

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-08-0493-FOF-TP ISSUED: August 5, 2008
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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 ACKNOWLEDGING NEUTRAL TANDEM'S
NOTICE OF VOLUNTARY DISMISSAL

BY THE COMMISSION:

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. Neutral Tandem requested that we: (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, 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, we heard oral argument.

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

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Dismiss). On August 3, 2007, Neutral Tandem filed its Response to Level 3's Motion to Dismiss.¹

On August 27, 2007, Order No. PSC-07-0698-FOF-TP was issued, acknowledging Neutral Tandem's voluntary dismissal of its first petition and merging Docket No. 070127-TX 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.

On January 30, 2008, we issued Order No. PSC-08-0073-FOF-TP, finding that we had jurisdiction pursuant to Section 364.16(2), Florida Statutes, to ensure that a Competitive Local Exchange Company provides access to and interconnection with its telecommunications services to any other provider of local exchange telecommunications services in Florida. However, we 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, we 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 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 was scheduled for consideration by this Commission at our regularly scheduled Agenda Conference on June 17, 2008. The parties reached a negotiated settlement, however, and requested that staff's recommendation be removed from consideration at the June 17 Agenda Conference, which was done.

On June 12, 2008, Neutral Tandem filed a Notice of Voluntary Dismissal of Petition (Notice of Voluntary Dismissal). On July 2, 2008, staff filed its recommendation on the Notice of Voluntary Dismissal. At our July 15, 2008 Agenda Conference, we voted to accept Neutral Tandem's Notice of Voluntary Dismissal.

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.

Discussion and Analysis

In support of its Notice of Voluntary Dismissal, Neutral Tandem stated that:

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

We have 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 our past decisions.⁵

Accordingly, and particularly in light of the parties' negotiated settlement of their dispute, we acknowledge Neutral Tandem's Notice of Voluntary Dismissal. Because there is nothing further in this docket for this Commission to address, the docket shall be closed.

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).

Based on the foregoing, it is

ORDERED by the Public Service Commission that Neutral Tandem's Notice of Voluntary Dismissal of Petition, without prejudice, is hereby acknowledged. It is further

ORDERED that all confidential documents can be returned to their source. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 5th day of August, 2008.



ANN COLE
Commission Clerk

(S E A L)

HFM

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.