

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of a Complaint and Request
for Expedited Hearing of Neutral Tandem,
Inc., Against Level 3 Communications

PROTECTIVE ORDER

In the Matter of the Application of Level 3
Communications, LLC, to Terminate
Services to Neutral Tandem, Inc.

BACKGROUND:

1. This matter was referred to the Office of Administrative Hearings by the Minnesota Public Utilities Commission (Commission) for a contested case hearing in its Notice and Order for Hearing issued on May 9, 2007, in the above-entitled dockets.

2. During the proceedings in this matter, Parties may file, request and use trade secret information or nonpublic data, as defined by Minnesota Statutes chapter 13.01, *et seq.* ("Trade Secret Information"). For purposes of this Order, the term "Party" shall not include any government agency.

3. Minnesota Statutes section 14.60, subdivision 2, allows the Administrative Law Judge in a contested case to conduct a closed hearing to discuss trade secret or nonpublic data, issue necessary protective agreements and orders, and seal all or part of the hearing record.

ACCORDINGLY, IT IS HEREBY ORDERED:

Minnesota state agencies, such as the Minnesota Department of Commerce and the Minnesota Public Utilities Commission (hereafter, Minnesota state agencies), are subject exclusively to Minn. Stat. §§ 13.01, *et seq.* ("Minnesota Government Data Practices Act" or "Minn. Stat. Ch. 13"), the records retention requirements of Minn. Stat. §§ 138.163-138.226, applicable agency rules and procedures, and by paragraph 11 of this Order, such that this Protective Order may guide but does not control the Minnesota state agencies' treatment of trade secret data produced as part of this proceeding except as specifically noted in paragraph 11 below.

1. Confidential Trade Secret Information and Highly Confidential Trade Secret Information.

(a) All Confidential Trade Secret Information and Highly Confidential Trade Secret Information (collectively referred to as "Trade Secret Information") shall be furnished pursuant to the terms of this Protective Order, and shall be treated by all persons accorded access thereto pursuant to this Protective Order as constituting confidential, competitive, trade secret, and business information, and shall be used solely for the purpose of this proceeding (discovery, testimony, comments, information requests, motions, cross-examination and argument) and solely in accordance with this Protective Order, and shall not be used or disclosed for any other purpose or in any other manner.

In accordance with the Commission's September 1, 1999, Revised Procedures for Handling Trade Secret and Privileged Data (Commission's Procedures), all documentary material claimed to be Trade Secret Information or Nonpublic Data shall be marked substantially as follows by stamping each individual page with the designation "CONTAINS CONFIDENTIAL [or HIGHLY CONFIDENTIAL] TRADE SECRET INFORMATION- NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NOS. P-5733/C-07-296 and P-5733, 6403/M-07-354." Additionally, all hard copies of nonpublic documents containing the above designation shall be reproduced on yellow paper.

All copies of documents so marked will be made and maintained in a manner that will facilitate maintaining confidentiality of the information. For purposes hereof, notes made pertaining to or prepared as the result of a review of Trade Secret Information shall be subject to the terms of this Protective Order. Any such material received in photographic, digital or electronic formats shall be identified as protected by the producing party by means appropriate to the medium and shall be handled by the recipient in a manner suitable to protect its confidentiality.

(b) Trade Secret Information shall not include information, which is demonstrated by the party in possession of the information;

(i) to have been in its possession or the possession of its officers, directors, employees, affiliates, or agents prior to receiving it from the disclosing party, and not subject to a confidentiality obligation, or

(ii) to have been in, the public domain prior to the disclosure of such information by the disclosing party to the receiving party, or becomes a part of the public domain through no breach of this Order by the receiving party, or

(iii) to have been supplied to the receiving party without restriction by a third party who is under no obligation to the disclosing party to maintain such information in confidence.

The party in possession of information subject to this exclusion shall inform the disclosing party claiming the information is Trade Secret Information that it is subject to this exclusion prior to using it in reliance on this exclusion.

(c) Use of Trade Secret Information and Persons Entitled to Review.

