

**State of New Hampshire
Before the New Hampshire Public Utilities Commission**

Joint Petition of Hollis Telephone Company,
Inc., Kearsarge Telephone Company,
Merrimack County Telephone Company, and
Wilton Telephone Company, Inc., for Authority
to Block the Termination of Traffic from
Global NAPS, Inc., to Exchanges of the Joint
Petitioners in the Public Switched Telephone
Network

Plaintiffs,

v.

GLOBAL NAPS, INC.,

Defendant

Case No. **DT 08-028**

**MOTION OF GLOBAL NAPS TO STAY DISCONNECTION AND PAYMENT
ORDER BASED ON SECTION 251 NEGOTIATIONS BETWEEN GLOBAL AND THE
TDS PLAINTIFFS, FOR RECONSIDERATION BASED ON NEW LAW AND NEW OR
CORRECTED FACTS AND FOR A REHEARING PURSUANT TO RSA 541:3**

INTRODUCTION

On November 10, 2009, without the benefit of an evidentiary hearing, the Public Utilities Commission (Commission) issued its Order concluding that “Global NAPS has failed to prove its assertion that its traffic is exempt from access charges. The Commission ordered Global to render “payment in full of outstanding invoices” of approximately \$600,000.00 to petitioners Hollis Telephone Inc., Kearsarge Telephone Co., Merrimack County Telephone Co. and Wilton

Telephone Co. (known collectively as “TDS”), and to enter into “a mutually acceptable payment arrangement” or face disconnection of service. (Order, 24). In so ruling, the Commission, assessed Feature Group D access charges against Global relying on call detail records which fail to distinguish between “regular” voice traffic and ESP or other IP-enabled traffic, (Order, 21).

On November 17, 2009, Global NAPS Inc. (Global) wrote to counsel for the plaintiffs Hollis Telephone Inc., Kearsage Telephone Co., Merrimack County Telephone Co. and Wilton Telephone Co. (known collectively as TDS), invoking its right to negotiate interconnection agreements (ICAs) with them pursuant to 47 U.S.C. §251 of the Telecommunications Act (TCA)(Ex. A). As we set out below, the Federal Communications Commission (FCC) has ruled in its well-known *Time Warner* opinion¹ that such interconnection is statutorily required and that a state agency order allowing disconnection instead is inconsistent with federal law and must be stayed. Furthermore, November 10, 2009 Order is unlawful and unreasonable as it was rendered in an evidentiary vacuum and is violative of the due process clauses of the United States and New Hampshire Constitutions. Thus, Global requests a rehearing under RSA 541:3. This motion is supported legally by recent rulings by an Administrative Law Judge (ALJ) of the Pennsylvania Public Utilities Commission (PUC) and a federal judge in a recent trial in New York City between Global and Manhattan Telecommunications (MetTel), a local telephone company seeking tariff charges, as well as the Commission’s own rules.

This motion is supported on factual grounds by sworn testimony from both the New York

¹ *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, DA 07-709, Memorandum Opinion and Order, (March 1, 2007) (*Time Warner*).

and Pennsylvania cases, as well as a study Global has done about the actual origination of calls plaintiffs claim originated as landline calls, in Time Division Multiplex (TDM), in New Hampshire.

PUC 203:25 specifically states that “the party seeking relief through a petition...shall bear the burden of proving the truth of any factual proposition by a preponderance of evidence.”

The Commission improperly and unconstitutionally shifted the burden of proof to Global by erroneously finding that Global was “uniquely in control of data or information essential to resolving the issue or issues raised.” (Order, 20). The Commission failed to hold an evidentiary hearing at which Global could produce evidence in support of its position that it did not originate the calls at issue, was exempt from the tariffs being imposed, and did not have a unique access to the underlying billing information at issue. The principle fallacy with the Commission’s ruling is that there is no factual record to support its finding that the traffic in question is “‘regular’ voice traffic” and not “ESP or any other IP-enabled traffic.” (Order, 21).

Accordingly, a full factual hearing is required to test whether TDS can meet its burden of proof to show the instate and landline nature of the billed calls to prove its contention that it was entitled to bill Global and that it actually provided termination for traffic over “Feature Group D” trunks. A full factual hearing is also required to allow Global to prove that it really is entitled to federal exemptions for its voice over internet protocol (VoIP) /enhanced traffic and as an intermediate carrier.

