

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: June 27, 2007

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Teitzman, Mann)
Division of Competitive Markets & Enforcement (Lee, King)

RE: Docket No. 070127-TX – Petition for interconnection with Level 3 Communications and request for expedited resolution, by Neutral Tandem, Inc.

AGENDA: 07/10/07 – Regular Agenda – §120.57(2), Florida Statutes, Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: July 10, 2007; Date Level 3 will terminate interconnection agreement with Neutral Tandem.

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070127.RCM.DOC

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Case Background

On February 26, 2007, Neutral Tandem, Inc. (Neutral Tandem) filed its Petition for Interconnection with Level 3 Communications (Level 3) and Request for Expedited Resolution and/or Interim Relief. Neutral Tandem requests that this Commission: (1) establish interconnection terms and conditions for the continued delivery by Neutral Tandem of tandem transit traffic to Level 3 and its subsidiaries; (2) resolve its Petition on an expedited basis; and (3) issue an interim order directing Level 3 not to block traffic terminating from Neutral Tandem over the parties' existing interconnections while its Petition is pending. In its Petition, Neutral

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Tandem asserts that Level 3 plans to terminate the parties' agreements as of March 23, 2007.¹ On March 13, 2007, Level 3 filed its Corrected Response and Motion to Dismiss Neutral Tandem's Petition.

By Order No. PSC-07-0295-PCO-TX, issued April 6, 2007, Neutral Tandem's Request for Expedited Resolution and/or Interim Relief was denied.

On May 3, 2007, Order No. PSC-07-0392-PCO-TX (Procedural Order) was issued. The Procedural Order required the parties to file briefs on the legal issues (1-3a), as set forth in Attachment A. Additionally, pursuant to the Procedural Order, Oral Argument took place before the Commission on May 24, 2007.

Two voice over internet protocol (VoIP) providers have filed letters supporting Neutral Tandem's Petition. SunRocket filed its letter of support on June 4, 2007. Vonage filed its letter of support on June 6, 2007.

Staff is aware that identical or similar petitions have been filed in other states. Staff is monitoring these proceedings, however, staff believes consideration of these petitions will be governed by each individual state's law addressing interconnection and telecommunications services.

Staff's recommendation addresses issues 1-3a as set forth in the Procedural Order. Staff notes that this is a case of first impression which presents unique circumstances and policy concerns not previously addressed by the Commission.

¹ Level 3 has subsequently extended the termination date to July 10, 2007.

Discussion of Issues

Issue 1: Does the Commission have jurisdiction over Neutral Tandem's Petition? If so, what is the source of the Commission's authority?

Recommendation: Yes. Pursuant to §364.16(2), Florida Statutes, the Commission has authority to ensure that a CLEC provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services. (TEITZMAN, LEE)

Parties' Arguments

Level 3: Level 3 contends that Neutral Tandem's position that §§364.16(2) and 364.162, Florida Statutes, mandate CLEC-to-CLEC direct interconnection and state arbitration is not supported by the language in the statute, is inconsistent with Commission precedent, is in conflict with federal law, and provides an invitation to a floodgate of CLEC petitions requesting direct interconnection with each other to the ultimate detriment of consumers and competition.

Level 3 asserts that §364.16(2), Florida Statutes, requires a CLEC to provide access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services. Level 3 argues that Neutral Tandem has not petitioned for access to or interconnection with a Level 3 service but rather has petitioned the Commission to maintain existing interconnections between the two companies' facilities. Level 3 asserts that §364.16(2), Florida Statutes, is limited to access to and interconnection with a CLEC's **services** and therefore, the Commission lacks jurisdiction to mandate **facilities** interconnection on a CLEC like Level 3. (Level 3 BR at 9-10)

Level 3 argues that Neutral Tandem incorrectly relies on §364.162(2), Florida Statutes to support its position that under §364.16(2), Florida Statutes, the Commission may arbitrate an interconnection agreement between a CLEC and an ILEC. Level 3 asserts that §364.162(1), Florida Statutes, explicitly applies only to negotiations between CLECs and ILECs. Level 3 argues further that to give meaning and effect to the ILEC/CLEC state arbitration provisions in §364.162, Florida Statutes, the only reasonable and harmonious interpretation of the phrase "any other provider of local exchange telecommunications services" in §364.16(2), Florida Statutes, is that it refers to an ILEC because only a CLEC and ILEC could utilize the §364.162, Florida Statutes, arbitration provision referenced in §364.16(2), Florida Statutes. (Level 3 BR at 11)

