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STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

May 14, 2008 - 1:41 p.m.
Concord, New Hampshire

RE: DT 08-028
HOLLIS TELEPHONE, INC., KEARSARGE
TELEPHONE CO., MERRIMACK COUNTY
TELEPHONE CO., and WILTON TELEPHONE CO.:
Joint Petition for Authority to
Block the Termination of Traffic from
Global NAPs, Inc. (Prehearing conference)

PRESENT: Chairman Thomas B. Getz, Presiding
Commissioner Graham J. Morrison
Commissioner Clifton C. Below

Connie Fillion, Clerk

APPEARANCES: Reptg. Hollis Telephone, Inc.,
Kearsarge Telephone, Co., Merrimack
County Telephone Co., and Wilton
Telephone Co.:
Paul J. Phillips, Esq. (Primmer, Piper...)
Joslyn Wilschek, Esq.

Reptg. Global NAPs, Inc.:
James R. J. Scheltema, Esq.

COURT REPORTER: Steven E. Patnaude, LCR No. 52

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APPEARANCES: (C o n t i n u e d)

Reptg. Granite State Telephone, Inc.,
Dunbarton Telephone Co., Inc.,
Northland Telephone Co. of Maine, Inc.,
d/b/a FairPoint Communications, Bretton
Woods Telephone Co., and Dixville
Telephone Co.:
Frederick J. Coolbroth, Esq. (Devine...)

Reptg. Union Telephone Co. and
BayRing Communications:
Darren Winslow
Trent Lebeck

Reptg. PUC Staff:
Lynn Fabrizio, Esq., Esq.

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STATEMENTS OF PRELIMINARY POSITION BY:

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Mr. Phillips

7, 17

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Mr. Scheltema

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Mr. Coolbroth

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Mr. Winslow

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Ms. Fabrizio

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1 P R O C E E D I N G S

2 CHAIRMAN GETZ: Okay. Good afternoon,
3 everyone. We'll open the prehearing conference in docket
4 DT 08-028. On February 19, Hollis Telephone Company, et
5 al, filed a petition for authority to block the
6 termination of all traffic carried by Global NAPs to TDS
7 exchanges on the public switched telephone network in New
8 Hampshire. TDS alleges that Global NAPs is not paying to
9 terminate its access traffic in TDS territories and owes
10 TDS \$192,000 for activities from February 2003 to
11 January 2008. On March 19, Global NAPs responded
12 asserting, among other things, that the traffic in
13 question is exclusively interstate in nature and it denies
14 allegations and certain facts in the complaint.

15 Order of notice was issued on April 22nd
16 setting a prehearing conference for this afternoon. And,
17 I'll note that the affidavit of publication has been
18 filed. And, that there are Petitions to Intervene from
19 Union Telephone and BayRing Communications and the Granite
20 State Telephone Company, et al.

21 Can we take appearances please.

22 MR. PHILLIPS: Good morning, Mr.
23 Chairman and Commissioners. My name is Paul Phillips,
24 from the law firm of the Primmer, Piper, Eggleston &

{DT 08-028} [Prehearing conference] (05-14-08)

1 Cramer. I'm here representing the four TDS companies.
2 I'm joined by Joslyn Wilschek, from our firm, on the end,
3 and by Deb Martone and Mike Reed from TDS Telecom.

4 CHAIRMAN GETZ: Good afternoon.

5 CMSR. MORRISON: Good afternoon.

6 CMSR. BELOW: Good afternoon.

7 CHAIRMAN GETZ: Other appearances?

8 MR. SCHELTEMA: Good morning,

9 Commissioners. My name is Jim Scheltema. I'm
10 representing Global NAPs, Inc. And, to my right is
11 Jeffrey Nowack here for the technical conference.

