COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

In the Matter of the Petition of Level 3 Communications, LLC To Direct Neutral Tandem-Massachusetts, LLC To Provide Notice To Its Customers Of The Termination Of Certain Contract Arrangements	)))))))	DTC No. 07-3

NEUTRAL TANDEM'S RESPONSE TO LEVEL 3'S MOTION TO DISMISS

Neutral Tandem, Inc. and Neutral Tandem-Massachusetts, LLC (collectively, "Neutral Tandem") hereby responds to the June 27, 2007 Motion to Dismiss ("Motion") filed by Level 3 Communications, LLC and Broadwing Communications, LLC (collectively, "Level 3") that is incorporated within Level 3's response to Neutral Tandem's Answer and Cross-Petition dated June 13, 2007 ("Cross-Petition") in the above-captioned proceeding. Level 3 initiated the instant docket by filing a May 27, 2007 Petition against Neutral Tandem ("Petition"). As detailed below, Neutral Tandem respectfully requests that the Department of Telecommunications and Cable ("DTC" or "Department") dismiss or summarily deny the Level 3 Motion and address in full the merits of the Neutral Tandem Cross-Petition.

INTRODUCTION

Level 3's Petition and Neutral Tandem's Cross-Petition are two sides of the same coin that seek resolution of the same substantive question: whether Level 3 has the obligation to accept traffic directly from Neutral Tandem on just, reasonable and nondiscriminatory terms, or, to the contrary, whether Level 3 can deny just and reasonable interconnection to Neutral Tandem and unilaterally impose unreasonable and discriminatory interconnection terms and charges. Thus, this dispute involves the Department's general supervisory authority over Massachusetts

common carriers,[1] requires the Department to "inquire into the rates" demanded by Level 3 for accepting terminating traffic from Neutral Tandem,[2] and requires the Department to investigate and, if necessary, use its regulatory authority to correct patently certain "unjust and unreasonable" rates and practices of Level 3.[3] The Level 3 Motion asserts that Neutral Tandem's Cross-Petition should be dismissed out-of-hand because it seeks relief to which it is not entitled under Massachusetts law, and asks the DTC to act where it has no authority. As set forth below, Level 3's arguments are meritless.

First, Level 3's own Petition belies the assertion that the DTC lacks the regulatory authority to consider the issues raised by the parties' dispute. Level 3's Petition invokes the jurisdiction of the DTC and seeks relief "pursuant to" M.G.L. c. 159, §§ 12 and 13 -- the same general supervision over common carrier provisions Neutral Tandem relies on in support of its Cross-Petition.[4] Level 3 cannot have it both ways – invoking Department jurisdiction when it suits its ends and denying Neutral Tandem jurisdiction when it does not. Neutral Tandem's Cross-Petition also identifies ample additional statutory authority, including M.G.L. c. 159, §§ 14, 16, and 17, for the DTC to consider Neutral Tandem's request that Level 3 maintain its current direct interconnection with Neutral Tandem and continue to accept terminating traffic on just, reasonable and nondiscriminatory terms. This jurisdiction is justified by Neutral Tandem's interests in avoiding a Hobson's choice where Level 3 has demanded a grossly excessive fee for direct interconnection -- $0.001 per minute of use, totaling two-thirds of the $0.0015 per minute that Neutral Tandem charges to originating carriers (excluding the cost of additional charges for

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1 M.G.L. c. 159, §§ 12-13.

2 M.G.L. c. 159, § 17.

3 M.G.L. c. 159, §§ 14, 16.

4 *See* Level 3 Petition, at 1.

trunking facilities borne by Neutral Tandem that are not assessed to its customers) – or face a Level 3 prohibition on direct interconnection between Neutral Tandem and Level 3 to terminate calls to Level 3's substantial customer base in Massachusetts that will, potentially, drive Neutral Tandem out of business. It is also independently justified by the potential harm to wireless companies, traditional CLECs, cable-based providers and Voice-Over-Internet-Protocol ("VOIP") providers that rely on Neutral Tandem for cost-effective and redundant transit services from the unjustified Level 3 demands for compensation as a condition of direct interconnection.

Second, despite the DTC's clear jurisdiction to preside over and determine the merits of Neutral Tandem's Cross-Petition, Level 3's Motion attempts to obscure the relevant issues by claiming that the federal Telecommunications Act of 1996 (the "1996 Act") preempts the DTC from regulating *any* aspect of *local* telecommunications.[5] In similar fashion to the state law arguments noted above, once again Level 3's argument, if accepted, would require dismissal of Level 3's *own* Petition. Moreover, as detailed below, Neutral Tandem's Cross-Petition is entirely consistent with the federal regulatory scheme enacted in the 1996 Act and, thus, Level 3's preemption argument fails.

Importantly, several independent analyses by fellow state commissions concerning this same dispute between Neutral Tandem and Level 3 overwhelmingly support the merits of Neutral Tandem's Cross-Petition, both on the purported jurisdictional issues raised by Level 3's Motion, including its preemption argument, and on the merits of Neutral Tandem's position. For

[5] *See, generally*, 1996 Act, codified at 47 U.S.C. §§ 151 *et seq.* Level 3 misleadingly characterizes the U.S. Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Bd.* as holding that the 1996 Act preempts states from regulating *any* aspect of local telecommunications competition. In fact, that decision generally found that the Federal Communications Commission ("FCC") had authority under the 1996 Act to require states to follow the FCC's TELRIC ratemaking methodology. 525 U.S. 366, 384 (1999).

example, the Georgia Public Service Commission unanimously adopted its Staff's recommendation on June 19, 2007, which found that:

- "The Commission order[s] 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 [Neutral Tandem]. Level 3 is obligated under [state law] 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 [i.e., the ILEC] 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."[6]

Similarly, the Staff of the Illinois Commerce Commission issued its recommendations on June 4, 2007 and June 8, 2007 finding that:

- "The public interest is served by Commission review of interconnection and traffic exchange arrangements between Level 3 and Neutral Tandem to ensure pertinent terms and conditions are just and reasonable[.]"

