

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint and request for )  
emergency relief of **NEUTRAL TANDEM, INC.**, ) Case No. U-15230  
against **LEVEL 3 COMMUNICATIONS, LLC.** )  
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At the November 26, 2007 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman  
Hon. Monica Martinez, Commissioner  
Hon. Steven A. Transeth, Commissioner

**ORDER**

Neutral Tandem, Inc., filed a complaint on March 1, 2007, requesting Commission resolution of a dispute concerning interconnection with Level 3 Communications, LLC (Level 3), under MCL 484.2203. In addition to a request for emergency relief, which the Commission denied without prejudice on March 21, 2007, Neutral Tandem requested that the Commission establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 and its subsidiaries. The parties participated in mediation procedures, but did not both accept the recommended settlement.

On June 6, 2007, a prehearing conference was held before Administrative Law Judge Sharon L. Feldman (ALJ), during which the ALJ heard arguments on Level 3's motion for a cease and desist order restraining Neutral Tandem from distributing the mediator's recommendation to other state commissions. The ALJ denied that motion. Level 3 appealed that decision.

The Commission Staff (Staff) also participated in this case.

On August 9 and 10, 2007, evidentiary hearings were held. The record consists of 619 pages of testimony and 36 exhibits. Neutral Tandem filed corrections to the transcript, which the ALJ found should be made in the absence of any timely objection by Level 3.

The parties filed briefs and reply briefs on August 27 and September 5, 2007, respectively. On October 8, 2007, the ALJ issued her Proposal for Decision (PFD), in which she recommended that the Commission grant Neutral Tandem most of the relief sought in the complaint.

On October 19, 2007, Level 3 filed exceptions to the PFD.<sup>1</sup> On October 29, 2007, Neutral Tandem and the Staff filed replies to those exceptions.

### Background

Neutral Tandem provides tandem transit service for third-party competitive local exchange carriers (CLECs) as an alternative to using incumbent local exchange carrier (ILEC) facilities when a CLEC is not directly connected to the terminating carrier. Neutral Tandem and Level 3 have been directly interconnected for over two years under a series of negotiated commercial agreements. Those agreements were entered into without Commission assistance, oversight, or approval.

On January 30, 2007, Level 3 notified Neutral Tandem that their agreement dated July 6, 2004 would terminate on March 2, 2007, later extended to March 23, 2007. Level 3 also terminated the parties' February 2004 agreement according to the terms of that agreement, effective March 23, 2007. Level 3 no longer desired direct interconnection with Neutral Tandem, and refused to negotiate anything other than indirect interconnection through an available ILEC. However, direct

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<sup>1</sup>Level 3 requested oral argument on the title page of its exceptions. That request is hereby denied.

interconnection between Neutral Tandem and Level 3 has continued in Michigan under orders granted by the Commission while this case is pending.

The terminated contracts also covered the parties' relationship in states other than Michigan. A dispute has arisen in those other states as well. Neutral Tandem has permitted its direct interconnection to terminate in some of those other states in which it no longer delivers traffic to Level 3.

Neutral Tandem does not seek reinstatement of the terminated contracts, but requests the Commission to: (1) require Level 3 to maintain direct interconnection with Neutral Tandem for delivery of terminating traffic, (2) prohibit Level 3 from charging Neutral Tandem any fee or other compensation for transit traffic delivered to Level 3 by Neutral Tandem, (3) require Level 3 to permit interconnection on terms and conditions no less favorable to Neutral Tandem than the terms and conditions Level 3 currently offers to the ILEC for tandem transit service, (4) require Neutral Tandem to provide all necessary caller identification information regarding the originating caller under MCL 484.2305a, and (5) permit the parties 45 days to agree on non-discriminatory terms and conditions, and failing agreement, the Commission commit to take appropriate action after the 45-day period has passed.

Level 3 challenges the Commission's authority to grant the relief Neutral Tandem requests and asks the Commission to find that Level 3 may terminate its direct interconnection with Neutral Tandem. Level 3 asserts that the Federal Telecommunications Act of 1996 (federal Act), 47 USC 251 *et seq.*, creates a right for it to refuse direct interconnection with another telecommunications carrier. It argues that the federal law preempts the Commission's authority to order direct interconnection, and no Michigan law supports granting Neutral Tandem's requested relief.

