

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

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

Neutral Tandem-Illinois, LLC, Neutral Tandem, Inc., and its subsidiaries, (collectively “Neutral Tandem”), respectfully submits this opposition to Level 3 Communications, LLC’s (“Level 3”) Petition Requesting that the Commission Reopen the Proceeding to Permit Level 3 to Discontinue Direct, Physical Interconnection with Neutral Tandem (the “Petition”).

**INTRODUCTION**

Level 3’s Petition seeks to reopen this proceeding in which the Illinois Commerce Commission (the “ICC” or “Commission”) previously found, based upon an extensive record, including substantive hearings, that Level 3 had engaged in knowing and unreasonable conduct in violation of Illinois law. Despite Level 3’s assertions to the contrary, the Petition presents ***no*** new facts or arguments ***at all***, much less any new facts or arguments that alter the Commission’s prior well-reasoned and firmly-supported findings and conclusions in this proceeding.

The Petition asserts only two arguments, each of which Level 3 previously raised with this Commission and which the Commission rejected. And even if Level 3 had not previously raised the Petition arguments with this Commission, the arguments have no merit. Level 3’s Petition thus should be summarily denied.

More egregiously, Level 3’s Petition contains objectively false statements of fact. Not only do these false statements highlight the appropriateness of this Commission denying the

Petition, they reveal the lengths to which Level 3 will go to avoid complying with the ICC Order in this proceeding and the requirements of Illinois law. For these reasons, Neutral Tandem respectfully believes that the public interest would be served by the ICC opening a *new* docket to review Level 3's recidivist bad acts and to determine whether the Commission should: (1) assess civil penalties against Level 3; and (2) analyze Level 3's certification in the State of Illinois.

## **BACKGROUND**

### **A. Proceedings Leading to the ICC Order.**

Neutral Tandem and Level 3 have been directly interconnected in the State of Illinois since July 6, 2004 pursuant to a series of negotiated contracts. As of the date of Neutral Tandem's Complaint in this proceeding, Neutral Tandem terminated more than 56 million minutes of tandem traffic per month to Level 3 and its subsidiaries in Illinois.

On January 31, 2007, the parties executed the most recent amendment to their contracts, which set forth updated terms and conditions under which Level 3 would utilize Neutral Tandem's services to terminate Level 3's traffic to other carriers. On that very same day, only a few hours later, Level 3 notified Neutral Tandem that it was canceling the agreement under which Neutral Tandem terminated traffic to Level 3 that originated from other carriers' customers. Level 3 initially informed Neutral Tandem that it would no longer accept terminating traffic from Neutral Tandem after March 2, 2007 and would unilaterally terminate the parties' direct interconnection on that date. After certain negotiations, Level 3 pushed back its threat of permanent disconnection until June 25, 2007.

Neutral Tandem attempted to negotiate with Level 3 to maintain the parties' direct interconnection. Neutral Tandem met with Level 3 representatives on multiple occasions in an attempt to resolve their disputes. Several senior Neutral Tandem executives traveled to Level 3's

Colorado headquarters for an in-person meeting in February 2007. Neutral Tandem also participated in multiple telephone calls and sent Level 3 numerous correspondence in an attempt at negotiating mutually agreeable interconnection terms. These efforts proved futile.

Left with no other options to Level 3's anticompetitive conduct, Neutral Tandem filed a Complaint with this Commission on April 25, 2007. Neutral Tandem's Complaint asserted that Level 3's anticompetitive actions violated Sections 13-514, 13-702 and 9-250 of the Illinois Public Utilities Act (the "PUA"). Specifically, Neutral Tandem alleged that Level 3's refusal to maintain the parties' existing interconnection on non-discriminatory terms violated Sections 13-514, 13-702 and 9-250 of the PUA and asked the ICC to "declare that Level 3's request for unreasonable terms and conditions of interconnection violat[ed] Section 13-514 of the PUA...." (Complaint, at 25.) Level 3 filed its Answer on May 2, 2007.

On May 22 and May 23, 2007, ICC Administrative Law Judge ("ALJ") Ian Brodsky heard evidence on the merits of Neutral Tandem's Complaint. Neutral Tandem presented testimony from Rian Wren, its President and Chief Executive Officer, and Dr. Surendra Saboo, its Chief Operating Officer and Executive Vice President. Level 3 offered testimony from Sara Baack, a Senior Vice President in its Wholesale Markets Group, and Timothy Gates, a paid witness employed by QSI Consulting, Inc. ICC Staff presented the testimony of Jeffrey Hoagg, the Commission's principal telecommunications policy advisor. Following the hearing, Neutral Tandem, Level 3 and ICC Staff submitted extensive post-hearing briefs.

On June 25, 2007, after considering the evidence presented by the parties and ICC Staff, ALJ Brodsky issued his Order (the "ALJ Order"). A copy of the ALJ Order is attached as Exhibit A. ALJ Brodsky concluded, among other things, that "[b]y a preponderance of the evidence, [Neutral Tandem] has established that the conduct of Level 3 at issue in this dispute

violates Sections 13-514(1), 13-514(2), 13-514(6), and 13-702 [of the PUA], and, as such, is an impediment to competition and contrary to the public interest.” (Ex. A, at 13.)

On July 2, 2007, Level 3 filed with the Commission a 37-page Petition for Review of the ALJ Order. A copy of Level 3’s Petition for Review is attached as Exhibit B. On July 10, 2007, after both Neutral Tandem and ICC Staff filed responses to the Petition for Review, the Commission issued the ICC Order, which rejected Level 3’s Petition for Review and adopted the ALJ Order in its entirety. The ICC issued an amended order on July 26, 2007, which made no substantive changes to the original July 10, 2007 ICC Order. Together, these two Orders represent the “ICC Order” and are attached as Exhibit C.

Level 3 thereafter filed with the ICC an Application for Rehearing and a Supplemental Filing in Support of its Application. Copies of Level 3’s Application and Supplemental Filing in Support of its Application are attached as Exhibits D & E. Neutral Tandem filed written oppositions to each filing. On August 17, 2007, after considering Level 3’s arguments, the Commission denied Level 3’s Application for Rehearing. (Ex. F.)

**B. The ICC Order Found That Level 3 Violated Numerous Provisions of the PUA.**

In the ICC Order, the Commission adopted ALJ Brodsky’s conclusion that:

By a preponderance of the evidence, [Neutral Tandem] has established that the conduct of Level 3 at issue in this dispute violates Sections 13-514(1), 13-514(2), 13-514(6), and 13-702 [of the PUA], and, as such, is an impediment to competition and contrary to the public interest.

