

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service
Commission held in the City of
Albany on June 20, 2007

COMMISSIONERS PRESENT:

Patricia L. Acampora, Chairwoman
Maureen F. Harris
Robert E. Curry, Jr.
Cheryl A. Buley

CASE 07-C-0233 - Petition of Neutral Tandem - New York, LLC for
Interconnection with Level 3 Communications and
Request for Order Preventing Service
Disruption.

ORDER PREVENTING SERVICE DISRUPTION AND
REQUIRING CONTINUATION OF INTERIM INTERCONNECTION

(Issued and Effective June 22, 2007)

BY THE COMMISSION:

INTRODUCTION AND SUMMARY

We initiated this proceeding to consider a complaint in which Neutral Tandem, Inc. - New York LLC (Neutral Tandem) asks that we require Level 3 Communications LLC (Level 3) to continue direct interconnection with Neutral Tandem, while Level 3 asks us to require a migration plan for orderly divestiture of Neutral Tandem's customers in anticipation that we will allow Level 3 to discontinue the interconnection. The two firms established their present direct interconnection pursuant to a transport agreement and two termination agreements. Level 3 unilaterally has canceled the termination agreements, after fulfilling the notice requirements prescribed in the agreements.

In today's order we grant Neutral Tandem's requested relief provisionally by directing the parties to continue performing their respective obligations as if the canceled termination agreements remained in effect, pending the completion of a proceeding pursuant to Public Service Law (PSL) §97 if necessary to investigate the rates, charges, rules and

regulations under which the parties provide call transport and termination services to one another. We shall initiate the rate proceeding at our first regularly scheduled session after 90 days have elapsed from the date of this order, unless the parties execute a new termination agreement in the interim.

FACTUAL AND PROCEDURAL BACKGROUND

In New York and other states, Neutral Tandem maintains tandem switches which competitive local exchange carriers (CLECs) can use as an alternative to tandem switches owned by incumbent local exchange carriers (ILECs) such as Verizon New York Inc. Neutral Tandem provides this service to about 23 CLECs in New York. Level 3 or its affiliates likewise operate in New York and other states, as CLECs that transport local calls originated by their end-user customers and terminate local calls to those customers. Among telecommunications providers in the New York market, Neutral Tandem is unique in offering a competitive alternative to the ILEC's tandem switch, and in providing transport and termination services only to CLECs without having end-user customers of its own.

Until the controversy that led to this proceeding, Neutral Tandem and Level 3 had been handling local calls in New York pursuant to three interconnection agreements between them. Under the first, which may be described as a "transport agreement," local calls that are originated by Level 3's end-user customers and routed through Level 3 can be directed to Neutral Tandem's tandem switch (instead of Verizon's) and thence to a CLEC. An economic incentive for Level 3 to use this arrangement is that Neutral Tandem offers Level 3 the transport service at a lower price than Verizon's.

The other two interconnection agreements, initially executed in 2004, are described herein as "termination agreements" and govern calls in the opposite direction. That is,

the termination agreements specify terms whereby calls originating from a CLEC¹ and routed to Neutral Tandem's tandem switch can be directed to Level 3 (here again, bypassing the Verizon tandem switch) and thence to Level 3's end-user customers. One of the termination agreements with Neutral Tandem was executed by Level 3; the other was executed by Broadwing Communications LLC, and was inherited by Level 3 when it acquired Broadwing. For Level 3, the economic attraction of the termination agreements has been that Neutral Tandem pays Level 3 compensation for calls governed by the agreements. Verizon, in contrast, would be under no similar obligation to Level 3 if the calls in question were handled by Verizon rather than Neutral Tandem; instead, under that scenario, Level 3 would be compensated only if it made the effort to collect reciprocal compensation from the originating CLECs.

On January 31, 2007, the parties executed a newly negotiated transport agreement. Later that day, Level 3 notified Neutral Tandem that Level 3 intended to discontinue negotiations on a new termination agreement and cancel one of the two preexisting termination agreements, viz., the one executed by Level 3. Shortly thereafter, Level 3 gave notice that it also would cancel the termination agreement executed by Broadwing. Without examining any negotiating positions undisclosed by the parties, the record is clear that a primary obstacle to negotiation of a new termination agreement has been the issue whether Level 3 should continue to receive compensation directly from Neutral Tandem (as Level 3 contends) or should be relegated to its right of reciprocal compensation from the CLECs (as Neutral Tandem contends).