Level 3 seeks compensation it believes is due under the previous agreements for services rendered while this case was pending. It also seeks attorney fees under MCL 484.2601, alleging that it has suffered economic harm by the need to defend this complaint. Level 3 also seeks a Commission determination that it has no responsibility for the alternative dispute resolution proceedings that took place in this proceeding under MCL 484.2203a.

## DISCUSSION

### Preemption

Level 3 argued that the Commission is preempted by federal law from ordering direct, physical interconnection between two CLECs. It argued that under 47 USC 251(a), a CLEC is permitted to interconnect with other CLECs directly or indirectly, at the receiving CLEC's election. It argued that if the parties to a potential interconnection agreement could not agree on terms and conditions for direct interconnection, "then they remain indirectly connected." Level 3 argues that adopting the PFD would interfere with both parties' ability to choose direct or indirect interconnection and "sidesteps the process for interconnection established by federal law."

Level 3's exceptions, p. 8. Level 3 also cites the Federal Communications Commission's (FCC) 1996 decision in *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (CC Docket No. 95-185, rel'd August 8, 1996), ¶¶ 997 and 1408.

Neutral Tandem and the Commission Staff argued that the federal Act does not preempt Commission authority to regulate CLEC to CLEC interconnection.

The ALJ noted that 47 USC 251(d)(3) prohibits the FCC from preempting any state regulation of access and interconnection obligations for local exchange carriers that: "(A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements

of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.” She further noted that 47 USC 261(c) provides:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access service, as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.

The ALJ concluded that the Staff and Neutral Tandem correctly analyzed this question. She rejected Level 3’s argument that 47 USC 251(c) created a federal right to be free of all other interconnection requirements. She reasoned that the savings provisions in the federal Act demonstrated congressional intent to preempt state regulation only when it is inconsistent with the Act or frustrates its purposes. Merely imposing an obligation to directly interconnect with another telecommunications provider should not be considered inconsistent with the federal law. The ALJ found support lacking for Level 3’s proposition that a CLEC’s right to limit interconnection to indirect interconnection is an integral or important part of the federal regulatory scheme.

The ALJ stated that the United States Court of Appeals decisions relied upon by Level 3 found that the additional obligations created by state tariff significantly interfered with the detailed negotiation and arbitration scheme crafted by Congress, and were not merely any small additional obligation. The ALJ concluded that requiring direct interconnection in this case would neither be so burdensome as to “place a thumb on the negotiating scales,” *Wisconsin Bell v Bie*, 340 F 3d 441, 444 (CA 7, 2003), in favor of one party or the other, nor “bypass[ ]and ignore[ ] the detailed process for interconnection set out by Congress in the [federal Act], under which competing telecommunications providers can gain access to incumbents’ services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that

are then subject to state commission approval, FCC oversight, and federal judicial review.”  
*Verizon North v Strand*, 309 F 3d 935, 941 (CA 6, 2002).

The ALJ rejected Level 3’s argument that the right to insist on indirect interconnection is a critical component of the 1996 Act. She concluded that requiring direct interconnection in this matter would not be inimical to the federal scheme. She noted that the state commissions that have considered Level 3’s preemption claim (New York, Illinois, Georgia, and Florida) have uniformly rejected it.

Level 3 excepts to the ALJ’s conclusions and argues that the FCC has ruled that a CLEC may elect whether to connect directly or indirectly so that it may choose the option best suited to its strategy. Level 3 argues that the FCC required Verizon to provide transit service to AT&T and MCI in order to exchange traffic with other CLECs with whom AT&T and MCI were not interconnected. According to Level 3, the FCC directed AT&T to use its best efforts to establish direct interconnection with a CLEC (to obviate the need for transit service) when its traffic to that company exceeded the DS-1 level. Level 3 argues that the FCC did not require direct interconnection, but merely required AT&T to use its best efforts to negotiate direct interconnection with the CLECs. Level 3 argues that the FCC explicitly rejected the idea that it should arbitrate CLEC to CLEC interconnection agreements.

Level 3 argues that the federal courts have declared that the Commission may not bypass the federal process for creating intercarrier compensation. Level 3 cites *Verizon North, supra*, as holding that the Commission’s authority to participate, arbitrate, or enforce interconnection agreements is circumscribed. It argues that there is no provision in the federal Act for the Commission to require an interconnection agreement between CLECs, much less to arbitrate the terms of an interconnection agreement.

