisions of the Illinois Act and the federal Telecommunications Act, and are a reasonable means of traffic exchange between the parties.

The parties, and Commission Staff, each filed with the Commission their respective testimony, and on May 22, 2007, the ALJ commenced the hearing. Subsequently, the parties, and Commission Staff, each filed with the Commission their initial and reply briefs. On June 25, 2007, the ALJ issued an Order resolving the allegations of Neutral Tandem's Complaint and Request for Declaratory Ruling.

ARGUMENT

I. The Order Errs by Concluding that Level 3's Termination of the Agreement was Done to Gain a Competitive Advantage

The Order concludes that Level 3 has violated the Illinois Act by forcing Neutral Tandem to exchange traffic with Level 3 through the AT&T tandem, or some other form of indirect interconnection, while maintaining a direct interconnection for calls routed from Level 3 to Neutral Tandem. Order at 5-6. The Order misapprehends Neutral Tandem's role in the marketplace and the parties' commercial agreements, and then concludes that Level 3's conduct was intended to gain a competitive advantage. The Order tries to conveniently categorize the interconnection between Level 3 and Neutral Tandem as "Type L" and "Type N" interconnection, and then concludes that Level 3's conduct imposes on Neutral Tandem and other carriers discriminatory interconnection and routing arrangements, while "securing" for itself more favorable routing arrangements. While it may have been convenient to label the interconnection architecture as "Type L" and "Type N," that labeling leads the Order to ignore the requirements of the Illinois Act.

The Order labels "Type N" interconnection as an arrangement by which originating carriers (*i.e.*, the 18 customers of Neutral Tandem) directly interconnect with Neutral Tandem, and use Neutral Tandem, rather than AT&T, as the transit provider. Order at 6. The Order confusingly calls this architecture "direct/indirect interconnection arrangement . . . labeled as "Type N" interconnection after its proponent." The Order further concludes that "Level 3 has secured "Type N" interconnection only for its own use; *i.e.*, that Level 3 directly interconnects with Neutral Tandem only for purposes of delivering traffic originated on Level 3's network to other CLECs, using Neutral Tandem's transit services.

As a threshold matter, the ALJ overstepped his authority by evaluating the conduct of the parties based on two separate commercial arrangements. Only the agreement where Neutral Tandem terminates to Level 3 is at issue in this proceeding. Yet, the ALJ's Order states that "...

Level 3 shall continue to accept a direct physical interconnection by which NT delivers traffic to Level 3 for termination until a further order by the Commission, and for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to NT for transiting.”⁵ By tying Level 3’s obligation to receive traffic from Neutral Tandem, although that contract has been terminated, with Level 3’s continued performance under a separate contract not in dispute, the ALJ has engaged in ratemaking which is beyond the scope of this proceeding and supposedly was left behind with the advent of competitive providers. However if the Commission intends to impose such obligation, Level 3 is prepared to reroute the remaining 3 million minutes of traffic it sends to Neutral Tandem immediately. As Level 3 understands the Order, it would then be able to petition the Commission to terminate its physical interconnection facility with Neutral Tandem. It is also worth noting that the contract by which Level 3 originates traffic to Neutral Tandem is also terminable on 30 days notice. Following the hearing in this matter, Neutral Tandem terminated its provisions as to Broadwing and imposed a higher rate. Rather than pay that rate, Level 3 rerouted the traffic without incident which proves the point that if Neutral Tandem provides notice to its customers of the change in routing, those carriers will be able to take appropriate steps to reroute the traffic.

According to the Order, after the expiration of the Level 3 Agreement, Level 3 forced Neutral Tandem and its 18 carrier customers into “Type L” interconnection arrangements, whereby “CLEC customers then would *only have a doubly- indirect interconnection with Level 3 via NT and AT&T.*” Order at 5. Thus, the Order concludes that originating carriers could only route calls to Level 3 by double-transiting of the call – first from the originating carrier, then to Neutral Tandem, then to AT&T, and then terminating to Level 3.

⁵ Order at 12

The premise underlying the ALJ's conclusion that Level 3 violated the Illinois Act is the finding that:

“[t]he instant dispute concerns, in part, an attempt by Level 3 to force upon NT and its 18 other CLEC customers a ‘Type L’ interconnection. By disconnecting NT and forcing it to route traffic bound for Level 3 via AT&T, Level 3 would simultaneously impose a substantial adverse effect on NT’s ability to serve its customers, and foreclose from competing CLECs the very arrangement that Level 3 uses for itself.” Both of these effects violate Section 13-514(6).”

Order at 6. This premise of the Order is false. As a threshold matter, at no time during this dispute have any of Neutral Tandem’s customers had to “doubly-indirect” route traffic to Level 3.

In addition, the fact that Level 3 and Neutral Tandem did not reach an agreement to maintain a direct interconnection arrangement does not force carriers to “doubly-indirect interconnect” to route traffic to Level 3. Originating carriers that have traffic destined to Level 3 may choose to route calls through AT&T as the transit provider, and such calls never are sent to Neutral Tandem. If properly notified, most carriers would elect to route traffic through AT&T, just as those 18 originating carriers do to reach the approximately 50 other carriers operating in Illinois that do not have direct connection with Neutral Tandem. The undisputed testimony is that routing traffic through AT&T as the tandem provider is the “most common type of interconnection that we have in the industry today.” Tr. at 388. Moreover, Commission Staff witness Hoagg acknowledges that if Level 3 maintains its interconnection arrangements with AT&T to allow transit traffic to be routed through AT&T, then Level 3 is not refusing interconnection with any CLEC. Tr. at 433. The Commission cannot conclude that Level 3 has violated the Illinois Public Utilities Act by forcing originating carriers to route traffic to Level 3 in the same manner that is “the most common type of interconnection in the industry today,” and which Mr. Hoagg acknowledges is a reasonable form of interconnection.

There are two reasons why the Order is incorrect in concluding that it is unreasonable for Level 3 to force originating carriers to use AT&T to transit calls, instead of Neutral Tandem.

