

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

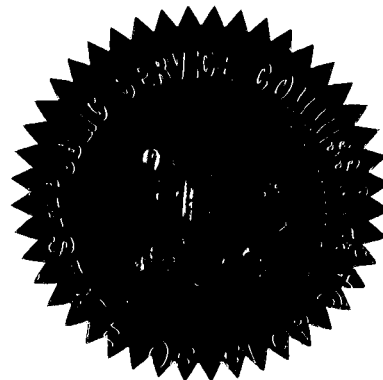
In the Matter of:

PETITION FOR INTERCONNECTION WITH
LEVEL 3 COMMUNICATIONS AND REQUEST
FOR EXPEDITED RESOLUTION, BY NEUTRAL
TANDEM, INC.

DOCKET NO. 070127-TX

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



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 4

BEFORE: CHAIRMAN LISA POLAK EDGAR
COMMISSIONER MATTHEW M. CARTER, II
COMMISSIONER KATRINA J. MCMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, August 14, 2007

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
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FLORIDA PUBLIC SERVICE COMMISSION

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1 PARTICIPATING:

2 BETH KEATING, ESQUIRE, and JOHN R. HARRINGTON,
3 ESQUIRE, representing Neutral Tandem-Florida, LLC.

4 KENNETH A. HOFFMAN, ESQUIRE, representing Level 3
5 Communications, LLC.

6 ADAM TEITZMAN, ESQUIRE, representing the Florida
7 Public Service Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN EDGAR: And we will begin our discussions
3 with Item 4.

4 MR. TEITZMAN: Commissioners, Item 4 addresses
5 Neutral Tandem's notice of voluntary dismissal without
6 prejudice of its first petition for interconnection in Docket
7 Number 070127-TX. Staff is recommending the Commission
8 acknowledge Neutral Tandem's voluntary dismissal without
9 prejudice. In Issue 2, staff recommends the Commission merge
10 the record of 070127-TX into Docket Number 070408-TP, which was
11 opened to address Neutral Tandem's second petition for
12 interconnection and raises the same issues that were to be
13 addressed in Docket 070127.

14 Staff understands that Ken Hoffman is here on behalf
15 of Level 3, and would like to address the Commission, and Beth
16 Keating and John Harrington are here to represent Neutral
17 Tandem. Staff is available to answer your questions.

18 CHAIRMAN EDGAR: Thank you.

19 Ms. Keating.

20 MS. KEATING: Good morning, Madam Chair,
21 Commissioners. Beth Keating, Akerman Senterfitt here this
22 morning on behalf of Neutral Tandem. With me, again, is John
23 Harrington of the Jenner Block law firm who is coordinating
24 counsel for Neutral Tandem.

25 Neutral Tandem would just like to say at this point

1 that we fully support staff's recommendation, and ask that you
2 approve it as presented to you. I would ask, Madam Chair, if
3 possible that we be given a few moments to respond to any
4 comments that Level 3 may present today.

5 CHAIRMAN EDGAR: Yes, ma'am.

6 Mr. Hoffman.

7 MR. HOFFMAN: Thank you, Madam Chairman.

8 Commissioners, good morning. My name is Ken Hoffman. I'm with
9 Rutledge, Ecenia, Purnell and Hoffman in Tallahassee. To my
10 right is Gregg Strumberger, he is corporate counsel for Level 3
11 Communications. We are here this morning on behalf of Level 3.

12 We do appreciate the opportunity to participate in
13 what typically is a very mundane matter for you, which is the
14 filing of a voluntary dismissal of a petition. Level 3 is
15 troubled by the way Neutral Tandem went about taking this
16 dismissal, and we think that the Commission should be
17 concerned, as well. The bottom line here is that there was no
18 credible reason or justification for Neutral Tandem to file a
19 voluntary dismissal and then refile a new petition in a new
20 docket.

21 Very briefly, you may recall that this is a case
22 where Neutral Tandem, an alternative transit provider, whose
23 only service is a transit service, requested this Commission to
24 mandate Level 3 to directly interconnect for the purpose of
25 terminating Neutral Tandem's transit traffic. This is the

1 first time that one CLEC attempted to invoke the Commission's
2 jurisdiction to conduct a state arbitration against another
3 CLEC. Because this was a case of first impression,
4 Commissioner McMurrin, as the prehearing officer, denied
5 Neutral Tandem's request to expedite the proceeding.

6 Back in May of this year you heard oral argument on
7 the legal issues of whether the Commission has such
8 jurisdiction, and whether Neutral Tandem specifically, a
9 company that does not provide basic local telecommunications
10 services, even had standing to bring this action.

11 The staff issued a recommendation after that oral
12 argument and the staff recommended that you find that you do
13 have jurisdiction, but that Neutral Tandem lacks standing and,
14 therefore, the case should be dismissed but without prejudice.
15 The staff stated in their recommendation that Neutral Tandem
16 may have standing if it files an amended petition as an agent
17 on behalf of the originating carriers that are customers of
18 Neutral Tandem.