- "The Commission should vigorously reject [Level 3's] narrow and self-interested position."

- "The shortcoming of, and fallacies inherent in, [Level 3's arguments] are profound."

- "The lack of consistency and principle, pursuit of self-interest and indeed blatant hypocrisy in Level 3's position are obvious, and palpable."

- Level 3's conduct in its dealings with Neutral Tandem "falls short of good faith."

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[6] 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, (attached hereto as Exhibit 1) (hereinafter collectively cited as "Georgia Commission Staff Recommendation, as adopted, at __"). The transcript of the June 19, 2007 hearing at which the Georgia Commission adopted Staff's Recommendation is attached hereto as Exhibit 2.

- "The evidence supports Neutral Tandem's position that it pays all direct costs associated with the common interconnection facilities" between Neutral Tandem and Level 3.

- "Level 3 refers to the 'calling party pays principle' as if it were a guideline, vaguely advisable from a policy standpoint, not generally applicable. This constitutes a particularly egregious misrepresentation of the state of the law."

- "There is no evidence here that Level 3 is in fact prevented from collecting reciprocal compensation from those CLECs that utilize Neutral Tandem's services, or even that it has suffered any cognizable harm from its own failure to do so. Level 3's assertion to the contrary is the reddest of herrings, and should be ignored."[7]

On June 25, 2007, the Administrative Law Judge for the Illinois Commerce Commission issued an order agreeing with Staff's conclusions and finding in Neutral Tandem's favor.[8]

Accordingly, for the reasons set forth herein, Level 3's Motion and the relief sought in its Petition should be denied, and Neutral Tandem's Cross-Petition should be considered on the merits and granted.

ARGUMENT

Pursuant to 220 C.M.R. § 10.06(6)(e), a party may move at any time after the submission of an initial filing for dismissal or summary judgment as to all issues or any issue in the case. In determining whether to grant a motion to dismiss, the DTC takes the assertions of fact as true and construes them in favor of the non-moving party.[9] Dismissal will be granted by the

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[7] Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, Initial Brief of the Staff of the Illinois Commerce Commission, at 6 (June 4, 2007) (hereafter cited as "IL Staff Initial Brief, at __.") (attached hereto as Exhibit 3); Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, Reply Brief of the Staff of the Illinois Commerce Commission, at 1 (June 8, 2007) (hereafter cited as "IL Staff Reply Brief, at __.") (attached hereto as Exhibit 4).

[8] Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, Order (June 25, 2007) (hereafter cited as "IL ALJ Order, at __.") (attached hereto as Exhibit 5).

[9] *Petition of the Attorney General of the Commonwealth of Massachusetts, pursuant to General Laws Chapter 164, § 93, for an Investigation of the Electric Distribution Rates of Fitchburg Gas and Electric Light Company*, D.T.E. 99-118, 2001 Mass. PUC LEXIS 67, at *5-7 (Oct. 2001) (denying motion to dismiss on grounds that the complainant properly pleaded Department authority under its enabling statute

Department only if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim.[10]

I. THE DEPARTMENT HAS CLEAR STATUTORY AUTHORITY TO GRANT NEUTRAL TANDEM THE RELIEF IT SEEKS IN ITS CROSS-PETITION.

As demonstrated below, the several statutory grants of authority indisputably give the DTC the power to award Neutral Tandem's requested relief -- to order Level 3 to directly receive traffic from Neutral Tandem under nondiscriminatory rates, terms and conditions.

A. Massachusetts Law Grants The DTC Broad Authority To Determine Terms Of Interconnection Between Neutral Tandem And Level 3.

Contrary to Level 3's attempts to minimize the role of the DTC in investigating and promoting telecommunications service and competition, Neutral Tandem's Cross-Petition establishes that the DTC has ample authority under Massachusetts law to order Level 3 to directly interconnect with Neutral Tandem for the sole purpose of accepting terminating traffic from Neutral Tandem on nondiscriminatory terms and conditions.[11]

The DTC has authority to hear Neutral Tandem's Cross-Petition pursuant to M.G.L. c. 159, § 12 which expressly grants the DTC "general supervision and regulation of and jurisdiction and control" over certain enumerated services "furnished or rendered for public use within the commonwealth." Those services include "the transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other method

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relative to unreasonable prices charged by electric companies and "[t]o dismiss would effectively gut [M.G.L. c. 164, § 93] and render it a nullity"); *see also Riverside Steam & Electric Company*, D.P.U. 88-123, at 26-27 (1988) (denying the respondent's motion to dismiss, finding that it did not appear beyond doubt that the petitioner could prove no set of facts in support of its petition.)