First, the Order presumes that originating carriers somehow are prejudiced or harmed by routing traffic destined to Level 3 through AT&T because AT&T's transit prices are higher than Neutral Tandem's prices. Order at 6. AT&T is required to provide transit service to CLECs, and is required to do so at Total Element Long Run Incremental Costs (TELRIC) prices set by the Illinois Commerce Commission. *In the matter of Illinois Bell Telephone Company's Prices for Wholesale Services*, ICC Docket Nos. 98-0486/98-0569 (cons.), Order (Feb. 2, 1998) ("TELRIC Order"). CLECs that enter the market in Illinois will execute an interconnection agreement with AT&T, and therefore agree to pay the cost-based prices for transit. It is clearly erroneous for the Order to conclude that it is unlawful for Level 3 to direct transit traffic through AT&T's transit services, when those same carriers elect to subscribe to AT&T's transit service, and particularly where the prices for AT&T's transit services are fixed by the Commission at cost-based prices.

Second, there are about 50 CLECs, wireless providers and cable companies that have agreements in place to transit traffic to AT&T that are also not interconnected with Neutral Tandem. Tr. at 393. The Order concludes that

"if Level 3 disconnected NT, it prevents other CLECs from using NT to transit their traffic to Level 3 . . . CLEC then will face the choice of paying either (1) the AT&T priced, which is 130% of that charged by NT, or (ii) the price of both NT and AT&T (230% of NT's price), and will invariably return to AT&T at the expense of NT."

Because there are 50 carriers that are not interconnected with Neutral Tandem, Neutral Tandem's customers are also faced with the choice of either routing traffic through AT&T, or finding some other route. It is clearly erroneous for the Commission to conclude that Level 3 has violated the Illinois Act by not directly interconnecting to Neutral Tandem when that is the most common form

of transiting traffic in Illinois. Level 3 does not impede competition in Illinois just by the mere fact that it would not be interconnected with Neutral Tandem (because the parties could not agree to terms of interconnection); for the Commission to reach this conclusion requires all other carriers in Illinois to interconnect with Neutral Tandem as well.

If an originating carrier routes traffic through AT&T because Neutral Tandem cannot do so directly with Level 3, no traffic will be delayed, and the quality of the calls will remain the same. Gates 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 has an interconnection agreement with Verizon that also 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.

II. The FCC has not Declared that Direct Interconnection is Appropriate Where More Than 200,000 Minutes of Traffic are Delivered

The Order also rests on the incorrect assumption that the FCC found that “direct interconnection is appropriate when more than 200,000 minutes of traffic are delivered per month.” Order at 6-7, (citing *In the Matter of Interconnection Disputes with Verizon Virginia, Inc.*, DA 02-1731, CC 00-218, 00-249, 00-251, Memorandum Opinion and Order para. 115-116 (Rel. July 17, 2002) According to the Order, because the FCC has concluded that direct interconnection is appropriate when it exceeds 200,000 minutes of use, then Level 3 must directly interconnect with Neutral Tandem. However, the FCC’s rulings in the *Verizon Virginia* case does not reach such a conclusion, and it is error for the Order to rely on that case for the conclusion that

the FCC has mandated direct interconnection between CLECs if the amount of traffic exchanged between the carriers exceeds 200,000 minutes of use.

In the *Verizon Virginia* case, AT&T and MCI had each brought a Section 252 arbitration proceeding against Verizon Virginia. Because the State Corporation Commission of Virginia declined to exercise jurisdiction, the arbitration proceeding was addressed by the FCC. In this proceeding, AT&T and MCI were seeking to compel Verizon to transit traffic. Verizon, as the ILEC, opposed this requirement. The FCC ordered that Verizon must provide transit services to AT&T and MCI to exchange traffic with other CLECs with whom AT&T and MCI were not directly interconnected. The FCC, however, did attempt to limit the circumstances when the ILEC would be required to transit traffic in Virginia. According to the FCC “as soon as [AT&T] receives notice from Verizon that its traffic [with other CLECs] has exceeded the DS-1 cut-off” AT&T is required to exercise its best efforts to “seeking direct interconnection” with originating carriers so that Verizon would not be required to transit traffic any longer. *Id.* at para. 116.

The Commissions use of “best efforts” is telling because it recognizes that if the originating carrier is also a competitive provider, there is no ability to compel arbitration to establish the terms and conditions of interconnection. The FCC recognized that in the realm of competitive providers, the ability to reach a traffic exchange agreement will be limited by the parties ability to agree. It is worth noting that the FCC did not then tell the competitive carrier to seek interconnection under state law presumably because the FCC views there to be no right to CLEC to CLEC arbitration under federal law which preempts any state law to the contrary.

The FCC’s conclusion does not require AT&T to directly interconnect with an originating carrier, to remove Verizon as the transit provider. However, even if it did so require, the Commission should not apply this conclusion by the FCC to this case. If the Commission

were to apply the FCC's findings to this proceeding, the result would destroy Neutral Tandem's business because it would require each of its customers to directly interconnect with each other, thus eliminating the need for Neutral Tandem's services.

The FCC's conclusion in the *Verizon Virginia* case does show, however, that the Commission cannot compel Level 3 to directly interconnect with a transit provider. The FCC rejected CLECs' claims in that case (AT&T and MCI) that they were permitted to directly interconnect with the ILEC for purposes of exchanging all of their transit traffic, and refused to impose that requirement. Here, however, the Order imposes an obligation on Level 3, to directly interconnect with Neutral Tandem to exchange unlimited transit traffic, an obligation that the FCC would not even impose on the ILEC.

III. Section 13-406 of the Illinois Act Does Not Require Level 3 to Directly Interconnect with Neutral Tandem.

The Order next concludes that Section 13-406 of the Illinois Act prohibits Level 3 from discontinuing its interconnection arrangement with Neutral Tandem without Commission approval. Order at 7. Section 13-406 requires that carriers seek commission approval before they withdraw from a market, or before they abandon their certificate of service authority. *See e.g. In the Application of Neon Telephone Company to Cancel Authority*, ICC Dkt. No. 06-0305, Order May 17, 2006. Level 3 is not abandoning any service, nor is its abandoning its certificate of service authority. The Commission has never relied upon Section 13-406 to require carriers to provide interconnection arrangements with other carriers, or to require a carrier to provide a service to a single carrier or subscriber.

