ATTACHMENT A

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DT 08-028

HOLLIS TELEPHONE, INC., KEARSARGE TELEPHONE CO., MERRIMACK COUNTY TELEPHONE CO., AND WILTON TELEPHONE CO.

Order Addressing Petition for Authority to Block the Termination of Traffic from Global NAPs Inc.

O R D E R N O. 25,043

November 10, 2009

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I. PROCEDURAL HISTORY

On February 19, 2008, Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. (collectively TDS) filed a joint petition seeking to block Global NAPs, Inc. (Global NAPs) traffic[1] from terminating on the local telephone networks of TDS. On March 3, 2008, the Commission directed Global NAPs to answer the allegations set out in the joint petition by March 13, 2008, pursuant to RSA 365:1. On March 19, 2008, Global NAPs filed an answer to the joint petition together with a motion to accept the late-filed answer. TDS responded on April 14, 2008 and, on

[1] For purposes of this decision we use the term "traffic" in the same manner the term is used in the Stipulation of Facts at 17 and 18 contained in Exhibit A to the Joint Intervenors' July 30, 2008 objection to Global NAPs' motion for evidentiary hearing: 17. Global NAPs Networks, Inc., transfers all traffic at issue in this proceeding to FairPoint-NNE in traditional TDM format at the FairPoint-NNE tandem in Manchester, New Hampshire. 18. FairPoint-NNE terminates the traffic at issue in this proceeding the same way it terminates a traditional voice call, that is, through meet point billing with the Independent ILEC.

April 22, 2008, the Commission issued an Order of Notice scheduling a prehearing conference for May 14, 2008.

On May 9, 2008, Union Telephone Company d/b/a Union Communications (Union), Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing) and Granite State Telephone, Inc., Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc. and Dixville Telephone Company (collectively, the Rural ILECs) filed petitions to intervene. The prehearing conference was held as scheduled and the Commission granted all intervention requests. A technical session was held following the prehearing conference, and Staff filed a letter containing a summary of the technical session, an agreed-upon list of discovery guidelines, and a proposed procedural schedule the following day. The Commission approved the procedural schedule by secretarial letter dated May 20, 2008. On May 28, 2008, Northern New England Telephone Operations LLC d/b/a FairPoint Communications - NNE (FairPoint) filed a petition to intervene, which was granted by secretarial letter on June 13, 2008.

On July 17, 2008, Global NAPs filed a letter with the Commission indicating that the parties could not agree on one of the stipulated facts and that other facts were also in dispute. On that basis, Global NAPs argued that an evidentiary hearing was needed. On July 25, 2008, it filed a motion for an evidentiary hearing, in which it described in more detail the facts it claimed were in dispute.

segTEL, Inc. filed an intervention request with the Commission on July 22, 2008. On July 21, 2008 TDS filed a letter opposing segTEL's intervention.

On July 21, 2008, TDS filed a letter, supported by the Rural ILECs and FairPoint, opposing Global NAPs' motion for an evidentiary hearing. On July 30, 2008, TDS and the Rural

ILECs each filed an objection to Global NAPs' motion for evidentiary hearing. FairPoint joined the Rural ILEC objection.

By secretarial letter issued on July 30, 2008, the Commission suspended the briefing schedule and directed Global NAPs to file specific objections to each stipulated fact contained in the attachment to Global NAPs' motion for evidentiary hearing, and to include a description of the evidence supporting each objection. On August 4, 2008, Global NAPs filed its specific objections to the proposed stipulated facts. On August 6, 2008, TDS filed a motion to compel Global NAPs to answer certain data requests. On August 8, 2008, the Rural ILECs and FairPoint filed a response to Global NAPs' objection to the stipulated facts.

On September 17, 2008, the Commission issued Order No. 24,894 granting segTEL's intervention request, compelling Global NAPs to file responses to certain of TDS' discovery requests, denying Global NAPs' motion for an evidentiary hearing, and setting a briefing schedule. The Order also requested Staff to provide information describing all assessment report and annual report filings made by Global NAPs with the Commission for the years 2004 through 2007. On September 23, 2008, Staff filed a memorandum reporting that Global NAPs had filed an annual report for 2004 and an assessment report for 2006, but no annual reports for 2005, 2006 or 2007, and no assessment reports for 2005 or 2007.

On September 26, 2008, Staff filed a memorandum recommending Global NAPs be fined and that its authority to operate be revoked. Staff based its recommendation on Global NAPs' failure to respond adequately or at all to certain data requests addressed in Order No. 24,894. In particular, Staff noted that Global NAPs' response to TDS Data Request 22, which was supplemental to TDS Data Request 7, did not include any additional or clarifying information to what had been submitted in the original, underlying data requests.

On Sunday, September 28, 2008, Staff received e-mails from Global NAPs containing annual reports for 2005, 2006 and 2007, followed by hard copies on September 30, 2008.

On October 2, 2008, Global NAPs filed a letter requesting confidential treatment pursuant to RSA 91-A:5, IV and Puc 204.06 [sic] of annual reports it had filed on September 30, 2008. Staff filed a memorandum on October 8, 2008, outlining numerous deficiencies contained in the reports and noting that the notary public authenticity was invalid pursuant to RSA 456-B.[2] Staff recommended that the Commission order Global NAPs to file audited financial statements for the calendar years 2004-2007 pursuant to Order No. 24,894. Staff further recommended that the Commission not accord confidential treatment to Global NAPs' annual reports.