Next, Level 3 asserts that §§251 and 252 of the Telecommunications Act of 1996 (the Act) preempt state regulation of CLEC-to-CLEC interconnection and traffic exchange. Level 3 contends that Congress recognized that there is no need for intrusive government oversight of the interconnection relationship between two CLECs at any level. Level 3 argues that voluntary negotiation is the mechanism Congress chose to establish interconnection and traffic exchange duties as between CLECs and is the appropriate mechanism in the instant case. (Level 3 BR at 12-14)

Finally, Level 3 counters Neutral Tandem's reliance on the *TDS Telecom Order*² and *Level 3 Communications v. Jacobs*.³ Level 3 asserts that the issue in *Level 3 Communications v. Jacobs* was whether the Commission was authorized under the regulatory assessment fee statute to include CLEC collocation revenue in the calculation of Level 3's regulatory assessment fee. Level 3 argues the substantive issue in the Level 3 decision has no bearing in this case. Level 3 argues that in the *TDS Telecom Order* the Commission held that it remained available to resolve unsuccessful transit negotiations between CLECs and BellSouth, an ILEC. Level 3 asserts that with regard to the relationship between two CLECs, the Commission simply acknowledged that § 251(a) of the Act obligates carriers to interconnect either directly or indirectly. (Level 3 BR at 14-16)

Neutral Tandem: In its brief, Neutral Tandem asserts that §364.16(2), Florida Statutes, provides the Commission with clear jurisdiction over its Petition. Neutral Tandem argues that §364.16(2), Florida Statutes, specifically requires competitive carriers such as Level 3 to provide "access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions." Neutral Tandem argues further that §364.162(2), Florida Statutes, sets forth that if competitive carriers are unable to reach agreement on the terms and conditions of interconnection, the Commission shall "set nondiscriminatory rates, terms and conditions" for interconnection within 120 days after a carrier files an interconnection petition. (Neutral Tandem BR at 5)

Neutral Tandem contends the Commission has already found that Chapter 364 grants it jurisdiction over interconnection for transiting purposes. Neutral Tandem cites to the *TDS Telecom Order* where the Commission held that "transit service is clearly an interconnection agreement under §364.16, Florida Statutes." Neutral Tandem notes that the fact that the *TDS Telecom Order* arose out of petitions challenging an ILEC's transit traffic tariff is a distinction without a difference under §364.16(2), Florida Statutes. (Neutral Tandem BR at 5-6)

Neutral Tandem argues that Level 3's assertions that the Commission lacks jurisdiction to order interconnection because neither party is an incumbent carrier is without merit and is contrary to Florida Supreme Court precedent. Neutral Tandem notes that in *Level 3 v. Jacobs*, the Court rejected a similar challenge by Level 3 to the Commission's jurisdiction when it found that Chapter 364 "gives the PSC authority over interconnection duties of both ILECs and [competitive local carriers]." (Neutral Tandem BR at 7)

Neutral Tandem also disagrees with Level 3's assertions that the granting of its Petition would supplant commercial negotiations. To the contrary, Neutral Tandem asserts that it has been able to arrive at interconnection arrangements through negotiation with every other carrier

² See Joint petition by TDS Telecom d/b/a TDS Telecom/Quincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC ["Joint Petitioners"] objecting to and requesting suspension and cancellation of proposed transit traffic service tariff filed by BellSouth Telecommunications, Inc., Docket Nos. 050119-TP, 050125-TP; Order No. PSC-06-0776-FOF-TP, issued September 18, 2006. (*TDS Telecom Order*)

³ *Level 3 v. Jacobs*, 841 So.2d 447 (Fla. 2003).

with which it has sought interconnection in Florida. Neutral Tandem contends that it is only because of Level 3's refusal to acknowledge the applicability of this Commission's adoption of the well-established principle that terminating carriers should seek recovery of their termination costs from originating carriers, rather than transiting carriers, that Commission intervention is necessary in this matter. (Neutral Tandem BR at 8-9)

In concluding its jurisdictional arguments, Neutral Tandem asserts that the Commission should be mindful of the potential implications that granting Level 3's Motion would have on the Commission's ability to oversee the flow of traffic on the public switched telecommunications network (PSTN). Neutral Tandem contends that the issues presented in its Petition deal directly with traffic traversing the PSTN which fall directly within the Commission's jurisdiction and within the Commission's plenary authority over the integrity of the telecommunications delivery system. (Neutral Tandem BR at 12)

Staff Analysis:

Section 364.16(2), Florida Statutes, sets forth that:

Each competitive local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions. If the parties are unable to negotiate mutually acceptable prices, terms, and conditions after 60 days, either party may petition the commission and the commission shall have 120 days to make a determination after proceeding as required by s. 364.162(2) pertaining to interconnection services.