Moreover, the interconnection arrangement between Level 3 and Neutral Tandem does not constitute a service regulated by the Commission. Level 3 does not tariff an interconnection arrangement for transit providers to interconnect with it. Even Neutral Tandem acknowledges

that the termination of the interconnection agreement was done with proper notice, and pursuant to the terms of the Level 3 Agreement, and did not rely on Section 13-406 for its Complaint and Request for Declaratory Ruling.

The Order's conclusion that Section 13-406 requires Commission approval to cease the exchange of traffic is inconsistent with Section 731.905 of the Commission's rules. Section 731.905 states that carriers may terminate any wholesale arrangements provided to other carriers, with 35 days written notice:

Except where otherwise agreed to, in writing, by the carriers, no provisioning carrier offering or providing wholesale service⁶ 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. Level 3 may discontinue the interconnection with Neutral Tandem upon providing notice, which it did. On April 24, 2007, Level 3 served notice on the Commission and on Neutral Tandem pursuant to Section 731.901 that Level 3 would be terminating the wholesale interconnection arrangement. Neutral Tandem Complaint, Ex. 6. Because the Commission's rules permit Level 3 to discontinue wholesale interconnection, Section 13-406 cannot be construed to require Commission approval for the termination of the parties' commercial agreements.

Even more telling is the dangerous precedent established by Judge Brodsky's Order. That precedent is unsupported by the Telecommunications Act of 1996, the PUA, basic theories of contract law and sound public policy. There is no dispute that Level 3 lawfully terminated the contract it negotiated with Neutral Tandem. However, under the application of the Order, any

⁶ A "wholesale" service is defined as "any telecommunications service subject to the Commission's jurisdiction that one carrier sells or provides to another carrier, as a component of, or for the provision of, telecommunications service to end users . . ." 83 Ill. Adm. Code §731.105.

contract termination will be viewed as a discontinuance or abandonment of service and cannot be terminated in Illinois until the Commission finds that it is in the “public interest”.⁷ Such a finding will eviscerate centuries of contract law and force the Commission to become involved in a myriad of commercial disputes between carriers.

It was error for the ALJ to rely on Section 13-406 of the Illinois Act to compel Level 3 to directly interconnect with Neutral Tandem.

IV. Section 13-514 Does Not Require Level 3 to Directly Interconnect with Neutral Tandem or Any Other Carrier.

Based on the above assumptions, the Order concludes that Level 3 violated Section 13-514 of the Illinois Act. Because Level 3 is, and will remain indirectly interconnected with Neutral Tandem and each of Neutral Tandem’s 18 carriers, the Commission cannot declare that Level 3 violated the Illinois Act. Section 13-514 may impose an obligation on carriers to interconnect, but it does not specifically require direct, physical interconnection. Level 3 cannot be held in violation of Section 13-514 because that provision of the Illinois Act requires only interconnection, not direct, physical interconnection.

Section 13-514 of the Illinois Act states in pertinent part:

A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; . . . :

- 1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;
- 2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;

⁷ Order at 7.

- 6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;

220 ILCS 5/13-514.⁸ There is no dispute that when Level 3 discontinues its direct interconnection with Neutral Tandem, Level 3 remains interconnected with each of Neutral Tandem's 18 customers, and is and will remain interconnected with Neutral Tandem. Gates Direct Testimony at 31, 34, 39. Tr. at 125. Staff witness Hoagg acknowledges that if Level 3 is indirectly interconnected with either AT&T or Neutral Tandem, then Level 3 is "not refusing" interconnection to any carrier. Tr. at 433; 434; 435. Section 13-514(1) only prohibits the *unreasonable refusal* to interconnect, which Level 3 cannot violate if it agrees to exchange traffic with either Neutral Tandem and its 18 customers, and remains indirectly interconnected.

Furthermore, by maintaining indirect interconnection with each originating carrier in Illinois, including Neutral Tandem and its customers, Level 3 will not be "impairing the speed, quality or efficiency" of either NTI's or its customers' traffic.⁹ Indirect interconnection is just as efficient and is equal in quality as direct physical interconnection. Indeed, Staff witness Hoagg acknowledges that indirect interconnection is a reasonable form of interconnection. Tr. at 430. The Commission cannot conclude in this proceeding that indirect interconnection is improper, unlawful, inefficient, or unreliable because to do so would remove Neutral Tandem entirely from the call flow. If the Order is sustained by the Commission, then each of Neutral Tandem's 18 customers would be required by Commission order to create direct physical interconnection with Level 3 and every other CLEC in the state. The Commission cannot grant Neutral Tandem's

⁸ Neutral Tandem alleges that Level 3's refusal to interconnect with Neutral Tandem violates Section 13-514(1), (2) and (6.) Complaint at ¶ 49. However, the Order does not track the language of any of these Sections, and does not specifically indicate how Level 3's conduct may have violated each subsection. Notwithstanding, Level 3 will show that its conduct did not violate any of the subsections of Section 13-514.

⁹ 220 ILCS 5/13-514(2).

requested relief without first concluding that Neutral Tandem's provision of indirect interconnection services to its customers is an inefficient or unreliable form of interconnection. In light of Mr. Hoagg's testimony, the Commission cannot conclude that Level 3 has violated Section 13-514(2).

Finally, by maintaining indirect interconnection with NTI and its 18 customers, Level 3 will have no effect on the ability to those 18 carriers to provide service to its customers, and thus there can be no violation of Section 13-514(6) either. Each of the 18 carriers will be able to route traffic to each other through Neutral Tandem and Level 3's decision has no impact on the exchange of that traffic. Tr. at 130. Importantly, the ALJ's Order makes no finding that indirect interconnection arrangements between Level 3 and Neutral Tandem would result, or has resulted in the blocking of calls destined to Level 3's end user customers, and no facts in the record before the ALJ would support such a finding. Specifically, the Order states:

the unreasonableness and knowing intent elements of NT's Section 13-514 claims are apparent from the nature and timing of Level 3's actions. In seeking to impose its uneven arrangement, it signed the contract related to traffic to be terminated to Level 3, and that same day gave notice to terminate the contract related to traffic to be terminated to Level 3.

