

DOCKET NO. 24844-U: Petition of Neutral Tandem Inc. for Interconnection with Level 3 Communications and Request for Emergency Relief: Consideration of Staff's Recommendation. (Shaun Rosemond, Dan Walsh)

I. Background

On March 2, 2007, Neutral Tandem, Inc. ("Neutral Tandem") petitioned the Georgia Public Service Commission ("Commission") to: "(1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 Communications, Inc. and its subsidiaries (collectively "Level 3"); and (2) issue an interim order on an expedited basis directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while this Petition is pending, so as to avoid disrupting the delivery of calls." (Neutral Tandem Petition, p. 1) (footnotes omitted).

At its April 3, 2007 Administrative Session, the Commission adopted a Procedural and Scheduling Order. Consistent with the Procedural and Scheduling Order, Level 3 filed its Response to Petition, Motion to Dismiss Petition and Motion for Migration Plan ("Response") on April 6, 2007. On May 3, 2007, the Commission held a hearing on the Petition, and received testimony and evidence from expert witnesses sponsored by both Neutral Tandem and Level 3.

II. Summary of Staff's Recommendation

Staff recommends that the Commission order Level 3 to interconnect directly with Neutral Tandem provided that Neutral Tandem pays Level 3's reasonable costs of interconnection. Neutral Tandem should not be required to pay reciprocal compensation or an additional fee to Level 3 as a condition of the direct interconnection. The Commission is not preempted from requiring Level 3 to interconnect directly with Level 3. Level 3 is obligated under O.C.G.A. § 46-5-164(a) to permit reasonable interconnection with Neutral Tandem. Given that Neutral Tandem is a transit provider, direct interconnection is necessary for interconnection to be reasonable. Under the condition that Neutral Tandem pays all of Level 3's reasonable costs of interconnection, direct interconnection is reasonable for Level 3 as well. Level 3 does not require AT&T to pay reciprocal compensation when it transports traffic that originates on the network of another provider. There is not a reasonable basis for Level 3 to discriminate between Neutral Tandem and AT&T with regard to the provision of transit service.

The reasoning behind Staff's conclusions is set forth in more detail below.

III. Positions of the Parties

A. NEUTRAL TANDEM

Neutral Tandem complains that Level 3 refuses to interconnect directly with it unless Neutral Tandem pays Level 3 reciprocal compensation for traffic that originates on the networks of a carrier customer of Neutral Tandem and terminates on Level 3's system, or if Neutral Tandem collects the reciprocal compensation payment from the carrier customer and passes it on

to Level 3. Neutral Tandem charges that Level 3's refusal to directly interconnect with it absent this condition violates the Georgia Telecommunications and Competition Development Act of 1995 ("State Act") O.C.G.A. § 46-5-160 *et seq.*, which requires local exchange companies to allow for reasonable interconnection and prohibits local exchange companies from discriminating in the provision of interconnection services. (*See*, O.C.G.A. § 46-5-164(a) and (b)). Neutral Tandem states that Level 3 directly interconnects with AT&T as a tandem traffic provider, and therefore, should directly interconnect with Neutral Tandem.

B. LEVEL 3

Level 3 rebuts the Petition with the following arguments:

- 1) The State Act is preempted by the Federal Telecommunications Act of 1996 ("Federal Act"), 47 U.S.C. 251 *et seq.*
- 2) State Act only requires "reasonable" interconnection. It does not require direct interconnection.
- 3) AT&T is an incumbent local exchange company ("ILEC"), and Neutral Tandem is not. Therefore, a reasonable basis exists for treating the two providers differently.
- 4) Neutral Tandem is not providing an "interconnection service" as defined in the State Act; therefore the State Act cannot be construed to prohibit discrimination against it.
- 5) Cost recovery arrangements proposed by Level 3 were intended to defray delivery costs borne by Level 3 as a result of the direct interconnection.

