

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

RECEIVED-FPSC
01 DEC 13 AM 9:13
COMMISSION
CLERK

In re: Petition of Neutral Tandem, Inc. and) Docket No. 070408-TP
Neutral Tandem-Florida, LLC)
for Resolution of Interconnection Dispute) Filed: December 13, 2007
with Level 3 Communications and Request)
for Expedited Resolution)

**NEUTRAL TANDEM, INC. AND NEUTRAL TANDEM-FLORIDA, LLC'S
REQUEST FOR ORAL ARGUMENT**

Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC ("Neutral Tandem"), by and through their undersigned attorneys, hereby respectfully request the Commission receive Oral Argument, not to exceed ten (10) minutes per side, when the Commission considers this matter at the Commission's regularly scheduled Agenda Conference on January 8, 2008, which is the Public Service Commission Staff's November 20, 2007, recommendation (the "Staff Rec.") in this Docket (or any revised/additional recommendation filed by Staff). In support thereof, Neutral Tandem states as follows:

1. At the outset, the Commission can and should recognize that the matter for review involves the dismissal of a petition where the public interest is squarely at issue. The issues presented herein are of considerable importance to the development of local telecommunications

- CMP** _____
COM _____ competition in the State of Florida. Indeed the Commission's own Staff has concluded:
CTR _____ (a) "if Level 3 is allowed to refuse direct interconnection with Neutral Tandem, Level 3 is
ECR _____ . . . jeopardizing the efficient and reliable exchange of traffic over the PSTN." Staff Rec. at 7.
GCL 1 _____
OPC _____ (b) "staff believes Level 3's refusal . . . hinders the further development of a competitive
RCA _____ telecommunications market in the State of Florida." Staff Rec. at 7.
SCR _____
SGA _____ (c) "Staff believes the entry of Neutral Tandem into the market as an alternative transit
SEC _____ service provider is an important step in the building of a competitive PSTN." Staff Rec. at 7-8.
OTH _____

2. Given the above recognition by Staff of the dangers to the consumer of Level 3's market conduct, and given the severe nature of the remedy of dismissal, any such dismissal should only be had where all interested parties have been accorded complete due process. Therefore Neutral Tandem respectfully requests the Commission at a minimum provide Neutral Tandem a brief opportunity to be heard at the Agenda Conference. The public interest, the interests of judicial economy, and fundamental notions of due process require no less.

3. This conclusion is even more compelling given that the Commission's own rules do not specifically preclude Neutral Tandem's request. Rule 25-22.0022, Florida Administrative Code, is applicable, and provides:

(1) Oral argument must be sought by separate written request filed concurrently with the motion on which argument is requested, or no later than 10 days after exceptions to a recommended order are filed. Failure to timely file a request for oral argument shall constitute waiver thereof. Failure to timely file a response to the request for oral argument waives the opportunity to object to oral argument. The request for oral argument shall state with particularity why oral argument would aid the Commissioners, the Prehearing Officer, or the Commissioner appointed by the Chair to conduct a hearing in understanding and evaluating the issues to be decided, and the amount of time requested for oral argument.

This Rule, like all rules, is not designed to work a penalty or forfeiture. Rather, the purpose is to establish an orderly process pursuant to which interested parties may request an opportunity to present argument, the Commission may determine the need for same, and prejudice is avoided by providing all involved with notice of a scheduled oral argument and an opportunity to prepare for and present same. The Rule should therefore be interpreted and applied in such manner as to further these objectives, and to offer all interested persons a full and complete opportunity to be heard in accordance with established notions of fairness and due process. The Rule sets forth a specific time frame within which a Movant must seek Oral Argument on a dispositive Motion, as well as a time frame for seeking oral argument on

exceptions filed with regard to a Recommended Order submitted to the Agency by an Administrative Law Judge. The Rule does not, however, specifically delineate the time frame within which a *Respondent* to a dispositive Motion may request Oral Argument. Further, the Rule by its terms does not preclude such request by a Respondent, especially where, as here, the Staff recommendation raises issues of significance to both the parties and to the public interest. Thus, under the specific language of the Rule, Neutral Tandem's request is neither untimely nor precluded. Moreover, under the circumstances presented herein, the Commission should provide the parties a reasonable opportunity to present argument where same comports with the purpose of the rules, with due process, is in the public interest, and works no prejudice against any party as all will have equal opportunity to be heard.