Order at 7. However, Neutral Tandem does not dispute that Level 3 had the right to terminate the July 2004 Agreement, and did so properly. Tr. at 135. Moreover, Neutral Tandem does not wish the Commission to address the agreement whereby Level 3 is able (but not required) to deliver traffic to Neutral Tandem. In fact, Neutral Tandem has repeatedly said that they do not want the Commission to force Level 3 to use its services. Because neither of these contracts are at issue, the Commission cannot draw an adverse inference about the parties' negotiations of them. The termination of the July 2004 Agreement, and the manner and timing of the termination is not what Neutral Tandem takes issue with. Neutral Tandem does not want the

Commission to impose the terms and conditions of the July 2004 Agreement on the parties because that Agreement requires Neutral Tandem to compensate Level 3 for traffic delivered to Level 3. Neutral Tandem seeks the ability to do what it could not get Level 3 to agree to in the commercial negotiations - - the ability to terminate traffic to Level 3 for free.

Regardless of the timing of the contracts, the Order still does not address how Level 3 can be held to be in violation of Section 13-514 if it maintains indirect interconnection with Neutral Tandem and all other CLECs, wireless carriers and cable companies. Like the federal Telecommunications Act, Section 13-514 requires only “interconnection.” Section 13-514 does not require direct, physical interconnection. In addition, Section 790.201 of the Commissions rules requires carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 83 Ill. Adm. Code § 790.210. Section 251(a) of the federal Act also provides that carriers have the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers” 47 U.S.C. § 251(a.) Neither statute requires Level 3 to “directly” interconnect with Neutral Tandem. Therefore, it cannot be a violation of Section 13-514 for Level 3 to limit its interconnection with Neutral Tandem to indirect interconnection.

Even assuming that the Commission declares that on a going-forward basis, Level 3 is required as a policy matter to directly interconnect with Neutral Tandem, Level 3 cannot be held in violation of Section 13-514 for electing to indirectly interconnect. There is no state or federal order, rule, regulation or statute that has heretofore imposed an obligation on Level 3 to directly interconnect with Neutral Tandem. The only reason the parties were interconnected in the first place is pursuant to the terms of a commercial agreement that was not subject to Commission jurisdiction. There is no dispute that this agreement was terminated, and Neutral Tandem does

not claim that Level 3 breached the agreement or in any way violated its terms. Therefore, Level 3's conduct in notifying Neutral Tandem to terminate the interconnection arrangement was lawful.

Level 3's decision to terminate its traffic exchange agreement with Neutral Tandem in favor of indirect interconnection is consistent with state and federal law. Level 3 and Neutral Tandem are free to interconnect either directly or indirectly under § 251 of the 1996 Act, and until the Commission orders otherwise, Level 3 was not required to establish or maintain direct physical interconnect with Neutral Tandem beyond the original contract term. Therefore, Level 3 cannot be held to have violated Section 13-514.

V. Section 13-702 Does Not Compel Level 3 to Maintain Direct Physical Interconnection

The Order next addresses Section 13-702. Section 13-702 of the Illinois Act provides as follows:

Every telecommunications carrier operating in the State shall receive, transmit and deliver, without discrimination or delay, the conversations, messages or other transmissions of every other telecommunications carrier with which a joint rate has been established or with whose line a physical connection may have been made.

220 ILCS 5/13-702. The Order concludes that “the intent of this Section of the Act is the prohibition of discrimination or delay. Although Level 3 protests there is no duty to maintain interconnection imposed by this Section, the discrimination flowing from Level 3's leveraging of the interconnection with Neutral Tandem is prohibited. Order at 8.

The Order concludes that because Level 3 has signed an agreement that permits it to transit traffic to Neutral Tandem (the “August 2005 Agreement”), it is also compelled to receive traffic from Neutral Tandem under the July 2004 Agreement, and that Level 3's decision to

terminate the July 2004 Agreement which permits Neutral Tandem to deliver traffic to Level 3 was done to discriminate against Neutral Tandem. The Order's reasoning omits the substantial reasons why Level 3 terminated the Level 3 Agreement with Neutral Tandem. More importantly, the Commission cannot take the fact that the parties have reached a commercial agreement to exchange one form of traffic (the August 2005 Agreement) to compel the parties to exchange a different form of traffic (as would be under the July 2004 Agreement.) Neither Agreements are under the jurisdiction of the Commission, and an agreement between carriers to exchange traffic does not impose a duty on Level 3 to directly interconnect with Neutral Tandem to exchange other traffic.

Prior to its termination, under the July 2004 Agreement (the agreement which permits NTI to terminate traffic to Level 3) Neutral Tandem was delivering 56 million minutes of traffic each month to Level 3. Wren Direct at 8. There is no evidence that Level 3 had delivered any traffic at all to Neutral under the July 2004 Agreement. In addition, the facilities used by the companies to route traffic under the July 2004 Agreement were one-way facilities, meaning that traffic could only be routed from Neutral Tandem to Level 3. The facilities used by the companies to route traffic from Level 3 to Neutral Tandem under the August 2005 agreement were also one-way facilities, and could only route traffic to Neutral Tandem.

The traffic exchanged between the parties under the two agreements was out of balance. Baack at 14. This was caused in part due to the recent merger and acquisition activity by Level 3. During the period from the summer of 2005 through 2006, Level 3 acquired 6 companies. Baack at 11. Two of these companies (ICG and Broadwing) also had agreements with Neutral Tandem, although the terms of the agreements were different than the agreements between Level 3 and Neutral Tandem. Baack at 12. Under the terms of the July 2004 Agreement between

Level 3 and Neutral Tandem, Neutral Tandem was required to compensate Level 3 for all traffic that was delivered to Level 3. The same is true of the August 2005 Agreement – for each minute of use of traffic delivered to Neutral Tandem, Level 3 paid compensation to Neutral Tandem. *Id.*

As part of merger integration planning, Level 3 began to evaluate its interconnection and traffic exchange agreements as well as all agreements pursuant to which Level 3 procured services from third parties. *Id.* at 13. The acquisitions substantially changed Level 3’s traffic patterns for VoIP, local, and long distance traffic, and, Level 3 needed to reorganize its resources to manage the integrated company. *Id.* Level 3 determined that the traffic exchange agreements with respect to Level 3 and Broadwing no longer made commercial or economic sense. *Id.* Level 3 learned during the integration process that neither company had managed the contracts well and the one-way termination of traffic to Level 3 had expanded through “ordering creep” to include states not covered by that agreement. *Id.* In addition, the terms under which Neutral Tandem provided remuneration to Level 3 were based on a complicated formula that only Neutral Tandem could calculate. *Id.* at 14. Level 3 was required to engage considerable effort on its network to support a contract with Neutral Tandem that had grown beyond the original commercial boundaries contemplated in the contract. *Id.* Consequently, Level 3 then exercised its contractual right to terminate those commercial agreements with Neutral Tandem with a goal of negotiating new agreements that were commercially sensible. *Id.* at 13.