In accordance with the cancellation provisions in each of the termination agreements, Level 3 gave Neutral Tandem 30 days' notice of its intent to cancel. The later of the two

¹ For the present discussion, a CLEC in the situation governed by the termination agreement can be said to "originate" the calls in question--in the sense that the call originates on that CLEC's network--although of course the call initially originates from an end user.

resulting expiration dates was March 23, 2007, which Level 3 then extended voluntarily (as to both termination agreements) through June 25, 2007 to allow time for a hearing and decision in this expedited proceeding. Meanwhile, both parties have continued to operate in accordance with the terms of the newly executed transport agreement and the preexisting, but canceled, termination agreements.

The parties' numerous filings to the Commission or the assigned Administrative Law Judge have included, most notably, Neutral Tandem's complaint and petition in which it seeks an order requiring interconnection and preventing service disruption; Level 3's motions to dismiss the complaint and compel Neutral Tandem to prepare a migration plan in anticipation of dismissal;² and prefiled testimony by both parties, which was examined in an evidentiary hearing.

ARGUMENTS AND CONCLUSIONS

Jurisdiction

The threshold question, broadly stated, is whether we have jurisdiction to grant Neutral Tandem's request for direct interconnection with Level 3. If not, then our obligation to ensure the continuity of safe and adequate service would require that we direct Neutral Tandem to implement an orderly migration plan as Level 3 proposes. For the following reasons, however, we conclude that the requisite jurisdiction to grant Neutral Tandem's requested relief is established by the PSL and is not preempted by the Telecommunications Act of 1996.

According to Neutral Tandem, its role as a transiting provider entitles it to direct interconnection with a CLEC such as Level 3 by operation of 16 NYCRR 605.2(a)(2), which provides that "interconnection into the networks of telephone corporations shall be provided for other public or private networks." In

² Consistently with the determinations in today's order, we formally deny Level 3's dismissal motion, which the Administrative Law Judge previously denied by informal ruling.

response, Level 3 correctly observes that Rule 605.2(a)(2) never has been relied upon to require that a CLEC offer direct interconnection to an entity such as Neutral Tandem (as distinguished from an end user). Level 3 emphasizes that, if it ended the termination agreements at issue and ended Neutral Tandem's direct interconnection under those agreements, Neutral Tandem nevertheless would remain interconnected to Level 3 indirectly via the Verizon tandem. Therefore, Level 3 argues, the interconnection requirement in Rule 605.2(a)(2) would continue to be satisfied.

As Neutral Tandem points out, however, we unquestionably have the authority to interpret our rules in a manner that "is not irrational or unreasonable."³ Thus, Level 3's objection that Neutral Tandem's proposed interpretation is novel begs the question whether Rule 605.2(a)(2) may reasonably be read to require direct interconnection between Level 3 and Neutral Tandem, should we determine that direct interconnection would be a "just, reasonable, adequate, efficient and proper" practice within the meaning of PSL §97(2) and a "suitable" connection method as required by §97(3). The question must be answered affirmatively. Under Level 3's theory, the regulation's silence regarding "direct" interconnection would implicitly prevent our requiring anything more than indirect interconnection through the Verizon tandem, even though the regulation does not expressly preclude our requiring a direct interconnection. Thus, instead of construing Rule 605.2(a)(2) conventionally, *i.e.*, as an implementation of statutory authority, Level 3's interpretation perversely would transform the rule into a constraint on our statutory authority to require direct interconnection in any instance where Level 3 refuses to offer it.

Moreover, given Level 3's theory that Rule 605.2(a)(2) requires interconnections only indirectly and only between a CLEC and the originating end users, Neutral Tandem is correct that it is self-contradictory for Level 3 to reject the notion of a

³ Ass'n of Cable Access Producers v. PSC, 1 AD3d 761, 763, 767 NYS2d 166, 168 (3d Dept. 2003).

mandatory direct interconnection between Neutral Tandem and Level 3, as that is precisely the configuration that creates, between Level 3 and originating end users, the "indirect interconnection" supposedly prescribed (according to Level 3) by Rule 605.2(a)(2).

The argument over Rule 605.2(a)(2) points to a more basic consideration, namely the scope of our authority pursuant to the statute from which any rule or ratemaking decision must be derived. Neutral Tandem properly invokes several relevant PSL provisions applicable to Level 3 as a telephone corporation (a characterization undisputed by Level 3). Thus, Neutral Tandem says, it must be granted direct interconnection with Level 3 pursuant to the requirement in PSL §91 that a telephone corporation provide such "facilities as shall be adequate and in all respects just and reasonable." Neutral Tandem cites also our responsibility to exercise "general supervision" over all telephone companies and facilities (PSL §94(2)); to ensure that rates are not "unjust, unreasonable or unjustly discriminatory or unduly preferential or in anywise in violation of law" (PSL §97(1)); to require just and reasonable rules, regulations, and practices, and adequate, efficient, proper, and sufficient equipment and service (PSL §97(2)); and to require suitable connections or transfers at just and reasonable rates (PSL §97(3)).