(i) **Persons entitled to review; use restrictions.** Trade Secret Information shall only be made available to a Requesting Party that has been formally granted party status pursuant to Minnesota Rules 7829.800 or 1400.6200. All Confidential Trade Secret Information made available pursuant to this Protective Order shall be given solely to counsel for the requesting party or other authorized persons who are designated by counsel as being the party's staff, experts or witnesses in this proceeding and who executed Exhibit A in a timely manner prior to their receipt of the Trade Secret Information. Trade Secret Information shall not be used or disclosed except for purposes of this proceeding. The Trade Secret Information may not be used or referenced in other proceedings in Minnesota or in other jurisdictions, including but not limited to (i) use by any Party in connection with any subsequent competitive bidding and/or resource acquisition process in Minnesota or other jurisdictions for the development of electric generating resources, or (ii) used by any Party or any affiliates or consultants in connection with any efforts in Minnesota or other jurisdictions to seek to develop, amend or lobby for any legislation. Unless otherwise provided in this Protective Order, all Trade Secret Information will be safeguarded and handled in accordance with the Commission's Procedures. (ii) **Third-Party Protections.** Prior to furnishing Trade Secret Information generated by any unaffiliated third-party to a Requesting Party, any responding party shall be allowed 48 hours to notify the affected unaffiliated third-party of the identity of the Requesting Party and the nature of the requested information. If the unaffiliated third-party objects to its disclosure to a particular Requesting Party, the responding party shall bring a motion for a protective order within 24 hours.

(iii) **Copies and databases.** Neither a Requesting Party nor any other person who may become authorized or who otherwise may gain access to the Trade Secret Information shall copy or duplicate it in any way, in whole or in part, except to the extent necessary for reasonable use with respect to the Proceeding. Trade Secret Information shall be managed so that it can be secured in a manner consistent with this agreement. Trade Secret Information shall be maintained in a secure location accessible only to individuals authorized by this Agreement to review the Trade Secret Information.

(d) **Nondisclosure Agreement.** Prior to giving access to Trade Secret Information as contemplated in paragraphs (a)-(c) above to any staff, expert or witness, whether or not such expert or witness is a person designated to testify in any such proceeding, counsel for the party seeking review of the Trade Secret Information shall deliver a copy of this Protective Order to such person; and prior to disclosure such person shall agree in writing to comply with and be bound by this Protective Order.

In connection therewith, Confidential Trade Secret Information shall not be disclosed to any person who has not signed a Nondisclosure Agreement in the form which is attached hereto and incorporated herein as Exhibit A. The Exhibit A Nondisclosure Agreement shall require the person to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that he or she has reviewed the same and has consented to be bound by its terms. The Nondisclosure Agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such Nondisclosure Agreement shall be delivered to counsel for the providing party prior to the staff, expert or witness gaining access to the Confidential Trade Secret Information.

2. **Highly Confidential Trade Secret Information**

(a) **Information That May Be Designated As Highly Confidential Trade Secret Information.** Any party, including any third party, may designate as "Highly Confidential" any document, deposition testimony or other discovery material that it produces and that it believes in good faith contains such highly confidential proprietary, commercially valuable, trade secret, competitively sensitive business or financial information, or other confidential information that is not generally available to the public or third parties, that disclosure of that information even to personnel within the Receiving Party or its affiliates may cause the Providing Party serious competitive injury. All materials designated "Highly Confidential" shall be protected from disclosure as specified herein, unless a party obtains an order of the Commission that all or certain portions of such materials are not, in fact, protected.

(b) **Access to Highly Confidential Trade Secret Information.** All information designated "Highly Confidential" shall be disclosed only to outside counsel of record to Parties in this proceeding, including paralegals, legal assistants and clerks for such outside counsel to Parties, who have signed an agreement in the form attached as Exhibit B hereto, or to government agencies including their counsel.

(c) **Designation of Highly Confidential Trade Secret Information.** The Parties may designate documents, deposition testimony, or other discovery material as "Highly Confidential" as follows: (1) Documents, discovery responses, or other tangible materials (including, without limitation, CD-ROMs and tapes) other than transcripts of depositions may be designated by conspicuously affixing

the legend “Highly Confidential - External Counsels’ Eyes Only” to each page of any document, discovery response, or other tangible material containing any Highly Confidential information (or, in the case of computer media, on the medium and its label and/or cover); (2) If Highly Confidential information is disclosed in a deposition, the parties may designate any or all of the transcript as “Highly Confidential - External Counsels’ Eyes Only” by so stating on the record of the deposition or by providing written notice to all counsel of record not later than 3 days after receipt of a transcript by all parties. All transcripts shall be treated as “Highly Confidential” until the expiration of that 3-day period; and (3) After the expiration of the 3-day period described in (2) above, only those portions of a transcript designated “Highly Confidential” shall be treated as such, except that all copies of any transcript that contains any Highly Confidential information shall be prominently marked “Highly Confidential - External Counsels’ Eyes Only” on the cover thereof and on each page thereof which contains Highly Confidential information. If any such transcripts are filed with the Commission, such transcripts shall be filed under seal.