Pursuant to §364.16(2), Florida Statutes, staff believes that Level 3, as a CLEC, is required to provide interconnection with its telecommunications services to any other provider of local exchange telecommunications services requesting such interconnection. As set forth above Level 3 asserts that "any other provider of local exchange telecommunications services" refers solely to ILECs. Staff disagrees with this assertion. Staff believes inclusion of the terms "any other" before "provider of local exchange telecommunications services" rather than "local exchange telecommunications company" as appears in §364.162(1), Florida Statutes, contemplates that a CLEC is required to provide access and interconnection with both ILECs and CLECs.

Staff further notes that §364.01(2), Florida Statutes, provides that the Commission has exclusive jurisdiction over all matters set forth in Chapter 364, Florida Statutes. Additionally, as noted by Neutral Tandem, the Florida Supreme Court held in Level 3 v. Jacobs that "[i]nterconnection is a fundamental duty of all local telecommunications providers in both Florida law and Federal Law." Consequently, staff believes that if providers of local exchange telecommunications services are unable to reach mutually acceptable prices, terms, and conditions for interconnection, the Commission may arbitrate the prices, terms, and conditions to ensure the requirements of §364.16(2), Florida Statutes, are met.

Level 3 also asserts that the Commission is preempted by federal law from arbitrating CLEC-to-CLEC interconnection arrangements. Staff finds Level 3's arguments in support of this assertion unpersuasive. The U.S. Supreme Court has stated there are three circumstances in which preemption may be found: (1) express preemption from the terms of a statute, (2) "field preemption" which can be inferred or implied from the pervasiveness of a federal scheme leaving no room for a state to supplement it, or (3) conflict preemption, where the state law would conflict with federal law so that it is impossible for a private party to comply with both. Fifie v. Cooksey, 403 F. Supp. 2d 1131, 1133 (M.D. Fla. 2005). See also English v. General Electric Co., 496 U.S. 72, 78-9, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990). Cliff v. Payco Gen. Am Credits, Inc., 363 F3d. 1113, 1122 (11th Cir. 2004).

Level 3 fails to cite, nor is staff aware of, any provision in the Act that expressly precludes a state commission from arbitrating a CLEC-to-CLEC interconnection agreement. Additionally, §§261(b) and (c) of the Act explicitly preserve state authority to impose requirements on a telecommunications carrier, subsequent to the date of enactment of the Act, for intrastate services that are necessary to further competition in the provision of telephone exchange service, so long as the State's requirements are not inconsistent with the Act or FCC regulations to implement the Act. Section 251(a)(1) of the Act specifically provides that each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities of other telecommunications carriers. Consequently, staff does not believe that the Commission is preempted from requiring Level 3 to interconnect directly or indirectly with the facilities of other telecommunications carriers pursuant to state law.

Staff believes it is important that the Commission further expand its consideration of this issue to address Level 3's obligation to provide access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services. Staff is concerned that if Level 3 is allowed to refuse direct interconnection with Neutral Tandem, Level 3 is unilaterally removing an originating carrier's right to choose a transit provider and negotiate on its own behalf the rates, terms, and conditions for transiting its traffic over the PSTN and jeopardizing the efficient and reliable exchange of traffic over the PSTN. Staff believes that if petitioned by an originating carrier, i.e., a provider of local exchange telecommunications services, pursuant to §364.16(2), Florida Statutes, the Commission may require Level 3 to directly interconnect with Neutral Tandem for purposes of terminating the originating carrier's traffic on Level 3's network.

In the *TDS Telecom Order* the Commission held, in pertinent part, that "BellSouth's transit service is more characteristic of an interconnection arrangement..." (*TDS Telecom Order* at 17) Staff notes that although BellSouth is an ILEC, the transit service provided by BellSouth in that proceeding is identical to Neutral Tandem's offering in the instant proceeding. Accordingly, staff believes the same finding applies in this proceeding.

Additionally, in the *TDS Telecom Order* the Commission held that "[t]he choice of how the originating call is delivered to the end user is not the choice of the terminating carrier, but rather the choice of the originating carrier, even if the carrier is a Small LEC." (*TDS Telecom Order* at 23) Staff notes that the Commission made no distinction between whether an

originating carrier utilizes an ILEC's transit service or an alternative transit provider, nor does staff believe a distinction would be appropriate.