(Ex. A, at 13.) The ICC designated the method of direct interconnection advocated by Neutral Tandem -- originating carrier to Neutral Tandem to Level 3 -- as “Type N” interconnection, and the method of indirect interconnection that Level 3 advocated -- originating carrier to Neutral Tandem to AT&T to Level 3 -- as “Type L” interconnection. (*Id.*, at 5.) The ICC found that “where a ‘Type N’ interconnection is possible, forcing the use of a ‘Type L’ interconnection

violates Section 13-514(1) of the Act, which prohibits the provision of inferior connections to another carrier.” (*Id.*, at 6.) The ICC also found that “[r]equiring NT or an originating CLEC to incur a second set of transit costs is the hallmark of the inferiority of this type of interconnection” and “violates Section 13-514(2) of the Act, which prohibits a telecommunications carrier from inhibiting the speed, quality, or efficiency of services used by another carrier.” (*Id.*)

In addition, the Commission found that Level 3’s refusal to interconnect with Neutral Tandem forces Neutral Tandem’s carrier customers in Illinois to either pay:

- (i) [T]he AT&T price, 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. This scenario will degrade the ability of NT to do business, and will impede the development of competition in Illinois. Therefore, the position advocated by Level 3 violates Illinois law.

(*Id.*, at 6.)

The Commission held that Level 3’s disconnection of the parties’ interconnection would “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).” (*Id.*) The Commission also found that “[b]oth the unreasonableness and the knowing intent elements of NT’s Section 13-514 claims are apparent from the nature and timing of Level 3’s actions.” (*Id.*, at 7.)

In addition to finding that Level 3’s conduct violated Section 13-514 of the PUA, the ICC also agreed with ICC Staff and Neutral Tandem that Level 3’s disconnection from Neutral Tandem violates Section 13-702 of the PUA. (*Id.*, at 8-9.) The ICC rejected Level 3’s argument that Section 13-702 “merely ‘requires Level 3 to receive traffic where there is an ongoing agreement for the exchange of traffic’” and held that “[t]he scope of 13-702 is more broad than

that advocated by Level 3 . . . Level 3’s position would simultaneously impact NT adversely in its ability to serve its customers, and would foreclose from others the very arrangement that Level 3 uses for itself.” (*Id.*, at 8) The Commission further noted that “[t]he intent of this Section of the Act is the prohibition of discrimination or delay. Although Level 3 protests that there is no duty to maintain interconnection imposed by this Section, the discrimination flowing from Level 3’s leveraging of the interconnection with NT is prohibited.” (*Id.*)

The Commission also found that Level 3’s demand for disconnection implicated Section 13-406 of the PUA, as follows:

By proposing to disconnect NT, Level 3 would impose upon NT, its 18 other CLEC customers, and all of their subscribers a discontinuation of service, as well as the *per se* impediments to competition complained of pursuant to Section 13-514. These impacts, along with the scheme of disparate treatment that would cause them, are contrary to the public interest.

(*Id.*, at 7.)

Consistent with its findings, the ICC issued the following mandates: (1) “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 NT for transiting” (*Id.*, at 12); (2) “Level 3 shall not require NT to pay or collect reciprocal compensation for traffic not originated by NT” (*Id.*); (3) “Level 3 shall not require NT 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” (*Id.*); (4) “NT shall continue to provide to Level 3 sufficient call detail such that Level 3 can bill the originating carrier for reciprocal compensation purposes” (*Id.*); (5) “if the parties are unable to reach an agreement on a contract that sets forth the terms and conditions for their commercial relationship, the interconnection shall continue based upon the status quo in

effect between the parties on January 30, 2007” (*Id.*); and (6) Level 3 must pay 80% of Neutral Tandem’s attorneys’ fees and costs as well as 90% of the Commission’s costs. (*Id.*, at 13.)

**C. Contrary to the Claims in Level 3’s Petition, Neutral Tandem Did Not Terminate Any Contract Between Neutral Tandem and Level 3.**

On August 18, 2005, Neutral Tandem and Level 3 entered into an agreement by which Level 3 originates certain traffic for delivery to the end-users of other telecommunications carriers via Neutral Tandem’s tandem services. (Saboo Aff., Ex. G, at ¶ 6.) That agreement is entitled “Master Service Agreement,” and is dated August 18, 2005. (*Id.*)

The August 18, 2005 contract was executed prior to Level 3’s acquisition of Broadwing Communications. (*Id.*, at ¶ 7.) Neutral Tandem and Broadwing Communications exchanged traffic pursuant to a separate, February 2, 2004 contract (the “Broadwing Agreement”). (*Id.*) The Broadwing Agreement also was executed prior to Level 3’s acquisition of Broadwing. (*Id.*)

Neutral Tandem and Level 3 agreed to modify and amend the August 18, 2005 agreement on January 31, 2007 (the “January 31, 2007 Amendment” or “Amendment”). (*Id.*, at ¶ 8.) Level 3’s Petition refers to the Amendment as the “Originating Contract.” (*Id.*) By its express terms, the January 31, 2007 Amendment applies only to Neutral Tandem and Level 3. (*Id.*, at ¶ 9.) Indeed, the January 31, 2007 Amendment specifically states that it is a contract “by and between Neutral Tandem, Inc. (‘Neutral Tandem’) and Level 3 Communications, LLC (‘Customer’).” (*Id.*) In addition, by its express terms, the January 31, 2007 Amendment only modified and amended the August 18, 2005 contract. (*Id.*) Thus, the January 31, 2007 Amendment did not apply to the delivery of transit traffic from Broadwing to other carriers through Neutral Tandem, nor did it modify or amend the terms of the Broadwing Agreement. (*Id.*, at ¶ 10.)

In February 2007, Level 3 notified Neutral Tandem that it intended to terminate the Broadwing Agreement as of March 23, 2007. (*Id.*, at ¶ 11.) Level 3 and Broadwing continued to

send transit traffic to Neutral Tandem after March 23, 2007. (*Id.*, at ¶ 12.) Thus, on May 17, 2007, Neutral Tandem sent a letter notifying Level 3 that, while Broadwing was free to continue utilizing Neutral Tandem’s services, due to its termination of the Broadwing Agreement, Broadwing’s use of Neutral Tandem’s services would be done pursuant to the terms of Neutral Tandem’s applicable tariffs. (*Id.*)

Contrary to the assertions in Level 3’s Petition, Neutral Tandem’s May 17, 2007 letter, by its clear terms, did not terminate the January 31, 2007 Amendment. (*Id.*, at ¶ 13.) Instead, the letter stated as follows:

[G]iven Level 3’s decision to terminate the contract between Neutral Tandem and Broadwing, there no longer is any contract in effect for the continued purchase by Broadwing of services from Neutral Tandem. The January 31, 2007 amendment to the August 18, 2005 contract between Neutral Tandem and Level 3, by its express terms, applies only to “Level 3 Communications, LLC.”