On October 17, 2008, the Commission issued Order No. 24,907 directing Global NAPs to resubmit its 2005, 2006 and 2007 annual report filings complete with balance sheets and income statements in compliance with Puc 449.04(g); to resubmit audited financial statements for Global NAPs, Inc. for the years 2004 through 2007, including balance sheets, income statements and footnotes; and to provide an annotated listing of each corporate entity related to Global NAPs' operations and services in New Hampshire, including full, official corporate names, names of all officers and any registered agents of each entity, corporate addresses of each entity, and meaningful descriptions of the relationship and function of each entity related to Global NAPs, Inc. as depicted in the corporate family structure provided in Global NAPs' original (and re-submitted) response to TDS Data Requests 7 and 22. The Commission also scheduled a hearing on Global NAPs' motion for confidential treatment.

On October 21, 2008, Global NAPs filed revised reports, together with a motion for confidential treatment. On October 29, 2008, Global NAPs filed a response to Order No. 24,907.

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[2] Staff also noted that the notarization appeared to be invalid pursuant to Massachusetts Revised Executive Order No. 455 (04-04) governing Standards of Conduct for Notaries Public. (The notarization occurred in Massachusetts.)

On November 13, 2008, Global NAPs filed a supplemental statement in support of its motion for confidential treatment. Based on the additional information provided in Global NAPs' supplemental statement, Staff filed a letter in support of granting the motion for confidential treatment. The Commission issued a secretarial letter accepting Staff's recommendation and canceling the hearing regarding Global NAPs' motion.

Briefs were filed by the Parties on September 29, 2008. Staff filed a letter with the Commission stating it was not filing a brief but reserving its right to file a reply brief if appropriate. Reply briefs were filed by the parties on October 7, 2008.

II. POSITIONS OF THE PARTIES

A. TDS

TDS asserted that the Commission should authorize it to block the future termination of traffic from Global NAPs to the exchanges served by TDS in the State of New Hampshire. It also urged the Commission to find Global NAPs in contempt for its "flagrant disregard" of Commission rules and orders, and to impose sanctions and penalties, including ordering Global NAPs to reimburse TDS for the portion of its legal costs and fees attributable to this docket, and to pay all amounts due and owing TDS asserted that from February 2003 through January 2008, and still continuing, Global NAPs delivered traffic for termination to exchanges served by TDS in New Hampshire, incurring significant monthly terminating access charges pursuant to TDS' intrastate and interstate tariffs.[3] It asserted that, despite repeated attempts to collect the charges incurred by Global NAPs, Global NAPs has failed and refused to pay amounts due and, as such,

[3] In their Joint Petition (Feb. 19, 2008), the TDS Companies calculated the amount due and owing from Global NAPs at $192,644.25. *See* Joint Petition ¶ 22, at 6. As of the date of Joint Petitioners' Initial Brief, that amount is now $325,298.74.

urged the Commission to block the future termination of traffic by Global NAPs to TDS's respective service territories.

TDS maintained that this matter is a simple dispute regarding the appropriate application of New Hampshire law to traffic that Global NAPs delivers for termination on TDS' network. It asserted that Global NAPs has attempted to divert the Commission's attention through the creative use of legal authorities from other jurisdictions and through outright evasion of and disregard for specific questions of the parties and the express mandates of the Commission. It maintained that despite Global NAPs' obfuscatory, evasive and dilatory efforts, TDS has shown that Global NAPs traffic bears all the hallmarks of regular voice traffic and none of the attributes of Enhanced Service Provider (ESP) traffic or traffic directed to Internet Service Providers (ISPs). TDS alleged that the call detail records indicate that the traffic being terminated by Global NAPs is indistinguishable from the traffic being terminated by any other intermediary carrier to TDS' exchanges. It argues that telephone tariffs have the force of law in New Hampshire[4] and that when an authorized carrier terminates traffic on TDS' networks it is obligated to pay for its use of those networks. TDS noted it is not in a position to subsidize free riders because allowing uncompensated use of the network increases the costs for those who are properly paying for their usage and maintained that it has made a lawful claim for payment from Global NAPs, which Global NAPs refuses to pay.

TDS argued that, despite the clear weight of evidence, Global NAPs continues to maintain that all the traffic it sends and receives on TDS' network is subject to the ESP exemption from access charges. However, notwithstanding repeated, specific data requests to show that the traffic in question is legitimately ESP traffic, Global NAPs has failed to

[4] *Freedom Ring Communications, LLC, Complaint against Verizon New Hampshire Re: Access Charges*, DT 06-067, Order No. 24,886 (NHPUC Aug. 8, 2008), at 8.

substantiate its claim; therefore, TDS urged the Commission not to linger any longer over Global NAPs' spurious claim.

In addition, TDS charged that through flagrant and repeated violations of the Commission's orders, Global NAPs has shown contempt for these proceedings and has caused it to incur unnecessary litigation expenses. Specifically, TDS urged the Commission to impose appropriate sanctions, including ordering Global NAPs reimbursement for the portion of the litigation costs, including attorneys' fees, attributable to Global NAPs' procedural delays and violations and imposing a condition on Global NAPs' authority to provide service in New Hampshire that requires it to pay the amounts now due and owing to TDS.