Immediately after sending notice of termination, Level 3 advised Neutral Tandem that it we desired to negotiate a new commercial agreement that would govern all the traffic that Neutral Tandem wanted Level 3 to terminate. *Id.* at 16. The parties engaged in several discussions, at which time Level 3 made several proposals. *Id.* .

The parties attempted to reach a negotiated commercial agreement for the exchange of traffic to Level 3, but could not. The fact that the parties had reached a commercial agreement for the exchange of other forms of traffic does not compel Level 3 to maintain direct interconnection. Section 13-702 does not create a right to maintain physical direct interconnection, and does not prohibit a carrier such as Level 3 from terminating an agreement under the express terms of that agreement.

Section 13-702 states that every telecommunications carrier shall receive traffic from another carrier “with which a joint rate has been established . . .” 220 ILCS 5/13-702. Under this first clause, the statute is explicit that carriers should establish interconnection only after there is agreement on the rate of compensation for the exchange of traffic. This language unambiguously provides that there is not a duty on Level 3 to create or maintain direct physical interconnection *in perpetuity* and without established terms and conditions for the exchange of traffic, which is the relief granted by the Order. In fact, the opposite is true – this clause of Section 13-702 provides that Level 3 is required to exchange traffic only after the parties have reached an agreement on the compensation for the delivery of traffic. The clear language of this clause supports Level 3’s position – unless there is an agreement in place between Level 3 and Neutral Tandem which requires Level 3 to receive traffic originated by third parties, there is no obligation to directly interconnect.

Section 13-702 further states that every carrier shall receive traffic “. . . with whose line a physical connection may have been made.” This language requires Level 3 to receive traffic where there is an ongoing agreement that establishes an ongoing interconnection between Neutral Tandem and Level 3 for transit traffic. This clause, by itself, does not impose an obligation or duty to maintain direct interconnection *in perpetuity* where there is no agreement,

or where the agreement has expired. Given that Section 13-702 requires an agreement on the compensation for the exchange of traffic as a precondition for the interconnection, Section 13-702 could not then be construed to require direct and physical interconnection even without any agreement.

Neutral Tandem's claim that there is a legal obligation for carriers to interconnect with each other is belied by neutral Tandem's own statements in formal filings made with the Securities Exchange Commission. In its Initial Public Offering S-1 statement, Neutral Tandem admits that its customers, both those that originate traffic and those that terminate traffic "could, at any time, solicit or receive proposal from other providers to provide services that are the same as or similar to ours. . . and any customer is able to discontinue the use of our services at any time." Level 3 Ex. 14, at p. 10 (Neutral Tandem S-1.) If there is a this legal obligation under Section 13-702 (or 13-514) for carriers to interconnect with each other, then Neutral Tandem could not and would not admit that carriers could terminate their agreements "at any time." It is not discriminatory for Level 3 to terminate its interconnection arrangement with Neutral Tandem under the express terms of the contract to which Neutral Tandem agreed.

Moreover, Neutral Tandem's agreements with its other carrier customers permit it to terminate the interconnection arrangements. Mr. Wren admitted that it has direct interconnection agreements with its customers. Tr. at 139. Its agreements with its own customers provide that "[t]he term of this Agreement shall be for one (1) year and will automatically renew for successive one year periods, unless terminated by written notice by either party no less than 30 days prior to the end of the initial term or any renewal term. " Level 3 Ex. 12 at 1 (NTI Customer Agreement.) The Commission cannot conclude that it is unlawful or discriminatory

for Level 3 to terminate its agreement with Neutral Tandem, where NTI itself has termination provisions in its agreements.

VI. The Commission Lacks Authority to Impose Contract Terms Between CLECs

The Order correctly concludes that Section 9-250 of the Illinois Act does not permit the Commission to impose on Level 3 the same rates, terms and conditions for Interconnection that other parties have entered into for the exchange of traffic. Order at 11. Specifically, the Order rejects the imposition of the rates, terms and conditions of the following agreements:

1. The agreement between Level 3 and AT&T;
2. The agreement between Time Warner and Neutral Tandem;
3. The agreement between Neutral Tandem and Verizon.

Id. The Order does, however, exceed the Commission's authority by mandating direct physical interconnection on rates, terms and conditions established by the Commission. The Order requires that the parties "observe the following provisions in their business relationship."

1. That Level 3 continue to remain direct, physical interconnection through which Neutral Tandem will deliver traffic to Level 3 originated by third-parties carriers.
2. That Level 3 not require Neutral Tandem to pay or collect reciprocal compensation for traffic not originated by Neutral Tandem.
3. That Level 3 shall not require Neutral Tandem to pay any fee or other compensation, either on a per minute basis or otherwise for traffic delivered to Level 3 for termination on the Level 3 network;
4. Neutral Tandem shall continue to provide to Level 3 sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation;
5. If the parties are unable to reach an agreement on a contract, then the interconnection shall continue based on the status quo in effect between the parties on January 30, 2007

The Order recognizes that the Commission lacks authority to create a contract between two CLECs, yet goes beyond its authority by requiring the parties to abide by the terms of an agreement that was never the subject of the Commission's jurisdiction, and was cancelled pursuant to the terms agreed to by the parties. The Commission may not enter the relief suggested by the Order.

First, the ALJ's Order states that Level 3 may not require Neutral Tandem to pay or collect reciprocal compensation, and then further orders that Level 3 shall not require Neutral Tandem to pay any fee or compensation for the exchange of traffic. Importantly, Level 3 has not demanded that Neutral Tandem pay reciprocal compensation charges for calls delivered by Neutral Tandem to Level 3, destined to Level 3's end user customers, and Level 3 has not demanded that Neutral Tandem collect reciprocal compensation charges from its own third-party customers, on Level 3's behalf. Thus, the ALJ's analysis regarding federal reciprocal compensation is misplaced.