Level 3 argues that the PFD reaches an unlawful result because it would require Level 3 to directly interconnect with Neutral Tandem under the provisions of MCL 484.2305, not under the federal Act. Level 3 asserts that adoption of the PFD would adopt a result for which there is no legal authority. Level 3 argues that the conclusion the ALJ reached that Level 3 should not be permitted to charge market rates for the interconnection nullifies any negotiation leverage Level 3 might have, which is barred by federal law.

Level 3 admits that additional obligations imposed by state law may not always be inconsistent with the federal Act, but argues that requiring direct interconnection would prohibit Level 3 from exercising its right to choose to interconnect directly or indirectly. Level 3 states that in this manner, requiring direct interconnection would interfere with the implementation of the federal Act and be inconsistent with Level 3's rights under 47 USC 251(a).

Neutral Tandem responds that requiring direct interconnection is entirely consistent with the interconnection obligations in the federal Act, making Level 3's preemption arguments without merit. It argues that the ALJ properly observed that a state law is not inconsistent with the act merely because it imposes additional obligations and correctly found that Level 3 failed to show that upholding every CLEC's right to refuse direct interconnection with another CLEC is an integral or important part of the federal regulatory scheme. Neutral Tandem argues that 47 USC 251(a) does not create a right for Level 3 to deny direct interconnection, but creates a duty for all telecommunications providers to interconnect with other providers.

Neutral Tandem argues that 47 USC 251 and 252 do not preempt the Commission's authority to address interconnection issues between CLECs. It cites *Wisconsin Bell, supra*, in arguing that a state's regulations concerning interconnection are not preempted if they are not inconsistent with the provisions of the federal Act.

Neutral Tandem affirms that every state that has considered claims nearly, if not absolutely, identical to Level 3's preemption claim has rejected them.

The Commission concludes that the ALJ's reasoning and conclusions should be adopted on this issue. Requiring interconnection on a non-discriminatory basis is not inconsistent with federal law. 47 USC 261(c) permits the Commission to impose requirements in addition to those provided in the federal Act "to further competition in the provision of telephone exchange service or exchange access" as long as those requirements are not inconsistent with the federal Act or the regulations to implement the federal Act. The Commission finds that in this case, the requirement to permit direct interconnection on non-discriminatory terms and conditions will promote competition and is not inconsistent with the federal Act or the regulations promulgated under that act. Requiring Level 3 to permit direct access does not run afoul of 47 USC 251(d)(3), which provides:

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Level 3's argument that the Commission would be violating Level 3's right to choose the method of interconnection presupposes that it alone has the "right" to insist on a particular type of interconnection with other competitive carriers. The direct connection between Level 3 and Neutral Tandem provides an indirect interconnection for Neutral Tandem's CLEC customers. Nowhere in federal or state law is there a right to demand what would effectively be a double indirect interconnection. To read that right into the federal Act would create an opportunity for Level 3 unilaterally to increase the costs of its competitors by economically mandating that they either move away from using Neutral Tandem for transiting their traffic or pay to transit traffic

twice, once to Neutral Tandem and once to the ILEC. The Commission finds that result would be inconsistent with the federal Act, the desire for a competitive, efficient telecommunications market, as well as state law, as discussed below.

#### Direct Interconnection Under State Law

Level 3 argues that the Michigan Telecommunications Act, MCL 484.2101 *et seq.*, (Michigan Act) cannot be construed to require direct physical interconnection between competitive carriers. It argues that MCL 484.2305 allows for either direct or indirect interconnection and does not require direct interconnection. It asserts that the definition of interconnection in MCL 484.2101(l) as an arrangement that can involve “2 or more” providers, contemplates the possibility of a third-party transit agent. Level 3 argues that the ALJ’s construction of the state statute fails to give effect to the statutory definition and creates a conflict with 47 USC 251. It argues that the Commission cannot require direct interconnection between all carriers without adding words to its enabling act. It asserts that the Commission will be “breaking new ground” if it holds that MCL 484.2305(b) requires direct interconnection. It argues that if the Commission adopts the findings and conclusions reached in the PFD, it would create havoc and “mass inefficiencies” because each requesting CLEC could require every other CLEC to directly interconnect with it. Level 3 exceptions, p. 22.