(*Id.*)

Neutral Tandem has never, at any point in time, terminated the January 31, 2007 Amendment. (*Id.*, at ¶ 14.) Indeed, as discussed below, notwithstanding Level 3’s claim that Neutral Tandem terminated the January 31, 2007 Amendment, both Level 3 and Neutral Tandem have continued to operate under the terms of the January 31, 2007 Amendment after the purported “termination.” (*Id.*)

**D. Contrary to the Claims in Level 3’s Petition, Level 3 and Neutral Tandem Have Continued to Operate Under the Terms of the January 31, 2007 Amendment After The Alleged “Termination” of that Amendment.**

In the months following Neutral Tandem’s May 17, 2007 letter, Level 3 continued to send significant amounts of originating transit traffic using Neutral Tandem’s services. (*Id.*, at ¶ 15.) Between June 2007 and September 2007, Level 3 originated several million minutes of transit traffic through Neutral Tandem each month. (*Id.*)

In delivering transit traffic in the months following Neutral Tandem's May 17, 2007 letter, Neutral Tandem consistently has billed and invoiced Level 3 at the rates referenced in the January 31, 2007 Amendment. (*Id.*, at ¶ 16.) Level 3 consistently has paid Neutral Tandem's invoices at the rates set forth in the Amendment without dispute. (*Id.*, at ¶ 17.) At no time has Level 3 ever refused to pay Neutral Tandem at the rates set forth in the Amendment, nor has Level 3 ever notified Neutral Tandem that billing Level 3 under the rates in the January 31, 2007 Amendment was inappropriate because the Amendment had been terminated. (*Id.*)

Beginning in September 2007, Level 3 significantly reduced the amount of transit traffic it was originating through Neutral Tandem under the January 31, 2007 Amendment. (*Id.*, at ¶ 18.) However, at no point has Level 3 ever stopped sending Neutral Tandem transit traffic under the Amendment. (*Id.*) In fact, even as of the date of this filing, Level 3 continues to send small amounts of Level 3-originated transit traffic using Neutral Tandem's services. (*Id.*)

**E. Level 3 Affiliate Broadwing Also Continues to Send Originating Traffic to Neutral Tandem Under the Terms of Neutral Tandem's Tariffs.**

Broadwing also continued to originate transit traffic using Neutral Tandem's services after Neutral Tandem's May 17, 2007 letter. (*Id.*, at ¶ 20.) Although in May 2007, Broadwing reduced the amount of transit traffic it was originating through Neutral Tandem, at no point has Broadwing ever stopped sending Broadwing-originated transit traffic through Neutral Tandem. (*Id.*, at ¶ 21.) In fact, even as of the date of this filing, Broadwing continues to send small amounts of Broadwing-originated transit traffic using Neutral Tandem's services. (*Id.*)

**ARGUMENT**

Despite Level 3's assertion that the Petition presents "changed" facts, the Petition fails, as a matter of law, to provide any basis for the Commission to reopen this docket. The Petition asserts only two arguments, each of which Level 3 previously raised with this Commission and

which the Commission rejected. The Petition thus cannot satisfy the standard for reopening this proceeding. Moreover, even if the arguments raised in the Petition were new, they do not support reopening this proceeding because: (1) they depend on objectively false statements of fact; (2) they are irrelevant; and (3) they do nothing to negate this Commission's prior findings and conclusions regarding Level 3's obligation under Illinois law to accept traffic from Neutral Tandem via a direct interconnection.

Neutral Tandem also respectfully suggests that, in addition to rejecting Level 3's Petition, the Commission should, on its own motion, consider exercising its authority to open a *new* proceeding to consider appropriate penalties against Level 3 for its repeated bad acts. Indeed, Level 3's egregious and anticompetitive conduct raises serious questions about whether Level 3 should be allowed to maintain its certification in the State of Illinois.

**I. THE COMMISSION PREVIOUSLY CONSIDERED AND REJECTED EACH OF THE ARGUMENTS RAISED IN LEVEL 3'S PETITION.**

In a transparent attempt to avoid the ICC Order's clear mandates, Level 3 claims that reopening this proceeding is appropriate because the "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 directly interconnect with Neutral Tandem. (Pet., at 1.) Despite its claim that the circumstances have changed since the Commission entered the ICC Order, Level 3's Petition advances only two arguments for reopening this proceeding, each of which Level 3 previously raised with the Commission and which the Commission rejected.

Because the Petition is based solely upon arguments and facts already considered by the Commission, it fails as a matter of law to provide the Commission with a basis for exercising its discretion to reopen this proceeding. Under 83 Ill. Admin. Code § 200.900 -- the only authority upon which Level 3 bases its Petition -- the Commission may only reopen a proceeding if "it has

reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening.” 83 Ill. Admin. Code § 200.900.

**A. Level 3’s Claim That it Is Entitled to Disconnect Neutral Tandem if it Does Not Deliver Traffic to Neutral Tandem Has Previously Been Rejected by the Commission.**

Level 3 first claims that relevant facts have changed since the ICC’s Order because Level 3 no longer delivers traffic to Neutral Tandem. (Pet., at 2-7.) According to the Petition, Level 3 is only required to directly interconnect with Neutral Tandem for purposes of terminating traffic if Level 3 also delivers traffic to Neutral Tandem. (*Id.*) Level 3 thus claims that “[t]he [ICC] 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.” (*Id.*, at 7.)

Contrary to Level 3’s assertion, even if true (which it is not), the fact that Level 3 purports to no longer deliver traffic to Neutral Tandem cannot provide a basis for reopening this proceeding. Level 3 previously asked the Commission to find that Level 3 is authorized to disconnect from Neutral Tandem under the circumstances alleged here, and the Commission rejected Level 3’s request. Specifically, in its Petition for Review, which Level 3 filed with the Commission on July 2, 2007 -- almost *eight months ago* -- Level 3 argued that the ALJ Order was “tying Level 3’s obligation to receive traffic from Neutral Tandem” to Level 3’s continued delivery of traffic to Neutral Tandem. (Pet. For Review, Ex. B, at 10.) Level 3’s Petition for Review also advanced precisely the same argument Level 3 advances in its current Petition:

[I]f the Commission intends to impose such [an] 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.*

(*Id.*) (emphasis added.) Furthermore, Level 3's Petition for Review even attempted to tie this argument to the same false claim it makes in its current Petition that: "Neutral Tandem terminated [the contract] provisions as to Broadwing...." (*Id.*)

In the ICC Order, the Commission denied Level 3's Petition for Review and adopted the ALJ Order in its entirety. (Exs. A, C.) Therefore, the ICC already considered and rejected Level 3's argument that it need not directly interconnect with Neutral Tandem if Level 3 does not deliver traffic to Neutral Tandem. For this reason, Level 3's argument cannot, as a matter of law, serve as a basis for the ICC to reopen this proceeding. *See* 83 Ill. Admin. Code § 200.90.