3. **Challenges or Other Special Requests.** This Protective Order establishes a procedure for the expeditious handling of proposed Trade Secret Information. It shall not be construed as an agreement or ruling on the discoverability, confidentiality or trade secret designation of any such information or document. Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents or other matters that have been designated as Trade Secret Information removed from the protective requirements of this Protective Order or to have them handled in a manner differently than described in this Protective Order (either for greater or lesser confidentiality protections). If the trade secret or nonpublic nature of this information is challenged, resolution of the issue shall be made by the Administrative Law Judge or Commission after proceedings in camera which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such trade secret or nonpublic matter shall be present. The record of such in camera hearings shall be marked “CONTAINS CONFIDENTIAL [and/or HIGHLY CONFIDENTIAL] TRADE SECRET INFORMATION - NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NOS. P-5733/C-07-296 and P-5733,6403/M-07-354,” unless the ALJ or Commission determines that the proceeding should not be classified as involving Trade Secret Information or Nonpublic Data. Notwithstanding anything herein to the contrary, a Requesting Party may disclose the Trade Secret Information in the event a Requesting Party becomes legally compelled or required to disclose on a public basis the Trade Secret Information to any court, administrative agency, or other governmental authority, provided that the Requesting Party give the party providing the information prompt notice so that such party may at its own expense seek a protective order or other appropriate remedy prior to disclosure and/or waive compliance with this Order.

4. **Use of Trade Secret Information in Comments or Pleadings.** Where reference to Trade Secret Information is required in comments, pleadings, information requests, cross-examinations, briefs, argument or motions, it shall be by citation of title or exhibit number or by some other non-confidential description. Any further use of or

substantive references to Trade Secret Information shall be placed in a separate “Nonpublic” copy of the pleading or brief on yellow paper and submitted to the Commission or Office of Administrative Hearings pursuant to the terms of the Commission’s Procedures. This “Nonpublic” copy shall be served only on counsel of record (one copy each) who have signed a Nondisclosure Agreement. All the protections afforded in this Protective Order apply to materials prepared and distributed under this paragraph.

5. **Use of Trade Secret Information in Depositions.** If, in the course of depositions, counsel for any party concludes that testimony or exhibits will involve Trade Secret Information, counsel shall request that the court reporter record such testimony in a confidential transcript that is marked “CONTAINS CONFIDENTIAL [and/or HIGHLY CONFIDENTIAL] TRADE SECRET INFORMATION - NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NOS. P-5733/C-07-296 and P-5733,6403/M-07-354,” and produced on the appropriate color paper. All Exhibits which have been marked as involving Trade Secret Information shall be attached to the confidential transcript and marked consistent with the Commission’s Procedures. Each party has the right to identify a transcript or exhibits as including Trade Secret Information pursuant to this paragraph for up to three business days after receipt of a transcript by all parties.

6. **Use of Trade Secret Information or in Hearings or Commission Meetings.** The Receiving Party shall not use Trade Secret Information in a hearing without first (a) providing prior notice to the disclosing party regarding the information to be used and (b) conferring with the disclosing party regarding limitations or procedures that can be used to avoid disclosing the confidential aspects of the information at issue to persons not otherwise entitled to receive such information. If the parties cannot reach agreement regarding the use of such information, then the dispute shall be submitted to the Administrative Law Judge or the Commission before the information is publicly disclosed. Without limiting the foregoing, no party shall disclose Trade Secret Information on oral testimony, cross-examination or argument except in accordance with this paragraph.

7. **Return or Destruction.** Unless otherwise ordered, all Trade Secret Information, including transcripts of any depositions to which a claim of “trade secret” or “nonpublic” status is made, shall remain under seal, shall continue to be subject to the protective requirements of this Protective Order, and, except as provided in Paragraph 10, shall either (i) be returned to counsel for the disclosing party within 30 days after final settlement or conclusion of the applicable matter including administrative or judicial review thereof, or (ii) destroyed and a certificate of destruction provided to counsel for the disclosing party within such 30 days, unless otherwise agreed by the disclosing party, except that the receiving party may in all cases retain a copy of such documents to the extent required to be maintained pursuant to regulatory requirements, in which case it shall continue to be maintained subject to the protections of this Agreement.

8. **Preservation of Nonpublic Status.** All persons who may be entitled to receive, or who are afforded access to any Trade Secret Information by reason of this

Protective Order shall neither use nor disclose the Trade Secret for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of these proceedings, and then solely as contemplated herein, and shall take reasonable precautions to keep the Trade Secret Information secure and in accordance with the purposes and intent of this Protective Order.