IV. Staff's Recommendation

Staff recommends that the Commission order Level 3 to interconnect directly with Neutral Tandem provided that Neutral Tandem pays all of Level 3's reasonable costs of interconnection. Neutral Tandem should not be required to pay or pass on reciprocal compensation payments to Level 3. Staff responds to the arguments raised by Level 3 as follows:

1. *Preemption*

The Eleventh Circuit recently explained:

[T]he Supreme Court has identified three types of preemption: (1) express preemption; (2) field preemption; and (3) conflict preemption. "Express preemption" occurs when Congress has manifested its intent to preempt state law explicitly in the language of the statute. If Congress does not explicitly preempt state law, however, preemption still occurs when federal regulation in a legislative field is so pervasive that we can reasonably infer that Congress left no room for the states to supplement it – this is known as "field preemption" or "occupying the field." And even if Congress has neither expressly preempted state law nor occupied the field, state law is preempted when it actually conflicts with federal law. "Conflict

preemption,” as it is commonly known, arises in two circumstances: when it is impossible to comply with both federal and state law and when state law stands as an obstacle to achieving the objectives of the federal law.

Cliff v. Payco General American Credits, Inc., 363 F.3d 1113, 1122 (11th Cir. 2004) (citations omitted). The fundamental question is the intent of Congress, as revealed in the language of the statute as well as the structure and purpose of the statute. *Id.* See also United Parcel Service, Inc. v. Flores-Galarza, 318 F.3d 323, 334 (1st Cir. 2003).

Every preemption analysis “start[s] with the assumption that the historic police powers of the states are not superceded by federal law unless preemption is the clear and manifest purpose of Congress.” Cliff v. Payco, 363 F.3d at 1122 *citing* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also* Maryland v. Louisiana, 451 U.S. 725, 746 (1981). This presumption also requires that any preemptive effect that is found to exist must be given a narrow application. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996). The power to pre-empt state law is “an extraordinary power...that we must assume Congress does not exercise lightly.” *Id.*; Gregory v. Ashcroft, 501 U.S. 452, 460 (1991). The presumption against preemption is particularly appropriate where Congress has legislated in a field that has traditionally been regulated by the States, such as local telephone service. Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355 (1986).

It does not appear that Level 3 is alleging express preemption of the State Act, and Staff is not aware of any provision in the Federal Act that provides that states are so preempted. The second type of preemption is field preemption, which as explained above, exists when federal regulation is so pervasive that Congress left no room for states to supplement it. Again, it is unclear as to whether Level 3 is asserting field preemption. Regardless, the express preservation in Section 261 of state authority to implement state regulations that are non inconsistent with federal regulations defeats any such argument.

Level 3 does assert “conflict” preemption in this instance. Level 3 claims that it is permitted under Section 251(a)(1) of the Federal Act to interconnect indirectly. (Level 3 Response, p. 5). Level 3 characterizes Neutral Tandem’s Petition as “an impermissible attempt to circumvent the federally-mandated interconnection process . . .” *Id.* Level 3 argues that construing O.C.G.A. § 46-5-164 to require Level 3 to interconnect directly with Neutral Tandem would conflict with its obligations under the Federal Act to interconnect directly or indirectly. (Level 3 Brief, pp. 9-10).

Level 3 also argues that the Federal Act indicates Congressional intent to displace state regulatory authority to allow state commissions to mandate CLEC to CLEC direct interconnection. (Level 3 Brief, p. 13). Level 3 argues that the premise of the Federal Act is to leave CLEC to CLEC interconnection to the market. *Id.* at 14. Neutral Tandem argues that Section 251(a)(1) does not specify which party has the choice of direct or indirect interconnection or the circumstances of the interconnection. (Neutral Tandem Brief, p. 11). Neutral Tandem also argues that state authority to impose requirements that foster local interconnection and local competition is preserved by Section 261 of the Federal Act. *Id.* at 17,

citing to Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc., 323 F.3d 348 (6th Cir. 2003). Neutral Tandem contends that its infrastructure investment provides valuable redundancy and resiliency to the Georgia telecommunications network. *Id.* at 21. Neutral Tandem also states its position would honor the “cost causer pays” principle. *Id.* at 22. In addition, Neutral Tandem argues that its presence provides a competitive alternative to AT&T as the transit traffic provider. *Id.* at 24.