[10] *Id.*

[11] Neutral Tandem Cross-Petition, at 4-5.

of system of communication . . . ."[12] The DTC also has authority to inquire into Neutral Tandem's request for continued interconnection -- and conversely, Level 3's threatened service termination -- pursuant to M.G.L. c. 159, § 13, which grants it the power to "inquire into the rates, charges, regulations, ***practices***, equipment and ***services*** of common carriers in this commonwealth . . . ***regarding any service of a kind subject to its jurisdiction***."[13] No other provisions of the General Laws "shall prevent the department from exercising to the fullest extent such jurisdiction, powers, authority and discretion."[14]

Despite these broad grants of authority to the DTC, Level 3 asserts that its interconnection obligations under Massachusetts law are "fully met" through indirect interconnection only, and that the DTC has no authority to order direct interconnection under these, or apparently any, circumstances because no provision of the Massachusetts General Laws expressly requires direct interconnection between CLECs. (Mot. at 13-14.) Level 3's argument is unsupported and misses the mark.

First, nothing on the face of M.G.L. c. 159, §§ 12 or 13 suggests that the DTC cannot require direct interconnection for the receipt of terminating traffic. Level 3 cites no authority for such a narrow interpretation of the DTC's patently broad regulatory authority over local telecommunication services. Moreover, while the vast majority of post-1996 Act proceedings at the Department have involved ILEC practices and rates, the Department has relied on Sections

[12] M.G.L. c. 159, § 12(d).

[13] M.G.L. c. 159, § 13 (emphasis added).

[14] M.G.L. c. 159, § 105.

12 and 13, as well as other statutes in c. 159, to regulate CLEC practices and rates that affected other carriers and the public.[15]

Second, maintaining a direct interconnection between Neutral Tandem and Level 3 here, for purposes of terminating transit traffic, is clearly the most reasonable and efficient method of interconnection for Neutral Tandem and its originating carrier customers in the Commonwealth. Neutral Tandem currently delivers 9.4 million minutes of transit traffic per month to Level 3 in Massachusetts and this volume is growing rapidly as Neutral Tandem expands its facilities and customer base in the Commonwealth.[16] This level of traffic dictates direct interconnection under federal standards for direct interconnection, as well as in many other states.[17] Additionally, in contrast to ILEC-provided transit service, Neutral Tandem also pays for *all* costs to maintain and manage the interconnection between Neutral Tandem and Level 3, including all transport costs, the costs of equipment, and the costs to maintain and supervise such equipment.[18] Neutral Tandem passes signaling information to Level 3 that will enable it to recover any additional costs

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[15] *E.g., Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts concerning customer transfer charges imposed by Broadview Networks, Inc.*, D.T.E. 05-4, Order at 3, 10 (2006) (denying CLEC request to charge for services priced by Verizon at a zero rate without a supporting cost study or demonstration that the services were not comparable); *Re Broadview Networks*, D.T.E. 02-14-A, Order at 12 (2002) (requiring Broadview under M.G.L. c. 159, § 12 to continue to serve customers of a bankrupt CLEC it had acquired when termination of service would have the public interest).

[16] *See* Neutral Tandem Cross-Petition, at 26. Interestingly, while Level 3 claims this amount of traffic is *de minimis*, it simultaneously filed a petition solely to address the terms for such traffic.

[17] The FCC has found that direct interconnection is appropriate at the DS-1 threshold. *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket 00-218, at ¶¶ 89-91 (rel. Jul. 17, 2002). The N.Y. Public Service Commission found direct interconnection appropriate beginning at a level of one DS-1 worth of traffic. N.Y. PSC Case 00-C-0789, *In re Motion of the Comm'n pursuant to Sec. 97(2) of the Pub. Serv. Law to Institute an Omnibus Proceeding to Investigate the Interconnection Arrangements Between Tel. Cos.*, Order Establishing Requirements for the Exchange of Local Traffic, at 7 (issued Dec. 22, 2000). The volumes in Massachusetts are well in excess of DS-1 levels.

[18] Neutral Tandem Cross-Petition, at 7-8, 14.

for termination from the originating carrier as reciprocal compensation. Thus, the costs to Level 3 from Neutral Tandem are lower than the comparable interconnection costs would be with Verizon for receipt of the very same third-party traffic.

Third, in the context of the tandem transit services at issue here, the "indirect interconnection" that Level 3 advocates is the functional equivalent of no interconnection at all. The Illinois Staff articulated this very plainly in recommending that the Illinois Commission grant Neutral Tandem's requested relief and reject Level 3's "self-serving" request for indirect interconnection:

> [W]hat Level 3 seeks is not indirect interconnection -- it is already indirectly interconnected with the 18 CLECs that exchange traffic with it through Neutral Tandem. What Level 3 is suggesting is, for want of a better term, "double indirect interconnection," which is to say that the CLEC traffic transits the Neutral Tandem network to the [ILEC] network, and thereafter transits the [ILEC] network to Level 3 for termination. Level 3's argument is that, inasmuch as interconnection in this manner is technically possible, it is all that Level 3 is required to do.
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> This is true that such "double indirect interconnection" is technically possible. It is possible to exchange traffic in this manner, just as it is possible to drive from Chicago to Springfield by way of Toronto. The point is that both courses of action are self-evidently less efficient in terms of cost, time, and reliability. Moreover, no one who is simultaneously (a) concerned about cost, reliability and time; and (b) in his right mind, will actually do either.[19]

Requiring Neutral Tandem and the third party originating carriers that have elected to transit calls through Neutral Tandem to utilize such a circuitous path to reach Level 3's end-users in Massachusetts is "clearly less efficient and more costly, and therefore ***by definition inferior***."[20] As the Illinois Commission ALJ concluded, "Level 3's scheme, with two transit providers, two

[19] IL Staff Reply Brief, at 5 (emphasis added; internal citations omitted).