12 CHAIRMAN GETZ: Good afternoon.

13 CMSR. MORRISON: Good afternoon.

14 CMSR. BELOW: Good afternoon.

15 MR. COOLBROTH: Good afternoon,

16 Mr. Chairman and Commissioners. For Granite State
17 Telephone, Inc., Dunbarton Telephone Company, Inc.,
18 Northland Telephone Company of Maine, Inc., d/b/a
19 FairPoint Communications, Bretton Woods Telephone Company,
20 Inc., and Dixville Telephone Company, I'm Frederick
21 Coolbroth of the firm of Devine, Millimet & Branch. And,
22 with me today is William Stafford from Granite State
23 Telephone and Stephen Nelson from Dunbarton Telephone.

24 CHAIRMAN GETZ: Good morning.

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1 CMSR. MORRISON: Good afternoon.

2 CMSR. BELOW: Good afternoon.

3 MR. WINSLOW: Good afternoon, Chairman
4 and Commissioners. My name is Darren Winslow. I'm
5 representing Union Telephone Company and BayRing
6 Communications today. Joining me from the companies are
7 Trent Lebeck.

8 CHAIRMAN GETZ: Good afternoon.

9 CMSR. MORRISON: Good afternoon.

10 CMSR. BELOW: Good afternoon.

11 MS. FABRIZIO: Good afternoon,
12 Commissioners. Lynn Fabrizio, on behalf of Staff. And,
13 with me today at the table are Kate Bailey, David Goyette,
14 and Jody O'Marra from the Telecom Division.

15 CMSR. BELOW: Good afternoon.

16 CMSR. MORRISON: Good afternoon.

17 CHAIRMAN GETZ: Good afternoon. Okay.

18 Is there anything procedurally that we need to address
19 before we hear the statements of the positions of the
20 parties? And, I guess the first thing I'll ask is, are
21 there any objection to any of the Petitions to Intervene?

22 MR. PHILLIPS: TDS has no objections to
23 the intervention petitions.

24 CHAIRMAN GETZ: Okay. Are there any

1 objections to any of the petitions?

2 (No verbal response)

3 CHAIRMAN GETZ: Okay. Well, then,
4 hearing nothing else, then, Mr. Phillips.

5 MR. PHILLIPS: Thank you, Mr. Chairman.
6 The four New Hampshire TDS Telecom Companies are here
7 today on what they believe is a very simple billing matter
8 involving traffic that comes to them in the ordinary
9 course by way of Verizon at the time, and now FairPoint,
10 with an originating operator carrier number that is
11 assigned to Global NAPs in the Global Exchange Resource
12 Guide and it is treated by TDS just as TDS treats every
13 other minute of traffic that comes to them that way, which
14 is that, when it comes to them by way of FairPoint, the
15 bills go out to the originating carrier. And, the
16 expectation is that payment will be made in the ordinary
17 course. There's absolutely nothing unusual about the
18 arrangement. It's the same arrangement that the TDS
19 Companies have with all carriers that terminate traffic on
20 their networks. The only thing unusual in this case is
21 that the bills have gone unpaid for such a long time, on
22 the one hand, and now the matter has unfortunately arisen
23 to a dispute before the Commission. And, several
24 jurisdictional and other legal objections have been raised

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1 by Global NAPs, saying that they are not obligated to pay
2 the bills.

3 And, so, from our standpoint, the
4 Commission should not be distracted by those claims, but
5 should focus their attention in this case on the very
6 simple matter before them, which is that the bills have
7 not been paid. And, at this point, it appears clear that
8 the bills are not going to be paid absent some action by
9 the Commission. And, so, we've come to the Commission
10 today to seek relief in the form of authority to block
11 that traffic and any other relief that the Commission
12 deems appropriate. Our view is that we don't need to go
13 to the length of having certificates suspended or anything
14 of that nature, but we would like to see some action taken
15 so that we can make sure that this traffic does not
16 continue in this fashion.

17 As I say, the traffic is very routine in
18 nature. There's really nothing in the records that we
19 have identifying this traffic that would give us any
20 indication that it's anything other than ordinary toll
21 traffic that originates outside of the local calling area,
22 terminates inside the local calling area, and that's the
23 way it's billed. And, obviously, we expect that payment
24 will be made in the ordinary course.

