

State of Florida



Public Service Commission

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COMMISSION CLERK

DATE: ~~November 20, 2007~~ December 26, 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. 070408-TP – Petition by Neutral Tandem, Inc. and Neutral Tandem-Florida, LLC for resolution of interconnection dispute with Level 3 Communications, LLC, and request for expedited resolution.

AGENDA: ~~12/04/07~~ 01/08/08 – Regular Agenda – Motion to Dismiss – Oral Argument ~~Not~~ Requested

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070408.RCM.DOC

Case Background

On February 26, 2007, Neutral Tandem, Inc. (Neutral Tandem) filed its First Petition for Interconnection with Level 3 Communications (Level 3) and Request for Expedited Resolution and/or Interim Relief (Docket No. 070127-TX). Neutral Tandem requested that the 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.

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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 of the Procedural Order. Additionally, pursuant to the Procedural Order, Oral Argument took place on May 24, 2007.

After filing a Motion for Leave to Amend its First Petition, Neutral Tandem subsequently filed its Notice of Voluntary Dismissal of Petition for Interconnection with Level 3, without prejudice, on July 9, 2007.

On July 11, 2007, Neutral Tandem filed its Second Petition for Interconnection with Level 3 and Request for Expedited Resolution and/or Interim Relief (Second Petition). Docket No. 070408-TP was opened to address Neutral Tandem's Second Petition. On July 25, 2007, Level 3 filed its Response and Motion to Dismiss Neutral Tandem's Second Petition (Motion). On August 3, 2007, Neutral Tandem filed its Response to Level 3's Motion to Dismiss (Response). By letter dated August 23, 2007, Neutral Tandem notified staff counsel it was withdrawing its request for expedited treatment.

On August 27, 2007, Order No. PSC-07-0698-PCO-TP was issued acknowledging Neutral Tandem's Voluntary Dismissal in Docket No. 070127-TX and merging the record of those proceedings into Docket No. 070408-TP.

On September 21, 2007, Order No. PSC-07-0772-PCO-TP was issued allowing the parties to file supplemental briefs addressing Issues 1-3a. Each party filed a legal brief on October 5, 2007.

Staff filed a recommendation on November 20, 2007, for the December 4, 2007 Agenda Conference; however, the item was deferred. On December 13, 2007, Neutral Tandem filed a Request for Oral Argument and Notice of Appearance of Christopher Kise as additional counsel of record for Neutral Tandem. On December 17, 2007, Level 3 filed its Response in Opposition to the Request for Oral argument. Issue A addresses Neutral Tandem's request.

Staff's recommendation addresses Issues 1-3a, which were identified by staff and the parties as the legal issues set forth in the Procedural Order and raised in Level 3's Motion.

Discussion of Issues

Issue A: Should the Commission grant Neutral Tandem's Request for Oral Argument?

Recommendation: No. Staff believes that Neutral Tandem's Request for Oral Argument is untimely and should be denied. However, staff notes that Rule 25-22.0022(7)(b), Florida Administrative Code (F.A.C.), sets forth that regardless of whether a party has requested oral argument, the Commission can request oral argument on any issue to be decided by a dispositive motion or recommended order. Therefore, although staff believes Neutral Tandem's Request for Oral Argument should be denied for lack of timeliness, staff believes the Commission does have the discretion, on its own Motion, to entertain oral argument on the issues addressed in staff's recommendation. (Teitzman)

Parties' Arguments

Neutral Tandem: On December 13, 2007, Neutral Tandem filed its Request for Oral Argument and Notice of Appearance of Christopher Kise as additional counsel of record for Neutral Tandem. Neutral Tandem requests the Commission receive oral argument, not to exceed ten (10) minutes per side, when the Commission considers staff's recommendation on this matter. In support of its Request, Neutral Tandem asserts that the issues presented in staff's recommendation are of considerable importance to the development of local telecommunications competition in the State of Florida.