19 Now, the Commission was set and scheduled to consider
20 that staff recommendation at the July 10, 2007, agenda
21 conference. Five days before that agenda conference on
22 July 5th, Neutral Tandem filed a motion for leave to amend
23 their petition together with an amended petition. The new
24 filings purported to cure the problem with their standing by
25 attaching limited agency letters from certain carrier customers

1 of Neutral Tandem.

2 Now, in their motion to amend, Neutral Tandem stated
3 that the staff recommendation suggested that Neutral Tandem's
4 appearance as an agent for its originating customers would
5 remedy the defect with Neutral Tandem's standing. Now that
6 misrepresents the staff recommendation, because staff had only
7 suggested that appearing as an agent may be sufficient to cure
8 the standing problem. Neutral Tandem in their motion also
9 suggested that a deferral may be appropriate to allow Level 3
10 the opportunity to respond to the motion for leave to amend the
11 petition, and that we thought was an interesting and even
12 presumptuous statement since Neutral Tandem's request to file
13 that amended petition had not yet even been granted. So there
14 was nothing for us to even respond to. We believe, if nothing
15 else, the request for the deferral confirmed that Neutral
16 Tandem was hoping to use its amended petition to essentially
17 moot, obviate the need for a Commission vote and avoid a
18 potential adverse Commission vote on their petition.

19 The next day, on July 6th, which was a Friday, Level
20 3 sent a letter to Mr. Teitzman objecting to Neutral Tandem's
21 preemptive attempt to bolster their lack of standing before
22 there was a Commission vote. We also pointed out the
23 misstatement of staff's position in Neutral Tandem's motion and
24 we expressed our objection to a deferral. So at that point,
25 Neutral Tandem was facing a Commission vote on a staff

1 recommendation which, depending on how the Commission voted,
2 could have resulted in a dismissal of their petition,
3 potentially even with prejudice, if the Commission did not
4 agree with the notion that Neutral Tandem could somehow cure
5 its own lack of standing under the statutes by appearing as a
6 representative for somebody else.

7 Neutral Tandem then learned that its attempt to
8 secure this deferral had been denied. So Neutral Tandem filed
9 their voluntary dismissal one day before the July 10 agenda
10 conference in what we think was a clear attempt to avoid an
11 adverse Commission vote.

12 Now, here again, in that notice of voluntary
13 dismissal, we believe that Neutral Tandem was less than candid
14 with the Commission. In that pleading, Neutral Tandem stated
15 that it was filing this voluntary dismissal to alleviate any
16 potential procedural concerns regarding the Commission's
17 ability to consider Neutral Tandem's amended petition. That
18 statement doesn't wash. These are good experienced lawyers
19 representing Neutral Tandem. Neutral Tandem could have simply
20 withdrawn that motion for leave to amend, and waited for the
21 Commission to vote on July 10th, and then refiled that motion
22 for leave to amend if the staff recommendation were approved.
23 Or they could have simply just left it in place, left it
24 pending, and waited for the Commission vote.

25 There was really no legitimate reason to take a

1 voluntary dismissal and then attempt to hit the reset button on
2 this whole case other than a concern on their part, we believe,
3 that their petition would be dismissed on jurisdictional
4 grounds if the Commission did not agree with staff on that
5 point, or on standing grounds if the Commission rejected
6 staff's agency theory.

7 So Neutral Tandem then filed a new petition a few
8 days later essentially raising all of the same allegations and
9 arguments and even asking for expedited procedures even though
10 Commissioner McMurrin had already denied that request in the
11 first docket. We moved to dismiss that petition, and in our
12 motion to dismiss that petition in the new docket we pointed
13 out what we believed to be Neutral Tandem's lack of candor with
14 the Commission in the first docket, specifically their
15 mischaracterization of the staff recommendation, and this
16 illusory justification for taking a voluntary dismissal. They
17 filed a 38-page response to our motion to dismiss, and nowhere
18 in those papers do they even attempt to respond to or rebut our
19 statements on this particular issue.

20 You may recall that one of the themes in Neutral
21 Tandem's arguments at that oral argument is that the public
22 switched network will be disrupted and calls to Level 3's
23 customers will not be completed if the Commission does not
24 agree with Neutral Tandem and mandate a direct connection
25 between Level 3 and Neutral Tandem, but instead allows Level 3

1 to receive these calls from Neutral Tandem, but indirectly
2 through an ILEC. Once again, there are credibility issues with
3 their statements.

4 Neutral Tandem has recently filed requests for
5 dismissals in a number of other states of similar disputes with
6 Level 3, and the reason that they state that they are taking
7 these dismissals is because Neutral Tandem has determined that
8 it will no longer deliver any traffic to Level 3 through the
9 parties' existing direct interconnections.

10 We have filed these requests with this Commission.
11 We think these pleadings again go to their credibility. First,
12 they appear to confirm that Neutral Tandem is more than able to
13 make the arrangements to reroute the traffic as Level 3 has
14 always contended without harming Neutral Tandem's customers,
15 without harming Level 3's customers, and without harming the
16 public switched network.