[20] IL Staff Initial Brief, at 17-18 (emphasis added).

sets of costs, and mandatory routing of traffic through the ILEC," is the "functional[] equivalent of a refusal by Level 3 to interconnect with NT."[21]

Finally, as a matter of policy, Level 3's demand for indirect interconnection is an unreasonable and unprecedented attempt to dictate to originating carriers which transit providers they must use. It is Level 3's view that indirect interconnection is all that is or can be required of Level 3 in this case, and that Level 3 may choose, at its sole election and under all circumstances, the form of interconnection it maintains with other carriers regardless of all other policy, network or regulatory considerations. (Mot. at 12-14.) The Illinois Staff highlighted the inherent hypocrisy in Level 3's position:

> First, Level 3 fails to understand that it is not, in the most fundamental sense, interconnecting with Neutral Tandem here -- rather, it is interconnecting with the CLECs to which Neutral Tandem provides tandem transit services, at those CLECs' request. These CLECs -- 18 in number -- are the carriers with which Level 3 is interconnecting for the exchange of traffic. These CLECs have quite obviously chosen to interconnect with Level 3 indirectly, through Neutral Tandem, and to exchange the traffic they originate with Level 3 indirectly, through Neutral Tandem.
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> Level 3, based on its conduct as manifest in the events underlying this proceeding, has no objection to interconnecting indirectly with CLECs through Neutral Tandem; it elected to do so itself for the traffic it originates and that terminates to these CLECs. As such, it has no real objection to direct connection with Neutral Tandem; again, it elected to connect directly with Neutral Tandem in order to achieve its own ends, the routing of traffic it originates for termination by those CLECs. Level 3 objects, nonetheless, to other carriers using the precise (if inverse) method to interconnect with it that it uses to interconnect with them. ***The lack of consistency and principle, pursuit of self-interest and indeed blatant hypocrisy in Level 3's position are obvious, and palpable.***[22]

As a matter of policy, allowing Level 3 -- the terminating carrier who does not bear the costs of transiting calls -- to dictate an inefficient and costly call route makes no sense. It would give Level 3, "effective veto power over any other CLEC carrier desiring direct interconnection,

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[21] IL ALJ Order, at 6.

[22] IL Staff Reply Brief, at 4-5 (emphasis added).

regardless of all other considerations such as efficiency, cost and effective delivery of traffic."[23] Such a policy would make the realization of network efficiencies "held hostage to the desires of the indirect interconnecter," and will either "foist inferior interconnection upon originating CLECs . . . or will force third-party CLECs to use [the ILEC's] transit services, which it is apparent they do not wish to use."[24]

Level 3's proposal that Neutral Tandem have an indirect interconnection with Level 3 and re-route traffic through Verizon for termination to Level 3 is illogical, has no legitimate business justification, and would unnecessarily force 9.4 million more minutes of traffic per month in the Commonwealth to route through Verizon's tandem (assuming, of course, that Verizon would have the switching and trunking facilities in place with respect to the switches served by Neutral Tandem to carry such traffic; if Verizon's facilities are not sufficient, customer service will be adversely affected until new facilities can be installed, if at all). In a situation like this, where two carriers cannot agree on the type of interconnection, the DTC not only has the statutory authority to intervene to protect adversely affected carriers, their end user customers and the public, but must exercise that authority in order to weigh all relevant and competing considerations and determine which type of interconnection would best serve the public interest.

[23] IL Staff Initial Brief, at 20.

[24] *Id.* at 20-21. Indeed, under Level 3's logic, it could create its own tandem transit service with associated charges to originating carriers that even exceeded ILEC transit charges and direct all originating carriers to use its transit service rather than ILEC or Neutral Tandem transit.

B. Massachusetts Law Also Grants The DTC Authority To Ensure That Any Charge Demanded Or Collected By Level 3 Is Reasonable And Nondiscriminatory.

Massachusetts telecommunications statutes make clear that charges made or demanded by a common carrier that are unjust or unreasonable are prohibited and declared unlawful.[25] If the DTC concludes that Level 3's refusal to accept terminating traffic from Neutral Tandem without compensation at a rate of $0.001 per minute of use is "unjust, unreasonable, unjustly discriminatory, unduly preferential, in any wise in violation of any provision of law, or insufficient to yield reasonable compensation for the service rendered," the DTC has express authority to determine "just and reasonable rates,"[26] and to correct unjust and unreasonable common carrier practices.[27] Department case law is clear that a CLEC is permitted to impose charges at the same level as the ILEC for the same or similar services but otherwise must support its rates by the filing of a cost study.[28] If the CLEC cannot make the required showing, the charges are invalidated.[29]

Level 3 asserts that its demand for compensation from Neutral Tandem is consistent with these statutory provisions because (1) Level 3 is not required to provide direct interconnection to Neutral Tandem "in perpetuity and without compensation"; and (2) Level 3 is entitled to treat Neutral Tandem differently than Verizon for providing the same tandem transit service because Neutral Tandem is not an ILEC. (Mot. at 14-15.)

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[25] M.G.L. c. 159, § 17.

[26] M.G.L. c. 159, § 17.

[27] M.G.L. c. 159, § 16; *see also Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts concerning customer transfer charges imposed by Broadview Networks, Inc.*, D.T.E. 05-4, Order, at 2 (2006).

[28] *Broadview Networks, Inc.*, DTE 05-4, *supra*, at 3, 10.