Neutral Tandem asserts further that Rule 25-22.0022, Florida Administrative Code (F.A.C.), does not specifically preclude Neutral Tandem's request. Neutral Tandem argues that the rule sets forth a specific time frame within which a Movant must seek Oral Argument on a dispositive Motion, but it does not specifically delineate the time frame within which a Respondent to a dispositive Motion may request oral argument. Neutral Tandem further argues that 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 parties and to the public interest. Consequently, Neutral Tandem contends that under the specific language of Rule 25-22.0022, F.A.C., its request is neither untimely nor precluded.

Additionally, Neutral Tandem argues that it cannot be said to have waived the opportunity to address the Commission through oral argument. Neutral Tandem asserts that waiver involves clear, intentional relinquishment of a known right. In addressing Order No. PSC-07-0772-PCO-TP, issued September 21, 2007, whereby the Prehearing Officer allowed the parties to file supplemental briefs and noted that the parties did not seek additional oral argument, Neutral Tandem contends that the Order only pertains to additional oral argument prior to issuance of the staff recommendation. Neutral Tandem argues that during a conference call to discuss the procedural posture of this case conducted by staff on August 23, 2007, any discussion by Neutral Tandem addressing oral argument pertained only to whether it would be necessary to conduct a separate oral argument prior to the issuance of a staff recommendation. Such oral argument would be solely on the specific issue of whether the letters of agency submitted by Neutral Tandem in this proceeding were sufficient to establish standing. Neutral Tandem asserts that it perceived additional argument on that limited question, prior to issuance

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of a staff recommendation, would not likely provide significant additional clarity to the record and would merely add an additional unnecessary burden upon the parties' and the agency's resources. However, Neutral Tandem argues that, 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.

Finally, Neutral Tandem submits that the requested oral argument will aid the Commission in its evaluation of Level 3's Motion to Dismiss. Neutral Tandem notes that prior oral argument was conducted on May 24, 2007, more than six months ago and prior to the issuance of staff's recommendation. Neutral Tandem argues that a fully developed discussion of the issues set forth in staff's recommendation provides "the parties the opportunity to address fully the specifics of the recommendation, provides the Commission the opportunity to obtain additional input and information from the parties and [s]taff 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."

Level 3: On December 17, 2007, Level 3 filed its Response in Opposition to the Request For Oral Argument filed by Neutral Tandem. Level 3 asserts that Neutral Tandem's Request for Oral Argument is the "latest in a series of tactics employed by Neutral Tandem to delay a Commission decision on the legal issues of jurisdiction and standing, thereby enabling Neutral Tandem to secure through delay the substantive relief initially sought in this proceeding." Level 3 argues that the two legal issues, jurisdiction and standing, have been subject to two rounds of briefing and oral argument before the full Commission.

In response to Neutral Tandem's assertion that it did not waive oral argument, Level 3 contends that Neutral Tandem expressly agreed that no further oral argument was necessary during the August 23, 2007 conference call. Level 3 points out that Neutral Tandem failed to file a Motion for Reconsideration or Clarification of Order No. PSC-07-0772-PCO-TP, which memorialized the agreement by the parties that no further oral argument was necessary.

Level 3 contends that Neutral Tandem's interpretation of Rule 25-22.0022, F.A.C., is without merit. Level 3 argues that the only reasonable interpretation of Rule 25-22.0022, F.A.C., is that only moving parties seeking affirmative relief may request oral argument or that the responding party must likewise request oral argument by a separate written request, contemporaneous with the filing of its response. Level 3 opines that otherwise a responding party could file a request for oral argument at any time prior to the agenda conference scheduled to address the subject motion. Level 3 asserts further that Neutral Tandem should not be allowed to cite an adverse staff recommendation as a basis for its untimely request for oral argument.

Additionally, Level 3 argues that Neutral Tandem's Request for Oral Argument fails to "state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided . . ." as required under Rule 25-22.0022, F.A.C. In response to Neutral Tandem's assertion that oral argument should be granted because the previous oral argument was conducted six months ago, Level 3 notes that it is standard practice for the Commission to make decisions and rule on issues many months after hearings and

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arguments have been presented to the Commission. Level 3 asserts further that a transcript of the proceeding is available for review by the Commissioners as necessary.