**B. Level 3's Claim That it Should Be Entitled to Disconnect Neutral Tandem Because of Neutral Tandem's Conduct in Other States Also Already Has Been Rejected by the Commission.**

Level 3's only other argument in support of its Petition asserts that "Neutral Tandem's conduct in other states proves that direct interconnection can be terminated without disrupting calls." (Pet., at 7.) In support of this argument, Level 3 asserts that, because in other states, it forced Neutral Tandem to migrate to the ILEC tandem volumes of traffic significantly smaller than the 56 million minutes of tandem traffic that Neutral Tandem delivered per month to Level 3 in Illinois, "Neutral Tandem could disconnect its direct interconnection with Level 3 . . . with no harm to the PSTN or the originating carriers' calls." (*Id.*, at 11.) Contrary to Level 3's claim, Neutral Tandem's actions in other states provide no basis for reopening this proceeding. And once again, Level 3's Petition simply restates -- **and actually cuts-and-pastes** -- an argument already considered and rejected by the Commission.

In pursuing the argument that Neutral Tandem's actions in other states somehow justifies reopening this proceeding, Level 3 relies upon the exact same inapposite testimony from the parties' dispute before the Michigan Public Service Commission that Level 3 relied upon when it

previously argued to this Commission that Neutral Tandem's conduct in other states supported Level 3's efforts to disconnect Neutral Tandem. Specifically, the Petition relies upon testimony that Dr. Surendra Saboo, Neutral Tandem's Chief Operating Officer and Executive Vice President, provided in the parties' Michigan proceeding. (*See* Pet., at 9-10.)

Notably, however, Page 10 of the Petition quotes Dr. Saboo's testimony that Level 3 literally cut-and-pasted from the Supplemental Filing in Support of its Application for Rehearing that Level 3 filed with this ICC on August 13, 2007, six months ago. (*Compare* Pet., at 10 with Level 3 Supp. Filing, Ex. E, at 3.) More critically, Level 3's Supplemental Filing in Support of Its Application for Rehearing also made the exact same substantive argument that Level 3 asserts in its Petition -- "Neutral Tandem's Michigan testimony conflicts with its testimony in Illinois that calls would fail in Illinois if Level 3 is permitted to terminate the exchange of traffic with Neutral Tandem." (*Compare* Level 3 Supp. Filing, Ex. E, at 5-8 with Pet., at 7-11.)

Level 3's present Petition also cites to affidavits that Dr. Saboo submitted in the parties' proceedings in seven other states. (*See* Pet., at 9.) Once again, however, Level 3's August 2007 Supplemental Filing in Support of its Application for Rehearing referenced these same affidavits and claimed that "[Dr.] Saboo's affidavits in these other jurisdictions ... raise[] new questions of fact that refute the Commission's conclusion that Level [3] has a continuing obligation to directly interconnect with Neutral Tandem." (Level 3 Supp. Filing, Ex. E, at 7.)

The ICC denied Level 3's Application for Rehearing on August 17, 2007. (*See* Ex. F.) The Commission thus previously considered and rejected the exact same argument, based on the exact same evidence, which Level 3 now raises in its Petition. Level 3's reliance upon previously rejected evidence and argument provides no basis for reopening this proceeding. *See* 83 Ill. Admin. Code § 200.90.

**II. EVEN IF THE COMMISSION CONSIDERS LEVEL 3'S REHASHED ARGUMENTS, THE PETITION MISCHARACTERIZES THE ICC ORDER AND CONTAINS OBJECTIVELY FALSE STATEMENTS OF FACT.**

Even if the Commission determines that Level 3's Petition presents new facts or argument upon which the Commission might appropriately rely to reopen this proceeding (which it does not), the Petition repeatedly mischaracterizes the ICC Order and makes objectively false statements regarding certain facts that Level 3 claims are relevant. As set forth more fully below, even if the Commission considers the substance of the Petition, Level 3's arguments have no merit and should be rejected.

**A. Level 3's Claim That it Is Entitled to Disconnect Neutral Tandem if it Does Not Deliver Traffic to Neutral Tandem Mischaracterizes the ICC Order and Depends Upon False Statements of Fact.**

As noted above, Level 3 first argues that relevant facts have changed since the ICC Order because Level 3 no longer delivers traffic to Neutral Tandem. (Pet., at 2-7.) According to the Petition, Level 3 is only required to directly interconnect with Neutral Tandem for purposes of accepting terminating traffic if Level 3 also is delivering traffic to Neutral Tandem. (*Id.*) Level 3's argument is based on the flawed premise that Level 3's delivery of traffic to Neutral Tandem was "the condition that caused the Commission to conclude that Level 3 should maintain direct, physical interconnection" with Neutral Tandem. (*Id.*, at 3.)

Contrary to Level 3's assertion, the fact that Level 3 purports to no longer deliver traffic to Neutral Tandem cannot provide a basis for reopening this proceeding because: (1) the argument is based on a gross distortion of the ICC Order, which did not condition Level 3's obligation to directly interconnect with Neutral Tandem on Level 3's continued delivery of traffic to Neutral Tandem; (2) the argument is dependent on the objectively false representation that "Level 3 and Broadwing no longer send traffic to Neutral Tandem anywhere in the United States" (Pet., at 5); and (3) the argument is based on Level 3's false assertion that Neutral

Tandem “cancelled the interconnection arrangement whereby Level 3 and its affiliate Broadwing would deliver traffic to Neutral Tandem.” (*Id.*, at 3.)