17 Second, Neutral Tandem's Chief Operating Officer
18 testified in Michigan just last week that they are allowing the
19 direct connection with Level 3 to be terminated, and they are
20 rerouting the traffic because they simply don't have enough
21 traffic in those states to justify the cost of litigating with
22 Level 3 in those states. And Neutral Tandem filed a pleading
23 yesterday with this Commission essentially saying the same
24 thing.

25 So, Commissioner Carter, you may recall at the oral

1 argument you made a statement about this dispute. You said
2 it's all about the money. We think you're right. It's all
3 about the money. They are taking dismissals where they don't
4 think they have enough traffic to justify the cost of
5 litigation.

6 So we are now left with your consideration of this
7 notice of voluntary dismissal. Neutral Tandem and the staff
8 have cited to cases which confirm that a party can take a
9 voluntary dismissal before a case goes to hearing, but none of
10 these cases address the issue of whether that voluntary
11 dismissal is with or without prejudice. If this Commission
12 were operating under and subject to Rule 1.420 of the Florida
13 Rules of Civil Procedure, then I believe I would have to say
14 that clearly a first dismissal such as that filed by Neutral
15 Tandem may be without prejudice, but the Commission is not
16 subject to that rule.

17 If Neutral Tandem had simply waited for a Commission
18 vote and the Commission had approved the staff recommendation,
19 Neutral Tandem could have simply moved forward with their
20 motion for leave to amend, and I believe that under Chapter
21 120 they would have justifiable reason to have that right to
22 file that amended petition. But they rejected that
23 opportunity. They took this dismissal. Neutral Tandem simply
24 assumed without any direct supporting legal authority that it
25 had the absolute right to take a voluntary dismissal without

1 prejudice.

2 It's obviously your decision as to how to handle
3 this, i.e., whether that dismissal that they have taken should
4 be with or without prejudice. I find no statute or rule that
5 dictates how the Commission should answer that question. We
6 believe that Neutral Tandem's actions could justify a sanction
7 of a dismissal with prejudice, but obviously that is something
8 that is in your discretion and we leave that decision to you.

9 That concludes my remarks, Madam Chairman.

10 CHAIRMAN EDGAR: Thank you.

11 Ms. Keating.

12 MS. KEATING: Commissioners, I really just want to
13 focus back on the issue that's before you today. The only
14 thing that has been noticed for discussion and debate, Neutral
15 Tandem's notice of voluntary dismissal. We suggest,
16 respectfully, that you should approve your staff's
17 recommendation for several reasons.

18 First of all, as your staff has correctly analyzed, a
19 party has a right to a voluntary dismissal without prejudice.
20 A voluntary dismissal is completely and entirely acceptable
21 under Florida case law. Obviously we have a difference of
22 opinion with Level 3 with regard to voluntary dismissal with or
23 without prejudice. As we read the case law, the only times
24 that it's appropriate for voluntarily withdrawal to be subject
25 to prejudice is in those instances where the case has involved

1 a petitioner who is an applicant for a certificate and the
2 conduct that the applicant is engaging in is ongoing, and in
3 that situation the agency has ongoing jurisdiction over the
4 applicant whether or not they withdraw their application for
5 certification.

6 The other instances are those situations where the
7 case has been to the trier of fact, and by that I mean a
8 situation where a DOAH hearing officer has heard the
9 substantive arguments of the case and has rendered a
10 recommended order to the agency for further consideration. In
11 all other instances, and this agency has recognized this, that
12 a notice of voluntary dismissal at least once is as of right
13 and without prejudice.

14 That being said, Level 3 has raised a number of
15 issues today that go to your substantive consideration of
16 Neutral Tandem's new petition. I submit to you that those
17 issues have not been noticed for discussion today, they are
18 simply not before you. Frankly, these arguments really seem
19 geared towards clouding the issues and misdirecting attention
20 away from the fact that in every other state where a
21 substantive decision has been made on this dispute between
22 Neutral Tandem and Level 3, Neutral Tandem has prevailed on the
23 merits. This appears to be an attempt to get you to move past
24 this case and not hear the merits.

25 Again, by law we have the right to withdraw our

1 petition without prejudice. And since Level 3 actually had
2 filed a motion to dismiss of the very petition that is before
3 you, it seems odd now that they are asking that you reject our
4 notice of withdrawal.

5 As for Level 3's arguments that this is a crisis of
6 our own making, and they have pointed out that Neutral Tandem
7 has moved to dismiss Level 3's petitions in other states, I
8 think it is key to note that again Level 3's notice of
9 supplemental filing is not before you today. We filed our
10 response yesterday, and we expect that that will be dealt with
11 in due time. And when the Commission is prepared to hear
12 arguments on that, we will certainly be prepared to address
13 that.