Staff does not agree with Level 3’s position that a decision that required it to directly interconnect with Neutral Tandem would conflict with the Federal Act. The first step in the analysis is to determine the obligations of CLECs under the Federal Act to interconnect. Section 251(a)(1) requires all local exchange carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” Level 3’s apparent position is that this statutory provision is satisfied if a LEC agrees to do either. However, the statute does not say that the party from whom interconnection is being requested is permitted to demand its preferred form of interconnection and limit the type of interconnection to which the requesting party is entitled.

Further, as discussed above, Section 261(b) and (c) preserve state authority to enforce or impose requirements on telecommunication carriers that are necessary to further competition, provided the requirement is not inconsistent with the Federal Act or FCC regulations to implement the Act. For the public policy goals cited to in Neutral Tandem’s brief and discussed herein, Staff concludes that requiring Level 3 to interconnect directly with Neutral Tandem is necessary to further competition. In Michigan Bell, the Sixth Circuit found that as long as state regulations do not prevent carriers from taking advantage of Sections 251 and 252 of the Federal Act, state regulations are not preempted. 323 F.3d at 358-59. For the reasons discussed above, Staff does not believe that requiring Level 3 to interconnect directly with Neutral Tandem would not prevent a carrier from taking advantage of Section 251 or 252.

A review of the case law relied upon by Level 3 in its case for preemption reveals that the authority does not apply to the relief sought in this case. For example, in Wisconsin Bell v. Bie, 340 F.3d 441 (7th Cir. 2003), the seventh circuit found preemption where a state tariff required the ILEC to state a reservation price. The Court concluded that the Federal Act’s arbitration procedure was interfered with by the state requirement that effectively mandated that negotiations begin at the reservation price listed in the tariff. 340 F.3d at 445. The Court also found that the tariff would result in appeals being filed in state court as opposed to federal court as required in the Federal Act for appeals of state commission decisions under Section 252. *Id.* at 445. Neither of those circumstances is present in this dispute. The Federal Act neither sets forth the detailed process for CLEC to CLEC arbitrations that it does for ILEC to CLEC arbitrations, nor does it require state commission decisions on CLEC to CLEC interconnection be appealed to federal court.

In Pacific Bell v. Pac-West Telecomm., 325 F.3d 1114 (9th Cir. 2003), the ninth circuit found a general rulemaking inconsistent with the Federal Act because it changed the terms of “applicable interconnection agreements” and contravened the provision that agreements have the force of law. 325 F.3d at 1127. An order requiring Level 3 to interconnect directly with Neutral Tandem under the terms set forth in Staff’s recommendation would not change the terms of

applicable interconnection agreements or contravene the Federal Act's provision that agreements have the force of law.

Level 3 also relies upon the decision in MCI v. Illinois Bell, 222 F.3d 323 (7th Cir. 2000). (Level 3 Brief, p.11). However, the language cited to in Level 3's brief is from the Court's discussion of whether the state has waived its Eleventh Amendment immunity by participating in the Federal Act's scheme. It is not discussing the issue of preemption. The question of state regulations that are necessary to further telecommunications competition and are not inconsistent with the Federal Act were not before the Court so there is no analysis of what type of state regulation would survive preemption.

2. *Reasonable Interconnection*

Level 3 also argues that the State Act only requires reasonable interconnection; it does not require direct interconnection. (Level 3 Response, p. 11). However, whether "direct" or "indirect" interconnection is reasonable in a given instance is a determination for the Commission.

Neutral Tandem is a provider of transit services. Its carrier customers use its service to transport calls that originate on one of their networks and terminate on the network of another. AT&T also provides transit services and is interconnected directly with the other telecommunications companies as a result of its historic position in the market. It would not serve any purpose for a carrier to transport a call originating on its network through Neutral Tandem if that call still must be transported through AT&T in order to terminate on Level 3's system. The carrier would simply use AT&T as the transit provider and exclude Neutral Tandem from the process. Therefore, indirect interconnection is not a reasonable option for Neutral Tandem. Under the condition that Neutral Tandem pays all of Level 3's reasonable costs for interconnection, Level 3 is not harmed by the Staff's recommendation. Level 3 does not have a reasonable basis for refusing direct interconnection under such circumstances.