Assuming for the moment that nothing in the Telecommunications Act of 1996 preempts us from granting the relief sought by Neutral Tandem, and that direct interconnection between Neutral Tandem and Level 3 is shown to be necessary for the effective provision of telephone service (as contemplated in, e.g., the cited provisions of PSL §§ 91, 97(2), and 97(3)), Level 3 has provided no plausible basis for its claim that the requested relief would exceed our statutory authority. On the contrary, the PSL provisions cited above are designed to vest us with plenary jurisdiction comprehensive enough to include supervision of the terms and conditions of interconnection for

transport and termination services, to the extent consistent with federal law.⁴

As noted, Level 3 misinterprets Rule 605.2(a)(2) as an implied prohibition against our requiring that Level 3 provide Neutral Tandem direct connection, as distinguished from indirect interconnection through the Verizon tandem. In a related argument, Level 3 says the Telecommunications Act of 1996 preempts any state statute or regulation that otherwise might authorize us to order Level 3 to offer direct interconnection. Level 3 argues that the 1996 Act, like Rule 605.2, bars us from requiring direct interconnection because the Act, in 47 USC §251(a)(1), provides that every carrier has a duty to "interconnect directly or indirectly with other carriers" (emphasis added). Accordingly, says Level 3, the Federal Communications Commission (FCC) has described indirect interconnection as "a form of interconnection explicitly recognized and supported by" the 1996 Act.⁵ Level 3 further notes that Rule 605.2(a)(2) antedates the 1996 Act, as if to imply that the rule cannot be reconciled with the 1996 regulatory framework.

That the 1996 Act recognizes indirect interconnection does not imply that the Act forecloses direct interconnection when the latter is more appropriate. The network configuration contemplated in the Act is one that provides the originating CLEC and its end users the opportunity to choose their preferred routing based on consideration of all relevant factors such as cost, reliability, and efficiency. As Level 3 itself, has argued to the Federal Communications Commission (FCC), "it is always the option of the carrier with the financial duty for transport [i.e., the originating CLEC] to choose how to transport its

⁴ As an illustration of our exercise of such jurisdiction, Neutral Tandem cites Case 00-C-0789, Omnibus Interconnection Proceeding, Order Establishing requirements for the Exchange of Local Traffic (issued December 22, 2000).

⁵ In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4740 (¶125)(rel. March 3, 2005).

traffic," as among "direct interconnection . . . via its own facilities, [via] the terminating carrier's facilities, or via the facilities of a third party."⁶

In this proceeding, however, as we have noted regarding Level 3's interpretation of Rule 605.2(a)(2), Level 3's interpretation of the 1996 Act would perversely transform the options assured the originating CLEC under 47 USC §251(a)(1) into a supposed power on Level 3's part to dictate that the originating CLEC cannot choose direct interconnection with Level 3. And, just as in its mistakenly restrictive interpretation of Rule 605.2(a)(2), Level 3 would read out of the 1996 Act the option of direct interconnection between Neutral Tandem and Level 3 even though such direct interconnection results in "indirect interconnection," which Level 3 says the Act requires, between Level 3 and originating CLECs' end users. Because Level 3's reading of §251(a)(1) would enable Level 3 to compel these results in disregard of the principle that originating CLECs may choose how to route their traffic, Level 3 errs in asserting that §251(a)(1), properly construed, preempts our requiring direct interconnection between by Neutral Tandem and Level 3 pursuant to the PSL and Rule 605.2(a)(2).

Indeed, the 1996 Act not only allows us to require direct interconnection, as discussed; the Act also affirmatively preserves our obligation to do so, when effective provision of service requires it, as part of our role in supervising interconnection arrangements under PSL §§ 91, 94, and 97. According to 47 USC §251(d)(3)(A), federal regulation must not prevent a state commission from establishing interconnection requirements otherwise consistent with the Act. Thus, even though indirect interconnection may, in the proper circumstances, satisfy a general duty of interconnection established in §251(a)(1), the Act does not preclude our requiring direct interconnection when that option is more reasonable and therefore is necessary for the discharge of our obligations under state

⁶ Reply Comments of the Missoula Plan Supporters, CC Docket No. 01-92 (February 1, 2007), p. 26.

law.⁷ Similarly, to the extent consistent with the Act, 47 USC §261(b) authorizes the enforcement of preexisting state regulations (such as Rule 605.2(a)(2), insofar as applicable); and §261(c) authorizes us to impose new requirements for furtherance of competition in the provision of exchange access. As noted below, a major benefit of direct interconnection between Neutral Tandem and Level 3 is that it promotes such competition. Thus, 47 USC §§ 251 and 261 provide further assurance that we can act consistently with federal law in requiring the parties to maintain their present interconnection.