Finally, Level 3 asserts that Neutral Tandem's argument that the public interest and dangers to consumers justify oral argument is without merit. Level 3 argues that these arguments have been thoroughly vetted and examined through two rounds of briefs and the extensive oral argument already conducted before the Commission. Level 3 contends that it has unilaterally agreed to maintain interconnection with Neutral Tandem until the Commission rules on the issues of jurisdiction and standing and that doing so has resulted in "substantial adverse financial implications" for Level 3.

Staff Analysis: Rule 25-22.0022(1), F.A.C., sets forth that:

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.

Although the rule does not explicitly set forth the procedure for a responding party to request oral argument, staff agrees with Level 3's assertion that the only reasonable interpretation of the rule is that a responding party shall file a Request for Oral Argument upon the filing of its response to a dispositive motion, such as a Motion to Dismiss. To interpret the rule otherwise, would allow a responding party an undue advantage in determining whether or not it will be requesting oral argument. Accordingly, staff believes that Neutral Tandem's Request for Oral Argument, filed approximately four months after filing its Response and after the filing of staff's recommendation, is untimely.

Staff notes that at the August 23, 2007 conference call, the parties were specifically asked if any additional oral argument was necessary in this proceeding. Both parties indicated to staff that additional oral argument would not be necessary but requested the opportunity to file additional briefs to supplement their arguments.¹ Subsequent to the conference call, staff notified the Prehearing Officer that the parties had indicated that additional oral argument was not necessary but had requested to file supplemental briefs. Order PSC-07-0772-PCO-TP was then issued by the Prehearing Officer allowing the parties to file supplemental briefs and memorializing that neither party sought additional oral argument before the Commission. As noted by Level 3, Neutral Tandem did not file a Motion for Reconsideration or Clarification of the Order, nor was staff notified of Neutral Tandem's interest in addressing the Commission until after the filing of staff's recommendation for the December 4, 2007 Agenda Conference. Prior to the filing of the recommendation, staff did indicate to Neutral Tandem its intention to set forth in the notice section of the recommendation that it addressed a Motion to Dismiss was

¹ Staff notes that the parties did disagree over the scope of the supplemental briefs. The Prehearing Officer later determined that the parties' supplemental briefs could address Issues 1-3(a).

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being addressed and that oral argument had not been requested.

Accordingly, for the reasons set forth above, staff believes that Neutral Tandem's Request for Oral Argument is untimely and should be denied. However, staff notes that Rule 25-22.0022(7)(b), F.A.C., sets forth that regardless of whether a party has requested oral argument, the Commission can request oral argument on any issue to be decided by a dispositive motion or recommended order. Therefore, although staff believes Neutral Tandem's Request for Oral Argument should be denied for lack of timeliness, staff believes the Commission does have the discretion, on its own Motion, to entertain oral argument on the issues addressed in staff's recommendation.

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

Section 364.16(2), Florida Statutes, provides 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 interconnections 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 section 364.162(2) pertaining to interconnection services.

Section 364.162(2), Florida Statutes, provides in pertinent part that

In the event that the commission receives a single petition relating to either interconnection or resale of services or facilities, it shall vote, within 120 days following such filing, to set nondiscriminatory rates, terms, and conditions, except that the rates shall not be below cost.

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 by 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

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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)

Level 3 contends that as a creature of statute, the Commission’s powers are limited to those granted by the Legislature.² Consequently Level 3 argues that since the Legislature has not granted the Commission authority to mandate direct interconnection between the facilities of two CLECs, an Order doing such would exceed the Commission’s statutory authority. (Level 3 Supp. BR at 3)

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*³ and *Level 3 v. Jacobs*.⁴ Level 3 asserts that the issue in *Level 3 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 AT&T, 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

² See *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493 (Fla. 1973)

³ 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, L.L.C. [“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*)

⁴ *Level 3 v. Jacobs*, 841 So.2d 447 (Fla. 2003).