Furthermore, the order that Global pay \$600,000 under state and federal tariffs is unlawful as the Commission does not have jurisdiction over federal tariffs and thus cannot order payment related to those tariffs or disconnection due to a failure to pay those tariffs.

I. FCC RULINGS REGARDING 47 U.S.C. SECTION 251 ESTABLISH GLOBAL'S RIGHT TO INTERCONNECT WITH INCUMBENT CARRIERS AND PROHIBIT THE COMMISSION FROM AUTHORIZING DISCONNECTION

The Commission noted in its November 10 order that the *TVC* case² before the New York Public Service Commission (NYPSC) ended with an understanding that Global would be offered a negotiated rate for termination of its VoIP traffic. (Order, 19 (citing *TVC* at 16-17)). The implication was that Global had made no such offer to the New Hampshire plaintiffs. In response, Global has sent a letter to counsel for the TDS plaintiffs offering to negotiate rates for interconnection. TDS must now agree to negotiate interconnection with Global.

The FCC has ruled definitively that incumbent local exchange carriers (ILECs) such as the TDS Companies are required to interconnect with competitive carriers like Global who transmit VoIP, and that state commission rulings to the contrary are “inconsistent” with the TCA.³ In *Time Warner*, the petitioner, Time Warner Cable (TWC), deployed facilities-based telephony utilizing VoIP technology and purchased telecommunications services from various carriers (including MCI and Sprint) to connect its customers to the public switch transit network (PSTN). *Id.* Two state commissions determined that rural ILECs were under no obligation to enter into ICAs with carriers such as MCI and Sprint who, like Global, operate as wholesale service providers. *Id.* at paras. 3 and 5. In response, TWC sought a declaratory ruling from the FCC affirming that “requesting wholesale telecommunications carriers are *entitled* to obtain interconnection with [ILECs] to provide wholesale telecommunications services to other service providers (including VoIP-based providers).” *Id.* at para. 2 (emphasis added). The Wireline Competition Bureau granted the petition, concluding that state commission decisions denying

² PSC Case No. 07-C-0059, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Order dated Mar. 20, 2008 (*TVC*).

³ *Time Warner*, paras. 1, 17.

this right to interconnection are “inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment.” *Id.* at para. 1.⁴

As per the FCC’s ruling, Global is also “entitled” to interconnection with the rural ILECs involved in this dispute. Because Global has requested such interconnection, the rural ILECs are obligated to negotiate an ICA with Global and may not be granted permission to terminate service to Global in the interim.

II. ALTERNATIVELY, TDS MUST MEET ITS BURDEN OF PROOF AND SHOW AT AN EVIDENTIARY HEARING, THAT IN THE FACE OF GLOBAL’S EVIDENCE TO THE CONTRARY, IT PROPERLY BILLED GLOBAL FOR FEATURE GROUP D CALLS, FOR INSTATE CALLS AND FOR LANDLINE/TDM-ORIGINATED CALLS

TDS, like all other plaintiffs, have the burden of proof here. *Alliance Commc’ns Co-op, Inc. v. Global Crossing*, Nos. Civ. 06-4221 *et al.*, 2007 WL 1964271, at*3 (D.S.D.Jul. 2, 2007)(“To recover for amounts charged pursuant to a tariff, ‘plaintiffs must demonstrate (1) that they operated under a federally filed tariff and (2) that they provide services to the customer pursuant to that tariff.’”); PUC 203:25. Thus, TDS has to satisfy its burden of proof to show that calls it billed at Feature Group D rates were actually transmitted over Feature Group D lines, and that the calls it billed to Global at intrastate rates actually originated in New Hampshire and were from landline telephones.