Network Design and Public Policy Objectives

Having determined that 47 USC §251(a)(1) does not limit our statutory authority to require that Level 3 continue providing Neutral Tandem direct interconnection, the next issue is whether such a requirement would serve the interests entrusted to us under the PSL. In other proceedings, the Commission or our staff already has answered that question in the affirmative, and Level 3 has not persuasively demonstrated the contrary in this case.

Direct interconnection between Neutral Tandem and Level 3 enables Neutral Tandem to maintain its independent tandem switch as a viable alternative to Verizon's. The availability of an independent tandem in turn furthers the development of facilities-based competition among wireless, cable, and landline telephony, by offering the providers of all such services an economically advantageous alternative to the Verizon tandem. According to Level 3, the volume of traffic it receives from Neutral Tandem is insufficient to make direct interconnection with Neutral Tandem a more cost-effective configuration, as

⁷ The 1996 Act recognizes that we may need to decide how interconnections should be structured in the course of rate arbitration between an ILEC and a CLEC. 47 USC §§ 252(c), (d). Although this case does not involve an ILEC, it involves a similarly inseparable interrelationship between the reasonableness of interconnection methods and the reasonableness of the rates charged for those interconnections.

compared with receiving the same traffic indirectly from Neutral Tandem through the Verizon tandem. However, the record shows that Neutral Tandem sends Level 3 a volume of traffic about 180 times greater than the DS-1 level, and we have found the latter sufficient to justify maintenance of dedicated transport capacity on the part of a terminating CLEC such as Level 3.⁸

For originating CLECs, the ability to choose the more cost effective tandem service, as between Neutral Tandem's and Verizon's competing services, creates an opportunity for cost savings and optimum efficiency. The resulting mitigation of the CLECs' cost of service tends to enhance competition among CLECs, minimize the costs recovered through end users' rates, and encourage additional investment in facilities-based services, consistently with the similar objectives we have cited in supporting the principles of open network architecture and comparably efficient interconnection.⁹

In addition, the redundancy resulting from alternative tandem switching options enhances the diversity and reliability of the public switched telephone network. These objectives have consistently been recognized on several occasions, particularly as a response to lessons of the September 11, 2001 attacks and Hurricane Katrina.¹⁰ While Level 3 disputes the benefits of redundancy on the basis that Neutral Tandem's tandem switch is just as vulnerable as other CLECs' facilities sharing the same physical location with Neutral Tandem's, even an arrangement where Neutral Tandem and CLECs collocate provides clear diversity

⁸ Case 00-C-0789, *supra*, Order Establishing Requirements for the Exchange of Local Traffic (issued December 22, 2000).

⁹ See, e.g., Case 88-C-004, Interconnection Arrangements, Open Network Architecture, and Comparably Efficient Interconnection, Opinion No. 89-28 (issued September 11, 1989), at pp. 7-8.

¹⁰ Petition of Neutral Tandem, Inc. for Interconnection with Verizon Wireless, WC Docket No. 06-159, Reply Comments of NYSDPS (filed September 25, 2006); Case 03-C-0922, Telephone Network Reliability, Order Instituting Proceeding (issued July 21, 2003); DPS Staff White Paper (issued November 2, 2002).

and reliability advantages as compared with relying only on an ILEC's tandem switch maintained solely at the ILEC's location.

Conversely, denial of the relief sought by Neutral Tandem would create potential impediments to competition, by enhancing Level 3's capacity to act as a bottleneck between its end users and CLECs if the CLEC chooses Neutral Tandem's tandem switch over Verizon's. While Level 3 argues that any interference with originating CLECs' access through Neutral Tandem to Level 3's end users would violate Level 3's own business interests, Neutral Tandem has shown that Level 3 has allowed incoming traffic to be disrupted in analogous situations in the past. Level 3's potential bottleneck function becomes an ever greater concern insofar as Level 3 may seek to provide tandem switch service in competition with Neutral Tandem.

