

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-

DATE: August 2, 2007

TO: Office of Commission Clerk (Cole)

FROM: Division of Competitive Markets & Enforcement (Lee, King)
Office of the General Counsel (Teitzman, Mann)

RE: Docket No. 070127-TX – Petition for interconnection with Level 3 Communications and request for expedited resolution, by Neutral Tandem, Inc.

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: 08/14/07 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070127.RCM2.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. Neutral Tandem requests 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

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over the parties' existing interconnections while its Petition is pending. On March 13, 2007, Level 3 filed its Corrected Response and Motion to Dismiss Neutral Tandem's Petition.

By Order No. PSC-07-0295-PCO-TX, issued April 6, 2007, Neutral Tandem's Request for Expedited Resolution and/or Interim Relief was denied.

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 before the Commission on May 24, 2007.

On July 5, 2007, Neutral Tandem filed its Motion for Leave to Amend Petition. Subsequently, on July 9, 2007, Neutral Tandem filed its Notice of Voluntary Dismissal of Petition for Interconnection with Level 3, without prejudice.

On July 11, 2007, Neutral Tandem filed its Second Petition for Interconnection with Level 3 Communications (Level 3) and Request for Expedited Resolution and/or Interim Relief (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.

Discussion of Issues

Issue 1: Should the Commission acknowledge Neutral Tandem's Notice of Voluntary Dismissal of its First Petition for Interconnection with Level 3, without prejudice, in Docket No. 070127-TX?

Recommendation: Yes. The Commission should acknowledge Neutral Tandem's Notice of Voluntary Dismissal of its First Petition for Interconnection with Level 3, without prejudice, in Docket No. 070127-TX. (TEITZMAN)

Staff Analysis: It is a well established legal principle that the plaintiff's right to take a voluntary dismissal is absolute.¹ Once a voluntary dismissal is taken, the trial court loses all jurisdiction over the matter, and cannot reinstate the action for any reason.² Both of these legal principles have been recognized in administrative proceedings.³ Accordingly, Neutral Tandem can dismiss its petition as a matter of right, which is in accord with past Commission decisions.⁴

Therefore, staff recommends that the Commission acknowledge Neutral Tandem's Notice of Voluntary Dismissal of its First Petition for Interconnection with Level 3, without prejudice, in Docket No. 070127-TX.

¹ Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975)

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

³ 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).

⁴ 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).

Issue 2: Should the Commission merge the record from Docket No. 070127-TX into Docket No. 070408-TP?

Recommendation: Yes. Staff recommends that if Issue 1 is approved, the Commission should merge the record in Docket No. 070127-TX into Docket No. 070408-TP. Because Neutral Tandem's Petition in Docket No. 070408-TP addresses the same issues that were to be addressed in Docket No. 070127-TX, staff believes it is appropriate and efficient to consolidate the records. **(TEITZMAN)**

Staff Analysis: Staff recommends that if Issue 1 is approved, the Commission should merge the record in Docket No. 070127-TX into Docket No. 070408-TP. Because Neutral Tandem's Petition in Docket No. 070408-TP addresses the same issues that were to be addressed in Docket No. 070127-TX, staff believes it is appropriate and efficient to consolidate the records.

Issue 3: Should these dockets be closed?

Recommendation: If Issue 1 is approved, there is nothing further in Docket No. 070127-TX for the Commission to consider. Therefore, staff recommends that Docket No. 070127-TX should be closed.

Staff recommends that Docket No. 070408-TP should remain open to address Neutral Tandem's Second Petition for Interconnection with Level 3 Communications and Request for Expedited Resolution and/or Interim Relief. **(TEITZMAN)**

Staff Analysis: If Issue 1 is approved, there is nothing further in Docket No. 070127-TX for the Commission to consider. Therefore, staff recommends that Docket No. 070127-TX should be closed.

Staff recommends that Docket No. 070408-TP should remain open to address Neutral Tandem's Second Petition for Interconnection with Level 3 Communications and Request for Expedited Resolution and/or Interim Relief.