

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Neutral Tandem, Inc. and)	
Neutral Tandem-Illinois, LLC)	
)	07-0277
vs.)	
)	
Level 3 Communications, LLC)	

**LEVEL 3 COMMUNICATIONS LLC’S PETITION
REQUESTING THAT THE COMMISSION REOPEN THE PROCEEDING
TO PERMIT LEVEL 3 TO DISCONTINUE DIRECT, PHYSICAL
INTERCONNECTION WITH NEUTRAL TANDEM**

Level 3 Communications, LLC, (“Level 3”) petitions the Commission for approval for Level 3 to serve notice on Neutral Tandem, Inc. and Neutral Tandem-Illinois, LLC (collectively “Neutral Tandem”) that it will discontinue the direct, physical interconnection with Neutral Tandem, as permitted under Section 731.905 of the Commission’s Rules, 83 Ill. Adm. Code § 731.905. This Petition is made pursuant to Section 200.900 of the Commission’s rules of practice, 83 Ill. Adm. Code § 200.900, and in accordance with the express findings and conditions adopted by the Commission when it adopted Judge Brodsky’s June 25, 2007 Order in this matter. Section 200.900 of the Commission’s Rules provide that the Commission may on its own motion reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require such reopening. 83 Ill. Adm. Code § 200.900.

The Commission should reopen this proceeding given that facts relied on by the Commission when it adopted Judge Brodsky’s Order have so changed that Level 3 should no longer be required to maintain direct, physical interconnection with Level 3. Level 3 respectfully requests that the Commission reopen this proceeding, take notice of the change in circumstances, and permit Level 3 to discontinue its direct interconnection with Neutral Tandem.

I. PROCEDURAL BACKGROUND

On April 25, 2007, Neutral Tandem filed with the Commission a Verified Complaint and Request for Declaratory Ruling in which it alleged violations of Section 13-514 subsections (1), (2) and (6) as well as Sections 13-702 and 9-250 of the Public Utilities Act. 220 ILCS 5/9-250, 13-514 and 13-702. Pursuant to Section 13-515(d)(4), Level 3 filed its response on May 2, 2007. A hearing was held before Administrative Law Judge Ian Brodsky on May 22 and 23 2007.

On June 25, 2007, Judge Brodsky issued his Order, which was subsequently adopted by the Commission on July 10, 2007 (the "Order.") Judge Brodsky Ordered Level 3 to maintain its direct interconnection trunks with Neutral Tandem. Specifically, the Order required:

Therefore, NT and Level 3 shall observe the following provisions in their business relationship. First, as discussed *supra*, Level 3 shall continue to accept a direct physical interconnection by which NT delivers traffic to Level 3 for termination until further order from the Commission, and *for at least as long as Level 3 maintains a direct physical interconnection by which it delivers traffic to Neutral Tandem for transit.* (emphasis added.)

Order at 12. The balance of the order made findings with respect to the obligations of each party concerning future contractual negotiations and billing information Neutral Tandem would provide to Level 3 for traffic sent to Level 3. Those findings are not relevant to this request since Level 3's request is based on the Commission's Order and the specific conduct of Neutral Tandem. As discussed herein, the condition that existed at the time the Judge Brodsky issued his order is no longer in existence, and Level 3 should be relieved of any continuing, unending obligation to interconnect with Neutral Tandem.

Judge Brodsky based his conclusion that Level 3 should maintain direct, physical interconnection with Neutral Tandem on his finding that Level 3 had just entered into an agreement that would allow Level 3 to deliver traffic to Neutral Tandem, while at the same time refusing to allow originating carriers to deliver traffic to Level 3 through Neutral Tandem. Order

at 5. Judge Brodsky concluded that it was inappropriate for Level 3 to impose a one-way direct interconnection obligation, whereby Level 3 could deliver traffic to Neutral Tandem but was not required to receive traffic. Order at 7. Neutral Tandem cancelled the interconnection arrangement whereby Level 3 and its affiliate Broadwing would deliver traffic to Neutral Tandem. Therefore, the condition that caused the Commission to conclude that Level 3 should maintain direct, physical interconnection to receive traffic from Level 3 no longer exists – in accordance with Judge Brodsky’s rationale, it is inappropriate for Neutral Tandem to impose a one-way interconnection obligation on Level 3. The Commission should conclude that Level 3 is now permitted to discontinue direct interconnection with Neutral Tandem pursuant to § 731.905 of the Commission’s rules.