***First***, Level 3’s contention that its delivery of traffic to Neutral Tandem was the sole basis for the ICC Order requiring Level 3 to accept traffic from Neutral Tandem via a direct interconnection (Pet., at 2-7), grossly distorts the ICC Order. Indeed, the ICC Order contains numerous bases, ***independent of*** Level 3’s delivery of traffic to Neutral Tandem, supporting the ICC’s finding that Level 3 is required to directly interconnect with Neutral Tandem for the delivery of tandem transit traffic and that Level 3’s refusal to do so violates Illinois law. Specifically, the ICC Order found that:

- “[I]f Level 3 disconnects NT, it prevents other CLECs from using NT to transit their traffic to Level 3. The CLECs then will face the choice of paying either (i) the AT&T price, 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. This scenario will degrade the ability of NT to do business, and will impede the development of competition in Illinois.” (Ex. A, at 6.)
- “By proposing to disconnect NT, Level 3 would impose upon NT, its 18 other CLEC customers, and all of their subscribers a discontinuation of service, as well as the *per se* impediments to competition complained of pursuant to Section 13-514. These impacts, along with the scheme of disparate treatment that would cause them, are contrary to the public interest.” (*Id.*, at 7.)
- “[W]here a ‘Type N’ interconnection is possible, forcing the use of a ‘Type L’ interconnection violates Section 13-514(1) of the Act, which prohibits the provision of inferior connections to another carrier. Requiring NT or an originating CLEC to incur a second set of transit costs is the hallmark of the inferiority of this type of interconnection. It also violates Section 13-514(2) of the Act, which prohibits a telecommunications carrier from inhibiting the speed, quality, or efficiency of services used by another carrier.” (*Id.*, at 6.)
- “NT accurately characterizes Level 3’s scheme, with two transit providers, two sets of costs, and mandatory routing of traffic through the ILEC, as functionally equivalent of a refusal by Level 3 to interconnect with NT.” (*Id.*)

As these ICC findings make clear, Level 3’s obligation to directly interconnect with Neutral Tandem is not conditioned upon Level 3 delivering traffic to Neutral Tandem. Rather,

as the ICC Order found, Level 3's refusal to directly interconnect with Neutral Tandem violates numerous provisions of the Illinois PUA, regardless whether Level 3 delivers traffic to Neutral Tandem. Thus, even if Level 3's argument regarding its failure to deliver any traffic to Level 3 had not previously been raised with, and rejected by, this Commission, the argument has no merit and cannot serve as a basis for this Commission to reopen this proceeding.

**Second**, Level 3's assertion that it no longer delivers traffic to Neutral Tandem is demonstrably false. In its Petition, Level 3 makes the unequivocal statement that "Level 3 and Broadwing no longer send traffic to Neutral Tandem anywhere in the United States." (Pet., at 5.) Level 3 cites to the attached affidavit of Julie Mathis, its Vice President of Switched Access Management, in support of this assertion. (*Id.*)

But Level 3's and Ms. Mathis' factual assertion that "Level 3 and Broadwing no longer send traffic to Neutral Tandem anywhere in the United States" is patently false. As set forth more fully in the attached affidavit of Dr. Surendra Saboo, both Level 3 and Broadwing continue to send Level 3-originated and Broadwing-originated transit traffic through Neutral Tandem for delivery to other carriers. (Saboo Aff., Ex. G, at ¶¶ 23-25, 15-21.) As of the date of this filing, Level 3 continues to route Level 3-originated transit traffic through Neutral Tandem for delivery to other carriers. (*Id.*, at ¶ 23.) Furthermore, as of the date of this filing, Broadwing continues to route Broadwing-originated transit traffic to Neutral Tandem for delivery to other carriers. (*Id.*, at ¶¶ 25.)<sup>1</sup>

**Third**, in arguing that it no longer sends any traffic to Neutral Tandem, Level 3 falsely claims that "Neutral Tandem cancelled the interconnection arrangement whereby Level 3 and its affiliate Broadwing would deliver traffic to Neutral Tandem." (Pet., at 3.) Contrary to this

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<sup>1</sup> Thus, Level 3's and Ms. Mathis' assertion that "[o]n September 5, 2007, Level 3 ceased sending traffic [sic] transit traffic [to] Neutral Tandem" similarly is false. (*See* Pet., Ex. D, Mathis Aff., at ¶ 3; Pet., at 5.)

assertion, Neutral Tandem did not terminate the January 31, 2007 Amendment. (Saboo Aff., Ex. G, at ¶¶ 6-14.)

Level 3's false claim that Neutral Tandem terminated a January 31, 2007 amendment to the parties' interconnection agreement is based entirely on a May 17, 2007 letter from Neutral Tandem to Level 3. (Pet., at 5.) That May 17, 2007 letter, however, did nothing to terminate any agreement between the parties and simply noted that the January 31, 2007 Amendment to the parties' agreement did not apply to Broadwing. (Saboo Aff, Ex. G, at ¶¶ 6-14.) Indeed, Neutral Tandem's May 17, 2007 letter stated simply that:

[G]iven Level 3's decision to terminate the contract between Neutral Tandem and Broadwing, there no longer is any contract in effect for the continued purchase by Broadwing of services from Neutral Tandem. The January 31, 2007 amendment to the August 18, 2005 contract between Neutral Tandem and Level 3, by its express terms, applies only to "Level 3 Communications, LLC."

(*Id.*, at ¶ 13.)

**Fourth**, the parties' conduct following Neutral Tandem's May 17, 2007 letter reveals that both Level 3 and Neutral Tandem understood that the January 31, 2007 Amendment remained in effect after that date. As noted above, for example, since May 17, 2007, Level 3 has sent originating transit traffic using Neutral Tandem's services under the terms, rates and conditions of the January 31, 2007 Amendment. (Saboo Aff., at ¶¶ 15-19.) And Neutral Tandem routinely bills Level 3 for this traffic at the rates referenced in the Amendment and sends Level 3 invoices, at those rates, for the amounts owed. (*Id.*, at ¶ 16.) Since May 17, 2007, Level 3 never has refused to pay Neutral Tandem at the rates contained in the Amendment, or notified Neutral Tandem that billing Level 3 under the rates in the January 31, 2007 Amendment was inappropriate because the Amendment had been terminated. (*Id.*, at ¶¶ 16-17.) Instead, pursuant to the January 31, 2007 Amendment, Level 3 consistently pays Neutral Tandem the amounts set forth in the invoices without complaint. (*Id.*, at ¶ 17.)

**B. Level 3's Claim That it is Entitled to Disconnect Neutral Tandem Because of Neutral Tandem's Conduct in Other States Similarly Has No Merit.**

Level 3's only other argument in support of its Petition to reopen this proceeding focuses on Level 3's ability to force Neutral Tandem to re-route small amounts of traffic that Neutral Tandem previously delivered to Level 3 in other states. (Pet., at 7-11.) Contrary to Level 3's assertion, Neutral Tandem's actions in these states provide no basis to reopen this proceeding.