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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 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

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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

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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, now known as AT&T Florida (AT&T) is an ILEC, the transit service provided by AT&T 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.⁵ (*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 Section 364.01, 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.

⁵ 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)

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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.

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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. Furthermore, staff does not believe that under Florida law, Neutral Tandem qualifies as an agent for originating carriers. Accordingly, staff believes that Neutral Tandem lacks standing to seek relief under §§364.16 and 364.162, Florida Statutes.

While Neutral Tandem is not an agent under the legal definition, staff reiterates that the Commission has already held that (1) the originating carrier, not the terminating carrier, chooses how the originating call is routed to the end user; (2) the originating carrier is obligated to compensate the transit provider; (3) the originating carrier is responsible for delivering traffic to the transit provider in such a manner that it can be identified, routed, and billed; and, (4) the originating carrier, not the transit provider, should compensate the terminating carrier for terminating traffic to the end user. If an originating carrier believes that it is being adversely impacted by the actions of a terminating carrier, then the originating carrier is the appropriate party to file a letter of complaint or dispute with the Commission against the terminating carrier. (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)

Level 3 argues that Neutral Tandem's assertion that it has standing as an authorized agent for certain originating carriers, for which Neutral Tandem has filed Letters of Agency (LOAs),

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“fails for a number of reasons.” First, Level 3 contends that there is nothing in §364.16, Florida Statutes, which authorizes one carrier to represent the interests of another carrier. (Level 3 Motion at 29) Level 3 asserts further that Neutral Tandem has failed to allege and demonstrate that the originating carriers have standing to petition the Commission “for mandated directed interconnection by a transit provider with whom they have a contract.” (Supp. BR at 5)

Level 3 asserts that under Florida Law that an actual agency relationship exists if the principal retains the right to control the actions of the agent. Villazon v. Prudential Health Care Plan, 843 So.2d 842, 853 (Fla. 2003). Level 3 contends that the LOAs filed by Neutral Tandem do not provide the originating carriers with the required control over Neutral Tandem’s establishment of the technical and operational aspects of terminating transit traffic. Level 3 argues further that under established case law, Neutral Tandem may not act as an agent for a principal with whom it has a conflict. State ex. Rel. Harris v. Gautier, 147 So. 2d 240, 246 (Fla. 1933). Level 3 asserts that because it will seek to recover the costs involved in the termination of Neutral Tandem’s transit traffic from Neutral Tandem and Neutral Tandem’s position is that such costs should be recovered from the originating carrier, a principal-agent conflict exists that is not allowed under Florida law. (Level 3 Supp. BR at 6)

Finally, Level 3 contends that Neutral Tandem is misleading the Commission regarding the scope of the LOAs. Level 3 asserts that because the LOAs state that they are limited to the technical and operational aspects of making arrangements for termination of transit traffic, there is no authority pursuant to the LOAs to address compensation issues on behalf of these originating carriers pursuant to §§364.16(2) and 364.162, Florida Statutes.

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

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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)

Neutral Tandem asserts that in addition to having standing in its own right, it has submitted with its Second Petition six LOAs⁶ authorizing Neutral Tandem to act on behalf these originating carrier customers to negotiate transit traffic arrangements with other carriers using Neutral Tandem’s service. Neutral Tandem argues that the fact that §364.16, Florida Statutes, is silent as to whether a carrier can be represented by an agent should not lead to the conclusion that such an activity is barred by the statute and that Level 3’s interpretation negates the entire body of agency case law. Neutral Tandem contends that it is well-established law that a corporation may act as an agent for another corporation. United Bonding Ins. Co. v. Banco Suizo-Panameno, S.A. 422 F.2d 1142, 1146 (5th Cir. 1970). Neutral Tandem further contends that it is similarly well-established that an agent need not have the same legal qualifications as the principal in order to make a contract on behalf of that principal, but rather stands in the place and stead of the principal. Fla. Jur. 2d *Agency & Employment* § 3; Wright v. Sterling Drug, Inc., 321 So. 2d 460 (Fla. 2d DCA 1975), quashed on other grounds 342 So. 2d 503. (Neutral Tandem Response at 29-30)