Finally, TDS alleged that Global NAPs is in flagrant violation of New Hampshire utility laws through its failure to file required regulatory reports for a number of years and its use of unauthorized affiliates to provide utility services in New Hampshire. It maintained that Global NAPs has construed a daisy-chain of corporate affiliates to evade justice and to place its financial assets beyond the reach of creditors like TDS, a consistent pattern of behavior in which Global NAPs and its affiliates have engaged in other states. It reported that in an action analogous to the facts of this proceeding, the United States District Court for the District of Connecticut recently concluded that Global NAPs willfully violated the court's discovery order to produce financial and corporate information, withheld and destroyed evidence in bad faith, gave misleading and non-responsive answers to discovery requests, prejudiced the plaintiffs, squandered judicial resources, and committed a "fraud upon this court."[5]

TDS urged the Commission to review the disclosures and violations present in this docket and consider revoking Global NAPs' authority to serve in New Hampshire; to order

[5] *Southern New England Telephone Company v. Global NAPs, Inc.*, Civ.A. No. 3:04-cv-20785, 2008 WL 2704495, (D.Conn. July 1, 2008).

Global NAPs to show cause why it should not be found in contempt for its willful violation of Order No. 24,894; and to order appropriate penalties and sanctions. It also asked that the Commission order Global NAPs to reimburse TDS for the portion of their litigation costs, including attorneys' fees, attributable to procedural delays caused by Global NAPs.

B. Global NAPs

Global NAPs disagreed with TDS' assertion that the traffic at issue originates and terminates within New Hampshire and thus is indisputably intrastate in nature. Global NAPs argued that there is no evidence in the record regarding the traffic at issue in this docket and, thus, no factual predicate upon which the Commission can make a determination -- neither with respect to liability for charges, nor the blocking of traffic without a prior determination of liability. Global NAPs claimed that the Commission's decision to eliminate an evidentiary proceeding has made it impossible for the Commission to have a full and complete record upon which to base any ruling against Global NAPs.

However, according to Global NAPs, the Commission is not precluded from ruling in favor of Global NAPs in the instant case, because the traffic at issue is the same type of traffic that the New York Public Service Commission (NYPSC), on March 20, 2008, determined was from ESPs and thus not subject to access charges.[6] Therefore, even without a fact-based determination, the Commission can and should rule based on the precedent of the New York Commission's investigation of the traffic. Global NAPs alleged that the NYPSC concluded that ". . . most, if not all, the traffic GNAPs sends [to the TVC network] for termination is nomadic VoIP" and as a result of the traffic being at least partially nomadic, (a) the traffic was under the sole and exclusive jurisdiction of the Federal Communications Commission (FCC), and (b) no

[6] *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges* (March 20, 2008).

intrastate access charges could be imposed. Global NAPs argued that aside from the characteristics of the traffic that subject it to the jurisdiction of the FCC, what matters for the purpose of determining jurisdiction is where the end points of a communication are located. The FCC has stated that "both court and [FCC] decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications."[7] Global NAPs asserted that this Commission lacks substantive jurisdiction to establish the rates, terms and conditions of interstate access service and that the FCC has exclusive jurisdiction over interstate communications services.

According to Global NAPs, TDS' contention that the traffic at issue shows a variety of originating and terminating telephone numbers typical of voice traffic, rather than single or limited number of end-user customers that would be typical of ISP-bound traffic, remain, in the absence of evidence, merely unsupported assertions. Global NAPs contended that there is a disjunction when trying to apply traditional telephony NXX comparisons using the NXXs of called and calling parties to determine jurisdiction to ESP traffic, which is precisely why the FCC has declared this traffic to be subject to its jurisdiction.

Global NAPs contended that the traffic it receives from ESPs is transported in asynchronous transfer mode (ATM) format and that it is only because TDS required Global NAPs to use time-division-multiplexing (TDM) format that it is forced to step superior packet-based switching down from ATM format to the archaic TDM format. Global NAPs stated that

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[7] *In the Matter of Teleconnect Company v. The Bell Telephone Company of Pennsylvania*, 10 FCC Rcd 1626, 1995 FCC LEXIS 966 (1995); aff'd sub nom. *Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997). *See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd 22466, ¶ 17 (1998) ("the [FCC] traditionally has determined the jurisdictional nature of communications by the end points of the communication"). See also Federal State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9173 (1997) (traffic is deemed interstate "when the communication or transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession or the District of Columbia").

the compulsion to convert traffic to TDM makes any claim by TDS of "IP-in-the-middle" absurd. Global NAPs maintained that the fact that traffic must be handed off in TDM format does not change the treatment of traffic. Global NAPs contended that it would be patently unfair for a carrier to be penalized by having to pay access charges merely because TDS requires the call to be in TDM for traffic exchange. Global NAPs asserted that its traffic is transported solely to and from ESPs and is primarily nomadic.

Global NAPs indicated that there are other distinctions between the traffic at issue here and the traffic that the Commission typically regulates. Global NAPs is not an analog switched carrier operating like other CLECs; it uses soft switches to move data packets -- i.e., packet switching -- in a non-linear fashion to the end destination. According to Global NAPs, it receives outbound traffic from ESPs, transports the traffic in ATM, and hands that traffic to TDS. Global NAPs hypothesized that the unique nature of its network topology and its customers makes it impossible to determine the appropriate jurisdiction over the traffic, and therefore, the imposition of access charges is not a solution.

Global NAPs suggested that TDS' assertions that the end-users' numbers are served by a variety of LECs, and thus that it is unlikely that the traffic is in IP-format, lacks legal or factual support. Global NAPs argued that, in the absence of being able to present any evidence on this topic, it is impossible to say which LECs are providing what services, just as it is certainly impossible to draw conclusions from TDS' unsupported hypotheses. Global NAPs contended that the traffic it receives for delivery to TDS for termination to end-users is solely from ESPs and that the Commission lacks substantive jurisdiction to determine that access charges are due for the subject traffic.