14 But to address the specifics that Mr. Hoffman has
15 presented to you today, yes, it's correct that Neutral Tandem
16 has, in fact, moved to dismiss those cases, and he is correct
17 that it is because there is a much lesser level of traffic that
18 Neutral Tandem terminates to Level 3 in those states, and as
19 such it has simply been impossible for Neutral Tandem, which is
20 a much smaller company with much fewer resources to pursue
21 litigation in those states where it doesn't make -- it's simply
22 not practical or efficient to continue litigation as compared
23 to rerouting traffic.

24 That is just not the case in Florida. Neutral Tandem
25 terminates 60 million minutes of traffic to Level 3 in this

1 state. It doesn't make any practical or efficient sense to
2 reroute the traffic here. Again, this is not an issue that is
3 before the Commission right now. We really ask that you go
4 back and you approve the staff's recommendation before you,
5 which is solely on the notice of withdrawal, and we ask that
6 you do so without prejudice so that we can move forward and let
7 the Commission hear the arguments in due course.

8 CHAIRMAN EDGAR: Thank you.

9 Mr. Hoffman, are you asking that this Commission
10 reject the request for notice of voluntary dismissal?

11 MR. HOFFMAN: No, they have a right to take a
12 dismissal. The cases that are cited by Neutral and by the
13 staff do not specifically address when a party takes a
14 dismissal whether it is with or without prejudice, and that is
15 the only issue that I'm raising. I think that they have the
16 absolute right to take a voluntary dismissal so long as it is
17 taken before the case goes to hearing. No question about that.

18 The issue that we are trying to raise goes to whether
19 it should be with or without prejudice. And so we are not
20 trying to address substantive concerns. Our argument to you is
21 that we believe you would be within your discretion to consider
22 taking a dismissal with prejudice if you believe that Neutral
23 Tandem's conduct and misrepresentations to the Commission in
24 their pleadings reached the point where it would justify the
25 imposition of the sanction of a dismissal with prejudice.

1 That's our argument.

2 CHAIRMAN EDGAR: Okay.

3 Commissioners, any questions?

4 Commissioner McMurrrian.

5 COMMISSIONER McMURRIAN: I guess I would like to ask
6 staff to respond to the arguments they have heard, but
7 focussing mainly on the with or without prejudice argument.

8 Thank you, Mr. Teitzman.

9 MR. TEITZMAN: I guess first to address this question
10 of what exactly staff recommended in its previous
11 recommendation, what the exact statement was, I would like to
12 read that. It was, "Staff believes a dismissal without
13 prejudice is appropriate because Neutral Tandem may have
14 standing if they can demonstrate that it has authority to act
15 as an agent for an originating carrier in negotiating and
16 reaching traffic termination agreements," and that was a
17 statement that was made in recognition of 120.569(2)(c), which
18 states that dismissal of a petition shall at least once be
19 without prejudice to petitioner's filing a timely amended
20 petition curing the defect. So if the Commission had approved
21 staff's recommendation finding that there was a legal defect,
22 staff believed that dismissal without prejudice was
23 appropriate.

24 Staff believes the same is still appropriate today,
25 that dismissal without prejudice would be the appropriate

1 decision to be made. We do not believe that sanctions are
2 required. I do not believe that the statements made by Neutral
3 Tandem in their petition raised to the level of requiring
4 sanctions. Obviously they were just arguing their position,
5 but there was nothing egregious in what they stated. And as
6 stated by both parties, we believe that dismissal is a right of
7 Neutral Tandem.

8 COMMISSIONER McMURRIAN: Okay. So I think I heard
9 you say that without prejudice, you believe that part of their
10 right includes the caveat without prejudice, part of their
11 right of dismissal.

12 MR. TEITZMAN: In this circumstance, yes. I also
13 made a note of one other statement that was made. We do not
14 believe that deferral was actually requested of the previous
15 agenda item. It was suggested that it may be appropriate, but
16 no formal request was made by Neutral Tandem for a deferral of
17 the item and, therefore, deferral was never addressed or
18 rejected by the Commission.

19 COMMISSIONER McMURRIAN: One more. To the extent any
20 party has misrepresented staff recommendation or anything else,
21 I mean, will there be a way to address that going forward?

22 MR. TEITZMAN: Well, certainly going forward we will
23 be addressing the substantive issues. Are you specifically
24 asking if we'll address whether or not Neutral Tandem misstated
25 staff's recommendation?

1 COMMISSIONER McMURRIAN: No, I wasn't really
2 suggesting that. But I guess I'm asking if there is any import
3 to that. I mean, if there has been some representation and
4 that has some impact on the case one way or the other. I mean,
5 we would have a chance within the docket going forward and I --
6 we would have a chance to address any impact of that or any
7 import of that going forward. Not that we would take up the
8 specific issue about whether or not they misrepresented staff
9 recommendation, I don't think we would be doing that.