Consistent with the terms and conditions of the parties' predecessor agreement, Level 3 has requested that Neutral Tandem pay reasonable, market-based charges to cover Level 3's costs of providing traffic termination for calls delivered by Neutral Tandem, and destined to Level 3's end users.

It is undisputed that Level 3 incurs costs to establish and maintain a second interconnection arrangement (AT&T's being the first) for the receipt of traffic from originating carriers. Baack at 9, 14, 15; Gates at 52, 54, 55. While Level 3 also incurs costs to maintain its primary interconnection arrangement with AT&T for the receipt of transit traffic from other carriers, Level 3 receives compensation on 90% of the traffic received from AT&T. Baack Direct at 8. Under the Order, Level 3 would receive no compensation on the traffic received

from Neutral Tandem. Staff witness Hoagg acknowledges that regardless of whether Level 3 is or is not receiving intercarrier compensation from originating carriers, if Level 3 was incurring costs relating to the Neutral Tandem interconnection, Level 3 would be entitled to receive compensation from Neutral Tandem for those costs. Tr. at 495. It is unlawful for the Commission to order Level 3 to exchange traffic with Neutral Tandem with no agreement in place for Level 3 to receive revenue for what is a market-based competitive service. More damaging to the workings of the competitive market, the order has conditioned what the parties can request in negotiations. Even worse, the Order mandates that the terms of the existing agreement remain in place if no new contract is reached. Since Neutral Tandem does not even compensate Level 3 for the costs of interconnection under the terminated agreement, it has no incentive to negotiate on what those costs are since they can continue to terminate traffic to Level 3 for free. Such an action by the Commission is the equivalent of ratemaking with respect to two carriers but leaves one carrier without any mechanism to recover its costs and therefore required to subsidize its competitors.

There is no statutory authority for the Commission to impose a contract between Level 3 and Neutral Tandem which requires direct interconnection, and doing so is preempted by federal law. Sections 251 and 252 of the federal Act establish the process by which Competitive LECs may interconnect with Incumbent LECs. The federal Act creates a federally-mandated arbitration process to govern interconnection between ILECs and CLECs seeking to interconnect and exchange traffic. However, Congress intentionally chose not to provide a *regulatory* process for interconnection between non-ILECs, leaving that process to commercial negotiations. Sections 251 and 252 “replace[d] a state-regulated system with a market-driven system that is self-regulated by binding interconnection agreements.” *Pacific Bell v. Pac-West Telecomm.*, 325

F.3d 1114, 1128 (9th Cir. 2003) (“*Pacific Bell*”). In that system, Congress placed specific duties on ILECs, but not competitive carriers, to negotiate formal interconnection agreements in good faith and provided for arbitration by state commissions of all disputes which arose in the formation of such agreements. *See* 47 U.S.C. §§ 251(c)(1) and 252. Congress created no similar mechanism for creating an interconnection agreement between non-ILECs. Courts recognize that the detailed provisions of Sections 251 and 252, and the dispute resolution provisions in those sections, expressly preempt state law. *See Wisconsin Bell v. Bie*, 340 F.3d 441, 444-5 (Posner, J.) (7th Cir. 2003) (holding that a state tariffing requirement to implement federal interconnection obligations was invalid because such a requirement conflicted with the arbitration provisions of Section 252); *Verizon North Inc. v. Strand*, 309 F.3d 935, 943-4 (6th Cir. 2002) (holding that state tariffing of interconnection is inconsistent with Section 252). Given the Act’s clear language, structure, and legislative history, it is plain that Congress intended to displace any state regulatory authority that would allow state commissions to mandate direct physical CLEC-to-CLEC interconnection under regulator-determined terms and conditions.

Moreover, the Commission has specific procedures in place to arbitrate the terms and conditions of an interconnection agreement between a CLEC and an ILEC, but these provisions do not apply to Interconnection Agreements between CLECs. 220 Ill. Adm. Code Part 761.10. The Commission also has established procedures for the approval of negotiated interconnection agreements between a CLEC and an ILEC, but these procedures also apply exclusively to Section 252 Interconnection Agreements. 220 Ill. Adm. Code Part 762. The Commission does not have rules, procedures or policies in place to create or impose on two competitive carriers terms and conditions for direct, physical interconnection.

The Order presumes that Level 3 may simply request compensation from originating carriers, and these originating carriers would compensate Level to cover Level 3's costs of interconnecting with Neutral Tandem. However, that assumption has been rejected by the FCC. The FCC acknowledges that CLECs have difficulty in establishing intercarrier compensation arrangements, and confirmed that interconnection arrangements between CLECS must still be established through voluntary agreements, not regulatory edict. In response to a petition brought by T-Mobile to invalidate an ILEC tariff that established intercarrier compensation, the FCC stated "that LECs may have had difficulty obtaining compensation from CMRS providers because LECs cannot require CMRS providers to negotiate interconnection agreements or submit to arbitration under section 252 of the Act." *Developing a Unified Intercarrier Compensation Regime; T-Mobile, et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, 20 FCC Rcd. 4855, at ¶ 15 (2005) ("T-Mobile Order").

The Order also wrongfully orders Level 3 and Neutral Tandem to honor the terms of the parties agreement that was terminated, by agreement, as of January 30, 2007. Order at 12. The Order acknowledges that the Commission lacks authority to impose terms and conditions of a contract between CLECs under federal law (fn. 43), but then imposes terms and conditions anyway. Level 3 terminated the July 2004 agreement with Neutral Tandem pursuant to the express written terms of the agreement. Tr. at 135. There is no dispute that the agreement between Level 3 and Neutral Tandem permitted the parties to terminate the agreement, and no dispute that Level 3 terminated the agreement in accordance with its terms. The Commission may not now impose the very terms of an agreement that was terminated. Notably, if the parties were required to abide by the terms of the Agreement as of January 30, 2007, Level 3 would be

permitted to terminate that Agreement on 30 days notice to Neutral Tandem anyway. The Commission cannot force two CLECs (or even a CLEC and an ILEC) into the terms of a commercial agreement that has been terminated, by agreement of the parties.¹⁰

VII. If the Commission Creates New Law and Requires Interconnection Under Section 9-250, It May Not Apply That New Obligation Retroactively to Conclude That Level 3 Violated Section 13-514.