1 And, that's where we are today.

2 CHAIRMAN GETZ: All right. Thank you.

3 Mr. Scheltema.

4 MR. SCHELTEMA: Permission to approach?

5 I have things to distribute. I don't know if you want to
6 actually mark these or not. This is the most recent of
7 the three items that I'll be giving you. It's a decision
8 in a District Court in Florida, the essence of which is
9 "we're going to wait for the FCC to make a ruling on this
10 jurisdictionally interstate traffic." The second one is a
11 decision I believe in March from the New York Public
12 Service Commission, which investigated the type of traffic
13 that we carry. They were asked to make a similar ruling,
14 in essence, which declared that, from an independent, that
15 Global NAPs owed access charges. And, they determined
16 that they could not apply the intrastate tariff as
17 requested, and they also determined that the traffic that
18 Global NAPs carried was much, if not all of it, nomadic
19 VoIP traffic.

20 CHAIRMAN GETZ: Yes, Mr. Scheltema, it
21 looks like you've given us two documents that are
22 identical.

23 MR. SCHELTEMA: Okay. I'm sorry.

24 CHAIRMAN GETZ: We've got two copies of

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1 the TVC --

2 MR. SCHELTEMA: Yes.

3 MR. PHILLIPS: Mr. Chairman, we would
4 ask Mr. Scheltema if he would identify these documents for
5 the record.

6 MR. SCHELTEMA: Certainly.

7 CHAIRMAN GETZ: Well, while this is
8 being distributed, let me just speak to the status of the
9 proceeding at this point. Today what we're looking for is
10 preliminary statements. I'm not anticipating full oral
11 argument. I don't think there's any necessity at this
12 point to mark these, what all seem to be just decisions of
13 other jurisdictions that we could either take
14 administrative notice of or which could be cited in any
15 legal argument.

16 MR. SCHELTEMA: Okay. Let me start with
17 the notion that this is a "simple matter", as Mr. Phillips
18 asserted. With respect to the "simple" part of this,
19 there are some threshold problems with the complaint.
20 First off, it assumes that Global NAPs has the burden of
21 proof to show this traffic is not subject to the tariffs
22 being asserted by the Independents, which is an entire
23 reversal of due process notions.

24 Second, we don't have any support, other

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1 than some listings of claims asserted by the Independents,
2 for what these invoices relate to. That is, there is no
3 call data records, there is no calling party information.
4 All we have is a nonsworn statement in a complaint.

5 And, that seems a bit cursory to request
6 the Commission to disrupt the flow of traffic and
7 communications in New Hampshire, when really one of your
8 charges is to ensure that communications continues on a
9 quality basis. So, that's essentially the initial
10 position. There are much more complex arguments with
11 respect to jurisdiction. I don't know if you want me to
12 touch upon those now or await in abeyance until the other
13 parties have spoken?

14 CHAIRMAN GETZ: Well, it's not -- at
15 this point, we're looking for preliminary statements.
16 We're not going through the full oral argument. But,
17 certainly, if you have something to say, say it now,
18 you're not going to -- I don't anticipate a second round,
19 though, I will give the Petitioner a last round to respond
20 to what's happened beforehand.

21 MR. SCHELTEMA: Okay. The Independents
22 have asserted that, well, they basically admitted that
23 much of the traffic that they are asserting are subject to
24 these access charges is both interstate and/or intrastate.

1 We haven't seen a breakdown or determination between the
2 two. To the extent that the traffic is interstate, this
3 Commission lacks the jurisdiction to block it. If there
4 is a way to block the interstate only portion then -- or,
5 excuse me, if there is a way to block the intrastate only
6 portion, it may be able to do so. However, that presumes
7 that the traffic is traditional TDM, that is Time Division
8 Multiplexing, traffic. Global NAPs carries only ISP
9 traffic. ESP isn't ISP. All of the traffic that Global
10 NAPs carries is jurisdictionally interstate. Much of the
11 traffic that Global NAPs carries has been coined as
12 "VoIP", which is Voice-over Internet Protocol. And, as
13 the New York Commission, the decision I showed you, will
14 indicate on Page 14, much, if not all of that, is nomadic
15 VoIP. So, even to the extent that you compare the NXX
16 codes of the originating, that is the calling and the
17 called parties, and you're able to determine from that
18 that the call may have been placed within New Hampshire,
19 according to a geographical correlation, that may not be
20 dispositive because of the nomadic nature of the traffic.
21 That is, I could take my laptop, place a call from my
22 laptop here, using a Massachusetts NXX; alternatively, I
23 could do the same thing from Pensacola. So, the
24 geographic correlations ascribed to the NXX of traditional

1 telephony do not apply to Global NAPs' traffic.