10 MR. TEITZMAN: Well, I certainly think that the
11 opportunity for the Commission to address it is there and open.

12 COMMISSIONER McMURRIAN: I had one other one, but it
13 escapes me now, so maybe it will come back to me.

14 CHAIRMAN EDGAR: Okay.

15 Commissioner Argenziano.

16 COMMISSIONER ARGENZIANO: Thank you.

17 To staff, you said the -- I would like to know the
18 defect, meaning the supposed misrepresentation?

19 MR. TEITZMAN: Oh, no, I apologize. In our original
20 recommendation, we had recommended that the petition be
21 dismissed without prejudice for lack of standing, so that would
22 be the defect that I was referring to.

23 COMMISSIONER ARGENZIANO: And to Mr. Hoffman, do you
24 agree with staff's answers to Commissioner McMurrrian as far as
25 your original statements?

1 MR. HOFFMAN: The only place I disagree -- let me
2 step back, Commissioner Argenziano. I think this is a matter
3 that is clearly within your discretion, and I think that
4 whatever decision you make is a discretionary decision. I
5 think that the reference Mr. Teitzman makes to Chapter 120 is a
6 part of the statute that says that a party may file an amended
7 petition. In other words, a party may move to amend and amend
8 their petition one time.

9 I don't recall that that addresses voluntary
10 dismissals, but I think that what Mr. Teitzman is doing is
11 drawing a parallel there to say that -- and I don't want to
12 recharacterize his argument incorrectly, but I take from that
13 that he is advocating that if the statute says that you can
14 amend your petition one time, then why can't you just take a
15 dismissal and then file a new petition in a new docket. I
16 think that is what he is saying. And my only argument to you
17 is that there is nothing that I found in the statute or your
18 rules which technically address what happens when you take a
19 voluntary dismissal, is it with or is it without prejudice.

20 COMMISSIONER ARGENZIANO: Madam Chair. To staff, is
21 there statutory or in our rulemaking what you described, the
22 ability or the right to, I guess, you said one time defer?

23 MR. TEITZMAN: One time you may amend your
24 petition --

25 COMMISSIONER ARGENZIANO: Amend, I'm sorry.

1 MR. TEITZMAN: -- for a legal defect, that's correct,
2 that's under Chapter 120.

3 COMMISSIONER ARGENZIANO: In regards to a dismissal?

4 MR. TEITZMAN: Yes. I'll read it to you, if you
5 would like. "Dismissal of a petition shall at least once be
6 without prejudice to petitioners filing a timely amended
7 petition curing the defect unless it conclusively appears from
8 the face of the petition that the defect cannot be cured."

9 COMMISSIONER ARGENZIANO: And, Mr. Hoffman, you just
10 said the opposite of that. He just read it to me.

11 MR. HOFFMAN: Commissioner, what that is saying is
12 that if you file petition one, and somebody moved to dismiss
13 your petition and it were granted, like if Neutral Tandem filed
14 their first petition and Level 3 moved to dismiss and that
15 motion were granted, then what the statute is saying is that
16 Neutral Tandem should be given the opportunity to file an
17 amended petition.

18 That's not what happened here. This is Neutral
19 Tandem filing a petition and then unilaterally deciding on its
20 own for the reasons that we stated we believe, to just
21 voluntarily dismiss it, and then file a new action in a new
22 docket.

23 COMMISSIONER ARGENZIANO: Madam Chair, one other --
24 but you agree that they have a right to dismiss, a voluntary
25 right to dismiss.

1 MR. HOFFMAN: Yes.

2 The only issue that I have raised, Commissioner, that
3 I have tried to raise is whether their right to take a
4 dismissal, which we believe they have, should be with or
5 without prejudice.

6 COMMISSIONER ARGENZIANO: Thank you.

7 CHAIRMAN EDGAR: Commissioner Skop.

8 COMMISSIONER SKOP: Thank you, Madam Chair.

9 Could staff repeat the reference in Chapter 120
10 specifically to the Statute? I'm having trouble hearing down
11 here, and I missed the reference, and I'm trying to find it.

12 MR. TEITZMAN: It is 120.569, Sub (2)(c).

13 COMMISSIONER SKOP: And in that particular section,
14 as Mr. Hoffman has pointed out, it doesn't speak directly to
15 prejudice or without prejudice, is that correct?

16 MR. TEITZMAN: It discusses -- it does discuss
17 without -- a petition shall be dismissed at least once without
18 prejudice.

19 COMMISSIONER SKOP: Madam Chair, I need a second to
20 look at this. If there are other questions that Commissioners
21 have --

22 CHAIRMAN EDGAR: We will come back to you,
23 Commissioner.

24 Commissioner McMurrian, did you say that you had
25 remembered your question?

1 COMMISSIONER McMURRIAN: Yes.

2 When we go forward with the second petition, assuming
3 we do, depending on the outcome of this discussion we are in,
4 we will again be at the stage of determining whether the
5 Commission has jurisdiction and whether the parties have
6 standing, right?

7 MR. TEITZMAN: That is correct. That is why in Issue
8 2 we are asking that the hearing record from the first docket
9 be merged into the second docket.

10 COMMISSIONER McMURRIAN: So just because there has
11 been a second petition filed, there is no -- we haven't given
12 any indication as to whether the standing issue has been cured.
13 And, in fact, staff's recommendation said that it may address
14 it, right?