[29] *See id.*

The first myth of Level 3's argument is easily dispelled. Neutral Tandem does not seek "free" interconnection at all. To the contrary, as discussed above, Neutral Tandem pays all costs for maintaining direct interconnection between Neutral Tandem and Level 3. Any other costs to Level 3 for termination of traffic should properly be recovered as reciprocal compensation by Level 3 from the originating carrier. Under the fundamental, well-established tenets of reciprocal compensation,[30] the originating carrier, not the tandem transit provider, is obligated to pay Level 3 reciprocal compensation for each minute of traffic sent to Level 3 for termination to Level 3's end users. Neutral Tandem properly relays to Level 3 all signaling information that Neutral Tandem receives from the originating carrier, enabling Level 3 to bill the originating carrier for appropriate termination charges.[31] As a result, Level 3 is able to collect compensation from both its own customer and the carrier of the originating party, for Level 3's network and call termination costs. Any additional recovery which Level 3 demands from Neutral Tandem is inherently unreasonable, because it would permit Level 3 to obtain double recovery for the same, limited, call termination costs. Further, Neutral Tandem does not seek "perpetual" interconnection. The amount of traffic that Neutral Tandem delivers to Level 3 dictates direct interconnection between the parties to maintain an efficient network, and Neutral Tandem simply delivers traffic to Level 3 that Level 3 is obligated to receive.

Level 3's second argument, that it is entitled to discriminate against Neutral Tandem as compared to Verizon, is similarly unavailing. (Mot. at 15.) Level 3 does not dispute that it receives ***no*** payment from Verizon when Verizon delivers the very same tandem transit traffic to

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[30] *See, e.g.*, 47 C.F.R. §§ 51.701 *et seq.* Carriers either compensate one another for the pre-determined costs to terminate each other's originating calls, or institute a "bill and keep" arrangement, under which each carrier recovers its costs by billing its own end users and keeping such revenue. Indeed, Level 3 seems to be operating under the bill and keep regime with many other carriers, since it neither receives nor pays reciprocal compensation for much of its traffic.

[31] Neutral Tandem Cross-Petition, at 11-12.

Level 3 that Neutral Tandem delivers. Yet, Level 3 openly demands payments from Neutral Tandem for the exact same termination service (for which, as noted above, all costs are properly recoverable as reciprocal compensation from originating carriers or through bill and keep arrangements). The mere fact that Level 3 demands such payments from Neutral Tandem here states a claim under M.G.L. c. 159, § 17, and gives the DTC authority to act under M.G.L. c. 159, §§ 13, 14, and 16.

Further, the fact that Verizon is an ILEC and Neutral Tandem is a CLEC and that Verizon provides Level 3 with services in addition to tandem transit services (Mot. at 15-16) are not principled bases for Level 3's discriminatory pricing. The Georgia Public Service Commission rejected the same arguments proffered by Level 3 in that proceeding:

> The fact that AT&T [the ILEC] 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.[32]

Level 3's attempt to minimize its discriminatory compensation demands by painting Neutral Tandem as the wrongdoer are equally misleading and disingenuous. Relying on an irrelevant provision of a contract between Neutral Tandem and Verizon, Level 3 argues that Neutral Tandem has agreed to pay terminating compensation to other carriers for transiting terminating traffic. (Mot. at 16.) Level 3's reliance on Section 6.1 of the Verizon contract is misplaced. While this proceeding involves the lawful termination of transit traffic directly from Neutral Tandem to Level 3, Section 6.1 of the Verizon contract expressly applies only to *non-*

[32] Georgia Commission Staff Recommendation, as adopted, at 6.

transit traffic that carriers misdirect to Neutral Tandem.[33] Section 6.2 of the agreement, entitled "Tandem Transit Traffic and Four Party Traffic," the very next section of the contract, applies to Neutral Tandem's transmittal of transit traffic and contains no compensation provision.[34] Similarly, Level 3's claim that Neutral Tandem "has conceded that it had previously agreed to provide at least one Level 3 subsidiary with a usage-based transport recovery charge" mischaracterizes the facts. (Mot. at 16, n. 32.) Under its July 2004 agreement with Level 3, Neutral Tandem agreed to provide Level 3 with a usage-based transport recovery charge *on an interim basis*, in consideration of establishing *a two-way business relationship* with Level 3. The transport recovery fee was to phase down to zero as Level 3's usage of Neutral Tandem's transit service increased. Thus, it would not be appropriate to order such payments in the context of establishing nondiscriminatory terms and conditions for a one-way interconnection agreement, like here where Neutral Tandem only seeks to transit traffic to Level 3 for termination.

C. DTC Oversight Is Also Necessary To Ensure That Level 3 Does Not Engage In Anticompetitive Behavior By Abusing Its Monopoly Control Over Access To Its Own End-Users.

The DTC should also exercise its broad authority over the issues raised in Neutral Tandem's Cross-Petition to promote competition. In addition to the important policy issues discussed in Neutral Tandem's Cross-Petition,[35] the DTC should also be concerned about Level 3's bottleneck control over the telephone numbers assigned to Level 3's end-users. As such, Level 3 is the only telecommunications company that can terminate transit traffic to those

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[33] *See* Transcript of Rian Wren, Neutral Tandem's President and Chief Executive Officer, at 143:13-146:18, Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n (attached hereto as Exhibit 6). It is worth noting that the *non-transit* traffic covered by this amendment constitutes only 0.01% of the total local transit traffic Neutral Tandem carriers in New York. (*Id*. at 145:20-22.)

[34] *Id.*, at 144:7-146:18.