Global NAPs declared that, unless and until a distinction can be made between what is interstate and what is intrastate traffic, blocking access would violate federal law. Even if, *arguendo*, the Commission found VoIP to be at least partially intrastate traffic, a decision imposing liability on Global NAPs is impossible given the lack of evidence to determine what is or is not interstate traffic. Global NAPs asserted that TDS' request to block traffic is extraordinary and without justification in the law, which favors interconnection.[8] To order blocking, according to Global NAPs, would be to go beyond not only the jurisdiction of the Commission but also the powers of the courts, which lack the authority to peremptorily direct the taking of property in awarding judgments for damages. No law has been violated by Global NAPs and TDS has failed to identify any statute or rule that would justify the ordering of blocking. Instead, TDS urges the Commission, based on its "general supervisory authority over public utilities and their plant in New Hampshire" to order blocking of Global NAPs' traffic, an action tantamount to a taking. Moreover, argues Global NAPs, TDS asks that this be done without a finding of liability. Global NAPs stated that the request for declaratory ruling should be dismissed for lack of jurisdiction because it is anti-competitive, because there is no finding of liability, and/or because such drastic action is directly counter to the Telecommunications Act's mandate to promote competition.

C. Rural ILEC Intervenors

Rural ILECs claimed that this is a simple case in which one carrier is obtaining access services from other carriers and refusing to pay for those services. They believe the situation is untenable and should not be allowed to continue. They asserted that TDS is entitled to be paid for the access services it provides to Global NAPs.

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[8] *See* 47 U.S.C. § 251.

Rural ILECs alleged that Global NAPs, Inc. is a public utility, having filed as a CLEC; however, the other Global NAPs affiliates appear to be providing public utility services without Commission authorization. In addition to obtaining services without paying for them, Rural ILECs charged that Global NAPs has breached the interconnection agreement approved by the Commission.

Rural ILECs asserted that TDS is entitled to be paid for the access services provided to Global NAPs. Rural ILECs disputed Global NAPs' claim that because the traffic may have utilized internet protocol at some point during transmission prior to its arrival at Global NAPs (although Global NAPs does not know this to be the case nor has it taken steps to verify it), such traffic is exempt from access charges. There is no such law, rule or regulation that provides a blanket right to use somebody else's network for nothing. Rural ILECs contended that Global NAPs is bound by the agreement, by applicable tariffs, and by New Hampshire law. All provide for the payment of access charges to TDS, yet Global NAPs refuses to do so even though it uses these services. Rural ILECs also contended that Global NAPs is liable to TDS for services rendered for which payment has not been received and, if Global NAPs continues to refuse payment, the Commission should allow TDS to simply disconnect and block Global NAPs' traffic.

Rural ILECs asserted that the FCC rulings that Global NAPs refers to as "ESP Exemptions" do not bar the Commission from enforcing the applicable access tariffs. They challenged Global NAPs' claim that its traffic is "internet traffic not subject to access charges" and that "the NHPUC's jurisdiction is limited to local and intrastate traffic" as the US Court of

Appeals for the First Circuit held that the preemptive effect of the FCC Internet Order[9] was limited to the issue of reciprocal compensation for locally dialed calls to internet service providers. Rural ILECs maintained that the traffic at issue here is not locally dialed traffic and, therefore, the FCC Internet Order has no effect on the obligations of Global NAPs to pay access charges to TDS.

Rural ILECs also challenged Global NAPs' reliance on a NYPSC decision dated March 20, 2008 as, in their view, the ruling is confined to "nomadic" VoIP service and has no bearing on fixed VoIP service or other non-local traffic. Most important, the New York commission's order starts a process for making sure that compensation is paid to the terminating LEC even for the nomadic VoIP traffic. They contended that it is unknown whether the traffic at issue in the instant docket is nomadic VoIP traffic, given that Global NAPs does not know and does not check, according to the Stipulated Facts. Rural ILECs held that there is no basis to conclude how much, if any, of this traffic is nomadic VoIP and that it is unreasonable for the Commission to conclude that applicable tariff provisions have been preempted by federal law.

Finally, they recommended that the Commission conduct a compliance review of Global NAPs believing a review will plainly show violations by Global NAPs of New Hampshire laws and rules. According to Rural ILECs, there is a substantial question whether the certified carrier in New Hampshire is providing any service at all; instead, it appears likely that entities that are not certified to provide service in New Hampshire are providing telecommunications services in violation of RSA 374:22. They alleged that all Global NAPs entities admit that they are not certified as competitive toll providers, yet they are apparently carrying toll traffic in New Hampshire. Rural ILECs noted that, according to the report of Staff dated September 17, 2008,

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[9] Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP Bound Traffic*, FCC 01-131 Docket Nos. 96-98 and 99-68 (adopted April 18, 2001). "

Global NAPs, Inc. has not submitted reports to the Commission required by applicable rules, and the reports that Global NAPs has filed contain information that is potentially suspect. Joint Intervenors urged the Commission to conduct a compliance review of Global NAPs and its affiliates.

III. COMMISSION ANALYSIS

The four TDS Companies (TDS) are registered incumbent local exchange carriers in the State of New Hampshire. Global NAPs is a registered competitive local exchange carrier (CLEC) in New Hampshire pursuant to Puc 431.01; it is not registered under Puc 451.01 as a competitive intra-LATA toll provider (CTP).[10]

TDS complains that Global NAPs is accessing TDS's local exchange network to terminate long distance toll calls to end-user customers located in TDS service areas without paying applicable charges. Nine other carriers intervened in this proceeding with similar concerns. Global NAPs argues that the calls it transmits via TDS's network are not subject to charges of any kind because they are Enhanced Service Provider (ESP) calls exempted by the FCC from access charges.[11] Global NAPs is not itself an ESP, however;[12] rather, it provides call transport services to ESPs, who, in turn, provide call initiation and reception services to end users. To resolve this dispute, we must consider the legal framework pertaining to network access, the nature of Global NAPs traffic, and the applicable burden of proof.