15 MR. TEITZMAN: That is correct, Commissioner.

16 COMMISSIONER McMURRIAN: Okay. And I guess my other
17 question is, Mr. Hoffman has made points about how the company,
18 how Neutral Tandem has chosen to go about dismissing the case
19 and has voluntarily dismissed it instead of taking another route.
20 And it seems that the route chosen by Neutral Tandem was at
21 least suggested somewhat in the recommendation, but how much
22 has staff played a part in that decision-making by Neutral
23 Tandem? Because if we are really going to talk about whether
24 or not they chose the right path, but if staff has sort of
25 suggested that that is the path they take, it seems like we

1 need to move on, quite frankly.

2 I'm sorry, I know that's a tough question, but I just
3 think that maybe we need to talk about that. If it wasn't as
4 much of a -- I guess the company always had the ability to
5 choose whatever route it wanted to take next, but were there
6 other discussions with the company as to what they might be
7 able to do going forward to file a second petition other than
8 what was stated in the recommendation?

9 MR. TEITZMAN: I think their options were discussed,
10 but staff did not recommend a particular option for them to
11 choose. We certainly had a discussion with them, were they
12 going to request deferral of the original item, is that what
13 they wanted, so we had those kind of discussions. And options
14 were discussed, but no recommendation was made to Neutral
15 Tandem as to what they should do.

16 COMMISSIONER McMURRIAN: Chairman, perhaps it would
17 be a good idea for the two parties to sort of weigh in on that,
18 and they can address, you know, how much, I guess, leeway they
19 felt like they had in filing the kind of filing they initially
20 made.

21 CHAIRMAN EDGAR: Ms. Keating, can you respond to
22 Commissioner McMurrrian's points?

23 MS. KEATING: Absolutely, Madam Chair. If I could,
24 though, could I take just a moment and go back to the issue of
25 whether we misrepresented staff's recommendation, because that

1 really -- first of all, let me point out that that was in our
2 motion for leave to amend, which based on staff's
3 recommendation at that point in time we thought was the
4 appropriate tack to take. And we thought that going ahead and
5 filing a motion for leave to amend before the Commission's
6 agenda conference made sense. It got the information that we
7 perceived that staff viewed as defective in our original
8 petition before the Commission in the most expeditious manner
9 possible.

10 Level 3 raised concerns about whether the item should
11 be deferred and whether they had appropriate time to respond.
12 We respected that. And as such decided, well, we need to get
13 that information before the Commission in the most expeditious
14 manner possible. It didn't seem to make sense to us for the
15 Commission to go ahead and vote out staff's recommendation,
16 which if you had voted out staff's recommendation as drafted
17 would have left us leave to refile. Withdrawing avoided the
18 unnecessary expenditure of agency resources to draft an order
19 and issue an order on that when we were hoping to still have
20 the opportunity to refile.

21 We believe we have the right to take a voluntary
22 dismissal without prejudice. As such it made sense at that
23 point, since objections had been raised to the procedural
24 timing that we had taken for filing the motion for leave to
25 amend, to just go ahead, withdraw, and start over. But in the

1 motion for leave to amend we simply said that staff suggested
2 that filing affidavits representing agency from our customers
3 would be sufficient, that is all we said. We didn't say staff
4 said it would, in fact, give us standing. We said staff
5 suggested. And I don't agree with Level 3's representation
6 that that indicates that we said staff said for sure that it
7 would get us over the hump, at least in staff's mind.

8 With regard to the timing, again, its just like we
9 said, we felt like, in view of staff's recommendation, it made
10 sense to go ahead and file for leave to amend. Procedural
11 concerns were raised, so we felt like it was most appropriate
12 to go ahead and dismiss. I mean, it's as simple as that.

13 CHAIRMAN EDGAR: Mr. Hoffman.

14 MR. HOFFMAN: The staff recommendation that we are
15 referring to that would have gone to the agenda says on Page
16 11, "Staff believes a dismissal without prejudice is
17 appropriate because Neutral Tandem may have standing if it can
18 demonstrate that it has authority to act as an agent for an
19 originating carrier in negotiating and reaching traffic
20 termination agreements."

21 Neutral Tandem's motion for leave to amend states on
22 Page 2, "Commission staff has suggested in its recommendation
23 to the Commission that such demonstration would remedy the
24 staff's concerns with regard to Neutral Tandem's standing in
25 this matter." You can draw your own conclusions from that.

1 When they filed this motion for leave to amend, they
2 raised -- Neutral Tandem raised the suggestion of a deferral.
3 They're the ones that teed that up. We were very concerned
4 that they were using this tactic of trying to cure the problem
5 that staff saw in the recommendation prematurely, so we let Mr.
6 Teitzman know that we objected to any deferral and we wanted to
7 see the Commission discuss it, vote it, vote whatever the
8 Commission would vote. That's how that went down, but there
9 was never then and there is not now a procedural issue with
10 that motion for leave to amend that could not have been easily
11 cured, if you will, by a law clerk. You either let it sit and
12 see what happens, or you could withdraw it and then refile it
13 on Wednesday after the Commission voted. So it's one of those,
14 you know, it is what it is and it isn't what it isn't. But it
15 is certainly within your discretion to evaluate what has
16 happened here.