[35] Neutral Tandem's Cross-Petition, ¶¶ 51-58.

numbers. There can be no substitute provider of such a service. The FCC has found that non-incumbent carriers undoubtedly can wield market power in terms of unreasonably leveraging bottleneck access to their end-users, and that it is appropriate to use regulatory authority to "prevent CLECs from exploiting [that] market power" when they do so.[36] The Illinois Staff similarly recognizes that "traffic termination is a bottleneck service and function; no carrier other than Level 3 can provide the termination function to Level 3's customers."[37]

Indeed, Level 3 is itself demonstrating the existence of such market power, not only by its improper actions in this docket with Neutral Tandem, but also by its recent proposed tariff revisions with respect to all originating carriers in the Commonwealth and in West Virginia. Level 3 recently filed with the DTC a proposed tariff revision that sought a 1,000-plus percent increase in the rate it charges to originating carriers for local end office access switching.[38] Level 3's attempt to charge what undoubtedly amount to monopoly rents was so clear that even Verizon petitioned the DTC to suspend and investigate -- noting that Level 3 is the bottleneck provider of calls destined to its customers.[39] The Department granted a suspension order and, under above-discussed state law principles, required Level 3 to furnish a supporting cost study and pre-filed testimony and allowed other interested parties to file intervention petitions.[40] Level 3 subsequently withdrew its proposed revision rather than provide a supporting cost

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[36] *In re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 9923, ¶ 34 (rel. Apr. 27, 2001).

[37] IL Staff Initial Brief, at 21 (emphasis added).

[38] *Investigation as to the Propriety of Rates and Charges set forth in Tariff M.D.T.C. No. 5 by Level 3 Communications, LLC*, Massachusetts DTC 07-1, Notice of Investigation and Hearing, May 21, 2007.

[39] Verizon Petition for Suspension of Tariff, DTC 07-1, April 24, 2007.

[40] D.T.C. 07-1, *Order*, April 30, 2007.

study.[41] The West Virginia Commission suspended a similar Level 3 attempt there,[42] acting on the recommendation of its staff, which aptly concluded that since "connecting carriers have no choice regarding connecting to Level 3 for the purposes of completing calls to its customers . . . this becomes a *de facto* monopoly situation."[43]

Level 3's actions in this proceeding are no different. The Department similarly should not and cannot allow Level 3 to charge Neutral Tandem without a cost study or other appropriate substantiation that the costs are just, reasonable and nondiscriminatory under c. 159, an interconnection fee that almost approximates the full amount of Neutral Tandem's charges to CLECs for providing facilities-based tandem transit service. Level 3 is quite plainly attempting to use its bottleneck control over call termination to improperly extract money from Neutral Tandem and, indirectly, from the wireless, wireline, cable-based CLEC and VOIP providers that rely on Neutral Tandem for the cost-effective transit service needed to offer competitive telecommunications services to the benefit of Massachusetts end users. Indeed, Level 3 has been quite clear that it is willing to use the threat of traffic disruption as a negotiating tool, stating that it views the blocking of traffic as "a critical part of the negotiating toolkit[.]"[44]

The case for effective oversight is particularly compelling in these circumstances, where Level 3's unfounded demands for excessive and discriminatory payments from Neutral Tandem appear to be motivated by an anticompetitive and unlawful attempt to eliminate Neutral Tandem

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[41] Letter from Level 3 to Department, DTC 07-1, June 20, 2007.

[42] Case 07-0566-T-T, Commission Suspension Order, dated April 19, 2007.

[43] Case 07-0566-T-T, PSC Utilities Division, Further Recommendation, dated April 19, 2007.

[44] Level 3's Corrected Mot. to Dismiss and Resp. to Pet. of Neutral Tandem, Florida Pub. Serv. Comm'n, at 7 (Mar. 12, 2007). As the FCC has noted, tactics like those employed by Level 3 have no place in the public switched telephone network: "If such refusals to exchange traffic were to become a routine bargaining tool, callers might never be assured that their calls would go through." *In re Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 9923, ¶ 24 (rel. Apr. 27, 2001).

as a competitor in the transit marketplace. Level 3's own Senior Vice President and Assistant General Counsel admits that "Level 3 has made no secret of its intentions to offer its own competitive transit services."[45] Knowing that Neutral Tandem anticipated using the net proceeds from its IPO to fund the continued expansion of its business, Level 3 hurriedly entered into an amendment of its originating service contract with Neutral Tandem (for the delivery of Level 3 traffic to other carriers) and then immediately sent Neutral Tandem notice of Level 3's intent to terminate other interconnection agreements existing between the parties.[46]

Where, as here, one party is willing to use bottleneck facilities and the threat of traffic disruption as negotiating tools, the DTC can and should exercise its broad authority. Level 3's attempt to restrict the DTC's regulatory oversight must be rejected out of hand, particularly given the ever-increasing percentage of traffic carried by non-incumbent carriers.

II. FEDERAL LAW IS ENTIRELY CONSISTENT WITH NEUTRAL TANDEM'S REQUEST FOR RELIEF.

Level 3 has sought to deny several state commissions the opportunity to substantively evaluate its conduct by arguing that Neutral Tandem's request to maintain its direct interconnection with Level 3 is preempted by the 1996 Act. Level 3's Motion makes the same arguments here. (Mot. at 6-13.) While state law may vary in each jurisdiction, Level 3's preemption argument has failed universally. Governing law and sound policy each independently supports the conclusion that the DTC should determine that the relief requested by Neutral Tandem is appropriate, lawful, and in the public interest.