A. TDS has the burden to prove that Global received the Feature Group D service for which it was billed

TDS has billed Global standard access charges. Standard access charges are assessed on calls that leave the caller’s residence on a “Feature Group D” trunk. But IP and wireless calls are not and cannot be Feature Group D calls. In the recent MetTel litigation in New York, plaintiff’s

⁴ The FCC later concluded that “wholesale competition and its facilitation of the introduction of new technology holds particular promise for consumers in rural areas.” *Id.* at para. 13.

billing expert acknowledged that a call cannot be a Feature Group D call if it is a wireless call or if it is on a private line. (Redden, Trial Tr., 82, Sept. 8, 2009)(Ex. B).⁵ In a sample analyzed for the MetTel litigation, Global showed that out of the first hundred or so calls it sent to Verizon, the party with whom Global had an ICA in New York, and with whom Global has an ICA in New Hampshire, not one originated with a pure landline company. (Herron, Trial Tr. 302, Sept. 10, 2009)(Ex. C). This result is totally to be expected in this case, because all the traffic Global delivers to New Hampshire comes to it from one of the three enhanced service provider (ESP) forwarding companies that process its traffic.⁶

As the attached testimony of Jeff Noack, the Director of networks operations at Global, attests, Global does not transmit traffic on Feature Group D trunks. (Noack, Trial Tr., 212, ln 14-16, Sept. 9, 2009)(Ex. D). This result is further confirmed by a study done by Keith Herron, a senior switch engineer at Global NAPs, which indicates that based on a one week sampling, 84.3 per cent of the minutes of use (MOUs) of all calls sent to TDS that week came from VoIP, cable, or cell phone companies, and only 5.64 per cent came from TDM landline companies. (Ex. E Attachment 1). Thus, a high percentage of all calls could not possibly involve Feature Group D or be subject to traditional tariff rates.

Further, Global does not have any Feature Group D facilities and does not connect to TDS by means of such facilities, as TDS would admit in a fact hearing. Global's connection to New Hampshire and to TDS is a dedicated line, not a Feature Group D line. The lines between Global and TDS are not part of the Public Switch Transit Network (PSTN), but are private lines.

⁵ All exhibits were prepared by Matthew Thielemann. Exhibit P is an affidavit by Mr. Thielemann attesting to the fact that all transcript excerpts are true and accurate copies.

⁶ All three of these companies, through their websites advertise themselves to the trade as VoIP and enhanced traffic processor/forwarders, specializing in traffic from nomadic VoIP companies.

B. TDS has the burden to prove that the calls it billed to Global are instate

Under the law, and under the language of standard tariffs, a telephone call is subject to the intrastate tariff rates if it begins and ends in the same state, in this case, New Hampshire. In New Hampshire, as in Pennsylvania, calls forwarded by Global reach local telephone companies through a Verizon (or FairPoint) tandem. The tandem carrier supplies the local phone companies with the originating phone numbers, if it has them. As frequently occurs, and as Verizon testified in Pennsylvania and New York, about 20% of originating numbers are missing from the records provided. (Munsell, Trial Tr., 170, Sept. 9, 2009)(Ex. F). Despite this, the local phone company assumes for billing purposes (unless it does more research) that if the originating phone number is from an area code assigned to a city in New Hampshire, the call actually began there.

The modern fly in this ointment is, as the FCC noted in its Vonage opinion,⁷ that VoIP providers such as Vonage and BroadVoice (a Global VoIP affiliate), have no right to obtain phone numbers from the National American Numbering Plan Association (NANPA) so instead buy them from certain “partner” phone companies, primarily Level 3, Sprint and Paetec.

The relevance of this fact is demonstrated by the case in Pennsylvania, where the local company, Palmerton attempted to bill Global for 70 supposedly instate phone calls coming from Lancaster, Pennsylvania phone numbers which were assigned to Paetec.⁸ During the fact hearing, Paetec admitted that it had sold all 70 phone numbers to Vonage. *Palmerton* at 48. This meant that calls which appeared to be in TDM and instate almost certainly originated in IP and could have come from anywhere. Such revelations caused Palmerton’s case to fail.

⁷ *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 F.C.C.R. 22404, 2004 WL 2601194 (2004)(*Vonage*).

⁸ *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and other affiliates*, C-2009-2093336, Initial Decision issued August 11, 2009 (*Palmerton*)(Ex. G).

Further cutting against FairPoint's billing assumptions about the instate nature of Global's traffic is the fact that all of Global's calls are processed by only three suppliers, all of whom are out-of state. Thus, if Sprint sells a New Hampshire phone number to Vonage or BroadVoice, that number would reach Global only after it had been processed by one of the three ESP companies who supply traffic to Global: Transcom or PointOne, in Texas, or CommPartners in Nevada.