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[10] Puc 402.10 defines a CTP as "any carrier authorized to provide intraLATA toll service, except for an ILEC that provides toll service exclusively to its local service customers in New Hampshire.

[11] Enhanced Service Providers are telecommunications providers that provide an "enhanced" communications service, defined by the FCC as any service "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702. *See also, Final Decision*, 77 F.C.C.2d 384 (1980).

[12] *See Global NAPs Objection to Stipulation of Facts* at No. 9 (Global NAPs customers are ESPs who exchange data packets to Global NAPs for further transport, which may be voice, data or a mix thereof).

A. Legal Framework/Jurisdiction

Congress has established that incumbent local exchange carriers, such as TDS, must interconnect directly or indirectly with the facilities and equipment of other telecommunications providers. 47 U.S.C. § 251(a). Congress is clear in its expectation that local exchange carriers will be compensated for access to and use of their network facilities by other carriers. *See* 47 U.S.C. 252(d) (establishing pricing standards for the provision of interconnection and network element charges).

The Federal Communications Commission (FCC) has confirmed that any carrier who wishes to avail itself of an incumbent carrier's network must pay for that privilege. *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36, FCC 04-28, released March 10, 2004 ("*IP-Enabled Proceeding*") at ¶ 33. ("[A]s a policy matter, we believe that any service provider that sends traffic to the [Public Switched Telephone Network] should be subject to similar compensation obligations, irrespective of whether traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.") Without such payment, the added cost to the incumbent of transporting and terminating the traffic is borne fully by the incumbent.

Rates, terms and conditions of access are generally established through either interconnection agreements or interstate and intrastate access tariffs, which govern interstate and intrastate traffic originating or terminating on a carrier's local exchange network. 47 U.S.C. § 251(c) (interconnection agreements); 47 U.S.C. § 252(f) (statements of generally available terms).

Interstate Traffic. Interstate telecommunications traffic falls under the jurisdiction of the FCC and the federal Telecommunications Act of 1996 (Telecom Act), Pub.L. No. 104-104, 110

Stat. 56 (codified as amended in 47 U.S.C.). Incumbent carriers generally provide exchange access to their networks through interconnection agreements negotiated pursuant to Section 251 of the Telecom Act. Such agreements often specify that interstate and intrastate exchange access shall be governed by applicable tariffs. *Joint Petitioners Brief at 9.* The applicable interstate exchange access tariff for TDS is filed by the National Exchange Carrier Association (NECA) with the FCC. 47 C.F.R. 69.3.

Each of the TDS Companies involved in this proceeding has adopted and filed an interstate exchange access tariff with the FCC. *Joint Petition* para 18 at 5. Section 17 of those tariffs "establishes the applicable rates for terminating interstate switched access services to exchanges served by [the TDS Companies] in New Hampshire." *TDS Joint Petition* at 5.

Intrastate Traffic. The FCC has reaffirmed that states have authority over intrastate access charge regimes. *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 63, 73 (2006). Intrastate telecommunications traffic in New Hampshire is governed by intrastate access tariffs and subject to the jurisdiction of the Public Utilities Commission. *See* RSA 378:1 (every public utility shall file with the public utilities commission...schedules showing the rates, fares, charges and prices for any service rendered or to be rendered in accordance with the rules adopted by the commission). Incumbent carriers are required to file tariffs with the Commission. Puc 411.01.

The Commission's rules define a tariff as "the schedule of rates, charges and terms and conditions under which a regulated and tariffed service is provided to customers, filed by an ILEC, and either approved by the commission or effective by operation of law." Puc 402.52. It is well settled that tariffs filed with the Commission have the force and effect of law. *See, e.g., Appeal of Pennichuck Water Works*, 120 NH 562, 566 (1980) (tariffs required to be filed with the

PUC do not simply define the terms of the contractual relationship between a utility and its customers, they have the force and effect of law); *Teleco Inc. v. Southwestern Bell Telephone Co.*, 511 F.2d 949, 952 (10th Cir. 1975) cert. denied, 423 U.S. 875, *citing Southwestern Bell Telephone Co. v. Cox*, 375 P.2d 972 (Okl.) (tariffs duly filed bind both the utility and its customers); *Lee v. Consolidated Edison Co. of New York*, 98 Misc. 2d 304, 306, 413 N.Y.S.2d 826, 828 (1978) (once accepted by the Commission, the tariff schedule takes on force and effect of law and neither party can depart from the measure of compensation therein).

Each of the TDS Companies has filed an intrastate exchange access tariff with the Commission. Section 3 of the Hollis Telephone Company (HTC) tariff and section 17 of the Wilton Telephone Company (WTC), Merrimack County Telephone Company (MCTC) and Kearsarge Telephone Company (KTC) intrastate access tariffs establish "the applicable rates for terminating intrastate switched access" services to exchanges served by those companies. *TDS Joint Petition* at 5-6.

Global NAPs argues that the traffic at issue in this proceeding is interstate and, therefore, not subject to the jurisdiction of this Commission. To reach that conclusion, Global NAPs argues that the calls are Internet Protocol (IP)-enabled and cannot be distinguished as intrastate versus interstate traffic; as a result, they must all be considered interstate. Global NAPs cites certain decisions of the FCC and other state commissions to support its argument. We have reviewed the cited cases and find none to be dispositive with respect to the traffic at issue here.