Level 3's preemption theory finds no support in the language of Section 251(a)(1) or in the 1996 Act in general. Section 251(a)(1) of Title 47 of the United States Code requires that

[45] Correspondence to Neutral Tandem dated March 14, 2007, at 4, attached to the Neutral Tandem Cross-Petition as Exhibit 7.

[46] Neutral Tandem Cross-Petition, at 14-15.

telecommunications carriers "interconnect, directly or indirectly," with other carriers' networks. On its face, Section 251(a)(1) merely establishes a federal duty to interconnect, directly or indirectly, with other carriers. The purpose of Section 251(a)(1) is merely to ensure that all carriers are interconnected in some manner, and indirect interconnection is the minimum level of interconnectivity that achieves this objective.[47] However, Level 3 cites no authority supporting its novel attempt to transform the existence of a federal duty to interconnect "directly or indirectly," into a blanket right for Level 3 to refuse direct interconnection under state law.

The reason Level 3 cites no such authority is simple: no such authority exists. Indeed, when Congress enacted the 1996 Act, "it did not expressly preempt state regulation of interconnection."[48] Congress made clear that 1996 Act was not to be construed to have preemptive effect unless that preemption was express:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[49]

Moreover, Level 3's preemption argument here directly contradicts its arguments to the FCC just four months ago. In its reply brief to the FCC in support of the Missoula Plan, Level 3 noted that one key component of the plan is its "affirmative obligation for *all* carriers to accept

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[47] *See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499, ¶ 997 (rel. Aug. 8, 1996). Even if Level 3's interpretation of Section 251(a)(1) is correct, which it is not, there is an independent right to direct interconnection under Section 201 upon a showing of public interest. Section 251 expressly says that it does not diminish in any way the rights established under Section 201.

[48] *Mich. Bell Tel. Co. v. MCImetro Access Transmission Serv., Inc.*, 323 F.3d 348, 358 (6th Cir. 2003).

[49] Telecommunications Act of 1996, § 601(c), 110 Stat. 56, 143 (1996) (uncodified note to 47 U.S.C. § 152); *see also Mich. Bell*, 323 F.3d at 358.

direct interconnection."[50] Level 3 specifically told the FCC that direct interconnection is "not only entirely consistent with federal law, but fair and efficient for all carriers."[51] Thus, it is readily apparent that Level 3's proffered preemption argument here is rooted only in Level 3's own self-interest within this particular proceeding, as opposed to any principled reading of the law.

As the General Laws indicate, the DTC is vested with jurisdiction over, and broad authority to regulate, enumerated services "furnished or rendered for public use within the commonwealth" including telecommunications services at issue here.[52] The DTC's colleagues in Georgia, applying similar statutory law to the same set of facts, have found that the PSC is "not preempted from requiring Level 3 to interconnect directly with Neutral Tandem." [53] Rather, quite to the contrary, "Level 3 is obligated under [state law] to permit reasonable interconnection with Neutral Tandem."[54]

Similarly, Illinois Staff determined that the Illinois Commerce Commission has authority to act on Neutral Tandem's Petition because, as here, "the establishment and maintenance of competitive telecommunications markets" are "a fundamental policy of the state of Illinois."[55] Accordingly, Illinois Staff and the Illinois Administrative Law Judge both rejected the notion that state commissions should decline to exercise their authority and involve themselves in disputes between competitive carriers, finding instead that commission review "is in the public

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[50] *See Reply Comments of the Missoula Plan Supporters in Support of the Missoula Plan*, at 22, filed in CC Docket No. 01-92 (Feb. 1, 2007) (emphasis in original).

[51] *Id.*

[52] M.G.L. c. 159 §§ 12, 13.

[53] Georgia Commission Staff Recommendation, as adopted, at 1.

[54] *Id.*

[55] IL Staff Initial Brief, at 7.

interest" and may be required "to ensure that telecommunications traffic is appropriately exchanged between carriers."[56] The Illinois Staff found that the issues raised in the dispute between Neutral Tandem and Level 3 do implicate the public interest, and rejected the notion that the dispute could be summarily ignored as a private matter of commercial negotiations:

> The public interest concern implicated here is the exchange of traffic. The agreement per se between carriers (two CLECs in this instance) is not of central importance, but rather the interconnection and traffic exchange agreements (and the terms and conditions thereof) that are central to competitive policy. The purpose of interconnection between carriers is, of course, to enable exchange of traffic. Interconnection is pointless for any reason other than traffic exchange. Traffic exchange, subject to appropriate terms and conditions, is essential to competitive telecommunications markets and services. Without reliable and efficient traffic exchange, the "network of multiple interconnected networks" essential to competitive telecommunications markets will either function poorly or not at all. It follows that, from a policy perspective, regulatory oversight, where required, of terms and conditions governing interconnection and traffic exchange between all carriers is necessary and appropriate.[57]

Illinois Staff also highlighted the "fallacies" of Level 3's argument that state commissions would open the door to regulatory oversight of all agreements between CLECs if they act on Neutral Tandem's petitions:

> Level 3 insists that it is "not in the public interest" for the Commission to "force two competitive providers into a regulated agreement." ***The fallacies of Level 3's position are apparent and unmistakable.*** The first is the obvious hyperbole. . . the Commission only reviews agreements involving two CLECs when intractable issues arise, and only reviews and oversees those portions [of] such agreements necessary to ensure consistency with the public interest. The second is Level 3's failure to recognize any circumstance between CLECs where Commission oversight is appropriate. To illustrate, Level 3 would have the Commission sit idly by even when a dispute between CLECs regarding interconnection and traffic exchange would cause calls to be blocked or not otherwise completed. This is patently erroneous and contrary to the Commission's authorities and responsibilities to protect the public interest.[58]

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[56] *Id.* at 8.