Section 731.905 of the Commission’s rules provides that carriers may terminate any wholesale arrangements provided to other carriers upon 35 days written notice:

Except where otherwise agreed to, in writing, by the carriers, no provisioning carrier offering or providing wholesale service¹ 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 respectfully requests that the Commission permit Level 3 to discontinue the direct interconnection arrangement that permits Neutral Tandem to deliver one-way traffic terminated to Level 3. Even assuming the direct physical interconnection arrangement with Neutral Tandem is discontinued, Level 3 will continue to be indirectly interconnected with Neutral Tandem and its customers through alternative interconnection arrangements.

¹ 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.

II. NEUTRAL TANDEM TERMINATED ITS ACCEPTANCE OF LEVEL 3 TRAFFIC UNDER ITS ORIGINATING TRAFFIC AGREEMENT AND NOW MAINTAINS A ONE-WAY RELATIONSHIP WITH LEVEL 3.

During the period from July 2004 through January 30, 2007, Level 3 and Neutral Tandem maintained a commercially negotiated interconnection arrangement that created a direct interconnection arrangement between the parties. (the “July 2004 Agreement,” a copy of which is attached hereto as Exhibit A.) The July 2004 Agreement permitted Level 3 to route traffic to Neutral Tandem for delivery to third-party carriers, and permitted Neutral Tandem to deliver third-party carrier traffic to Level 3. Level 3 agreed to pay Neutral Tandem a fee for traffic delivered to Neutral Tandem, and Neutral Tandem agreed to pay a fee to Level 3 for traffic delivered to Level 3. In 2006 Level 3 acquired Broadwing Communications, which had a separate agreement with Neutral Tandem, entered into as of February 2, 2004 (“Broadwing Agreement.”) Each of the contracts are commercially negotiated contracts, which are not required to be filed with the Commission.

On about January 31, 2007, Level 3 entered into a new agreement that was intended to substitute and replace both the Broadwing Agreement and the July 2004 Level 3 Agreement. (the “Originating Contract”, a copy of which is attached hereto as Exhibit B.) However, the January 31, 2007 Originating Contract was one-way – it only permitted Level 3 to deliver traffic to Neutral Tandem, and did not permit Neutral Tandem to deliver traffic to Level 3. It was this exchange of obligations that Judge Brodsky concluded was inappropriate:

Level 3 has secured a “Type N” interconnection for its own use, i.e., it is directly interconnected with NT for the purpose of having traffic originated on the Level 3 network transited by NT to other CLECs. The 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.

On May 17, 2007, a few days before the start of the Illinois Hearing, Neutral Tandem informed Level 3 by letter that it was terminating the Originating Contract the parties executed on January 31 whereby Level 3 and its affiliates could originate traffic to Neutral Tandem. Exhibit C. The letter claims that the amendment did not apply to traffic originated by Level 3's Broadwing affiliates and as a result, any traffic originated by Broadwing through Neutral Tandem would be billed at Neutral Tandem's tariff rates. The tariffed rates were substantially higher than the contract rate. Neutral Tandem also argued that pursuant to the terms of its Illinois tariffs, Broadwing was obligated to accept traffic from Neutral Tandem if it used Neutral Tandem's transit services under the tariff.

While Level 3 disagrees with Neutral Tandem's interpretation of its tariff or the Originating Contract, Level 3 rerouted its traffic instead of paying the substantially higher rates Neutral Tandem demanded. On May 25, 2007, two days after completion of the hearing, Level 3's affiliate Broadwing stopped routing transit traffic via Neutral Tandem. Level 3 ceased sending traffic to Neutral Tandem on September 5, 2007. Level 3 and Broadwing no longer send traffic to Neutral Tandem anywhere in the United States. Affidavit of Julie Mathis, Exhibit D.

By terminating the Originating Contract with Level 3, Neutral Tandem has now created a one-way relationship for the termination of traffic, the very type of relationship that Judge Brodsky held to be unlawful under Section 13-514. Neutral Tandem continues to terminate traffic to Broadwing and Level 3 in Illinois even though neither Broadwing nor Level 3 route traffic to Neutral Tandem.

Judge Brodsky's ordered 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 from 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." Order at 12. Judge Brodsky further ordered that the parties attempt to reach an agreement that would formalize a commercial arrangement between the two companies.