Neutral Tandem argues that as an agent for these carriers, it is empowered to stand in the shoes of the principal carriers, which includes pursuing this litigation. Neutral Tandem disputes Level 3’s assertion that the originating carriers need to be parties to the petition because the dispute that has arisen is based on Level 3’s refusal to abide by its statutory requirement to interconnect with “any provider,” and Neutral Tandem contends that it qualifies as “any provider” regardless of its status as agent for the carriers. Neutral Tandem asserts further that while Florida law allows a party bound by an agent to a third party by a contract to sue that third party under the principal’s own name, there is no requirement that this be the case. Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc. 610 F.2d 371, 372 (5th Cir. 1980). (Neutral Tandem Response at 31-32)

Finally, Neutral Tandem disagrees with Level 3’s assertion that the LOAs prevent Neutral Tandem from any discussion on behalf of the originating carriers relating to the prices

⁶ The six originating carrier customers are XO Communications, Inc. (XO), Sprint Spectrum, L.P. d/b/a Sprint PCS and Sprint Communications Company L.P. (Sprint), Comcast, Alltel Communications, Inc. (Alltel), FDN Communications, Inc. (FDN), and AT&T.

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used in intercarrier compensation. Neutral Tandem notes that the LOAs state clearly that the Agent (Neutral Tandem) may deal with third parties "on all matters pertaining to the traffic termination arrangement." (Neutral Tandem Response at 32)

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."⁷ 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

⁷ The original term (alternative local exchange company or ALEC) was changed to CLEC on May 23, 2003.

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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.⁸ Staff believes Neutral Tandem’s delivery of transit traffic is clearly not a voice-grade exchange service available to the public for hire.

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 believes Neutral Tandem lacks standing to petition the Commission to establish interconnection terms and conditions with Level 3.

Does Neutral Tandem have standing as an agent for originating carriers?

It is well established that the mere use of the terms ‘principal’ and “agent” do not create an agency relationship. Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., 401 F. Supp. 2d 1270 (S.D. Fla. 2004). The three elements of an agency relationship under Florida law are (1) acknowledgment by the principal that the agent will act for it, (2) the agent's acceptance

⁸ 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 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)

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of the undertaking, and (3) control by the principal over the actions of the agent. Fla. Jur. 2d *Agency and Employment* § 1, Harbaugh v. Greslin, 436 F. Supp. 2d 1315 (S.D. Fla. 2006); Compania de Elaborados de Cafe v. Cardinal Capital Management, Inc., 401 F. Supp. 2d 1270 (S.D. Fla. 2003); In re Cuenant, 339 B.R. 262 (Bankr. M.D. Fla. 2006). Fernandez v. Florida Nat. College, Inc., 925 So. 2d 1096 (Fla. 3rd DCA 2006).

Upon review of the LOAs filed by Neutral Tandem, staff believes that Neutral Tandem has sufficiently plead the first two elements. The originating carriers have clearly acknowledged Neutral Tandem may act as their agent for the purpose of negotiating transit traffic arrangements with other carriers using Neutral Tandem's service. Additionally, by filing these LOAs in support of its Petition, staff believes that Neutral Tandem has established its acceptance of the undertaking. However, as discussed below, upon a thorough review of relevant Florida case law, staff does not believe that Neutral Tandem has established sufficient control by the originating carriers over the actions of Neutral Tandem.