Global NAPs relies on the FCC's *Vonage* decision to argue that "all or by any measure substantially all" of the traffic at issue is interstate and therefore not subject to this Commission's jurisdiction. *Global NAPs Brief* at 16-17, *citing Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*,

Memorandum Opinion and Order, 19 FCC Recd 22,404 (2004) ("*Vonage* decision"). Similarly, Global NAPs cites a New York Public Service Commission (NYPSC) decision to argue, again, that the New Hampshire Commission has no jurisdiction because "if there was evidence on this issue, it is probable that the subject traffic is *even* when measured using traditional voice telephony NXX comparisons of called and calling parties – to a large degree 'interstate.'" *Global NAPs Brief* at 7 (emphasis in original).

In the *Vonage* decision, the FCC preempts states from imposing market entry requirements such as certification, tariffing and related requirements on Vonage's interstate IP-enabled services as conditions to offering such services within a state. *Vonage* at ¶ 46. In its decision, the FCC preempted Minnesota's efforts to impose regulatory entry requirements on Vonage's IP-enabled services because it foresaw the possibility of "similar imposition of 50 or more additional sets of different economic regulations" on Vonage's services. *Vonage* at ¶ 37. Underlying the FCC's decision is the recognition of the impracticability of separating intrastate from interstate calls in an IP-enabled system, such as that used by Vonage. *Id.* at ¶¶ 31-31. The FCC noted that "state regulation violates the Commerce Clause if the burdens imposed on interstate commerce by state regulation would be 'clearly excessive in relation to the putative local benefits.'" *Vonage* at ¶ 38.

Payment for services rendered, however, cannot be construed as an excessive regulatory burden. Here, TDS is not proposing that this Commission impose new regulations on Global NAPs that could pose a potential barrier to market entry – it is seeking enforcement of its existing intrastate tariff. Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment is an unjust burden for New Hampshire's local

exchange carriers, and can create unfair market competition where other carriers are paying for those same services.

The NYPSC decision cited by Global NAPs also recognized the difficulty of distinguishing intra- and interstate portions of nomadic IP-enabled traffic. *NYPSC Order Directing Negotiation*, Case 07-C-0059, Complaint of TVC Albany, Inc. against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges (March 20, 2008). The NYPSC further noted, however, that "[a]ny telecommunications carrier that delivers traffic over the public switched telephone network for another carrier can reasonably expect to be compensated irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." *NYPSC Order* at 15. In its decision, the NYPSC directed Global NAPs to enter into private contract negotiations on the rates, charges, terms and conditions for the exchange of nomadic VoIP traffic. *Id.* at 16-17.

The California PUC similarly noted in a recent decision that its decision to require Global NAPs to pay access charges "took into account the fact that the FCC expressed a general policy view that services which terminate on the PSTN, such as those offered by GNAPs, should not be exempt from access or similar charges." *California PUC GNAPs Decision Denying Rehearing*, Slip Op. 2009 WL 254838 (Cal.P.U.C.) at 10, *citing* FCC Order *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges* (2004) 19 F.C.C.R. 7457, 7464-65, ¶ 15.

Global NAPs focuses on the interstate versus intrastate issue underlying each decision to conclude more broadly that because some of its calls are an IP-enabled service, it is impossible to distinguish intrastate from interstate and, therefore, jurisdiction over all its traffic defaults to the FCC. In so doing, Global NAPs evades the more fundamental concern that it has failed to

pay anything for access to TDS facilities and services, whether the traffic at issue is interstate or intrastate.

B. Burden of Proof

TDS filed its petition as a complaint under RSA 365:1 and pursuant to RSA 374:3, under which the Commission "shall have general supervision of all public utilities and the plants owned, operated or controlled by the same."

It is a generally accepted principle of administrative law that petitioners bear the burden of proving their allegations in a contested administrative proceeding. *See, generally,* Davis & Pierce, Administrative Law Treatise (1994), at §10.7 (noting that the term 'burden of proof' as set forth in the Administrative Procedures Act means the burden of going forward); and *Environmental Defense Fund, Inc. v. EPA,* 548 F.2d 998 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977) (distinguishing the burden of going forward and the burden of ultimate persuasion). Accordingly, Puc 203.25 establishes that:

> [u]nless otherwise specified by law, the party seeking relief through a petition, application, motion or complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence.
> N.H. Code of Admin. Rules Puc 203.25.

The burden may shift to the respondent party, however, where the respondent is uniquely in control of data or information essential to resolving the issue or issues raised. *See, e.g.*, *Re Public Svc. Co. of N.H.*, 87 NHPUC 688 (2002); *see also, Environmental Defense Fund (EDF) v. EPA*, *supra*, at 1014 and 1018 (noting that the party initiating a proceeding has the general burden of coming forward with a prima facie case, but other party-proponents of a denial of relief also have an evidentiary burden to maintain, particularly where such parties are "naturally possessed of pertinent evidence"); *Comcast Phone of New Hampshire*, NHPUC Order No. 24,938 at 18 (Feb. 6, 2009) (petitioner bears burden of producing evidence reasonably available

to it, while respondent bears burden of producing evidence in its exclusive control); and *BlueRidge Telephone Co. et al.*, GA PSC Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision, Docket No. 21905, Slip Copy 2009 WL 2588844 (Ga. P.S.C.) (Jul. 31, 2009) (party raising the affirmative defense of preemption has the burden of proof, *citing Buist v. Time Domain Corporation*, 926 So. 2d 290, 296 (2005)).