Given Neutral Tandem's function as a transit provider and including the condition that Neutral Tandem pay Level 3's reasonable costs, Staff recommends that the Commission order that direct interconnection is necessary for reasonable interconnection in this instance.

3. *Unreasonable Discrimination*

Neutral Tandem has charged that Level 3 is unreasonably discriminating against it in violation of O.C.G.A. § 46-5-164(b). The basis for this charge is that Level 3 will not interconnect directly with Neutral Tandem unless Neutral Tandem pays it reciprocal compensation or some other fee in addition to its costs, when a comparable payment is not required from AT&T as a condition of direct interconnection with Level 3. Level 3 responds that AT&T's ILEC status provides a reasonable basis for the disparate treatment. Specifically, Level 3 states that it receives other services and benefits from direct interconnection with AT&T. (Level 3 Brief, p. 28). Level 3 also points out that AT&T may be required to provide transit services as a result of its historically derived ubiquitous network. *Id.*

That AT&T is an ILEC and Neutral Tandem is a CLEC does not by itself constitute a reasonable basis for discriminating between the two providers. There has to be a distinction that provides a reason for treating the two differently in this instance. The fact that AT&T became in effect a default transit service provider as a result of its ubiquitous network is not a reasonable basis for Level 3 to refuse as favorable terms and conditions from another transit service provider. The fact that AT&T provides other services to Level 3 that have nothing to do with transit traffic is not a reasonable basis to refuse to interconnect directly with another transit provider. If the calls from Neutral Tandem's carrier customers were transported to Level 3 using AT&T as a transit provider, Level 3 would not receive reciprocal compensation from AT&T and would not be given any better or additional information about the originating carrier.

A reasonable objection by Level 3 would be if there were costs related to directly interconnecting with Neutral Tandem that Neutral Tandem was not willing to cover. There was conflicting record evidence on this issue. Staff recommends that Neutral Tandem be required to pay for all reasonable costs of the direct interconnection.

Finally, Staff recommends that the Commission find it has authority to order direct interconnection regardless of whether there is unreasonable discrimination.

4. *Interconnection Service*

Level 3 argues that Neutral Tandem is not providing an interconnection service because it does not originate or terminate telecommunications service. (Level 3 Brief, pp. 26-27). Because O.C.G.A. § 46-5-164(b) only applies to the provision interconnection services, Level 3 argues that Neutral Tandem is not entitled to the relief that it seeks. *Id.* at 26.

Level 3 is correct that Neutral Tandem does not originate or terminate telecommunications service. However, that does not mean that Neutral Tandem does not provide an interconnection service. O.C.G.A. § 46-5-162(8) defines "interconnection service" to mean "the service of providing access to a local exchange company's facilities for the purpose of enabling another telecommunications company to originate or terminate telecommunications service." The definition does not require that the LEC originate or terminate a call. Neutral Tandem's service meets the definition of "interconnection service" because it provides access to a LEC's facilities for the purpose of enabling another company to originate or terminate telecommunications service.

O.C.G.A. § 46-5-164(b) provides that "The rates, terms, and conditions for such interconnection services shall not unreasonably discriminate between providers . . ." The prohibition against unreasonable discrimination applies to the service offered by Neutral Tandem.

5. *Cost Recovery*

Level 3 states that the cost recovery arrangements were intended to defray delivery costs borne by Level 3 from the traffic sent to it by Neutral Tandem. (Response, p. 18). As mentioned above, Staff recommends Neutral Tandem be ordered to pay all reasonable costs of direct interconnection. In connection with any uncollected amounts from incoming calls, again, Level 3 is not placed in any worse position as a result of its interconnection with Neutral Tandem. That is, Neutral Tandem will provide Level 3 with the same information that AT&T will provide if the calls are transited over AT&T's network.