The Order concludes that Level 3 has an obligation to maintain direct interconnection with Neutral Tandem under the terms of either a commercial agreement to be negotiated between the parties, or according to the terms of the July 2004 Agreement. Order at 11. However, other than citing to the FCC's *Verizon Virginia* case, the Order identifies no rule regulation or statute that requires Level 3 to maintain direct interconnection with another CLEC. As discussed above, the *Verizon Virginia* case does not impose an obligation on carriers to directly interconnect under any circumstance, and certainly does not require CLECs to directly interconnect with each other. The Order then fashions a relief under Section 9-250 to require Level 3 to maintain direct interconnection with Neutral Tandem under the terms of a commercial agreement between the parties. Assuming that the Commission has authority to award this relief, which it does not, such a declaration by the Commission is matter of first impression. Never before has the Commission ordered CLECs to directly interconnect with other CLECs for purposes of exchanging traffic; never before has the Commission established a contract between two competitive carriers to exchange traffic.

Because this is a matter of first impression, the Commission's conclusion that Level 3 must directly interconnect with Neutral Tandem is a new rule established by the Commission.

¹⁰ Section 252 of the federal Communications Act permits the Commission to arbitrate and approve of the terms and conditions of an agreement between a CLEC and an ILEC for interconnection, unbundled network elements, collocation and other requirements of the federal Act. 47 U.S.C. § 252. However, the parties all agree that the Commission may not rely on Section 252 to impose terms and conditions between two CLECs.

because this This relief can only be given prospective relief, and cannot be relied upon to conclude that Level 3 has violated Section 13-514; Level 3 had no notice that the Commission would require CLEC-to-CLEC interconnection.

Courts have examined under what circumstances an administrative agency may apply new rules or statutory interpretations to existing relationships. *Shapiro v. Regional Bd. Of School Trustees of Cook County*, 116 Ill.App.3d 397, 451 N.E.2d 1282 (1st Dist. 1983.) In determining whether an administrative agency may apply retroactively its newly adopted rules courts review the following considerations: 1) whether the case is one of first impression, 2) whether the agency action results in injury or substantial prejudice, 3) whether the regulation represents an abrupt departure from well-established practice, 4) the extent to which the party against whom the new regulation is applied relied on the former regulation and, 5) the degree of the burden imposed upon that party. *Cartwright v. Illinois Civil Service Commission*, 80 Ill.App.3d 787, 400 N.E.2d 581 (1st Dist. 1980.)

In the instant case, applying a duty on Level 3 to interconnect with Neutral Tandem, and applying that duty retroactively to conclude that Level 3's conduct violated Section 13-514 would be improper. First, there is no precedent that Level 3 could have relied upon to conclude that it had a duty, without an agreement in place, to directly interconnect with Neutral Tandem; this is a case of first impression in Illinois, and in the other states where these matters are pending. Second, to apply this new duty to Level 3 to draw the conclusion that Level 3 had a duty in February, March, April and May to directly interconnect with Neutral Tandem would result in substantial injury to Level 3. Third, the well-established practice is that CLECs indirectly interconnect with each other, unless there is a valid and existing agreement between them to directly interconnect. For the Commission to conclude now that it may, under Section 9-

250, impose an obligation on Level 3 to directly interconnect, is an abrupt departure from well established practice. Fourth, Level 3 had right to, and did rely on, prior practice when it notified Neutral Tandem that the July 2004 Agreement, having been terminated, would no longer permit the parties to directly interconnect. Finally, to impose this new duty on Level 3 retroactively would create a substantial burden on Level 3 because it would lead the Commission to conclude that Level 3 violated a standard that no party was aware of prior to the Order.

Section 10-113 of the Illinois Act allows the Commission to “rescind, alter or amend any rule, regulation, order or decision made by it,” only “upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints.” Courts have found that the notice required by Section 10-113 contemplates “a written complaint setting forth an alleged violation of the [Act], order or rule of the Commission,” or at least a written notice finding that there were “errors of law or fact” in the prior order or that the Commission has “reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening.” *Quantum Pipeline Co. v. Illinois Commerce Commission*, 304 Ill.app.3d 310, 319-320 (3rd Dist. 1999.) Failure to provide specific, individual notice of such facts is a violation of due process. In the instant case, Level 3 had no notice that the Commission would impose a new duty on CLECs to directly interconnect with each other.

In prior cases before the Commission involving interconnection terms and conditions, the Commission concluded that it would not retroactively apply new rules or duties on the interconnection arrangements between carriers. In the Commission’s rulemaking proceeding that established the interconnection obligations of Incumbent Local Exchange Carriers, the Commission concluded that it would not apply those interconnection obligations retractorily. *In the matter of the Commission’s Revision of 83 Ill. Adm. Code 790*, ICC Docket No. 99-0511,

Order (March 27, 2002, 2002 WL 32702297, *32702297. The Commission concluded that:

it would not be appropriate to require, through this proceeding, that the revised Part 790 supercede the terms and conditions of existing interconnection agreements. Rather, as Staff suggests, the Commission will address retroactive application of the new rules on a case-by-case basis as situations are brought before the Commission.

The Commission should similarly reject applying any duty or obligation on Level 3 to directly interconnect with Neutral Tandem. By applying any obligation to directly interconnect on a prospective basis only, the Commission would require interconnection, but conclude that Level 3 did not violate Section 13-514.

VIII. The Commission Did Not Award the Relief Requested by Neutral Tandem So the Commission Should Not Impose Any Attorneys Fees to Level 3.

The Order erroneously concludes that Level 3 has violated Section 13-514 and 13-702 of the Illinois Act, and then imposes 80% of Neutral Tandem's attorneys fees on Level 3, and 90% of the Commission's costs on Level 3. In light of the foregoing arguments, the Commission should vacate the Order and conclude that Level 3 did not violate state law. However, even assuming the Commission concludes that Level 3 did violate state law, the Commission may not impose attorneys fees and costs on Level 3.

Under Section 13-516, the Commission may award attorneys fees if the Commission concludes that there is a violation of Section 13-514. However, courts have held that the award of attorneys fees should reflect the parties' litigation success because the Commission's decisions often result in a "split decision." *Globalcom v. Illinois Commerce Commission*, 347 Ill.App.3d 592, 618 (1st Dist. 2004.) In light of this test, even assuming the Commission determines that Level 3 must maintain direct interconnection going forward, the Commission should award Neutral Tandem no attorneys fees, or *de minimis* attorneys fees, at most. The

Order, even as it stands, requires the parties to maintain interconnection under the terms and conditions of the July 2004 Agreement. This is not the relief requested in the complaint or Neutral Tandem's complaint.