Even if the Commission had not previously considered and rejected Level 3's argument regarding Neutral Tandem's re-routing of traffic in other states, the argument has no merit. As Neutral Tandem explained when it addressed Level 3's argument the first time it was made, Neutral Tandem's conduct in other states "has no relevance to the proceeding before this Commission, which involves the anticompetitive behavior of Level 3 *in Illinois*, as found by [ALJ] Brodsky and this Commission, and how that anticompetitive behavior violated Illinois law." (Neutral Tandem Resp. to Supp. Filing, Ex. H, at 1.)

Level 3's argument refers to Neutral Tandem's migration of certain traffic in seven other states. (Pet., at 9.) In considering this argument, it is important for Neutral Tandem to provide background information regarding why it was forced by Level 3's illegal conduct to migrate traffic bound for Level 3 to the ILEC tandem in the seven states. Neutral Tandem brought formal actions against Level 3 in eight states -- including Illinois -- in which large amounts of traffic that Neutral Tandem delivered to Level 3 was at risk of being impacted by Level 3's illegal demands and anticompetitive conduct. (Neutral Tandem Resp. to Supp. Filing, Ex. H, at 3.) In May 2007, Level 3 filed petitions seeking to disconnect its existing facilities to Neutral Tandem in other states where the parties exchanged much smaller amounts of traffic. (*Id.*)

Although Neutral Tandem maintained that Level 3's efforts to unilaterally stop accepting traffic delivered by Neutral Tandem in the other states was improper and unlawful, Neutral

Tandem was unable to expend the additional resources to engage Level 3 in litigation in every state, particularly in states where the parties exchanged a small amount of traffic. (*Id.*, at 3-4.) As a result, Neutral Tandem was forced to re-direct the small amount of traffic being delivered to Level 3 in these states and move to dismiss Level 3's petitions as moot. (*Id.*, at 4.) Neutral Tandem's ability to re-direct a small amount of traffic in these seven states, with several month's notice, has no bearing on the situation in Illinois, where, at the time of its Complaint, Neutral Tandem delivered more than 56 million minutes of tandem traffic a month to Level 3. (*Id.*)

The Petition reasserts three notably flawed points that Level 3 previously raised in its Supplemental Filing in Support of its Application for Rehearing. Although Neutral Tandem's prior response addressed each argument in full, Neutral Tandem again addresses the points here.

***First***, citing Dr. Saboo's Michigan testimony, Level 3 erroneously claims that Neutral Tandem's ability to re-route traffic in states where the parties exchanged a small amount of traffic contradicted Neutral Tandem's position regarding the amount of time it would take Neutral Tandem to re-route traffic in Illinois. (Pet., at 9-10.) Level 3 goes so far as to suggest that "Neutral Tandem can disconnect its direct interconnection with Level 3 in a matter of days ... with no disruption to the Public Switched Telephone Network." (*Id.*, at 7.)<sup>2</sup>

As Dr. Saboo's Michigan testimony made clear, however, the small volume of traffic that Neutral Tandem delivered to Level 3 in the states in which Neutral Tandem was forced to withdraw certain services is the reason why it did not take six months to transfer the traffic as it would in a state like Illinois, where Neutral Tandem delivers over 56 million minutes of traffic to Level 3 each month. (Neutral Tandem Resp. to Supp. Filing, Ex. H, at 7.) In fact, Dr. Saboo testified in Michigan that "the current experience itself is, you know, it's been several weeks, as I

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<sup>2</sup> Level 3 made a similar claim at pages 5-6 of its August 13, 2007 Supplemental Filing, although there, Level 3 claimed Neutral Tandem could re-route its traffic in "just a few weeks." (*See* Ex. E, at 5-6.)

mentioned, and it's not done yet in smaller states like Wisconsin, so that even gives me more assurance that it will take six months if we do this in Michigan." (Exhibit I, at 409:8-12.) Notably, Neutral Tandem delivers approximately 30 million minutes of traffic to Level 3 in Michigan per month, 25 million minutes per month *less* than in Illinois. (*Id.*, at 409:14-15.) Dr. Saboo's Michigan testimony is entirely consistent with his Illinois testimony.

**Second**, Level 3's Petition claims that in states where Neutral Tandem was forced to re-route traffic, Neutral Tandem did not work with its customers regarding re-routing the traffic, but instead "unilaterally opted to inform its customers that they would no longer route to Level 3." (Pet., at 9.)<sup>3</sup> Level 3's assertion is wrong -- Neutral Tandem did not unilaterally determine to disconnect its customers in these jurisdictions. (Neutral Tandem Resp. to Supp. Filing, Ex. H, at 5.) Rather, as Dr. Saboo stated in his testimony before the Michigan Commission, after being forced by Level 3 to withdraw certain services in certain states, "[Neutral Tandem] worked with our customers" 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." (Exhibit I, at 352:4-5; 354:9-15.) Neutral Tandem worked closely with each of its affected customers in these jurisdictions to ensure that its traffic was delivered to Level 3 without any blockage, even though the traffic likely is being transited to Level 3 in a more costly, less efficient and less reliable manner than before.

**Third**, the Petition claims that Dr. Saboo's Michigan testimony and Neutral Tandem's conduct in other states "contravenes Neutral Tandem's claims that originating carriers get the

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<sup>3</sup> Level 3 made a similar claim at page 4 of its August 13, 2007 Supplemental Filing. (*See* Ex. E, at 4.)

option to route traffic to Level 3....” (Pet, at 9.)<sup>4</sup> Nothing could be further from the truth. As ALJ Brodsky and the ICC previously found, the interconnection scheme that Level 3 advocates “forces originating CLECs to utilize a call path other than the one they apparently prefer, as evident from their present subscriptions with [Neutral Tandem].” (ICC Order, Ex. A, at 5-6.) The evidence in this matter clearly established that Level 3’s illegal and anticompetitive conduct denies Neutral Tandem’s originating carrier customers their choice of how to route traffic to end users on Level 3’s network. That Level 3 would cite its own callous, anticompetitive and illegal strategy of refusing to abide by its legal obligations to receive traffic in the manner the originating carrier chooses as a basis for asking the ICC to second-guess its sound decision further illustrates that the ICC Order is correct -- Level 3’s actions violate Illinois law.

Moreover, Dr. Saboo explained that Neutral Tandem’s withdrawing of certain services in certain states was forced upon Neutral Tandem by Level 3’s filing of petitions in those jurisdictions to disconnect Neutral Tandem, thus forcing Neutral Tandem to either expend great resources to fully litigate the cases, or withdraw certain of its services from the smaller markets. Dr. Saboo explained in Michigan the difficulty of the choice that Neutral Tandem had to make in not fighting back against Level 3’s anticompetitive behavior in these other jurisdictions and the harm that will be caused to its customers in those jurisdictions, as follows:

[A]re the originating carriers’ costs going up and they’re getting harmed because of lesser, less reliability; yes, they are having to pay more to go through the ILEC tandem, and it’s in some sense not a free election to go to that, it’s because of the petitions that Level 3 put in place in these states to disconnect and force us to incur additional costs. So from a cost benefit analysis, for the amount of traffic it was, we had no other choice, we were left with no other choice other than to ask our customers to do that. And other than fighting these cases and incurring legal costs that are very high, we had to ask our customers to do that.