Indeed, despite efforts to reach agreement on the terms and conditions for a commercial arrangement, Level 3 and Neutral Tandem have been unable to agree to terms of a contract for Neutral Tandem's unilateral delivery of traffic to Level 3. Therefore, in accordance with Judge Brodsky's Order, Level 3 continues to receive traffic pursuant to the terms and conditions of the July 2004 Agreement, which was the status quo as of January 30, 2007. *See* Order at 12.

Under this July 2004 Agreement, Neutral Tandem pays Level 3 compensation for each minute of use of traffic delivered to Level 3. Ex. A, p. 21. In addition to these terms for compensation, the parties agreed that if either party wished to terminate the contract, they could do so on thirty-days written notice. Ex. A, p. 9-10. However, neither Level 3 nor Neutral Tandem want to exchange traffic under the terms and conditions of the July 2004 Agreement. Neutral Tandem objects to compensating Level 3, and Level 3 terminated the Agreement. The Commission has required the parties to negotiate the terms and conditions of a substitute arrangement, but the parties have been unsuccessful in doing so. Because neither party wants to exchange traffic under the terms of the Commission-imposed July 2004 Agreement, and neither party has been able to satisfy the conditions imposed by the Commission's Order to negotiate a new replacement commercial Agreement, the Commission should conclude that it is permissible

for Level 3 to discontinue direct interconnection service pursuant to Section 731.905.² The Order anticipates that in the event that Level 3 and Broadwing no longer use Neutral Tandem's originating services, then Level 3 can seek to unwind the direct interconnection relationship with Neutral Tandem. Because Neutral Tandem, exercising its own business judgment, terminated the Originating Contracts, under the terms of the Judge Brodsky's Order, Level 3 should no longer be required to terminate traffic from Neutral Tandem. If the Commission fails to permit Level 3 to terminate the one-way exchange of traffic now conducted by Neutral Tandem, it will be sanctioning the very conduct that the Commission held to be in violation of Section 13-514. The Commission should act immediately to eliminate this discriminatory treatment by allowing Level 3 and Broadwing to disconnect the direct interconnection trunks through which Neutral Tandem sends traffic to Level 3.

III. NEUTRAL TANDEM'S CONDUCT IN OTHER STATES PROVES THAT DIRECT INTERCONNECTION CAN BE TERMINATED WITHOUT DISRUPTING CALLS.

It is clear from Neutral Tandem's testimony that Neutral Tandem can disconnect its direct interconnection with Level 3 in a matter of days, and that such disconnection can be accomplished with no disruption to the Public Switched Telephone Network. In addition, Neutral Tandem has confirmed through its testimony that it does not need to seek permission from originating carriers prior to discontinuing the direct interconnection with Level 3.

In its testimony and then under cross examination before Judge Brodsky, Neutral Tandem made a number of representations regarding alleged difficulties and time it would take Neutral

² Level 3 does not necessarily agree that it is required to comply with Section 721.905 prior to terminating the interconnection relationship with Neutral Tandem. Section 721.905 is intended by its terms to apply to a carrier, like an Incumbent Local Exchange Carrier, that provides wholesale network elements to a competitive carrier. Without waiving that argument, Level 3 is willing to abide by the 35 day notice period provided in Section 721.905. Notably, Neutral Tandem did not provide 35 days notice to Level 3 when it terminated the Originating Contract on May 17, 2007.

Tandem's customers to migrate their traffic to an alternative transit provider. Specifically, Neutral Tandem witness Surendra Saboo testified that if the physical interconnection arrangement between Level 3 and Neutral Tandem were terminated, there would be "substantial injury to Neutral Tandem, to third party carriers, and to those carriers' end users, and to the PSTN at large." Saboo Direct Testimony at 3; Tr. 184-86. Neutral Tandem also claimed that termination of the parties' direct physical interconnections would cause immediate and widespread tandem exhaust, and in turn, would demand that Illinois CLECs undertake trunk augmentations, including the building of new trunks, to continue to exchange traffic through the incumbent LEC's tandem. Saboo Direct Testimony 4-5; Wren Direct Testimony 23. Neutral Tandem also testified that it would take approximately six months for carriers using Neutral Tandem's services to migrate traffic destined to Level 3 to an alternative path. Saboo Direct Testimony at 6; see also Tr. 272-73.

