

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

RECEIVED - FPSC
08 JUL - 2 AM 11:18
COMMISSION
CLERK

DATE: July 2, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Mann, Teitzman) *RAH* *SAS for LVK*
Division of Competitive Markets & Enforcement (Lee, King) *Plus*

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: 07/15/08 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrin

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\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 (First Petition, 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.

DOCUMENT NUMBER-DATE

05749 JUL-2 8

FPSC-COMMISSION CLERK

On May 3, 2007, Order No. PSC-07-0392-PCO-TX (Order Establishing Procedure) was issued. The Order Establishing Procedure required the parties to file briefs on the legal issues (1-3a), as set forth in Attachment A. On May 24, 2007, oral argument took place.

After filing a Motion for Leave to Amend its First Petition, Neutral Tandem filed a Notice of Voluntary Dismissal of Petition for Interconnection with Level 3, without prejudice, on July 9, 2007, in Docket No. 070127-TX,

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 consider Neutral Tandem's Second Petition. On July 25, 2007, Level 3 filed its Response and Motion to Dismiss Neutral Tandem's Second Petition (Motion to Dismiss). On August 3, 2007, Neutral Tandem filed its Response to Level 3's Motion to Dismiss.¹ 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.

On January 30, 2008, the Commission issued Order No. PSC-08-0073-FOF-TP, finding that it has jurisdiction pursuant to Section 364.16(2), Florida Statutes, to ensure that a Competitive Local Exchange Company (CLEC) provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services in Florida. However, the Commission concluded that additional information was needed before a determination could be made whether Neutral Tandem has standing to petition for interconnection with Level 3. Accordingly, the Commission denied Level 3's Motion to Dismiss and ordered that this docket remain open to conduct an administrative hearing.

On February 1, 2008, Level 3 filed a Motion for Interim Compensation Pending Final Agency Action (Motion for Interim Compensation) seeking relief based on the provisions of the Traffic Exchange Agreement dated July 6, 2004, between Level 3 and Neutral Tandem (Level 3 Contract). On February 8, 2008, Neutral Tandem filed its Response in Opposition to Level 3's Motion for Interim Compensation. On April 17, 2008, Level 3 filed its Amended Motion for Interim Compensation Pending Final Agency Action (Amended Motion for Interim Compensation) and expressly referenced Section 11.3 of the Level 3 Contract as the basis for its requested interim compensation. On April 24, 2008, Neutral Tandem filed its Response in Opposition to Level 3's Amended Motion for Interim Compensation (Response in Opposition).

Staff's recommendation on the Motion for Interim Compensation (Staff Recommendation) was scheduled for consideration by the Commission at its regularly scheduled Agenda Conference on June 17, 2008. The parties reached a negotiated settlement, however, and requested that the staff recommendation be removed from consideration at the June 17 Agenda Conference.

On June 12, 2008, Neutral Tandem filed a Notice of Voluntary Dismissal of Petition (Notice of Voluntary Dismissal). Staff accordingly removed the staff recommendation from the

¹ Order No. PSC-07-0698-FOF-TP, issued August 27, 2007, merged the record of Docket No. 070127-TX, Neutral Tandem's First Petition, into Docket No. 070408-TP, Neutral Tandem's Second Petition.

Docket No. 070408-TP
Date: July 2, 2008

June 17, 2008 Agenda Conference. This recommendation addresses Neutral Tandem's Notice of Voluntary Dismissal. The Commission is vested with jurisdiction over this matter pursuant to Chapter 364, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission accept Neutral Tandem's Notice of Voluntary Dismissal?

Recommendation: Yes. The Commission should accept Neutral Tandem's Notice of Voluntary Dismissal and the hearing should be cancelled. (Mann, Lee)

Staff Analysis: By Neutral Tandem's Notice of Voluntary Dismissal, it withdraws its Second Petition, filed July 11, 2007, and requests that this docket be closed. In support of its Notice, Neutral Tandem avers that:

- Neutral Tandem and Level 3 have reached a negotiated settlement of the dispute that served as the basis for Neutral Tandem's Second Petition.
- The negotiated settlement resolves all issues currently before the Commission for resolution in this proceeding.
- Both parties agree that voluntary dismissal, without prejudice, is appropriate in this circumstance.
- Level 3 no longer requires a ruling on its pending Motion for Interim Compensation and its Amended Motion for Interim Compensation, which may be deemed moot with no ruling on the merits.

The Commission has repeatedly recognized that the right of a petitioner to take a voluntary dismissal is absolute.² Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.³ Both of these legal principles have been recognized in administrative proceedings.⁴ Thus, Neutral Tandem can dismiss its petition as a matter of right, which is in accord with past Commission decisions.⁵

² Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

³ Randle-Eastern Ambulance Service, Inc. v. Vasta, Elena a, etc, 360 So. 2d 68, 69 (Fla. 1978)

⁴ Orange County v. Debra, Inc., 451 So. 2d 868 (Fla. 1st DCA 1983); City of Bradenton v. Amerifirst Development Corporation, 582 So. 2d 166 (Fla. 2d DCA 1991); Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., 630 So. 2d 1123 (Fla. 2d DCA 1993) aff'd, 645 So. 2d 374 (Fla. 1994).

⁵ See Order No. PSC-05-0724-FOF-TP, issued July 6, 2005, in Docket Nos. 040489-TP, In re: Emergency complaint seeking order requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to continue to honor existing interconnection obligations, by XO Florida, Inc. and Allegiance Telecom of Florida, Inc. (collectively, Joint CLECs) and 040520-TP, In re: Emergency petition seeking order requiring BellSouth Telecommunications, Inc. and Verizon Florida Inc. to continue to honor existing interconnection obligations, by the Florida Competitive Carriers Association, AT&T Communications of the Southern States, LLC, MCImetro Access Transmission Services, LLC, and MCI WorldCom Communications, Inc.; Order No. PSC-02-0857-FOF-TP, issued June 24, 2002, in Docket No. 011615-TP, In re: Complaint of KMC Telecom, Inc. for enforcement of interconnection agreement with Sprint-Florida, Incorporated; But see Order No. PSC-07-0297-FOF-SU, issued April 9, 2007, in Docket No. 020640-SU, In re: Application for certificate to provide wastewater service in Lee County by Gistro, Inc. and Order No. PSC-96-0992-FOF-WS, issued August 5, 1996, in Docket No. 950758-WS, In Re: Petition for approval of transfer of facilities of Harbor Utilities Company, Inc., to Bonita Springs Utilities and cancellation of Certificates Nos. 272-W and 215-S in Lee County (voluntary dismissal cannot be utilized to divest the Commission as an adjudicatory agency of its jurisdiction granted to it by the legislature).

Docket No. 070408-TP

Date: July 2, 2008

Accordingly, and particularly in light of the parties' negotiated settlement of their dispute, staff recommends that the Commission accept Neutral Tandem's Notice of Voluntary Dismissal and that the hearing be cancelled.

Issue 2: Should this docket be closed?

Recommendation: If Issue 1 is approved, there is nothing further for the Commission to consider in this docket. Therefore, staff recommends that Docket No. 070408-TP should be closed. (Mann)

Staff Analysis: If Issue 1 is approved, there is nothing further for the Commission to consider in this docket. Therefore, staff recommends that Docket No. 070408-TP should be closed.