9. **Reservation of Rights.** The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or documents or cross-examination on the grounds of relevancy or materiality.

10. **Inadvertent Disclosure.** No party shall have waived its right to designate any documents, data, information, studies, or other materials as Trade Secret Information by inadvertent disclosure, provided the disclosing party thereafter gives written notice to the recipient(s) of such information that it should have been designated as Trade Secret Information. From and after receipt of such notice, the previously disclosed information subsequently identified as Trade Secret Information shall be marked as Trade Secret Information and treated as such for purposes of this Protective Order.

11. **Information Provided to State Agencies.** The files of the Public Utilities Commission, the Office of Administrative Hearings, the Department of Commerce, the Office of the Attorney General, and other state agencies containing trade secret data or otherwise protected information shall be treated as required by Minn. Stat. §§ 13.01, et seq. and 138.161, et seq. and, as such are not subject to this Protective Order except, any outside expert retained by a state agency may not receive or review Trade Secret or Nonpublic Data subject to this Order until the expert has signed Exhibit A.

Dated: September 5, 2007.

_____/s/ Richard C. Luis_____
RICHARD C. LUIS
Administrative Law Judge

7-2500-18018-2
P-5733/C-07-296
P-5733,6403/M-07-354

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of a Complaint and Request
for Expedited Hearing of Neutral Tandem,
Inc., Against Level 3 Communications

**NON-DISCLOSURE AGREEMENT
FOR CONFIDENTIAL TRADE
SECRET DATA – EXHIBIT A**

In the Matter of the Application of Level 3
Communications, LLC, to Terminate
Services to Neutral Tandem, Inc.

I, the undersigned, hereby acknowledge that I have read the attached Protective Order dated September 5, 2007, in Minnesota Public Utilities Commission Docket Nos. P-5733/C-07-296 and P-5733,6403/M-07-354, and understand the terms thereof and agree to be bound by all such terms. Without limiting the generality of the foregoing, I agree not to disclose any materials designated Trade Secret Information to any person or entity not authorized to receive materials designated "CONFIDENTIAL TRADE SECRET INFORMATION-NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NOS. P-5733/C-07-296 and P-5733,6403/M-07-354" under the terms of said Protective Order, or any copies or extracts of information derived therefrom, which have been disclosed to me. I further agree to use any such materials disclosed to me solely for the purpose of this proceeding and for no other purpose.

I certify that I am authorized to receive and review "Confidential Trade Secret Information" as that term is used in the Agreement.

I hereby submit myself to the jurisdiction of the Office of Administrative Hearings in Minnesota and the Minnesota Public Utilities Commission and the Minnesota District Court for the Second Judicial District (Ramsey County) for the purpose of enforcing said Protective Order.

Date: _____, 2007

Signature

Type or Print Name

Address

Name of Employer

Name of Party

Signatory's Role in Proceeding

7-2500-18018-2
P-5733/C-07-296
P-5733,6403/M-07-354

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In the Matter of the Application of Level 3
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Services to Neutral Tandem, Inc.

**NON-DISCLOSURE AGREEMENT FOR
HIGHLY CONFIDENTIAL TRADE
SECRET DATA – EXHIBIT B**

I, the undersigned, hereby acknowledge that I have read the attached Protective Order dated September 5, 2007, in Minnesota Public Utilities Commission Docket Nos. P-5733/C-07-296 and P-5733,6403/M-07-354, and understand the terms thereof and agree to be bound by all such terms. Without limiting the generality of the foregoing, I agree not to disclose any materials designated Trade Secret Information to any person or entity not authorized to receive materials designated “CONFIDENTIAL [or HIGHLY CONFIDENTIAL] TRADE SECRET INFORMATION-NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NOS. P-5733/C-07-296 and P-5733,6403/M-07-354” under the terms of said Protective Order, or any copies or extracts of information derived therefrom, which have been disclosed to me. I further agree to use any such materials disclosed to me solely for the purpose of this proceeding and for no other purpose.

I certify that I am authorized to receive and review both “Confidential Information” and “Highly Confidential Information” as that term is used in the Agreement.

I hereby submit myself to the jurisdiction of the Office of Administrative Hearings in Minnesota and the Minnesota Public Utilities Commission and the Minnesota District Court for the Second Judicial District (Ramsey County) for the purpose of enforcing said Protective Order.

Date: _____, 2007

Signature

Type or Print Name

Address

Name of Employer

Name of Party

Signatory's Role in Proceeding