[57] *Id.* at 9 (emphasis added; internal citations omitted).

[58] *Id.* at 9-10 (emphasis added; internal citations omitted).

The Illinois Staff further emphasized that Level 3's threat of unilateral disconnection "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."[59]

The Administrative Law Judge overseeing a virtually identical proceeding before the New York Public Service Commission similarly rejected Level 3's motion to dismiss Neutral Tandem's claims, which made the same jurisdictional and preemption arguments that Level 3 advocates to the DTC: "[T]he record presented to the Commission should be one in which the parties will have had a full opportunity to present evidence appropriate to whatever legal conclusions the Commission may reasonably be expected to adopt."[60]

As noted by the Georgia Commission in its particularly comprehensive review of Level 3's preemption arguments, "every preemption analysis 'start[s] with the assumption that the historic police powers of the states are not superseded by federal law unless preemption is the clear and manifest purpose of Congress.'"[61] Even where that very difficult standard may be met, "any preemptive effect that is found to exist must be given a narrow application."[62] "The power to pre-empt state law is 'an extraordinary power…that we must assume Congress does not exercise lightly.'"[63]

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[59] *Id.* at 5.

[60] N.Y. PSC Case 07-C-0233, Ruling on Motion to Dismiss, dated April 6, 2007.

[61] Georgia Commission Staff Recommendation, as adopted, at 3, *citing Cliff v. Payco*, 363 F.3d at 1122, *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[62] *Id., citing Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

[63] *Id., citing Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Level 3's preemption arguments also fly in the face of well-established Supreme Court precedent in the telecommunications arena itself. Indeed, as noted by the Georgia Commission, "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."[64] Analyzing Level 3's various preemption arguments, the Georgia Commission appropriately dismissed any possible preemption grounds. First, it found no apparent claim for nor grounds for express preemption.[65] Second, it found no field preemption, determining that "the express preservation in Section 261 of state authority to implement state regulations that are not inconsistent with federal regulations defeats any such argument."[66]

Level 3 has continuously argued over the past several months, without success, the same argument it attempts here – that the 1996 Act preempts state utility commissions from taking action in the disputes arising out of Level 3's conduct because of the doctrine of conflict preemption. Level 3 has argued, for example, that state commissions cannot act to set just and reasonable terms for interconnection between LECs simply because the 1996 Act also contains interconnection standards.[67] While Section 251(a)(1) sets a minimum requirement of direct or indirect interconnection, it does not specify which party has the choice, or dictate the terms for such interconnection under various circumstances – including those here.

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[64] *Id., citing Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

[65] *Id.* at 2-5.

[66] *Id*. at 3.

[67] In the Georgia proceeding, Level 3 characterized Neutral Tandem's Petition, as it does here, as "an impermissible attempt to circumvent the federally-mandated interconnection process . . ." Georgia Commission Staff Recommendation, as adopted, at 3 (*citing* Level 3's Response at 5). Level 3 also argued in the Georgia proceeding, again as it does here, that construing state law to require Level 3 to interconnect directly with Neutral Tandem would somehow conflict with its obligations under the Federal Act to interconnect directly or indirectly. *Id.* (*citing* Level 3 Brief, pp. 9-10).

To the contrary, the 1996 Act specifically preserves state authority, where states act to foster local interconnection and local competition.[68] Because Neutral Tandem's ability to interconnect for the delivery of competitors' traffic from traditional CLECs, cable providers, VOIP carriers and wireless providers indisputably promotes local competition, the Department's review and confirmation of that right is clearly consistent with – and in no way contrary to – the specific terms and overall goals of the 1996 Act. Indeed, the Georgia Commission has already concluded, on these same facts, that requiring Level 3 to interconnect directly with Neutral Tandem is actually "necessary to further competition."[69]

In rejecting Level 3's preemption argument, and concluding that a requirement that Level 3 directly interconnect with Neutral Tandem would not conflict with the Act, the Georgia Commission applied a two part analysis.

> 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.[70]

The Commission next evaluated the authority preserved under the Act, and the harmonious nature of the relief to be granted.

> 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. 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

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[68] 47 U.S.C. 261; *See also Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc.*, 323 F.3d 348 (6th Cir. 2003).

[69] Georgia Commission Staff Recommendation, as adopted, at 4.

[70] *Id.*

> 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.[71]

While Level 3 has argued that the 1996 Act mandates only "direct or indirect" interconnection between LECs, that argument overlooks the most obvious of points -- that Neutral Tandem *provides* indirect interconnection between originating carriers and Level 3 (as the terminating carrier). In other words, the direct interconnection between Level 3 and Neutral Tandem is necessary to achieve the minimum level of interconnection under the 1996 Act.

Accordingly, Level 3's preemptions arguments should be rejected as a matter of law and the DTC should deny Level 3's Motion to Dismiss the Neutral Tandem Cross-Petition.

[71] *Id.*

CONCLUSION

WHEREFORE, for the reasons set forth herein, Neutral Tandem respectfully requests that the Department dismiss or summarily deny Level 3's Motion to Dismiss, consider the merits and grant the Neutral Tandem Cross-Petition, and provide for such other and further relief as the Department may deem lawful and appropriate.

Respectfully submitted,

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