Neutral Tandem responds that the ALJ properly found that the Michigan Act requires direct interconnection in this case. Neutral Tandem posits that Level 3’s argument depends upon “a tortured reading” of MCL 484.2101(l) and MCL 484.2305. It states that Level 3’s argument creates a right to choose direct or indirect interconnection in any situation. Neutral Tandem takes the position that the Michigan Act provides the Commission broad authority over the regulatory

scheme that it is empowered to administer, citing *Attorney General v Public Service Comm*, 237 Mich App 82, 90; 602 N.W.2d 225 (1999).

Neutral Tandem argues that requiring direct interconnection is entirely consistent with the interconnection obligations in the federal Act, making Level 3's preemption arguments without merit. It argues that the ALJ properly observed that a state law is not inconsistent with the federal Act merely because it imposes an additional obligation.

Neutral Tandem argues that Level 3's proposed double indirect interconnection would require the originating CLEC customer of Neutral Tandem to incur two sets of transit costs (one for Neutral Tandem's service, one for the ILEC's service). It argues that such double cost imposition is the "hallmark of the inferiority of this type of interconnection." Neutral Tandem replies, p. 18, citing *Neutral Tandem, Inc v Level 3 Communications, LLC*, Illinois Commerce Commission Docket No. 07-0277, July 10, 2007 order, p. 6.

MCL 484.2204 provides:

If 2 or more telecommunications providers are unable to agree on a matter relating to a regulated telecommunications service or a matter prohibited by section 305 [MCL 484.2305], then either telecommunication provider may file with the commission an application for resolution of the matter.

MCL 484.2201 provides the Commission with jurisdiction to administer the Michigan Act in a manner consistent with the Act and Federal "telecommunications law, rules, orders, and regulations." The ALJ reasoned and the Commission agrees that no question arises that both parties to this complaint are telecommunications providers under the Michigan Act and that the Commission is charged with resolving disputes between two providers concerning MCL 484.2305.

MCL 484.2305 provides in part:

A provider of basic local exchange service shall not do any of the following:

- (a) Discriminate against another provider by refusing or delaying access service to the local exchange.
- (b) Refuse or delay interconnections or provide inferior connections to another provider.

Neutral Tandem's complaint asserted that Level 3's actions in refusing to provide direct interconnection on nondiscriminatory terms and conditions violated MCL 484.2305(a) and (b). It asserted that Level 3 should be required to permit direct interconnection on the same terms and conditions that Level 3 permits direct interconnection to the ILEC.

The ALJ concluded that, because the Michigan Act does not use the terms "direct" and "indirect" in relation to interconnection requirements, the Legislature did not demonstrate an intention that indirect interconnection is always sufficient to fulfill a provider's duty to interconnect with another provider's network. She noted that the obligations of MCL 484.2305 would be triggered by a request, because a delay or refusal could only logically come after a request. The ALJ found that the words "'shall not . . . refuse or delay' . . . suggests an obligation greater than simple reliance on an existing ILEC interconnection." PFD, p. 18.

The Commission finds that MCL 484.2305(a) and (b) should be read to prohibit Level 3 from refusing or delaying provision of direct interconnection with Neutral Tandem on non-discriminatory terms and conditions. Neutral Tandem has a right to request direct interconnection and Level 3 must negotiate for that direct interconnection on terms and conditions that are not unduly discriminatory to Neutral Tandem. The Commission is not persuaded that direct interconnection has been or will be a significant cost to Level 3, and notes that under the now terminated contracts, Neutral Tandem paid for the interconnection facilities with Level 3. Level 3 has not provided convincing evidence that it incurs costs for which it is not able to obtain compensation. As to

Level 3's reliance upon the words "2 or more providers" as evidencing legislative intent to include indirect interconnection, the Commission notes that the cited language appears in the definition of "interconnection." However, MCL 484.2305(a) and (b) prohibit a provider of basic local exchange service from discriminating against or refusing or delaying interconnection or providing inferior interconnections to "another provider," which provider is notably singular. The Commission concludes that each requesting provider has the right to non-discriminatory interconnection and a right to that interconnection without delay. Neutral Tandem states that it seeks only the right to deliver tandem traffic to Level 3 on a reasonable and non-discriminatory basis. Neutral Tandem commits that it will pay 100% of the transport costs of that traffic delivered over the direct interconnection.