A local phone company in New Hampshire, serving a local caller who wants to call a party in another city in New Hampshire would have absolutely no reason to send such call to Transcom in Texas and on to Global in Massachusetts and then back to New Hampshire. In support of this reasoning, Verizon's own witness stated at the MetTel trial that Verizon routes all calls from, New York to elsewhere in New York, locally rather than by an out-of-state route. (Munsell, Trial Tr., 171, Sept. 9, 2009).

The local New Hampshire phone company would undoubtedly have access to a direct wire, or the use of a wire through FairPoint, and would thus have no reason to route the call around the country unless it was a specialized business which required custom-enhancement of the call.

Further, it was admitted by Verizon and would have to be admitted by TDS, as witnesses that standard call detail records do not reveal whether the call began in nomadic VoIP or whether it came from a cable company like Comcast--and thus originated in IP, not TDM. As Verizon's witness testified in New York, the terminating carrier does not receive sufficient records to determine the nature of the traffic it receives and the characteristics of the call. (Munsell Trial Tr., 167-68, Sept. 9, 2009). That is why, given all of these unknowables, as Verizon's witness stated, Verizon charges VoIP providers at a unitary rate of \$.00045 per MOU (Munsell Trial Tr.

159-160, Sept. 9, 2009).

Based on how likely TDS is to be incorrect in its assertions about the local nature of Global's traffic it is quite unfair to treat the 20% or so of the calls that lack an originating number as being intrastate without any of the proof other courts and commissions have required of plaintiffs suing for traditional charges. The local company tariff rates in New Hampshire are about \$0.10 per minute for intrastate and \$0.01 per minute for interstate. Thus, the \$600,000 Global has been billed would be at least 3 times too large even if its traffic were not exempt, so long as its traffic was interstate. The November 10 order admits that some of the calls may be interstate stating that "there is nothing in those [TDS'] call detail records to distinguish "regular" voice traffic from ESP or any other IP-enabled traffic." (Order, 21). But the Commission makes no adjustment for that fact, obviously because not enough facts were developed to quantify the percentages.

C. TDS has the burden to prove that the calls for which it billed Global were landline rather than cable, cell phone or VoIP

In the MetTel trial Verizon's witness testified that it was not possible to tell, from looking at records documenting originating numbers whether a call came from on a cell phone, who originated the call, or how the call began. This means that the calls for which TDS has billed Global could be VoIP, cable, or cell phone calls.

Federal law is clear that calls made using cell phone technology (CMRS) are exempt from traditional access charges because cell phone calls are not intrastate and cannot be regulated by states pursuant to Section 332(c)(3)(A) of the TCA.⁹ The New Hampshire code recognizes

⁹ First Report and Order, FCC 96-325 CC Docket Nos. 96-98, 95-185, para. 1034 (Aug. 8, 1996); *See Atlas Telephone Company v. Oklahoma Corporation Commission*, 400 F.3d 1256, 1261 (10th Cir. 2009)(Holding that no access charges can be assessed for termination of cell phone calls).

this in Section 362:6, where it states that the Commission does not have jurisdiction over cellular mobile radio communications. 34 N.H.STAT.REV. 362:6.

VoIP traffic is also exempt from traditional charges. In 2004 SBC (now AT&T) tried to file a tariff that applied to VoIP. The FCC ruled that such a tariff would be accepted by them only if was limited to voluntary, special rates. Chairman Powell warned that “should we conclude that this tariff is being used to justify the imposition of traditional tariffed access charges on VoIP providers ...The Commission will take appropriate action...” FCC Press Release 11/26/2004.

Phone calls starting on a cable are also exempt from access charges because they all start in IP and undergo net protocol conversion.¹⁰

Thus, as TDS has not proven that Global’s traffic does not fall into any of the exempt categories mentioned above, it cannot collect traditional access charges for Global’s calls.

D. TDS has the burden to prove that it can bill Global instead of FairPoint for Tandem-Switched traffic

A further weakness in TDS’ claim is that Global doesn’t send traffic to the TDS companies, it sends traffic to Verizon (now FairPoint), with which it has a contract. That contract, at clauses 12.1 and 12.5, says that if traffic that originates with Global is transported through a Verizon tandem, to an ILEC and that ILEC charges Verizon for termination of such traffic, Global will be liable to Verizon for such charges (not to the ILEC). Thus, the TDS companies ignored the tandem arrangement when they billed Global rather than Verizon/FairPoint.