Although this proceeding has primarily been focused on questions of law, it is nonetheless quite clear in both parties' filings that the crux of this dispute involves compensation to Level 3 from Neutral Tandem for terminating traffic on Level 3's network. Staff notes that the Commission has already established in the *TDS Telecom Order* that originating carriers are obligated to: (1) compensate the transit provider; (2) deliver traffic to the transit provider in such a manner that it can be identified, routed, and billed; and (3) compensate the terminating carrier for terminating the traffic to the end user.⁴ (*TDS Telecom Order* at 24) Accordingly, staff believes that any dispute regarding compensation for Level 3's terminating service is more appropriately brought against an originating carrier of local exchange telecommunications services and not the transit provider, in this case Neutral Tandem.

Finally, staff believes Level 3's refusal to directly interconnect with Neutral Tandem hinders the further development of a competitive telecommunications market in the State of Florida. Although staff acknowledges that Chapter 364, Florida Statutes, does not directly address interconnection arrangements involving alternative transit providers, it does charge this Commission with the responsibility of fostering a competitive environment for the provisioning of telecommunication services. Staff believes the entry of Neutral Tandem into the market as an alternative transit service provider is an important step in the building of a competitive PSTN. As a result of Neutral Tandem's entry into the marketplace, originating carriers are no longer limited to utilizing an ILEC's facilities to deliver their traffic to a terminating carrier where Neutral Tandem operates.

In conclusion, staff recommends the Commission find it has jurisdiction pursuant to §364.16(2), Florida Statutes, to ensure that a CLEC provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services.

⁴ Staff notes again that although the *TDS Telecom Order* dealt with an ILEC's transit service, these obligations are applicable whether transit service is provided by an ILEC or an alternative transit service provider. The Commission found that these obligations are consistent with the "originating carrier pays" regime currently in place in the industry. (*TDS Telecom Order* at 24)

Issue 2: If the Commission has jurisdiction over Neutral Tandem's Petition, does Neutral Tandem have standing to seek relief under §§364.16 and 364.162, Florida Statutes?

Recommendation: No, staff does not believe Neutral Tandem's delivery of transit traffic constitutes provision of local exchange telecommunications services for the purposes of §364.16(2), Florida Statutes. Accordingly, staff recommends the Petition be dismissed without prejudice for lack of standing. (TEITZMAN, LEE)

Parties' Arguments

Level 3: Level 3 argues that Neutral Tandem lacks standing because it fails to allege in its Petition that it provides basic local telecommunications services. Level 3 further disagrees with Neutral Tandem's assertions that it provides "local exchange telecommunications services" and that it has standing because it is a certificated CLEC in the State of Florida. Level 3 contends that the fact an entity has been granted a CLEC certificate does not in any way speak to whether that entity is providing the type of service contemplated by the Legislature and by the Commission for CLECs. (Level 3 BR at 17-18)

Level 3 asserts that the only reasonable interpretation of §364.16(2), Florida Statutes, is that it requires a CLEC to provide access to and interconnection with another provider of basic local telecommunications services. Level 3 notes that §364.337, Florida Statutes, repeatedly describes the service to be provided by a certificated CLEC that is subject to Commission jurisdiction as "basic local telecommunications service" or "basic local exchange telecommunications services." Level 3 asserts that the principles of statutory construction require that the specific CLEC and definition sections of Chapter 364 be construed *in pari materia* (in the same matter) with the term "local exchange telecommunications services" provided by a CLEC under §364.16(2), Florida Statutes. Level 3 notes that further support is found in Rules 25-24.830(1) and (2), Florida Administrative Code, which describe a CLEC customer as a "basic local exchange telecommunications customer." Level 3 argues that because Neutral Tandem does not provide basic local telecommunications services, including access to 911 emergency services and relay services for the hearing impaired, it lacks standing to pursue the relief sought in its Petition under §364.16(2), Florida Statutes. (Level 3 BR at 18-20)

Neutral Tandem: Neutral Tandem asserts that under Florida law a party can establish its standing to seek relief under a statutory provision in one of two ways. First, the party can demonstrate that the statute itself has conferred the party with standing to seek relief. Second, the party can demonstrate that it will suffer direct injury unless it is allowed to seek relief under the statute, and that the harm to be suffered is of the type that the statute was intended to address. Neutral Tandem argues it satisfies both of these standards. (Neutral Tandem BR at 13)