Level 3 misinterprets the PFD when it asserts that if it is adopted by the Commission, the Commission would effectively hold that MCL 484.2305 requires direct interconnection between CLECs. That is not the case. There is no requirement that a requesting CLEC that does not desire direct interconnection must negotiate for it, only that if a provider requests direct interconnection, it should be permitted without refusal, undue delay, or discriminatory terms and conditions.

### Public Policy Arguments

The ALJ found that requiring direct interconnection in this case would promote competition in the tandem transit service market, leading to CLEC's having alternatives for that service, which would likely lead to more efficient pricing and routing. She further concluded that redundancy in the tandem transit service provided greater reliability for the public switched telephone network (PSTN).

Level 3 argues that requiring it to directly interconnect with Neutral Tandem will disadvantage other providers of tandem transit service due to the limited number of Level 3's ports, which are

necessary for interconnection. Level 3 also argues that there is no support for the ALJ's determination that a potential for call blockage exists if Level 3 refuses to directly interconnect.

Neutral Tandem argues that ordering direct interconnection in this proceeding will not grant Neutral Tandem any unfair competitive advantage. It argues that Level 3 has mischaracterized the relief that Neutral Tandem seeks and submissions it has made in other forums.

The Commission rejects Level 3's argument that public policy issues dictate a result different than that reached by the ALJ. Specifically, the Commission rejects the argument that should the Commission find indirect interconnection inferior, inefficient, or against the public interest, the result would be a forced direct interconnection between every CLEC. The requesting provider is in the best position to determine when it is efficient for it to directly connect with the network of another provider. In the present case, Neutral Tandem seeks direct interconnection with Level 3 so that it can provide indirect interconnection with Level 3 for CLEC customers of Neutral Tandem. This is indirect interconnection between the CLECs, as there is when the ILEC provides tandem transit service for CLECs to Level 3. What Level 3 seeks to force on Neutral Tandem's customers is a double indirect interconnection. Adopting Level 3's position could simultaneously create extra costs for Neutral Tandem's CLEC customers and have a severe negative effect on the transit provider's business. The only manner in which competitive tandem transit service will have a market is if the requesting providers have the right to request direct interconnection on a reasonable, non-discriminatory basis.

The Commission also rejects Level 3's argument that requiring it to permit direct interconnection in this case would restrict other providers from obtaining direct interconnection. Neutral Tandem has provided evidence that it would not need additional switch ports for a direct interconnection in this case.

The Commission further rejects Level 3's argument concerning the potential for call blocking. As the ALJ stated, this finding related to whether emergency relief should be granted and did not affect the interpretation of MCL 484.2305. A finding of call blockage potential or probability is not necessary to the result we reach. The Commission declines to make further findings on this issue.

### Terms and Conditions

Level 3 argues that the Commission lacks the authority to set parameters on the terms and conditions of an interconnection agreement between the parties. It argues that the ALJ concluded that Level 3 should be permitted to negotiate a "cost-based" rate for interconnecting with Neutral Tandem. She further concluded that Level 3 should not be permitted to charge Neutral Tandem for termination costs recoverable as reciprocal compensation from originating carriers, or impose a market rate. Level 3 argues that the Commission is preempted from interfering with contract negotiations between these parties. To the extent that the Commission orders Level 3 to recover a cost-based rate of compensation, it argues that the Commission must clarify that the costs should be determined according to the total service long run incremental cost standards of the Michigan Act. Level 3 argues that there is no statutory authority for the Commission to compel a contract between these two parties. It argues that a broad grant of authority does not permit the Commission discretion to do things not specifically authorized by statute. *Huron Portland Cement v Public Service Comm*, 351 Mich 255; 88 NW2d 492 (1952).

Level 3 further argues that contrary to the ALJ's conclusions, it demonstrated on the record that it incurs costs in receiving network traffic from Neutral Tandem that are not compensated by reciprocal compensation received from the CLECs. It asserts that Neutral Tandem does not pay the entire costs of transport to Level 3. It argues that Neutral Tandem does not contend that

Level 3 has no costs to interconnect with Neutral Tandem, only that it has no costs that Level 3 would not also incur if the transit traffic came solely from the ILEC. Level 3 states that the Commission cannot compel it to interconnect with Neutral Tandem without also permitting it to recover the costs of doing so. Level 3 notes that it must allocate all of its costs across all traffic and all interconnecting carriers, including Neutral Tandem. Level 3 argues that Neutral Tandem should not be permitted to shift its switch port costs to the ILEC.