Neutral Tandem's one count complaint requests the following relief:

- a. declare that level 3's request for unreasonable terms and conditions of interconnection violates Section 13-514 of the PUA as well as Sections 9-250 and 13-702 of the PUS; and
- b. order Level 3 to interconnect with Neutral Tandem on just, reasonable, and nondiscriminatory terms and conditions no less favorable than those under which Level 3 accepts transit traffic from AT&T.

Complaint at 25. Neutral Tandem requested that the Commission order Level 3 to interconnect with Neutral Tandem according to the terms and conditions of the Level 3/AT&T Interconnection Agreement. However, the Order specifically concludes that it could not impose the terms and conditions from the AT&T Agreement as the relationship between AT&T and Level 3. Order at 11. Therefore, the only relief requested by Neutral Tandem in its complaint was specifically rejected by the Order.

In its briefs, Neutral Tandem abandoned its request that the Commission impose on Level 3 the terms and conditions from the AT&T Interconnection Agreement. Instead, Neutral Tandem demanded that the Commission impose on Level 3 the terms and condition from an agreement between Neutral Tandem and Time Warner that those two companies executed in New York. Tr. at 125-126; Complaint at ¶ 65, fn. 27 (an agreement that was not offered by Neutral Tandem to Level 3 until this complaint was initiated). Specifically, Neutral Tandem requested that the Commission "order that the traffic terminations [agreement with Time Warner] be executed and filed within 30 days from the issuance of the Commission's Order in this proceeding. Neutral Tandem Initial Br. at 55.

The Order specifically rejects consideration of the Time Warner agreement. It states:

NT argues that Section 9-250 is a basis for the Commission to impose the preferred agreement on Level 3, and it suggests that its Traffic Termination Agreement with Time Warner is a useful template. This approach is problematic for three reasons: it resembles a Section 252 arbitration; it is substantially similar to the opt-in approach just rejected; and even if legally permissible, there is insufficient information of record to weigh whether such terms are genuinely appropriate to the relationship between NT and Level 3.

After rejecting the Time Warner agreement, the Order then fashions its own relief under Section 9-250. Order at 11. The Order compels the parties to negotiate the terms of a commercial agreement, and in the event that the parties are unable to negotiate an agreement, the Order directs that the parties exchange traffic under the terms of the July 2004 Agreement as it existed on January 30, 2007. Order at 14. Maintaining the status quo of a commercial relationship as it existed on January 30, 2007 is not the relief requested by Neutral Tandem. Neutral Tandem did not request that the Commission impose those terms and conditions. First, that agreement is terminable by either party on 30-days notice. Second, that agreement requires Neutral Tandem to compensate Level 3 for traffic terminated to Neutral Tandem. Neither of these provisions were desired or requested by Neutral Tandem. The Order rejected both requests made by Neutral Tandem in favor of a commercial agreement between the parties that existed before the Commission became involved.

In light of the foregoing, Neutral Tandem should be denied any attorneys fees – the Order specifically rejects the relief requested by Neutral Tandem in its briefs and complaint. To be consistent, the Commission should therefore split the assessment of the Commission's costs equally between Level 3 and Neutral Tandem.

For each of the foregoing reasons, the Commission must conclude that Level 3 has not violated any provision of Illinois law, and that the Commission has no authority or basis to either conclude that Level 3 has acted in a discriminatory manner, or that the Commission may fashion some interconnection contract that would compel Level 3 to directly interconnect with Neutral Tandem.

CONCLUSION

For the reasons set forth herein, Level 3 requests that the Commission reverse certain rulings set forth in the ALJ's Order that are inconsistent with the federal Telecommunications Act, 47 U.S.C. §§ 251, 252, and the Illinois Act, and that are not supported by the facts of record. Level 3 requests that the Commission enter judgment in favor of Level 3, and against Neutral Tandem; and grant further such relief as the Commission deems just, including the award of attorneys' fees, and an assessment of all costs on Neutral Tandem.

Respectfully submitted,

/s/ Henry T. Kelly

Henry T. Kelly
KELLEY DRYE & WARREN LLP
333 West Wacker Drive
Chicago, Illinois 60606
(312) 857-7070 (telephone)
(312) 857-7095 (facsimile)

Brett Heather Freedson
KELLEY DRYE & WARREN LLP
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)

Counsel to Level 3 Communications, LLC

Dated: July 2, 2007

Matt D Basil
Atty. for Neutral Tandem, Inc. and
Jenner Block LLP
330 N. Wabash Ave., Ste. 4700
Chicago IL 60611

Erik J Cecil
Level 3 Communications, L.L.C.
1025 Eldorado Blvd.
Broomfield CO 80021

Ellen C Craig
Atty. for Neutral Tandem, Inc. and
2970 N. Lake Shore Dr., Unit 15F
Chicago IL 60657

Brett Heather Freedson
Atty. for Level 3 Communications, LLC
Kelley Drye & Warren LLP
1200 19th St., NW, Ste. 500
Washington DC 20036

Ronald W Gavillet
Executive Vice President and
Neutral Tandem, Inc.
One S. Wacker Dr., Ste. 200
Chicago IL 60606

Stefanie R Glover
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago IL 60601

John R Harrington
Atty. for Neutral Tandem, Inc. and
Jenner & Block LLP
330 N. Wabash Ave., Ste. 4700
Chicago IL 60611

Matthew L Harvey
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago IL 60601-3104

Jeff Hoagg
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield IL 62701

Henry T Kelly
Atty. for Level 3 Communications, LLC
Kelley Drye & Warren LLP
333 W. Wacker Dr., Ste. 2600
Chicago IL 60606

Julie Musselman
Telecommunications Policy Analyst
Kelley Drye & Warren LLP
333 W. Wacker Dr.
Chicago IL 60606

Richard E Thayer
Director
Level 3 Communications, L.L.C.
1025 Eldorado Blvd.
Broomfield CO 80021

Ian Brodsky
Administrative Law Judge
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago IL 60601-3104