Florida courts have held that the issue of control is critical to the determination of agency. Harbaugh at 1320. A party seeking to demonstrate an agency relationship must show a very significant degree of operational control over the agent. Faro Techs., Inc. v. CimCore Corp., 2006 U.S. Dist. LEXIS 43404 (M.D. Fla. 2006); State v. American Tobacco Co., 707 So. 2d 851 (Fla. 4th DCA 1998). Evidence of operational control includes, for instance, evidence that the principal controlled the internal affairs of an agent or determined how the agent operated on a daily basis. Harbaugh at 1320. If a so-called principal controls only the outcome of the endeavor, and not the means used to achieve the outcome, then an agency relationship does not exist. Fla. Jur. 2d *Agency and Employment* § 2, Dorse v. Armstrong World Industries, Inc., 513 So. 2d 1265 (Fla. 1987); Chase Manhattan Mortg. Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A., 694 So. 2d 827 (Fla. 4th DCA 1997).

Staff notes that pursuant to the express language of the LOAs, the originating carriers have authorized Neutral Tandem solely to make arrangements for the termination of transit traffic. Furthermore, staff notes that the LOAs are silent as to any control the originating carriers retain over negotiations or this pending litigation. Accordingly, staff believes the originating carriers have authorized Neutral Tandem to pursue an outcome (i.e. an arrangement for the termination of transit traffic), but do not possess control over the means necessary to achieve that outcome. Therefore, staff does not believe that under Florida law, a principal-agency relationship exists between Neutral Tandem and the originating carriers.⁹

Conclusion

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. Furthermore, staff does not believe that under Florida law, Neutral Tandem qualifies as an agent for originating carriers. Accordingly, staff believes that Neutral Tandem lacks standing to seek relief under §§364.16 and 364.162, Florida Statutes.

⁹ Where a principal controls only the outcome of the relationship, not the means used to achieve that outcome, the other party is a contractor, not an agent. Fla. Jur. 2d *Agency and Employment* § 5.

While Neutral Tandem is not an agent under the legal definition, staff reiterates that the Commission has already held that (1) the originating carrier, not the terminating carrier, chooses how the originating call is routed to the end user; (2) the originating carrier is obligated to compensate the transit provider; (3) the originating carrier is responsible for delivering traffic to the transit provider in such a manner that it can be identified, routed, and billed; and, (4) the originating carrier, not the transit provider, should compensate the terminating carrier for terminating traffic to the end user. If an originating carrier believes that it is being adversely impacted by the actions of a terminating carrier, then the originating carrier is the appropriate party to file a letter of complaint or dispute with the Commission against the terminating carrier.

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

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.

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Issue 4: Should the Commission grant Level 3's Motion to Dismiss?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 2, Level 3's Motion to Dismiss should be granted, ~~without prejudice~~, because Neutral Tandem lacks standing to seek relief under §§364.16 and 364.162, Florida Statutes. (Teitzman)

Staff Analysis: If the Commission approves staff's recommendation in Issue 2, Level 3's Motion to Dismiss should be granted, ~~without prejudice~~, because Neutral Tandem lacks standing to seek relief under §§364.16 and 364.162, Florida Statutes.

The basic function of a motion to dismiss before this Commission is to test the legal sufficiency of the petition with respect to (1) substantial injury, (2) statutory right, and (3) requested relief. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); See also, Rule 28-106.201(2), Florida Administrative Code. In the instant case, Level 3's motion to dismiss focuses, in part, on the first item, the "substantial interests" requirement. That is, whether Neutral Tandem has "standing" to demand the relief requested. If in Issue 2 the Commission determines that Neutral Tandem does not have standing to demand relief, then the Commission must conclude that Neutral Tandem's petition is legally insufficient and must therefore be dismissed as a matter of law. §120.569(2)(c), Florida Statutes.

Staff does not believe it is necessary for the Commission to set forth whether Neutral Tandem's Petition should be dismissed with or without prejudice. Because Neutral Tandem's Petition is dismissed due to lack of standing, this is not a determination on the merits. Nevertheless, this is a final and adverse agency action with respect to standing. As a consequence, under the doctrines of res judicata and collateral estoppel, Neutral Tandem may not again bring this action in the same or similar capacity.

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Issue 5: 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.