Neutral Tandem further argued that Level 3 should be compelled to receive traffic from Neutral Tandem because originating carriers have elected to use Neutral Tandem as their transit provider for calls directed to Level 3. *See* Neutral Tandem Response to Level 3's Petition for Review at 48-49; Tr. at 130-132. According to Neutral Tandem, an originating carrier can choose to route calls to terminating carriers, and can elect any transit provider to route calls. If the transit provider does not have a direct interconnection in place with the terminating carrier, then the terminating carrier (i.e. Level 3) would be compelled under state law to interconnect with Neutral Tandem to create a traffic path that would satisfy the originating carrier's choice to use Neutral Tandem. *Id.*

However as Level 3 and regulators have learned from proceedings held after the Illinois hearing, Neutral Tandem's claims concerning the time it would take to migrate traffic and the

harm to its business plan were overblown and inaccurate. In the eight states where Level 3 brought complaints, Neutral Tandem unilaterally opted to inform its customers that they would no longer route traffic to Level 3. Neutral Tandem informed Level 3 and the respective commissions by filing affidavits indicating that they were no longer sending traffic to Level 3. This contravenes Neutral Tandem's claims that originating carriers get the option to route traffic to Level 3, even if there is no agreement between Level 3 and that carrier's preferred transit provider. Neutral Tandem, not the originating carrier, reserved for itself the option to determine which services to provide, and which carriers and where it wants to directly interconnect with Level 3, based on its own business decisions (such as its own cost to build a network to Level 3), and only after reaching agreement with the terminating carriers. The states and affidavits of Neutral Tandem Chief Operating Officer Surrendra Saboo are attached:

1. Indiana. Please see exhibit E.
2. Massachusetts. Please see exhibit F.
3. Maryland. Please see exhibit G.
4. Pennsylvania. Please see exhibit H.
5. New Jersey. Please see exhibit I.
6. Ohio. Please see exhibit J.
7. Wisconsin. Please see exhibit K.

Having established that Neutral Tandem can use its own business judgment and unilaterally determine to stop sending traffic to a terminating carrier, the question becomes "How long does that process take"? Neutral Tandem's testimony in Illinois portrayed this process as time consuming, cumbersome, and devastating to the public switched telephone network ("PSTN".) Wren Direct Testimony at 23. But as Neutral Tandem admitted to the Michigan Public Service Commission, its customers were able to do this in a matter of weeks, not months, and that Neutral Tandem did not seek the permission from the originating carriers before it unilaterally terminated that transport route to Level 3:

- Q. (Mr. Kelly) O.K. I'm sorry. When did you provide notice to your customers?
- A. (Dr. Saboo) Again, I don't now about notice, but it was several weeks ago.
- Q. (Kelly) So in July?
- A. (Saboo) I don't know the exact date when got started with letting customers know that they needed to start to reroute traffic.
- Q. (Kelly) Did you advise customers that in Wisconsin, Level 3 telephone numbers would, that calls could no longer be delivered to Level 3's telephone numbers?
- A. (Saboo) Yes. We had to give them Level 3's codes.
- Q. (Kelly) The NPA-NXX's?
- A. (Saboo) That's correct.

* * *

- Q. (Kelly) Did you solicit from your originating carriers their consent to no longer deliver traffic directly through Level 3?
- A. (Saboo) I'm not sure what you mean by solicit, but, you know, we worked with them and gave them Level 3's codes and asked them to not route those calls to us and to start finding other ways; and as I said, some of them have done some amount of the work and some of them have not, and for those that have not, we are tandeming through the ILEC tandem.
- Q. (Kelly): Did you ask them permission to do that?
- A. Well, they have to do a lot of the work, so I'm not sure the permission aspect of it, but we work with them because they have to do the work in terms of rerouting.

Michigan Transcript at 352-354 (attached hereto as Exhibit L.)