Neutral Tandem contends that the plain language of §364.16(2), Florida Statutes, confers standing on Neutral Tandem to seek the relief sought in its Petition. Neutral Tandem argues that §364.16(2), Florida Statutes, confers standing on any "provider of local exchange telecommunications services" both to seek interconnection, and to petition the Commission to establish the terms of interconnection if the parties cannot arrive at mutually agreeable terms and conditions through negotiation. Neutral Tandem asserts it is a certificated provider of local

exchange telecommunications services, and thus has standing to petition the Commission to establish terms and conditions for interconnection with Level 3. (Neutral Tandem BR at 14)

Neutral Tandem disagrees with Level 3's contention that it has failed to allege that it provides "local exchange telecommunications services." Neutral Tandem further disagrees with Level 3's assertion that "basic local telecommunication services" and "local exchange telecommunications services" are synonymous. Neutral Tandem argues that nothing in the plain language of Chapter 364 indicates that the terms "basic local telecommunication services" and "local exchange telecommunications services" share a common meaning and that to the contrary the use of different terms in Chapter 364 serves as strong evidence that different meanings were intended. Furthermore, Neutral Tandem notes that the Commission has already found in the *TDS Telecom Order* that transiting service should be categorized as "an interconnection arrangement" under §364.16, Florida Statutes." (Neutral Tandem BR at 14-15)

Neutral Tandem further contends that it has standing because it faces immediate and substantial harm of the type that §364.16(2), Florida Statutes, was designed to address. Neutral Tandem argues that Level 3's actions will result in: (1) the loss of direct interconnection with Level 3; (2) immediate and substantial economic loss and harm to its reputation when customers are required to re-route traffic through the ILEC tandems; (3) immediate impairment of Neutral Tandem's ability to provide tandem transit services for calls to Level 3's network and to provide competitive alternatives to the ILECs' transit services; and (4) harm to Neutral Tandem's ability to expand its presence in the Florida market, and even its ability to continue providing tandem transit services. Neutral Tandem asserts these immediate and direct injuries meet the standard required to establish standing. (Neutral Tandem BR at 16)

Staff Analysis: To meet the standard of standing for a petition under Rule 28-106.201(2), Florida Administrative Code, a petitioner must explain how the petitioner's substantial interest will be affected by the agency determination. "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981).

Staff believes that Neutral Tandem has met the first prong of *Agrico* by adequately alleging it will suffer an injury in fact of sufficient immediacy if Level 3 terminates direct connection between the parties. However, as discussed below, staff believes ultimately Neutral Tandem lacks standing to bring its Petition because its substantial interests do not fall within the zone of interest to be protected under §364.16(2), Florida Statutes.

Is Neutral Tandem a CLEC?

A competitive local exchange telecommunications company (CLEC) is defined in §364.02(5), Florida Statutes, as "a company certificated by the [C]ommission to provide local

exchange telecommunications services.”⁵ Section 364.337(1), Florida Statutes, provides that an entity petitioning to provide competitive local exchange service be granted a certificate of authority by the Commission upon a showing of sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served. Section 364.337(2), Florida Statutes, states in pertinent part that:

[t]he basic local telecommunications service provided by a competitive local exchange telecommunications company must include access to operator services, “911” services, and relay services for the hearing impaired. A competitive local exchange telecommunications company’s “911” service shall be provided at a level equivalent to that provided by the local exchange telecommunications company serving the same area . . .

Staff believes that there is no statutory requirement that a certificated CLEC actively provide local exchange telecommunications services. Certification simply means the Commission found the company has the “technical, financial, and managerial capability” to provide service. However, if a certificated CLEC provides basic local telecommunications service it must provide access to operator services, 911 services, and relay services for the hearing impaired. As discussed in more detail below, staff does not believe that, for the purposes of the instant proceeding, Neutral Tandem is providing local exchange telecommunications services in its provisioning of transit service. Therefore, for the purposes of this proceeding staff does not believe that Neutral Tandem is acting as a certificated CLEC.

Is Neutral Tandem acting as a local exchange telecommunications provider in its delivery of transit traffic?

As discussed in Issue 1, §364.16(2), Florida Statutes, requires that each CLEC shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services. Staff does not believe that Neutral Tandem serves as a local exchange telecommunications provider pursuant to Chapter 364, Florida Statutes, when it delivers transit traffic. Therefore, its substantial interests do not fall within the zone of interest to be protected under §364.16(2), Florida Statutes.