¹⁰ *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97, para 9 (released April 21, 2004)(“*IP-in-the-Middle*”).

III. RECENT RULINGS AND EVIDENCE FROM TARIFF-BASED CASES AGAINST GLOBAL IN NEW YORK AND PENNSYLVANIA CONTRADICT TDS'S LEGAL CONTENTIONS AND FURTHER REVEAL THAT THE FACTUAL PREDICATES OF THIS ORDER ARE INCORRECT AND THAT AN EVIDENTIARY HEARING IS NEEDED

In the past several months, Global has been involved in two proceedings where the witnesses Global called established that Global's traffic is primarily VoIP or otherwise enhanced and thus is not subject to traditional charges. The judges in both proceedings also ruled that factual hearings were required to establish the nature of Global's traffic.

A. Numerous recently litigated cases indicate that Global's traffic is primarily VoIP and enhanced and is entitled to be immune from tariffed access charges

In the recently tried case of *Manhattan Telecommunications Corp. v. Global NAPs* held September 8-10, 2009, in New York City, the plaintiff, an independent telephone company sued Global for its refusal to pay intrastate or interstate termination access tariffs. Until that trial Global had not been able to get Vonage, the paradigm nomadic VoIP company, to testify that its traffic was being sent to Global's traffic suppliers.¹¹ However, after being sued by MetTel in Federal District Court in New York City, Global was able to subpoena Vonage, which is headquartered in New Jersey, within 100 miles of the city.

At trial, Vonage testified that it sent traffic to Global's suppliers and that two of Vonage's biggest traffic forwarders were Transcom and CommPartners, who are Global's major suppliers of VoIP and enhanced traffic. (Mulligan, Trial Tr. 327, 333-34, Sept. 10, 2009)(Ex. H). Vonage also testified that all its traffic was computer (IP) originated and that all of its subscribers could have phone numbers from any state and could call from any state or country using portable broadband equipment. (Mulligan, Trial Tr. 327, 333-34, Sept. 10, 2009).

The New York trial was also the first time Transcom, a major ESP supplier of Global's

¹¹ Vonage refused to be a witness because it did not want, as a matter of business policy, to volunteer information about its distributors.

traffic, consented to provide a witness to describe the traffic it receives from nomadic VoIP companies, the enhancement it engages in, and its forwarding of such VoIP and enhanced traffic to Global. (Johnson, Trial Tr. 352-60, Sept. 10, 2009) (Ex. I).

Other testimony in New York showed that Global also forwards VoIP and has no end users, (Masuret, Trial Tr. 182-84, September 9, 2009)(Ex. J), and that it forwards traffic from Vonage, as well as several other known VoIP carriers, such as BroadVoice and YMAX. (Masuret, Trial Tr. 186, Sept. 9, 2009); (Berry, Trial Tr. 239, 243, 244, 246, Sept. 10, 2009)(Ex. K). Witnesses at the New York trial provided testimony that Global forwards enhanced traffic and described the kinds of efficiencies and cost benefits the enhancements give rise to, thus fully explaining why Global is entitled to an enhanced traffic exemption. (Eccles, Trial Tr. 253-54, 261, Sept. 10, 2009)(Ex. L); (Berry, Trial Tr. 236, Sept. 10, 2009). Finally, witnesses at the trial testified that companies that originate the traffic Global forwards all provide some sort of non-landline services, which are used to transmit traffic that is exempt from traditional charges. (Herron, Trial Tr. 302, Sept. 10, 2009).

Certain crucial facts and legal principles were also developed in a Pennsylvania proceeding, where an independent telephone company in Pennsylvania, backed by a state association of local telephone companies, sued Global for non-payment of intrastate tariff charges for termination of traffic GNAPs sent to them through Verizon.

In the hearing, the ALJ set forth certain important legal principles. First, he ruled that it was plaintiff's burden to prove that the traffic Global forwarded to it had actually begun as in-state landline calls. *Palmerton* at 23. Second, he found that the local company's witnesses had failed to show that Global's calls were generally intrastate. *Id.* Finally, he concluded that Global's witnesses had proved that Global's traffic was primarily nomadic VoIP, was

significantly enhanced and thus was not subject to traditional access charges. *Id.* at 50.