17 Commissioner Skop, you were looking at that statute,
18 and I was talking about that statute that Mr. Teitzman had
19 referred to, as well. That's the statute, again, that the
20 Commission cited on Page 11 of this staff recommendation that I
21 have been talking about. And, again, that statute kicks in in
22 this particular situation where Neutral Tandem had filed a
23 petition and then Level 3 moved to dismiss. And the staff was
24 saying, Commissioners, we think you should grant their motion
25 to dismiss, but under this statute they should be given the

1 right to amend.

2 So I guess when we piece it all together, the reason
3 we're here this morning is because we think the law is unclear
4 on whether it's with or without prejudice, and we believe that
5 the actions of Neutral Tandem taken as a whole could -- again,
6 this is in your discretion -- could be viewed by you to be a
7 clear effort to avoid a Commission vote on those particular
8 issues on July 10th.

9 CHAIRMAN EDGAR: Commissioner McMurrin.

10 COMMISSIONER McMURRIAN: Thank you, Chairman. I
11 guess I would just say that I think there are two ways to read
12 that sentence that you read from the motion for leave to amend.
13 And I also point out, and I don't really think I have to, but I
14 will do it anyway, that staff's statement in that
15 recommendation which we never considered was just that, it was
16 staff's statement about what they thought standing -- how
17 standing might be cured. The Commissioners didn't make any
18 ruling about that, and I think the Commissioners would still be
19 able to in the course of dealing with the second petition, if
20 we ultimately get there.

21 I will also add I wasn't thrilled with the way the
22 procedures were sort of handled through that, and what I mean
23 is we were heading to agenda conference and then we started
24 getting several filings at the last minute. I also don't blame
25 Neutral Tandem for going that route, based on what it said in

1 the staff recommendation. So I think it is just always hard
2 dealing with those kind of last-minute motions right before
3 agenda, trying to decide what is fair to all parties involved
4 and to the Commission itself. So I will say that I wasn't
5 exactly thrilled with it, but at the same time, we sort of are
6 where we are in dealing with the voluntary dismissal. And I
7 think that Neutral Tandem had a reason to think that that was
8 probably the correct course of action based on the sentence in
9 the staff rec. Those are just my thoughts, and I know that
10 other Commissioners have questions.

11 CHAIRMAN EDGAR: Thank you.

12 Commissioner Skop, did you want to jump in?

13 COMMISSIONER SKOP: Yes. Thank you, Madam Chair.

14 Briefly, if counsel, staff counsel can comment upon
15 Florida Statute 120.569(2)(c). Actually I'm sorry, (c), in
16 terms of it stating, "Unless otherwise provided by law, a
17 petition or request for a hearing," and then contrast that to
18 the more expressed language in Paragraph (e) where it speaks to
19 all pleadings, motions, or other papers. Does staff see a
20 material -- or can staff distinguish between the petition for
21 request for a hearing and motions between the different
22 language in that statute?

23 MR. TEITZMAN: I'm sorry, Commissioner, what section
24 were you referencing?

25 COMMISSIONER SKOP: Subsection (c) starting with,

1 "Unless otherwise provided by law, a petition or request for a
2 hearing," so it seems to imply the initial case and
3 controversy, the filing associated with that versus the
4 language in Subsection (e), "All pleadings, motions, or other
5 papers filed in the proceeding."

6 MR. COOKE: Commissioner, are you asking whether we
7 think that there was a frivolous purpose in connection with
8 the -- due to the amended original petition or this voluntary
9 withdrawal?

10 CHAIRMAN EDGAR: No, not whatsoever. I'm just merely
11 trying to ascertain whether staff sees a difference in terms of
12 the semantic language that is being used, because, again, it
13 speaks in (c) to the petitioner, a request for a hearing, and
14 then it speaks down in (e) to pleadings and motions. So what
15 I'm trying to do, again, I see the language for dismissal of a
16 petition at least once will be without prejudice, and that is
17 also supported by the Florida Rules of Civil Procedure, as has
18 been mentioned. But I'm just trying to distinguish whether the
19 motion for dismissal may be not spoken to there, if you will.
20 I think they are one in the same, but, again, the Florida
21 Statutes have --

22 MR. COOKE: I think the intent of 120.569 -- I mean,
23 our job when we get a petition filed is to determine -- one of
24 the things we need to determine is whether we have jurisdiction
25 or not, and one issue involved in that is whether there is

1 standing or not. And our original recommendation suggested
2 that there was not standing, but we also intimated that it
3 might be curable, that there might be circumstances based on
4 additional evidence that would suggest that standing was
5 proper. And, therefore, the original recommendation
6 recommended dismissal without prejudice.