Neutral Tandem responds that the PFD did not attempt to set the rates, terms, and conditions of a contract for direct interconnection between the parties. It argues that Level 3's arguments are an obvious attempt to collect reciprocal compensation from Neutral Tandem rather than the originating carriers.

Neutral Tandem asserts that the Commission does have jurisdiction to order the parties to negotiate. Neutral Tandem reaffirms that it does not seek a Commission-imposed contract for interconnection between these two parties. Rather, it seeks an order permitting it to directly interconnect with Level 3's network. Neutral Tandem asserts that the Commission has authority to order the parties to negotiate a non-discriminatory commercial interconnection agreement under the provisions of MCL 484.2305. It argues that for an agreement to comply with MCL 484.2305a, it must not seek to recover reciprocal compensation from other than the originating party.

Neutral Tandem asserts that Level 3 failed to demonstrate any costs for direct interconnection with Neutral Tandem for which it could not be compensated through the reciprocal compensation rates paid by the originating carriers. It argues that Level 3's attempt to negotiate a "market based" rate is merely an attempt to collect charges in addition to reciprocal compensation for transit traffic paid by the originating carriers.

The Commission finds that the PFD does not impermissibly interfere with the parties' freedom to negotiate a new commercial agreement without the need for Commission approval. The ALJ correctly found that those costs properly recovered through reciprocal compensation should not also be charged to Neutral Tandem, as they must be recovered from the originating carrier. As to the argument that Level 3's costs must be allocated across all traffic, the Commission notes that there is no difference in traffic volume dependent upon whether Neutral Tandem or the ILEC transits the traffic. Although Level 3 has not demonstrated on this record the likelihood of incremental costs associated with the traffic that it terminates to Level 3, the Commission concludes that it may seek compensation to defray any costs that it can justify. The Commission finds that the parties may negotiate an agreement that reaches a mutually agreeable compensation arrangement for costs incurred by either party, and makes arrangements that are suitable for the direct interconnection. What Level 3 may not do is demand terms and conditions that are unduly discriminatory between the ILEC and Neutral Tandem. The Commission therefore directs the parties to enter into negotiations to reach an agreement for direct interconnection. The parties are to negotiate in good faith and with reasonable diligence to reach an agreement. If, after 60 days following the issuance of this order, the parties have not been able to agree to terms and conditions for interconnection, either party may petition the Commission for baseball-style arbitration of their last best offers on disputed issues. The parties should include in their negotiations the appropriate compensation for traffic delivered to Level 3 through Neutral Tandem while this case was pending. If the parties can agree, there is no need for further Commission involvement.

The Commission has jurisdiction and authority to require non-discriminatory treatment for Neutral Tandem from Level 3 under MCL 484.2305. Should Level 3 fail to negotiate in good

faith for non-discriminatory terms and conditions of interconnection, it may be subject to the penalty provisions of MCL 484.2601.

### Relevancy of the Terminated Contracts

Level 3 argued that the Commission had no authority to interfere with the lawful termination of the two contracts it had with Neutral Tandem.

The ALJ concluded that the terminated contracts were not relevant to the present case, although she further stated that the justification for their termination and refusal to negotiate new contracts lacked “solid economic justification.” PFD, p. 28. The ALJ found that Neutral Tandem’s agreement to a termination provision in the contract did not waive its rights to the protections contained in MCL 484.2305.

Level 3 argues that the ALJ’s finding concerning the justification for termination constitutes an impermissible negative inference from the terminated contracts, was factually inaccurate, and impinges on Level 3’s right to weigh whatever reasons it may have for choosing indirect interconnection with Neutral Tandem.

Neutral Tandem argues that the ALJ properly found that the terminated contracts had no relevance to this proceeding. It states that Level 3 “confuses its right to terminate a contract with its lack of a right to violate Michigan law.” Neutral Tandem’s reply to exceptions, p. 48. Neutral Tandem admits that Level 3 could terminate the contracts under the provisions within those contracts, but argues that Level 3’s obligations under state law are independent of the prior contracts. It states that the previous agreements provided for two-way traffic between Neutral Tandem and Level 3. Neutral Tandem states that there is a distinction between those two-way contracts and the direct interconnection that Neutral Tandem now seeks to deliver tandem transit traffic to Level 3. Neutral Tandem states that all it now seeks is a Commission order requiring

Level 3 to continue receiving tandem transit traffic from Neutral Tandem on non-discriminatory terms.