4. Additionally, Neutral Tandem cannot be said to have waived the opportunity to address the Commission at oral argument. Waiver involves clear, intentional relinquishment of a known right. In the Prehearing Officer's Order Allowing Supplemental Briefs, Order No. PSC-07-0772-PCO-TP, the Prehearing Officer noted that the parties did not seek additional oral argument. However, Neutral Tandem submits this reference pertains to additional oral argument prior to issuance of the Staff recommendation. The Prehearing Officer's conclusion in this regard apparently stems from a conference call conducted by PSC Staff on August 23 with the parties to discuss the procedural posture of this case. During that conference call, any discussion by Neutral Tandem as to oral argument pertained only to whether it would be necessary to conduct a separate oral argument *prior to* the issuance of a Staff recommendation, as had been done previously in Docket No. 070127. In view of Neutral Tandem's suggestion on that August 23, conference call that supplemental briefs were necessary to address only the specific issue of whether the letters of agency submitted by Neutral Tandem in this proceeding were sufficient to

establish standing, Neutral Tandem perceived that additional oral argument on that *limited* question prior to the issuance of a Staff recommendation was not likely to provide significant additional clarity to the record and would merely add an additional, unnecessary burden upon the parties' and the agency's resources. However, on the record before the Commission, there is no basis to conclude Neutral Tandem waived *post* recommendation oral argument or oral argument on the ultimate question of dismissal. Neutral Tandem did not therefore, either by words or conduct, intentionally and knowingly relinquish its due process right to seek to be heard fully prior to dismissal of its petition.

5. Neutral Tandem also respectfully submits that the requested brief oral argument will aid the Commission in its evaluation of Level 3's Motion to Dismiss. The prior oral argument was conducted on May 24, 2007, more than six months ago and prior to the issuance of the Staff recommendation. The Staff recommendation notes both the existence of potential anticompetitive activity and the fact that the Commission has jurisdiction to address the issues raised in Neutral Tandem's Petition. However, the recommendation also concludes that Neutral Tandem lacks standing to raise these issues before the Commission (Neutral Tandem of course disagrees with this conclusion.¹). Thus Staff would apparently have the Commission effectively ignore potential anticompetitive activity, dismiss the petition, and wait for a new case and new complaint to be filed before undertaking any review of matters squarely in the public interest. At all events, since the Staff recommendation obviously raises matters of great concern both to the parties and to the public interest, a fully developed discussion of same provides the parties the

¹ Among other things, the recommendation's analysis of Neutral Tandem's standing appears to be based upon the assumption of facts not contained within the four corners of the Petition, the Motion to Dismiss, or any of the related pleadings, and that are in fact contrary to facts that have been set forth in Neutral Tandem's Petition, which must be taken as true for purposes of evaluating Level 3's Motion to Dismiss.

opportunity to address fully the specifics of the recommendation, provides the Commission the opportunity to obtain additional input and information from the parties and Staff regarding those specifics, and of equal importance, provides the public with confidence that the Commission always accords litigants complete due process when considering the draconian remedy of dismissal.

6. Under these circumstances, given the significance of the issues presented for review, and given that no prior argument has been heard on the Staff recommendation, Neutral Tandem respectfully submits that brief oral argument at the Commission's regularly scheduled Agenda Conference will aid the Commission in review of this matter, will accord all parties complete due process, and will not result in any prejudice nor any unwarranted regulatory costs or burdens. Thus, Neutral Tandem asks that the Commission allow presentations not to exceed 10 minutes per side.

WHEREFORE, based on all of the foregoing, Neutral Tandem respectfully requests that the Commission receive Oral Argument when it considers this matter at the January 8, 2008, Agenda Conference, which is the PSC Staff's recommendation addressing Level 3 Communications' Motion to Dismiss Neutral Tandem's Petition in this Docket.

Respectfully submitted,

NEUTRAL TANDEM, INC.
NEUTRAL TANDEM-FLORIDA, LLC

By: 

Ronald Gavillet
Executive Vice President &
General Counsel
Neutral Tandem, Inc.
One South Wacker, Suite 200
Chicago, IL 60606
(312) 384-8000
rongavillet@neutraltandem.com

Christopher M. Kise
Foley & Lardner, LLP
106 East College Ave., Suite 900
Tallahassee, FL 32301
(850) 513-3367
ckise@foley.com

John R. Harrington
Jenner & Block LLP
330 N. Wabash Ave.
Suite 4700
Chicago, IL 60611
(312) 222-9350
jharrington@jenner.com

Beth Keating
Akerman Senterfitt
106 East College Avenue, Suite 1200
P.O. Box 1877 (32302)
Tallahassee, Florida 32301
(850) 521-8002
beth.keating@akerman.com

*Attorneys for Neutral Tandem, Inc.
and Neutral Tandem-Florida, LLC*

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail First Class and Electronic Mail to Kenneth Hoffman, Esquire, Rutledge, Ecenia, Purnell, and Hoffman, P.A., 215 South Monroe Street, Suite 420, Tallahassee, FL 32301 (ken@reuphlaw.com), and that a copy has also been provided to the persons listed below this 13th day of December, 2007:

Gregg Strumberger, Esquire*
Gregory Rogers, Esquire*
Level 3 Communications, Inc.
1025 El Dorado Boulevard
Broomfield, CO 80021
gregg.strumberger@level3.com

Adam Teitzman, Staff Counsel
Florida Public Service Commission,
Office of the General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
ateitzma@psc.state.fl.us

Beth Salak, Director/Division of Competitive Markets and Enforcement
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
bsalak@psc.state.fl.us

By:



Christopher M. Kise