As both parties note, “local exchange telecommunications services” is not defined within Chapter 364. However, staff believes within Chapter 364, the term “local exchange telecommunications services” contemplates voice-grade exchange service which is available to the public for hire.⁶ Staff believes Neutral Tandem’s delivery of transit traffic is clearly not a voice-grade exchange service available to the public for hire.

⁵ The original term (alternative local exchange company or ALEC) was changed to CLEC on May 23, 2003.

⁶ See §364.16(4), Florida Statutes, states that, in order to assure that consumers have access to different local exchange service providers without being disadvantaged, deterred, or inconvenienced by having to give up the consumer’s existing local telephone number, all providers of *local exchange services* must have access to local telephone numbering resources and assignments on equitable terms that include a recognition of the scarcity of such resources and are in accordance with national assignment guidelines. Each local exchange provider, except small local exchange telecommunications companies under rate of return regulation, shall provide a temporary means of achieving telephone number portability. The parties, under the direction of the commission, shall set up a number

Furthermore, staff notes that §364.02(14)(a), Florida Statutes, excludes from the definition of telecommunications company “an entity which provides a telecommunications facility exclusively to a certificated telecommunications company.” Staff believes Neutral Tandem is essentially providing its facilities as a pathway or bridge for transit traffic to other certificated telecommunications companies and voice communication providers. Pursuant to §364.02(14)(a), Florida Statutes, because Neutral Tandem’s transit traffic service is not an offering to the public for hire but rather an offering to other carriers, staff believes that a colorable argument could be made that Neutral Tandem is not operating as a telecommunications company in the instant case.

Based on the above analysis, staff does not believe Neutral Tandem’s delivery of transit traffic constitutes provision of “local exchange telecommunications services” for the purposes of §364.16(2), Florida Statutes. Therefore, staff recommends that the Petition be dismissed without prejudice for lack of standing. Section 120.569(2)(c), Florida Statutes, provides that “dismissal of a petition, shall, at least once, be without prejudice to petitioner’s filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.” Staff believes a dismissal without prejudice is appropriate because Neutral Tandem may have standing if it can demonstrate that it has authority to act as an agent⁷ for an originating carrier in negotiating and reaching traffic termination arrangements.

portability standards group by no later than September 1, 1995, for the purposes of investigation and development of appropriate parameters, costs, and standards for number portability. If the parties are unable to successfully negotiate the prices, terms, and conditions of a temporary number portability solution, the commission shall establish a temporary number portability solution by no later than January 1, 1996. Each local exchange service provider shall make necessary modifications to allow permanent portability of local telephone numbers between certificated providers of *local exchange service* as soon as reasonably possible after the development of national standards. The parties shall negotiate the prices, terms, and conditions for permanent telephone number portability arrangements. In the event the parties are unable to satisfactorily negotiate the prices, terms, and conditions, either party may petition the commission and the commission shall, after opportunity for a hearing, set the rates, terms, and conditions. The prices and rates shall not be below cost. Number portability between different certificated providers of local exchange service at the same location shall be provided temporarily no later than January 1, 1996. (emphasis added)

⁷ “An agent is one who manifests consent to act for and under the control of a principal who manifests consent to the agent acting in such a manner.” Goldschmidt v. Holman, 571 So. 2d 422 (Fla. 1990)

Issue 3(a): If the Commission has jurisdiction over Neutral Tandem's Petition and determines that Neutral Tandem has standing to bring its Petition:

- a. Can the Commission require direct interconnection between Level 3 and Neutral Tandem, for the purpose of terminating transit traffic from originating carriers, delivered by Neutral Tandem to Level 3?

Recommendation: If the Commission approves staff's recommendation in Issue 2, this issue will be rendered moot. (TEITZMAN)

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, this issue will be rendered moot.

If, however, the Commission determines it has jurisdiction over Neutral Tandem's petition and that Neutral Tandem does have standing, it may be appropriate to order Level 3 to maintain the parties' existing interconnection arrangements to preserve continuity of service pending the Commission's final decision on the merits.

Docket No. 070127-TX
Date: June 27, 2007

Issue 4: Should this docket be closed?

Recommendation: Yes, if the Commission approves staff's recommendation in Issue 2, this docket should be closed. (TEITZMAN)

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, this docket should be closed.

If the Commission denies staff's recommendation in Issue 2, this docket should be set for hearing to address Issues 3(b) – 4(a-c).