

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

Neutral Tandem, Inc. and Neutral Tandem-Massachusetts, LLC (collectively “Neutral Tandem”), pursuant to 220 C.M.R. 1.04(5) and Mass. R. Civ. P. 12(b)(1), respectfully move the Department to dismiss as moot the Petition of Level 3 Communications, LLC (“Petition”). Upon the dismissal of the Petition, Neutral Tandem will file a notice of withdrawal of its Cross-Petition against Level 3 Communications, LLC and its subsidiaries, including Broadwing Communications, LLC (collectively “Level 3”) pursuant to 220 C.M.R. 1.04(4)(a). In support of this Motion, Neutral Tandem states as follows:

¹ Level 3 filed its original petition with the DTC on May 24, 2007. On May 30, Level 3 withdrew that petition and replaced it with another petition filed on May 30. Accordingly, all references in this Motion to the “Petition” or “Level 3’s Petition” are to the May 30, 2007 petition.

\$.001/minute charge was a May 8 letter from Level 3 to Neutral Tandem, in which Level 3 unilaterally announced that it would begin imposing such a charge after June 25. (*Id.*)

2. On June 13, 2007, Neutral Tandem filed its Answer and Cross-Petition against Level 3. Neutral Tandem's Cross-Petition requested that the Department order Level 3 to continue receiving traffic via the parties' existing interconnections after June 25, 2007 on nondiscriminatory terms and conditions. (Cross-Petition, ¶¶ 67-69.)

3. On June 27, 2007, Level 3 filed its response to and motion to dismiss Neutral Tandem's Cross-Petition. On July 9, 2007, Neutral Tandem filed its opposition to Level 3's motion to dismiss the Cross-Petition. To date, the Department has not issued a ruling on Level 3's motion to dismiss or any other substantive rulings, and no formal procedural schedule has been issued.

4. As of August 3, 2007, Neutral Tandem no longer delivers any traffic to Level 3 in Massachusetts via the parties' existing interconnections. (Ex. 1, Saboo Aff. ¶ 3.) Accordingly, there no longer is any basis for Level 3 to continue pursuing its requests that the Department order Neutral Tandem to stop routing traffic over the parties' existing interconnections and order Neutral Tandem to provide notice to its carrier customers. Accordingly, Level 3's Petition should be dismissed as moot.²

5. Similarly, there no longer is any basis for Neutral Tandem to pursue its Cross-Petition against Level 3, and Neutral Tandem will withdraw such Cross-Petition upon the Department's dismissal of the Petition.

6. Level 3 may contend that its request that the Department order Neutral Tandem to pay Level 3's unilateral \$.001/minute charge is not moot. (Pet. ¶ 8.) There is no basis

² See, e.g., *Robinson v. Contributory Retirement Appeal Bd.*, 62 Mass. App. Ct. 935-36 (2005) (rescript); *In the Matter of Sturtz*, 410 Mass. 58, 59-60 (1991).

whatsoever for the Department to issue an order requiring Neutral Tandem to pay any such charge. There is no contract between Neutral Tandem and Level 3 providing for the payment of any such charge; nor (to Neutral Tandem's knowledge) has Level 3 tariffed any such charge.

7. To the contrary, the \$.001/minute charge literally was made up out of thin air by Level 3. Level 3 has admitted in other proceedings that the \$.001/minute charge is not based on any costs Level 3 claims to incur to receive traffic from Neutral Tandem.³ As noted in Neutral Tandem's July 9, 2007 Response to Level 3's Motion to Dismiss (at pp. 2-3), the excessive charge demanded by Level 3 almost approximates the sum total of the per-minute charges that Neutral Tandem assesses to its own customers for transit services.

8. Other state commissions have rejected Level 3's attempt to unilaterally impose this unsupported and excessive \$.001/minute charge. The Illinois Commerce Commission found that Level 3's attempt to impose this charge as an offer of compromise was "illusory"⁴ and violated that state's laws forbidding carriers from "knowingly impeding the development of competition" in Illinois. The Illinois Commission also described Level 3's attempts to impose this charge as "impermissible," and noted that Level 3's efforts were:

little more than a thinly-veiled attempt to impose a reciprocal compensation-like obligation upon NT [Neutral Tandem] under a different label. . . . We also reject Level 3's notion that such a charge is a market-based rate. Level 3 has provided nothing to substantiate such a label.⁵

9. The New York Public Service Commission rejected a similar request by Level 3 that Neutral Tandem pay Level 3 a \$.0007/minute charge after June 25 -- less than the charge

³ See Docket No. 07-03-008, *Neutral Tandem California, LLC. v. Level 3 Communications, LLC*, Cal. Pub. Util. Comm'n, 06/05/07 Evidentiary Hearing Transcript, at 257. (Ex. 2.)

⁴ Docket No. 07-0277, *Neutral Tandem, Inc. v. Level 3 Communications, LLC*, Ill. Commerce Comm'n, adopting June 25, 2007 Order of ALJ Brodsky, at 9 (July 10, 2007) (Ex. 3). The June 25, 2007 Order of ALJ Brodsky (hereafter "Brodsky Order") is attached hereto as Exhibit 4.

⁵ Brodsky Order, at 10. Level 3's conduct in that proceeding was found so egregious that Level 3 was ordered to pay nearly all of Neutral Tandem's attorneys' fees. (*Id.* at 13, 15.)

Level 3 demands here -- concluding that the charge was “avowedly designed to encourage Neutral Tandem to stop offering tandem switching service” and would be “inconsistent with the objectives” that the commission cited in granting Neutral Tandem’s petition for relief in that state.⁶

10. In sum, there is no basis, in law, contract, or otherwise, for the Department to order Neutral Tandem to pay Level 3’s excessive, non cost-based, unilaterally imposed charge for the few weeks from June 25, 2007 until such traffic to Level 3 ceased as of August 3, 2007.

⁶ Docket No. 07-C-0233, *In re Petition of Neutral Tandem-New York, LLC for Interconnection with Level 3 Communications and Request for Order Preventing Service Disruption*, New York Public Service Commission, Order Preventing Service Disruption and Requiring Continuation of Interim Interconnection, at 13 (June 22, 2007) (Ex. 5).

WHEREFORE, for the reasons set forth herein, Neutral Tandem respectfully requests that the Department dismiss Level 3's Petition as moot, at which time Neutral Tandem will file a notice of withdrawal of its Cross-Petition.

Respectfully submitted,

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