The Commission finds that the ALJ's conclusions regarding the reasons for the termination have no relevance to the outcome of this proceeding. The rights and obligations under the properly terminated contracts are irrelevant to whether Neutral Tandem has a right to non-discriminatory interconnection terms and conditions for delivering tandem transit traffic to Level 3. To the extent that the ALJ made negative findings on this issue, the Commission has disregarded those findings in reaching its conclusions in this order.

#### Appeal of ALJ's Ruling

Level 3 argued that Neutral Tandem should be found in violation of the Michigan Act and ordered to cease and desist disseminating the resulting recommendation from the mediator. The ALJ denied Level 3's motion and Level 3 appealed that determination. Level 3 continues to argue that dissemination of the mediator's recommendation should be found to violate the letter and the spirit of the statute.

MCL 484.2203a(6) provides:

If the recommendation is not accepted under subsection (3), the individual commissioners shall not be informed of the recommended settlement until they have issued their final order under section 203 (MCL 484.2203).

The Commission finds that there is no support for finding that Neutral Tandem has violated this provision of the statute by its actions in providing information regarding the recommended settlement in this case prior to a Commission final order. The cited section prohibits informing the "individual commissioners" of the mediation recommendation. The individual Commissioners have not been informed of the recommended settlement in this case.

Neutral Tandem would have no notice that its actions violated the Act or any Commission rule. Unless the Legislature rewrites this provision to make the recommendation confidential for all prior to a Commission final order, or the Commission promulgates rules that would prevent dissemination, a party does not violate the act or Commission rules by providing copies of the recommendation to other jurisdictions before a final Commission order.

### Miscellaneous Issues

The Commission rejects Level 3's request for a finding that it is not responsible for any of the costs for mediation services and that Neutral Tandem should be required to pay its costs for this proceeding. The mediation fees and costs shall be paid by the parties in compliance with the provisions of the statute. *See*, MCL 484.2203(5). The Commission declines to order attorney fees and costs to be paid under MCL 484.2601. Before any attorney fees or costs could be considered due under that section, there must be not only a demonstration of economic harm, but a finding that the party charged with those fees and costs violated the statute. There has been no demonstration that Neutral Tandem violated the statute.

### Conclusion

For all of the above stated reasons, the Commission concludes that Neutral Tandem's complaint should be granted in part as provided in this order. The Commission finds that in doing so it is promoting a competitive environment for providers of basic local exchange service and encouraging innovation in the manner that those services are provided to the public. Any arguments not specifically addressed in this order that are contrary to its conclusions and findings have been rejected as irrelevant or not persuasive.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1991 PA 179, MCL 484.2101 *et seq.*; 1969 PA 306, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17101 *et seq.*
- b. Level 3 must permit Neutral Tandem direct interconnection on lawful, non-discriminatory terms and conditions.
- c. The parties should be directed to negotiate in good faith a commercial agreement or agreements to permit direct interconnection.
- d. The Commission should permit either party to petition the Commission for arbitration of the parties' last best offers on disputed issues if no agreement is reached in the 60 days following issuance of this order.

THEREFORE, IT IS ORDERED that:

- A. The parties shall negotiate in good faith a commercial agreement for the direct interconnection of Neutral Tandem, Inc., with Level 3 Communications, LLC, for the purposes of delivering tandem transit traffic for termination on Level 3 Communications, LLC's network under lawful and non-discriminatory terms and conditions.
- B. After 60 days following this order, either party may petition the Commission to arbitrate the parties' last best offers on disputed issues.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Orjiakor N. Isiogu  
Chairman, abstaining.

( S E A L )

/s/ Monica Martinez  
Commissioner

/s/ Steven A. Transeth  
Commissioner

By its action of November 26, 2007.

/s/ Mary Jo Kunkle  
Its Executive Secretary

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman, abstaining.

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Commissioner

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Commissioner

By its action of November 26, 2007.

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Its Executive Secretary