

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 070408-TP
ORDER NO. PSC-08-0073-FOF-TP
ISSUED: January 30, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

I. 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 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.

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).

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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 our 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.

Our 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. Upon consideration of Neutral Tandem's Request for Oral Argument, on our own Motion we requested oral argument at the January 8, 2008 Agenda Conference.

II. COMMISSION'S JURISDICTION

A. 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 our 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 this 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, we lack jurisdiction to mandate facilities interconnection by a CLEC like Level 3.

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, we 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 contends that as a creature of statute, our powers are limited to those granted by the Legislature.¹ Consequently Level 3 argues that since the Legislature has not granted this Commission authority to mandate direct interconnection between the facilities of two CLECs, an Order doing such would exceed our statutory authority. 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.

¹ See City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493 (Fla. 1973)

Finally, Level 3 counters Neutral Tandem's reliance on the *TDS Telecom Order*² and *Level 3 v. Jacobs*.³ Level 3 asserts that the issue in *Level 3 v. Jacobs* was whether this 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* we 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, we simply acknowledged that § 251(a) of the Act obligates carriers to interconnect either directly or indirectly.

Neutral Tandem

In its brief, Neutral Tandem asserts that §364.16(2), Florida Statutes, provides us 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 §364.16(2), Florida Statutes, sets forth that if competitive carriers are unable to reach agreement on the terms and conditions of interconnection, this Commission shall "set nondiscriminatory rates, terms and conditions" for interconnection within 120 days after a carrier files an interconnection petition.

Neutral Tandem contends that we have already found that Chapter 364 grants us jurisdiction over interconnection for transiting purposes. Neutral Tandem cites to the *TDS Telecom Order* where we 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 argues that Level 3's assertions that this 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 our jurisdiction when it found that Chapter 364 "gives the PSC authority over interconnection duties of both ILECs and [competitive local carriers]."

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).

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 our intervention is necessary in this matter.

In concluding its jurisdictional arguments, Neutral Tandem asserts that we should be mindful of the potential implications that granting Level 3's Motion would have on our 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 our jurisdiction and within our plenary authority over the integrity of the telecommunications delivery system.

B. Analysis and Decision

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, 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. We disagree with this assertion. The 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.

We note further that §364.01(2), Florida Statutes, provides that we have 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, we find that if providers of local exchange telecommunications services are unable to reach mutually acceptable prices, terms, and conditions for interconnection, we may arbitrate the prices, terms, and conditions to ensure the requirements of §364.16(2), Florida Statutes, are met.

Level 3 also asserts that this Commission is preempted by federal law from arbitrating CLEC-to-CLEC interconnection arrangements. We find 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 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, we are not preempted from requiring Level 3 to interconnect directly or indirectly with the facilities of other telecommunications carriers pursuant to state law.

In conclusion, we find that this Commission 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.

III. STANDING

A. 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 this Commission for CLECs.

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 our 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 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), “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 asserts further that Neutral Tandem has failed to allege and demonstrate that the originating carriers have standing to petition this Commission “for mandated directed interconnection by a transit provider with whom they have a contract.”

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.

Finally, Level 3 contends that Neutral Tandem is misleading this 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 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 this 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 this Commission to establish terms and conditions for interconnection with Level 3.

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 we have already found in the *TDS Telecom Order* that transiting service should be categorized as “an interconnection arrangement under §364.16, Florida Statutes.”

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 asserts that in addition to having standing in its own right, it has submitted with its Second Petition six LOAs⁴ 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

⁴ 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.

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 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).

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 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."

B. Analysis and Decision

A determination of whether Neutral Tandem has standing to petition this Commission for interconnection with Level 3 requires a comprehensive understanding of the services offered in Florida by Neutral Tandem. Upon consideration of the parties arguments, as set forth in their briefs and during oral argument, we require additional information before we can determine if Neutral Tandem has standing to petition this Commission for interconnection with Level 3. Consequently, we hereby deny Level 3's Motion to Dismiss and direct our staff to set this matter for hearing.

Based on the forgoing, it is

ORDERED by the Florida Public Service Commission that we have 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. It is further

ORDERED that Level 3's Motion to Dismiss is denied as set forth in the body of this Order. It is further

ORDERED that this docket shall remain open to conduct an administrative hearing.

By ORDER of the Florida Public Service Commission this 30th day of January, 2008.



ANN COLE
Commission Clerk

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.