7 I don't think that that has really changed in the
8 sense that the only distinction here is that instead of the
9 agency dismissing, the party here has taken a voluntary
10 dismissal. And Mr. Hoffman is drawing a distinction there
11 based on this language, which I think is putting too fine a
12 point on it. I think that the intent of 120.569(2)(c) is to at
13 least once give the party an opportunity to cure if something
14 has been plead that doesn't quite meet what is necessary. And
15 that is what we are suggesting controls here.

16 COMMISSIONER SKOP: Thank you for that clarification,
17 because, again, I do find that somewhat consistent with the
18 Florida Rules of Civil Procedure on that point for voluntary
19 dismissal with or without prejudice.

20 And, finally, Madam Chair, I do echo Commissioner
21 McMurrian's concerns about some of the issues associated with
22 that, but just given -- speaking to the matter before us today,
23 I will reserve any further comments. But I do have some
24 concerns in the manner in which this seems to be being handled
25 along the lines of what Commissioner McMurrian mentioned.

1 Thank you.

2 CHAIRMAN EDGAR: Commissioner Argenziano.

3 COMMISSIONER ARGENZIANO: To Mr. Hoffman. In reading
4 that statute again, I, like Commissioner Skop, am reading, "A
5 petition shall be dismissed if it is in substantial compliance
6 with these requirements or has been untimely filed." So, there
7 is the dismissal of petition shall, at least once, be without
8 prejudice to petitioners filing a timely amended petition
9 curing the defect unless it conclusively appears from the face
10 of the petition that the defect cannot be cured.

11 So, you need to explain to me once again, if you
12 will, because it is just not sinking in, how you think that
13 that doesn't apply to Neutral Tandem.

14 MR. HOFFMAN: Because that applies when Party A files
15 a petition and Party B files a motion to dismiss that petition,
16 and the agency grants that motion, and then it turns around and
17 it looks back at that statute and it says if the reason we
18 dismiss can be cured because there is a pleading defect, then
19 the Legislature has said we have to give them that second
20 chance. That's not what happened here.

21 What happened here was Neutral Tandem had the
22 opportunity to take that second chance that Mr. Cooke referred
23 to and that you are referring to, and they said, you know what,
24 we won't take it. So they took a voluntary dismissal. They
25 didn't cite the statute that you are referring to in their

1 voluntary dismissal.

2 COMMISSIONER ARGENZIANO: I got it. Thank you.

3 CHAIRMAN EDGAR: Thank you.

4 Mr. Teitzman, if the staff's recommendation were to
5 be adopted in its entirety, what would be the next procedural
6 steps for the then merged docket?

7 MR. TEITZMAN: Well, staff did intend to schedule a
8 conference call between the parties to discuss how to proceed.
9 The first formal step that would need to be taken is to rule on
10 the request for expedited process, and that would be done by
11 the prehearing officer, which is Commissioner McMurrin. But,
12 like I did say, before we got into those matters we wanted to
13 have a conference call between staff and the parties to discuss
14 how exactly to handle the new arguments that were raised in
15 both the second petition and Level 3's response to that
16 petition and motion to dismiss.

17 CHAIRMAN EDGAR: Commissioners, any further
18 questions? Any further comment?

19 Commissioner Carter.

20 COMMISSIONER CARTER: Just a brief comment. I think
21 that there is unanimity among all of the parties that the
22 voluntary dismissal is appropriate. It is just a fine point of
23 whether or not it should be with or without prejudice. But
24 from listening to Mr. Cooke and Mr. Teitzman, as well as my
25 fellow Commissioners, it seems that the first voluntary

1 dismissal can be without prejudice, assuming there is no
2 nefarious or extraordinary circumstance.

3 Mr. Cooke, did I read that correctly?

4 MR. COOKE: I agree with that. I agree.

5 COMMISSIONER CARTER: So, Madam Chairman, at the
6 appropriate time I would move staff's recommendation in its
7 entirety.

8 CHAIRMAN EDGAR: I am going to consider that a motion
9 at this time. Does that work? Okay.

10 There is a motion for the staff recommendation. Is
11 there a second or a question?

12 COMMISSIONER SKOP: Second.

13 CHAIRMAN EDGAR: Okay. There is a motion and there
14 is a second. I have one comment, which is that we would always
15 expect, of course, all parties to make good use of their time
16 and resources and good use of the Commission's time and
17 resources as well as they move through their procedural
18 abilities and options.

19 Commissioners, we have a motion and a second. Is
20 there further discussion?

21 Seeing none. All in favor say aye.

22 (Unanimous affirmative vote.)

23 CHAIRMAN EDGAR: Opposed?

24 COMMISSIONER ARGENZIANO: Aye.

25 CHAIRMAN EDGAR: Show the motion adopted.

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MR. HOFFMAN: Thank you for your time on this, Madam
Chairman and Commissioners.

CHAIRMAN EDGAR: Thank you.

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STATE OF FLORIDA)

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COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 20th day of August, 2007.



JANE FAUROT, RPR
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