(Exhibit I, at 355:6-18.)

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<sup>4</sup> Level 3 made a similar claim at page 2 of its August 13, 2007 Supplemental Filing. (*See* Ex. E, at 2.)

Contrary to Level 3's assertion, Dr. Saboo's testimony before the Michigan Commission is entirely consistent with his testimony before this Commission. The only difference between Neutral Tandem's actions in Illinois, as opposed to the other jurisdictions in which Level 3 forced Neutral Tandem from offering certain services in the market, is that Illinois is one of Neutral Tandem's largest markets. Neutral Tandem thus decided to expend the necessary resources to challenge Level 3's anticompetitive actions in Illinois and protect its customers from higher rates and a tandem transiting market dominated by the ILEC provider.

### **III. THE COMMISSION SHOULD CONSIDER OPENING A NEW PROCEEDING ON ITS OWN MOTION TO CONSIDER THE IMPOSITION OF SANCTIONS AGAINST LEVEL 3.**

As discussed above, Level 3's Petition should be denied. Moreover, the frivolous and false arguments advanced in Level 3's Petition, coupled with Level 3's prior anticompetitive behavior and violations of Illinois law, provide a basis for this Commission to exercise its authority to open a new docket, on its own motion, to consider the imposition of appropriate sanctions and/or penalties for Level 3's repeated bad acts. *See, e.g.* 220 ILCS 5/13-516(a)(2); 220 ILCS 5/13-305; 220 ILCS 5/5-202.1.

Under the PUA, "the Commission shall assess and collect all civil penalties established under this Act against telecommunications carriers...." 220 ILCS 5/13-304(a); *see also* 220 ILCS 5/4-203. The PUA provides for penalties where a party "knowingly misrepresents facts" before the Commission or "fails to comply" with the PUA or a Commission Order. 220 ILCS 5/5-202.1; 220 ILCS 5/5-305. Additionally, the PUA provides that civil penalties may be assessed "for a second and any subsequent violation of Section 13-514." 220 ILCS 5/13-516(a)(2). In assessing penalties, the Commission considers: (1) "the duration and gravity of the violation of the Act, the rules, or the order;" (2) "the presence or absence of due diligence on the part of the violator;" (3) "any economic benefits accrued by the violator;" and (4) "the amount of

monetary penalty that will serve to deter further violations by the violator....” 220 ILCS 5/13-304(a)(1)-(4); *see also* 220 ILCS 5/5-202.1 (listing similar standards for assessing penalties for knowing misrepresentations); 83 Ill. Admin. Code § 766.415 (listing similar standards for assessing penalties under Section 13-516).

Under these standards, Neutral Tandem respectfully suggests that the Commission should consider opening a new proceeding to determine appropriate sanctions and penalties to be assessed against Level 3. As discussed in detail above, Level 3 filed a Petition which contains false statements of fact. There can be no real dispute that the Petition misrepresents: (1) the status of Level 3’s and Broadwing’s usage of Neutral Tandem’s services for their originating traffic; and (2) Neutral Tandem’s purported “termination” of the January 31, 2007 Amendment.

Similarly, Ms. Mathis, a Level 3 Vice President, submitted an affidavit to this Commission that contained false representations of fact. The repeated factual misrepresentations in Level 3’s Petition and in Ms. Mathis’ affidavit provide ample basis for this Commission to open a new proceeding to consider the imposition of penalties against Level 3 under Sections 13-305, 5-202.1 or 13-516(a)(2) of the PUA.

Moreover, in clear violation of the ICC Order, Level 3 is billing Neutral Tandem for traffic delivered to Level 3 for termination on Level 3’s network in Illinois. The ICC Order clearly states that “Level 3 shall not require NT 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.” (Ex. A, at 12.) Yet on February 13, 2008, Level 3 sent an invoice attempting to bill Neutral Tandem for traffic delivered for termination on Level 3’s network in Illinois. (Saboo Aff., Ex. G, at ¶¶ 31-32.) Level 3’s attempt to charge Neutral Tandem for the delivery of transit

traffic for termination on the Level 3 network in Illinois is inconsistent with the plain terms of the ICC Order in this matter.

In short, between Level 3's filing of false submissions before this Commission, and its clear violation of the Commission's Order, multiple bases exist for the Commission to open a new proceeding to consider imposing civil penalties on Level 3.<sup>5</sup>

**IV. THE COMMISSION SHOULD CONSIDER OPENING A NEW PROCEEDING TO EXAMINE WHETHER IT REMAINS IN THE PUBLIC INTEREST FOR LEVEL 3 TO RETAIN ITS CERTIFICATION.**

Level 3's violation of the ICC Order, as well as its filing of a false Petition and affidavit before this Commission, reveal that Level 3 refuses to comply with Illinois law or the ICC Order, and raise serious questions as to whether Level 3 has the "managerial resources and abilities" to operate in Illinois. *See, e.g.*, 220 ILCS 5/13-405; 220 ILCS 5/13-403. Neutral Tandem thus respectfully suggests that more than adequate bases exist for the Commission to consider opening a new docket to address whether it remains in the public interest for Level 3 to retain its certification in Illinois.

In evaluating whether a provider should have a certificate to provide telecommunications service in the State of Illinois, the Commission considers whether the provider "possesses sufficient technical, financial, and managerial resources and abilities to provide" such service. 220 ILCS 5/13-405; 220 ILCS 5/13-403. Additionally, "[a]ny Certificate of Service Authority may be altered or modified by the Commission, after notice and hearing, upon its own motion or upon application of the person or company affected." 220 ILCS 5/13-401.

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<sup>5</sup> On February 19, 2008, Neutral Tandem filed a Motion for Approval of Attorneys' Fees and Costs requesting that the Commission approve Neutral Tandem's fee request pursuant to the ICC Order. Contemporaneously with this Opposition, Neutral Tandem is filing a Notice of Withdrawal Without Prejudice of its Motion for Approval of Attorneys' Fees and Costs. In the event that the ICC reopens this proceeding in response to Level 3's Petition, Neutral Tandem will ask the Commission to address its request for approval of attorneys' fees and costs as part of that reopened proceeding. Otherwise, Neutral Tandem will raise its request for fees through a subsequent procedurally appropriate submission.