TDS's intrastate exchange access tariff establishes that, for purposes of interstate and intrastate payment allocations, an interexchange carrier,[13] such as Global NAPs in this instance, "shall keep sufficient detail from which the percentages of interstate use for ... Access Service can be ascertained and upon request of the Telephone Company make the records available for inspection." *Merrimack County Telephone Company Intrastate Access Tariff, NHPUC No. 8*, section 2.3.11(G) (eff. Oct. 1, 1993).

As the above tariff language suggests, Global NAPs is in a position of uniquely controlling the information necessary to identify with certainty the nature of the traffic in question. The burden, therefore, is on Global NAPs to support its claim that the traffic at issue here is exempt from any access charges.

C. Nature of the Traffic in Question

As noted, TDS complains that Global NAPs is not paying for services rendered by TDS and billed under TDS's intrastate access tariff. *Joint Petitioners Brief* at 2. TDS has proffered call detail records to demonstrate that traffic from Global NAPs is, in fact, being transmitted through TDS's local exchange network. *Confidential Attachment to Staff-TDS-1-2,* attached to *Joint Petitioners Brief*, Exh. TDS-3. As TDS points out, there is nothing in those call detail records to distinguish "regular" voice traffic from ESP or any other IP-enabled traffic. *Joint*

[13] Puc 402.25 defines an interexchange carrier as "a telecommunications carrier that provides long distance interstate or intrastate telephone service."

Petitioners Brief at p. 6, Statement #16. TDS further argues that the data it collects for calls transmitted by Global NAPs and carried over TDS's network bear all the hallmarks of traditional voice traffic that is subject to access charges covered by access tariffs. *Joint Petitioners Brief* at 6-7.

As noted above, Global NAPs, in turn, asserts that the Commission has no jurisdiction over the calls in question because they are presumptively interstate and, therefore, exempt from access charges pursuant to the FCC's *Vonage* decision. *Global NAPs Brief* at 16-17. Global NAPs further argues that its calls are, by definition, exempt from *any* charges, whether under TDS's intrastate tariff or Section 252 of the Telecom Act, because they are calls from IP-enabled ESP customers. *Id.* at 12-13.

Global NAPs admits, however, that it does not know the original format of the calls it receives from its ESP customers for transport. *Global NAPs Objection to Stipulation of Facts* at 5, #13. Nor does Global NAPs distinguish the format of the traffic it receives, whether time division multiplexing (TDM), asynchronous transfer mode (ATM), or IP. *Id.* at 5, #14; *see also* #12 (Global NAPs is capable of accepting traffic in all three media types or transmission methods). Further, Global NAPs converts all traffic to ATM for transport on its own network and then converts the traffic to TDM for termination on the public switched network. *Id.* at 6, #15 and #16.

The only "evidence" Global NAPs has provided to support its claim that the calls are ESP calls and, therefore, according to Global NAPs, exempt from charges, is in the form of boilerplate customer contract language which states that any calls made under that contract are ESP calls. *See Joint Petitioners Reply Brief* at 4-5 and Exh. TDS-5/Part A and TDS-6/Part A. Global NAPs does not provide any data or explanation to refute TDS's argument that the call

data records confirm that some of the traffic is intrastate. Rather, Global NAPs misconstrues the case law to create blanket assertions that its traffic is IP-enabled and therefore interstate and exempt from charges.

On the other hand, Global NAPs effectively concedes that at least some, if not most or all, of its traffic is likely intrastate. *Global NAPs Brief* at 4 ("This classification of traffic as 'nomadic' is important because it indicates the extremely high probability that *not all* of the traffic terminated by Global to FairPoint is sent and received entirely within New Hampshire" (emphasis added)). Despite acknowledgment that some, if not all, traffic delivered by Global NAPs to FairPoint for termination to a TDS end-user is sent and received entirely within New Hampshire, Global NAPs has not paid any access charges, whether intrastate or interstate, whatsoever to TDS.

Despite multiple opportunities to support its arguments with data and information through discovery, technical sessions, and two rounds of briefing, as well as mandated compliance with a Commission order requesting further information, Global NAPs failed to produce any evidence to substantiate its claims that the calls carried over TDS' network are ESP traffic and exempt from access charges. Global NAPs offers nothing beyond the generic, boilerplate language its customers adopt by signing service contracts with Global NAPs. Indeed, in each of its filings, Global NAPs appears to rely on its general jurisdictional argument to avoid providing further data for this record.

Even if, *arguendo*, all Global NAPs traffic delivered to TDS facilities were determined to be interstate, Global NAPs remains obligated to pay for its access to TDS's network under TDS's interstate tariff. Here, however, Global NAPs has paid nothing for the use of TDS's network.

Global NAPs has failed in its burden of proving its arguments against TDS's claims. TDS has demonstrated through record evidence that Global NAPs' traffic is traveling across TDS facilities to access TDS end-users. Global NAPs has offered no evidence to refute TDS's argument that the intrastate traffic in question is identified and treated as exchange access traffic subject to intrastate tariffed access charges.

TDS Companies have on file both interstate access tariffs with the FCC and intrastate access tariffs with this Commission. To date, Global NAPs has not made any payments under either tariff for the access TDS has provided to terminate Global NAPs traffic, services totaling some $410,613.12 in unpaid bills as of January 2009. *Joint Petitioners January 20, 2009 Letter.*

Puc 412.19 permits a carrier to disconnect service to a non-residential customer, where that customer has violated a provision of the utility's approved tariff. Here, Global NAPs has violated TDS's intrastate access tariffs where it has refused to pay for access services rendered.