Neutral Tandem admitted in Michigan that it informed its customers based on Level 3's representations in other state proceedings – the same made in Illinois – that sufficient capacity was in place between the incumbent and Level 3 to handle any increase in traffic. Taken as a whole, it is clear that Neutral Tandem's advocacy in Illinois was designed to create the air of an emergency in order to avoid keep a specific revenue stream alive which Neutral Tandem has

been able to do now for more almost a year since the first termination date. Neutral Tandem's arguments about harm to the public switched telephone network, the amount of time needed to handle the migration or the impact on its business have not been borne out. In fact, Neutral Tandem's conduct proves Level 3's central principle: that if carriers provide notice to their customers of the need to reroute traffic, customers will make the best network decision for themselves to ensure traffic reaches its termination point. Although Neutral Tandem unilaterally terminated the routing of traffic to Level 3, it has not been forced out of business in any market where it was properly providing services. In a filing with the Public Utilities Commission of Ohio on October 12, 2007, after Neutral Tandem terminated the direct interconnection arrangements with Level 3 in Ohio, Neutral Tandem claims that it still "terminates traffic to 52 competitive wireless, wireline and broadband services in Ohio and is also connected to 11 ILEC tandems...". Neutral Tandem goes on to say that it transits 1.5 billion minutes of traffic annually in Ohio. See Exhibit M.³

Neutral Tandem can, when it chooses to do so, disconnect direct interconnection with Level 3 in a matter of days, without disrupting call completion, the Public Switched Telephone Network, competition in the transit market, or the ability of Neutral Tandem as an on-going concern. Therefore, Neutral Tandem could disconnect its direct interconnection with Level 3 within the 35 days provided in Section 731.905 of the Commission's rules with no harm to the PSTN or the originating carriers' calls.

³ It is also worth nothing that in the letter to the Ohio Commission, Neutral Tandem is advocating for market based negotiations for transit services and that it opposes a proposed rule that would force AT&T to set its transit rates at TELRIC. Setting transit rates at TELRIC would benefit all carriers but it seems that Neutral Tandem would prefer market based rates in order to maintain its margins.

IV. CONCLUSION

Section 200.900 of the Commission's rules of practice provides that the Commission "may, on its own motion, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require . . . such reopening." 83. Ill. Adm. Code 200.900. In the Order, Judge Brodsky linked Level 3's obligation to maintain a direct physical interconnection route with Neutral Tandem to Level 3's continued use of Neutral Tandem's transit services. Exercising its own business judgment, Neutral Tandem – two days after the hearing – informed Level 3 that it was terminating the contract that allowed Level 3 to use Neutral Tandem's transit services. Now that there remains only a one-way exchange of traffic, and no contract or agreement to replace the July 2004 Agreement, it would be inconsistent for the Commission to compel Level 3 to maintain direct interconnection with Neutral Tandem. Because Neutral Tandem terminated the contracts by which Level 3 would deliver traffic to Neutral Tandem, and because there is no longer any traffic routed from Level 3 to Neutral Tandem, the facts that Judge Brodsky relied on to compel direction interconnection between Level 3 and Neutral Tandem have changed. Because Level 3 no longer uses Neutral Tandem's transiting services, Level 3 respectfully requests that the Commission issue an order:

- a. Allowing it to unwind its direct, physical interconnection through which Neutral Tandem routes traffic to Level 3;
- b. Establishing a date upon which Level 3 can disconnect the direct, physical interconnection facilities, which date should be no more than 35 days from the Commission's Order;

- c. Requiring Neutral Tandem to provide notice to its customers that they will no longer be able to route traffic directly to Level 3 through Neutral Tandem as of the date established in the foregoing paragraph; and
- d. Declaring that Level 3 is relieved of any further obligation to terminate traffic delivered by Neutral Tandem until such time as there is an agreement between the parties to do so.

Dated: February 22, 2008

Respectfully submitted,

Level 3 Communications, LLC



By one of its attorneys

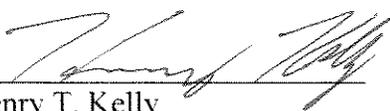
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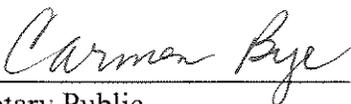
STATE OF ILLINOIS)
)
COUNTY OF COOK) SS.

VERIFICATION OF HENRY T. KELLY

I, Henry T. Kelly being duly first duly sworn and on oath state that I am an counsel for Level 3 Communications, LLC and, that I have read the foregoing Petition filed by Level 3 Communications, LLC. The allegations of fact are supported by either affidavit or documents attached as exhibits to the Petition, and on that basis, the allegations are true and correct to the best of my knowledge and belief.


Henry T. Kelly

Subscribed and sworn before me
This 22ndst day of February 2008


Notary Public.