Global's expert also testified before Pennsylvania PUC that Global is primarily a conveyer of enhanced traffic and that Global's suppliers, Transcom and PointOne send enhanced traffic to Global. (Fike, Hearing Tr. 974-77)(Ex. M).

B. An evidentiary hearing is legally required and denial of such hearing is a denial of due process of law in violation of the US constitution and the New Hampshire Constitution

In the New York trial, MetTel moved for summary judgment on the grounds that it was undisputed that it had a tariff and had received traffic it identified as coming from Global. Global defended on the grounds that since its traffic was VoIP, it was "nomadic" and thus not subject to intrastate tariffs. Global also asserted that since its traffic was enhanced, due to being end-to-end VoIP or otherwise, it was not subject to federal tariffs due to an FCC moratorium pending clarification of VoIP's status as an information or telecommunications service and issuance of intercarrier compensation rules.

Judge Rakoff denied MetTel's motion for summary judgment, concluding that he could not grant it relief on the tariff claims without determining all relevant VoIP and interconnection issues based on evidence developed fully at a fact hearing. He stated

Two disputed factual issues appear particularly significant. First, there remain material factual disputes regarding the nature of Global's traffic, particularly with respect to whether it originates in voice over internet protocol ("VoIP").(citation omitted). Second, there remain material factual disputes over whether Global is "interconnected" with MetTel, which would, in turn, determine whether the doctrine of constructive ordering is applicable.

Manhattan Telecommunications Corp. v. Global NAPs, 2009 WL 423990, at*2 (S.D.N.Y.

February 13, 2009)(Ex. N).

Likewise, the Pennsylvania PUC although it concluded that Global would probably lose,

ordered (expedited) fact hearing.

The Pennsylvania PUC hearing makes clear that the proper way to litigate these kinds of cases, which involve unknown factors such as the nature of the traffic at issue, is to have plaintiffs provide call detail records to Global and then for each side to agree on a sampling of the traffic to be examined. Once it is determined what company was the ostensible owner of the originating phone number, such company can be questioned about the nature of the transmission they use and whether they have sold the phone number to a nomadic VoIP company.

Thus, Judge Rakoff's ruling and the PUC ruling are precisely contrary to the ruling of this Commission that it can assess \$600,000 in tariff claims on Global without a fact hearing to determine the nature and extent of Global's VoIP traffic or the correctness of plaintiff's bills.

Furthermore, depriving Global of its right to send interstate traffic to New Hampshire and thus earn its living without honoring its request for an obviously necessary fact hearing including confrontation of TDS witnesses and an ability to call third parties is a denial of due process, violative of Amendments 5 and 14 to the U.S. Constitution and Articles 2, 14 and 15 of the Constitution of New Hampshire.

IV. INTERMEDIATE CARRIERS LIKE GLOBAL CAN NEITHER BE CHARGED WITH KNOWLEDGE OF THE ORIGINS OF CALLS NOR BILLED ACCESS CHARGES

There are only two possible types of calls that Global could have delivered to New Hampshire. In the first and more likely scenario, a New Hampshire phone number is sold to Vonage, BroadVoice or some other nomadic VoIP provider which provides that number to a subscriber and to Transcom or CommPartners, such that if the subscriber makes a call it goes through Transcom *et al*, then to Global and then to New Hampshire. In the second scenario, a company like Comcast, which has a cable network within a given New Hampshire city but no

long distance capability between different cities, partners with an interexchange carrier such as Sprint or Global Crossing, which may choose to send the call through Transcom *et al* to Global and back to New Hampshire.

It is important to note that in both scenarios Global does not act for the original caller and does not carry the call to Transcom or CommPartners. Thus, when Global receives a call along with millions of others in a pipeline it rents to Transcom *et al* it has no special knowledge of where or in what form the call began. The Commission's opinion suggests that Global has unique access to information about where the calls it forwards originate, but the exact opposite is true. In recognition of this, the FCC has ruled that where an interexchange carrier, such as Sprint or Global Crossing, in the scenarios just discussed, transmits traffic between a caller's carrier and then some distant carrier and such traffic is delivered by an intermediate carrier such as Global, that the intermediate carrier is absolutely not liable for any access charges that might be owed by the interexchange carrier who began the call. The FCC stated in its *Vonage* opinion:

We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers *and not against any intermediate LECs that may hand off the traffic to the terminating LECs*, unless the terms of any relevant contracts or tariffs provide otherwise.¹²

V. THE COMMISSION LACKS JURISDICTON TO ORDER PAYMENT UNDER FEDERAL TARIFFS OR TO AUTHORIZE THE CUTTING OFF OF INTERSTATE TELECOMMUNICATIONS

The TDS plaintiffs should have brought their federal tariff claims in federal district court

¹² *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, FCC WC Docket No. 02-361, FCC 04-97 (released April 21, 2004) (“*IP-in-the-Middle*”) (Emphasis added).

because the interpretation of a federal tariff remains a question of federal law. *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, 551 F.3d 587, 589 (7th Cir. 2008)(citing *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201, 201-03 (1918); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983)(per curiam)); *C.f. Public Util. Comm. v. Attleboro Co.*, 273 U.S. 83, 90 (1972)(holding that federal rates for gas moving between two states were not subject to state regulation because the business carried on by the two gas companies was “essentially national in character.”). Notably, federal law even required the filing of the federal tariffs allegedly at issue here. 47 U.S.C. § 203(a). The FCC recognized this rule in its *Vonage* opinion where it reiterated the well-settled principle:

When a service’s end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the Commission’s exclusive jurisdiction.¹³

Petitioners themselves even tacitly acknowledge the absence of jurisdiction in stating:

The Joint Petitioners seek approval to block the further use of their New Hampshire networks by GNAPs for such calls, without distinction between interstate and intrastate traffic. The Petition thus addresses both intrastate and interstate access charge disputes. If the Commission concludes that it does not have jurisdiction over the interstate charges, it can and should resolve the Joint Petitioner’s request with respect to the intrastate charges.

Joint Petitioners’ Br. at 4.

This Commission openly recognizes its jurisdiction only extends over communications within the state, and has refrained from regulating those services which allegedly affect the provision of interstate communications.¹⁴ The same result should occur here. An analysis of the

¹³ See *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 19 F.C.C.R. 22404, 2004 WL 2601194, para 17 (2004) (“*Vonage*”).

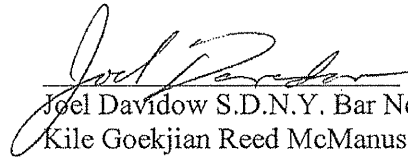
¹⁴ See <http://www.puc.nh.gov/Telecom/telecom.htm>.

charges of the bills for one recent month indicate that over 51% of the money being claimed was for interstate traffic. (Ex. O). Thus, this Commission could at most order Global to pay some figure under \$300,000, and should not order any payment until an accurate breakdown between instate and interstate charges for the whole period has been developed. Any order requiring payment of the full \$600,000 is *ultra vires* and would need to be corrected even if there were no other issues in this case.

CONCLUSION

Because Global's request for interconnection with the TDS plaintiffs has changed the legal and factual "situation on the ground" and because this motion and the evidence it attaches raise serious questions of law, fact and fundamental due process, Global asks for one of two scheduling changes: One, that the Commission arrange expedited briefing and consideration so as to rule on these issues well before the cut-off date. Two, preferably, that the Commission suspend any cut-off date until the issues raised in this document have been briefed, considered and resolved. Incompletely litigated suspensions are highly disfavored, as recognized in *Seacoast Anti-Pollution League*, 124 N.H. 708, 720 (1984), where the court cited RSA 541:5, which requires the Commission to decide a petition for rehearing within 10 days of filing, stating that the rule existed to prevent a protracted period of de facto suspension. Thus, Global should not be subject to such a suspension.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of December 2009 I caused a copy of the foregoing to be served on the attached service list.

Dated: December 2, 2009



Steven M. Gordon

**State of New Hampshire
Before the New Hampshire Public Utilities Commission**

DT 08-028

**Joint Petition of Hollis Telephone Company, Inc., Kearsarge
Telephone Company, Merrimack County Telephone
Company, and Wilton Telephone Company, Inc., for
Authority to Block the Termination of Traffic from
Global NAPs, Inc. to Exchanges of the Joint
Petitioners in the Public Switched Telephone Network**

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