D. Conclusions

Based on our review of the record and the arguments presented by the parties, we conclude that Global NAPs has failed to prove its assertion that its traffic is exempt from access charges. In the meantime, unpaid charges for access to TDS facilities continue to accrue at the rate of nearly $25,000 per month, totaling $410,613.12 as of January 1, 2009. *TDS Letter* dated January 20, 2009. If Global NAPs does not pay for access to TDS's network – access that is essential for the provision of service to its customers communicating with customers located in TDS's service territory, those costs must be absorbed by TDS. Such a result is untenable where the law is clear that carriers must compensate for such access. Therefore, we find that, absent payment in full of outstanding invoices or a mutually acceptable payment arrangement between

Global NAPs and TDS, TDS is entitled to disconnect service to Global NAPs, in accordance with the conditions set forth below.

Global NAPs is granted 30 days to pay in full, with interest at the current prime rate of 3.25%, any outstanding invoices from TDS. If, after 40 days from the date of this order, Global NAPs has not paid TDS in full or otherwise reached agreement with TDS for the continuation of service, TDS may disconnect service to Global NAPs. Within 10 days of this order Global NAPs shall provide the following notice to each of its customers that has terminated any calls within the TDS franchise area within the past year:

> The New Hampshire Public Utilities Commission has adjudicated a dispute between Global NAPs and the TDS Companies and concluded that Global NAPs owes TDS approximately $600,000 in access charges. Global NAPs has until December 10, 2009 to pay the charges to TDS. If payment is not made by that date, TDS may terminate service to Global NAPs. Should service to Global NAPs be terminated, the ability to complete calls in the TDS service territories will be affected.

If payment is made in full by November 20, 2009, then this notice will not be required.

The intervention of nine incumbent and competitive carriers encountering non-payment by Global NAPs for access to their networks, combined with Global NAPs' failure to provide any credible evidence to support its position that the traffic is exempt from access charges, leads us to conclude that it is in the best interest of New Hampshire ratepayers and telecommunications carriers alike to authorize those carriers, as well, to pursue disconnection of service to Global NAPs within the State of New Hampshire. In the event any other carrier believes Global NAPs is in violation of a provision of its approved tariff, based on this ruling,

the carrier shall file a motion for authority to disconnect Global NAPs with a full explanation of the grounds for disconnection. Global NAPs shall have 10 business days to respond in writing. If Global NAPs fails to provide evidence that it is not in violation of the Commission's rules, we will authorize the intervenor carriers to disconnect service to Global NAPs under the same 30-day condition outlined above.

With respect to Global NAPs's assertion that the lack of an evidentiary hearing violates its due process rights, we disagree for the following reasons. We are authorizing TDS to disconnect service to Global NAPs in accordance with certain procedural conditions, as stated herein. Disconnection of service to customers who fail to pay for services rendered or who are in violation of a filed and approved tariff is permitted under our rules within similar procedural constraints, none of which include a formal, evidentiary hearing. *See* Puc 412.19. We find here that Global NAPs has failed to pay for services rendered pursuant to a valid tariff. Given the opportunities provided for submitting data in the underlying proceeding and Global NAPs's failure to carry its evidentiary burden, we find that Global NAPs was provided appropriate due process under the circumstances.

In their January 20, 2009 letter, TDS requested the Commission to order Global NAPs to reimburse TDS for attorney fees expended in the course of this proceeding. We decline to award attorney fees at this time, but, in the event of non-compliance with the directives of this order, we may reconsider that issue.

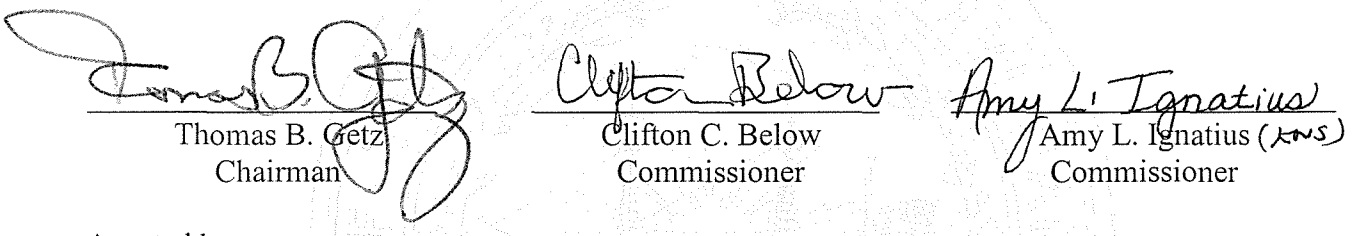
Based upon the foregoing, it is hereby

ORDERED, that Global NAPs pay in full, with interest, any outstanding invoices from TDS within 30 days; and it is

FURTHER ORDERED, that if, after 40 days from the date of this order, Global NAPs has not paid TDS in full or otherwise reached agreement with TDS for the continuation of service, TDS may disconnect service to Global NAPs; and it is

FURTHER ORDERED, that intervenor carriers are authorized to file motions to disconnect service to Global NAPs for failure to pay access charges pursuant to the process outlined in this Order.

By order of the Public Utilities Commission of New Hampshire this tenth day of November, 2009.

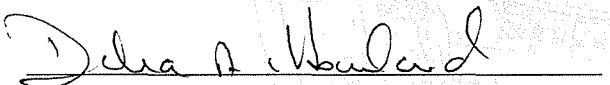


Thomas B. Getz
Chairman

Clifton C. Below
Commissioner

Amy L. Ignatius (KNS)
Commissioner

Attested by:



Debra A. Howland
Executive Director