2 The problem with trying to separate the
3 intrastate and the interstate components has been
4 attempted many times. It's one of the reasons why the ISP
5 Remand Order said that all the ISP inbound traffic was
6 jurisdictionally interstate. This is analogous. In this
7 instance, if you look at the Nebraska decision, I think
8 it's around Page 4, but it discusses what they call the
9 "impossibility exception". And, the "impossibility
10 exception" is there's no practical way to differentiate
11 and segregate these two aspects of intra versus interstate
12 traffic. Therefore, there's no way for the Public Service
13 Commission to apply blocking only to intrastate
14 facilities, and you would be treading on the Commerce
15 Clause, if you attempted to have Global NAPs' traffic
16 blocked in its entirety.

17 CHAIRMAN GETZ: Let me see if I can at
18 least get this portion understood, because I sometimes
19 have trouble following these responses to complaints in
20 the format of like a district or a superior court
21 pleading, where you just deny certain things, admit
22 certain things. Is it your basic position that Global
23 NAPs does not owe any payments to TDS or is the position
24 that, even if you did, we don't have the jurisdiction to

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1 do anything about it?

2 MR. SCHELTEMA: Well, you asked me
3 several questions, so I'm going to give you several
4 responses. The first is the easy one. I don't think you
5 have the ability to make a determination to block only the
6 intrastate traffic, because it's impossible to separate
7 intra versus interstate traffic.

8 CHAIRMAN GETZ: Well, that goes to the
9 remedy of blocking.

10 MR. SCHELTEMA: Correct.

11 CHAIRMAN GETZ: Okay.

12 MR. SCHELTEMA: And, the first portion
13 you asked is, "does Global NAPs feel that it owes
14 anything?" We don't have a contract with the parties at
15 issue here. All of the ISP traffic we believe is bill and
16 keep basis. So, therefore, no, we don't. To the extent
17 that there would be any amount due, it would be capped at
18 a per minute basis of 0.0007, which is the maximum rate
19 under the ISP Remand Order. But all the intercarrier
20 compensation is essentially up for grabs with the FCC,
21 which is why I gave you the Florida decision, because, on
22 the last page of the Florida decision which I gave you, it
23 says, in essence, "In close, this is too complicated. We
24 better wait to see what the Feds do, because we don't want

1 to have a patchwork quilt system of regulation throughout
2 the country."

3 CHAIRMAN GETZ: Do you have anything
4 further for your preliminary statement?

5 MR. SCHELTEMA: I think that's
6 sufficient.

7 CHAIRMAN GETZ: Thank you.

8 MR. PHILLIPS: Mr. Chairman, could I
9 just interject. I wasn't given a copy of the Florida
10 decision.

11 MR. SCHELTEMA: I can certainly e-mail
12 the decisions to people, if they request one.

13 CHAIRMAN GETZ: Okay. Mr. Coolbroth.

14 MR. COOLBROTH: Thank you, Mr. Chairman.
15 Life certainly presents its ironies. We litigated for
16 years a case at this Commission relating to virtual NXX,
17 in which this party argued for years that this Commission
18 could not look at the location of originating and
19 terminating traffic, but had to rely on the NXX code that
20 was presented. Now, we're being told the opposite. That
21 we can't rely on the NXX code. We have to try to figure
22 out where the party is.

23 I think that the TDS folks are correct.
24 This is traffic that presents itself as interexchange

1 traffic; originating in one exchange in New Hampshire and
2 terminating to an exchange in New Hampshire. The carrier
3 provides that service over an access tariff. The carrier
4 does not control what is carried over that, that access
5 line. The carrier performs its obligation under the
6 tariff to take traffic that has been presented over the
7 toll network and terminate that traffic. For doing so,
8 there's an access tariff. And, for doing so, the carriers
9 are entitled to be paid.