Prior to and throughout this proceeding, Level 3 repeatedly has engaged in conduct that can only be described as egregious and contrary to the public interest. At the outset, this Commission already has found that Level 3 committed knowing violations of Illinois law that were both intentional and unreasonable. As noted above, the ICC Order found that Level 3 had engaged in conduct that “is an impediment to competition and contrary to the public interest.” (ICC Order, Ex. A, at 13.) In finding that Level 3 violated Section 13-514, the Commission observed that Level 3’s conduct satisfied “[b]oth the unreasonableness and the knowing intent elements” of a Section 13-514 claim. (*Id.*, at 7). Based on its findings regarding Level 3’s anticompetitive behavior and violations of Illinois law, the Commission ordered Level 3 to pay 80% of Neutral Tandem’s attorneys’ fees and costs incurred in this proceeding, as well as 90% of the Commission’s costs. (*Id.*, at 13.)

The particularly egregious nature of Level 3’s conduct also was recognized by this Commission’s Staff. For example, Staff described Level 3’s conduct in this case as “a **naked attempt to extort** reciprocal compensation payments from Neutral Tandem, rather than go to the trouble of collecting them from the carriers that actually owe reciprocal compensation.” (Staff Resp. to Pet. for Review, Ex. J, at 4) (emphasis added). Staff also observed that Level 3 has a history of disrupting other carriers’ traffic, noting evidence in the record that “Level 3 uses the threat of disconnecting direct interconnection to gain a business advantage.” (*Id.*, at 3-4.) Explaining Level 3’s prior use of disconnection as a negotiating tactic, Commission Staff stated:

In 2005, Level 3, in the words of a Level 3 Vice President, ‘de-peered’ (“disconnected,” in English) Cogent, an internet service provider with which Level 3 was directly interconnected. As is the case here, Level 3 took the view that Cogent was not providing it with adequate compensation for the use of its network. Without delving into the particulars of the matter – of which, in any case, no witness available to testify in this proceeding has personal knowledge – all parties appear to accept that a carrier was disconnected as a result of a business dispute. Staff views this as deeply troubling.

(Staff Initial Brief, Ex. K, at 23.)

Commission Staff's recognition of Level 3's pattern and practice of engaging in bad faith conduct include the following observations:

- “Level 3’s conduct is clearly unreasonable inasmuch as its grievance here -- failure to receive adequate compensation for use of its network -- is of its own making, and *its threat of unilateral disconnection, considered along with its apparently having engaged in such conduct in the past, indicates a greater interest in commercial advantage than the maintenance of uninterrupted exchange of traffic that should be of primary importance to all carriers in a network of interconnected networks.*” (*Id.*, at 5) (emphasis added.)
- “Level 3, by rejecting the agreement by which Neutral Tandem delivers traffic to it, hours after executing agreements pursuant to which it delivers traffic to Neutral Tandem, *has engaged in conduct difficult to reconcile with good faith.*” (*Id.*) (emphasis added.)
- “Level 3’s conduct here has not been reasonable -- it has, in fact been by any rational standard *quite dubious.* Level 3 has engaged in a course of negotiations with Neutral Tandem which appear to the Staff to *fall well short of good faith.*” (Staff Resp. to Pet. for Review, Ex. J, at 3) (emphases added.)

These points reinforce this Commission’s prior conclusion that Level 3’s violations of Illinois law were both knowing and unreasonable. Furthermore, as Staff observed, Level 3 previously has used the threat of disconnection -- the same tactics condemned in this proceeding -- to gain a business advantage.

At least one other state commission has found that, based on Level 3’s “management practices,” it would deny a request for a certificate of public convenience and necessity to grant a certificate to provide telecommunications service to a Level 3 affiliate. *See Application of Level 3 Communications of Virginia, Inc.*, Final Order, Va. State Corp. Comm’n, Case No. PUC-2003-00026, at 5 (Nov. 6, 2003) (attached hereto as Ex. L.) In that case, the Virginia Commission specifically relied on shortcomings in Level 3’s management practices to find “that it [was] not in the public interest to issue the requested certificates” to Level 3’s Virginia affiliate. *Id.*

Explaining its reasoning, the Virginia Commission observed that “[t]he management practices of Level 3 LLC involving the installation of its facilities in Virginia, and its efforts to identify and remedy its potential wrongdoings related thereto, are not in the public interest.” *Id.* Among the concerns the Virginia Commission expressed regarding Level 3’s management practices were:

- Level 3 “failed to obtain proper permission to enter onto private land for the construction of its facilities”;
- Level 3 “wrongfully installed cable on numerous parcels of private property”;
- Level 3 “failed to reasonably advise property owners of its activities before, during, and after installation” of Level 3 facilities;
- Level 3 “performed little or no investigation to determine the scope of the problem after discovering that it may have violated the rights of private property owners”;
- Level 3 “informed a property owner that Level 3 LLC had the right of condemnation after it was advised in writing of the Commission’s Office of General Counsel’s position that Level 3 LLC did not possess such authority and that Level 3 LLC should immediately desist from informing landowners that it may wield such authority.”

(Ex. L, at 6 n.4.) In light of these and other shortcomings, the Virginia Commission found that “Level 3 has not established that it possesses sufficient managerial resources, policies, and abilities such that granting the requested certificates would be in the public interest.” *Id.* The Virginia Commission found that Level 3 could only attempt to reapply for a certificate for its affiliate when it could show “that its management possesses the resources and ability to act responsibly and in the public interest[.]” (*Id.*, at 8.)

One would think that a party that already has been found to have knowingly impeded the development of competition in Illinois would tread cautiously, both in terms of ensuring compliance with the ICC Order, and certainly in terms of the veracity of its subsequent statements before the Commission. Level 3 has done neither. Instead, since the issuance of the

ICC Order, Level 3 not only has violated that Order by billing Neutral Tandem for the delivery of transit traffic in Illinois, it has submitted a false pleading and affidavit before this Commission. Based on Level 3's conduct in this proceeding, Neutral Tandem respectfully suggests that a question exists as to whether it continues to be in the public interest for Level 3 to maintain its certification in the State of Illinois.

### **CONCLUSION**

WHEREFORE, for the foregoing reasons, Neutral Tandem respectfully requests that the Commission: (1) deny Level 3's Petition Requesting that the Commission Reopen the Proceeding to Permit Level 3 to Discontinue Direct, Physical Interconnection with Neutral Tandem; and (2) consider opening a new proceeding to address the appropriate next steps, if any, to be taken in response to Level 3's conduct.

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Respectfully submitted,

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