Remedies

The final question--albeit the primary one, evidently, in the parties' negotiations--is whether to credit Level 3's argument that, even if the public policy benefits of the present network configuration are more substantial than Level 3 concedes, they cannot justify an order compelling Level 3 to offer Neutral Tandem a termination agreement under which Level 3 serves Neutral Tandem free of charge. A corollary issue is Neutral Tandem's claim that Level 3, by insisting on payment, is attempting to extract terms that would be discriminatory or potentially anticompetitive. We view these claims as arguments that address neither the scope of our jurisdiction nor the merits, from a policy standpoint, of requiring direct interconnection pursuant to our authority under PSL §§ 97(2) and (3). Rather, they implicate only the question of just and reasonable pricing under §97, which is a conventional ratemaking issue to be resolved through the ratemaking process prescribed in PSL §97(1). It is for that reason that we will initiate a rate proceeding if the parties do not negotiate a new agreement.

In a rate case, as in negotiations, relevant considerations might include (among other things) whether

Level 3's access to reciprocal compensation from CLECs is an adequate substitute for direct payments from Neutral Tandem; whether the parties' transport and termination agreements should be considered independently or in combination when assessing the reasonableness of the rates they establish relative to the obligations and benefits they confer on each party; and, if the agreements are to be considered in combination, whether the terms established in the present transport agreement should be modified so that the agreements collectively will yield results that are just and reasonable overall.¹¹ As long as such considerations have yet to be examined in a future phase of this proceeding, it would be premature to determine whether any particular level of compensation (or the absence of compensation) renders a termination agreement unreasonable as Level 3 claims.

The parties have offered conflicting testimony regarding the extent, if any, to which cancellation of the present direct interconnection would disrupt traffic currently routed to Level 3 through Neutral Tandem. According to Neutral Tandem, an orderly transition would require six months. Level 3 seems to assert that a nearly instantaneous transition could be managed through the use of emergency facilities that link the Verizon tandem to Level 3, and adds that any disruption would be the product of Neutral Tandem's own failure to anticipate an adverse decision in this proceeding.

We find that the risk of disruption has been demonstrated sufficiently that an order requiring immediate cancellation of the present interconnection would not be consistent with the sound exercise of our supervisory authority under the PSL. Moreover, cancellation would be unreasonably disruptive under the best of circumstances because our objective at this stage of the proceeding is to initiate further

¹¹ A full rate proceeding, if any, also would be the more appropriate forum in which to consider (if necessary) the allegations that certain rates and practices are discriminatory or otherwise improper, as the parties have discussed in a series of late, unauthorized pleadings filed May 23, 2007 and subsequently.

negotiations and thus obviate a contested rate proceeding. It would make little sense to suspend the present interconnection in anticipation that it will be reinstated as soon as the terms and conditions of a new termination agreement have been established.

Accordingly, we are directing the parties to continue operating in accordance with their preexisting transport and termination agreements, provided however that payments pursuant to those agreements after the date of this order will be subject to adjustment, by reparation, credit, or refund,¹² should we find at the conclusion of a rate proceeding that such payments were insufficient or excessive. By postponing the commencement of a rate proceeding until our first session 90 days after issuance of today's order, we intend to provide the parties a reasonable opportunity to negotiate new rates and thus avoid the resource expenditure that would result from a litigated rate case.

Although Level 3 proposes that we direct Neutral Tandem to pay an interim rate of \$0.0007 per minute of use for termination service, that rate would be inconsistent with the objectives of today's order because it avowedly is designed to encourage Neutral Tandem to stop offering tandem switching service. Instead, by letting interim rates remain at the same level that the parties themselves negotiated at arms' length in the preexisting agreements, we ensure that the rates will be sufficiently reasonable as a proxy, subject to retrospective adjustment, for permanent rates subsequently established in a rate case. As should be obvious from the foregoing discussion, we have not thereby determined that a permanent termination agreement would be inherently unreasonable either if it exempted Neutral Tandem from any payment, or if it required that Neutral Tandem pay a rate different from the amount payable under the preexisting agreements.

¹² See PSL §113(1).

The Commission orders:

1. Neutral Tandem, Inc. - New York LLC (Neutral Tandem) and Level 3 Communications LLC (Level 3) are directed to maintain their current interconnections with each other in accordance with the transport agreement and the termination agreements described in this order.

2. Order Clause 1 above will remain in effect, and the rates prescribed therein will remain in effect subject to adjustment for the period from the date of this order until the later of (a) the execution of a termination agreement to replace the canceled agreements under which Neutral Tandem and Level 3 currently operate, or (b) completion of a rate proceeding to consider the parties' rates for transport and termination services.

3. This proceeding is continued but, upon completion, shall be closed in the Secretary's discretion.

By the Commission,

(SIGNED)

JACLYN A. BRILLING
Secretary