10 I think this really is a simple case and
11 should rest on that. Thanks.

12 CHAIRMAN GETZ: Mr. Winslow.

13 MR. WINSLOW: At this point in time,
14 Union Telephone Company and BayRing Communications have
15 not taken a position in this case. We wish to monitor and
16 see how it's going to affect our future operations.

17 CHAIRMAN GETZ: Thank you.

18 Ms. Fabrizio.

19 MS. FABRIZIO: Thank you, Mr. Chairman.
20 While Staff takes no position at this time on the
21 substantive matters of the case, we note that the filings
22 raise a number of factual questions that warrant further
23 investigation regarding the types of calls and access at
24 issue. We also note that, according to the Petition, the

1 activity complained of has been occurring over the past
2 several years. That the charges at issue now total over
3 \$192,000. And, that TDS has requested authority from the
4 Commission to block all traffic from Global NAPs, whether
5 interstate or intrastate. And, as a result, the Petition
6 raises the issue of whether and to what extent the
7 Commission has jurisdiction over the traffic terminating
8 on TDS's network, as well as the applicable charges.

9 Staff recommends an aggressive discovery
10 schedule and prompt resolution of this dispute. And,
11 toward that end, Staff would recommend that the parties
12 endeavor to reach a stipulation on the facts, after
13 discovery is concluded, and that the issues ultimately be
14 adjudicated on the papers.

15 CHAIRMAN GETZ: Okay. Just before I
16 give Mr. Phillips one more opportunity, as the Petitioner,
17 we will grant the Petitions to Intervene, inasmuch as the
18 parties have demonstrated rights, duties, privileges,
19 immunities or other interests affected by the proceeding,
20 and there do not appear to be any objections to the
21 interventions.

22 Mr. Phillips.

23 MR. PHILLIPS: Thank you, Mr. Chairman.
24 With respect to the Global NAPs' position statement, it's

1 not our intention to place the burden of proof on Global
2 NAPS. We understand that we're the Joint Petitioners. We
3 expect, in the course of this proceeding, to satisfy the
4 Commission's needs to have the traffic identified. And,
5 we are prepared, as an evidentiary matter, to present
6 those records. We don't believe that there will be any
7 question, when the Commission sees the evidence, about
8 what the nature of the traffic is or the nature of the
9 relationship is.

10 As I say, it's a very routine matter
11 from our standpoint, other than the fact that we have not
12 been paid. What's interesting, from Mr. Scheltema's
13 statement is, the idea that, for the last several years,
14 as these bills have accumulated, and as the letters have
15 gone from TDS to Global NAPS, the intention on the Global
16 NAPS' end was never to pay those bills. And, so, it took
17 a petition to the Commission seeking authority to block
18 that traffic to bring that matter to our attention. The
19 simple fact of the matter is that this traffic terminates
20 on the TDS network. It uses the TDS facilities. The
21 bills are sent by TDS to Global NAPS under the TDS tariff.
22 And, the bills are not being paid, and so the network is
23 being used without payment. And, that is really the sum
24 gist of the matter, as far as we are concerned. And, if

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1 there is some question about the nature of that traffic,
2 we expect to have that thoroughly analyzed and properly
3 adjudicated in this matter.

4 CHAIRMAN GETZ: Thank you. Is there
5 anything of a procedural nature that we need to address
6 this afternoon before we end for the day?

7 (No verbal response)

8 CHAIRMAN GETZ: Okay. Hearing nothing,
9 then we will close the prehearing conference and await a
10 recommendation from the parties as to the procedure. If
11 it's a joint recommendation, that would be helpful. If
12 it's not, then we will resolve whatever disputes as to
13 procedure that come before us. Thank you, everyone.

14 (Whereupon the prehearing conference
15 ended at 2:02 p.m. and the Staff and the
16 Parties subsequently convened a
17 technical session.)

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