

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. ("Joint Petitioners"), for Authority to Block the Termination of Traffic from Global NAPs, Inc., to Exchanges of the Joint Petitioners on the Public Switched Telephone Network

**JOINT PETITIONERS' OBJECTION TO RESPONDENT'S MOTION
FOR RECONSIDERATION, REHEARING AND SUSPENSION**

December 8, 2009

Submitted on behalf of:

HOLLIS TELEPHONE COMPANY, INC.
KEARSARGE TELEPHONE COMPANY
MERRIMACK COUNTY TELEPHONE COMPANY
WILTON TELEPHONE COMPANY, INC.

By:

PRIMMER PIPER EGGLESTON & CRAMER PC

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Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc. (collectively, "TDS" or the "Joint Petitioners"), by and through the undersigned counsel and in accordance with N.H. Admin. Rule Puc 203.07(e) and 2.03.07(f), hereby object to the "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" (the "Post-Judgment Motion"), which was filed by the Respondent, Global NAPs, Inc. ("GNAPs"), on December 2, 2009.

I. Summary

In Order No. 25,043 (the "Order"), issued by the Public Utilities Commission ("PUC") on November 10, 2009, the PUC ruled in favor of the Joint Petitioners' claims that GNAPs "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." Order at 14. The

PUC therefore ordered GNAPs “to pay in full, with interest at the current prime rate of 3.25%, any outstanding invoices from TDS” within 30 days of the Order or else face disconnection from further service by the Joint Petitioners. Order, at 25. In a letter filed on November 13, 2009, the Joint Petitioners advised the PUC that the amount then due and owing from GNAPs, with interest, was \$655,685.86. *See* Letter from P. Phillips to D. Howland (Nov. 13, 2009), at 1-2.

In its Post-Judgment Motion, GNAPs requests either reconsideration and rehearing based on newly-proffered factual allegations and legal authorities, or else a suspension of the Order based on a post-judgment action taken by GNAPs with respect to local interconnection. The PUC should reject GNAPs’ requests in their entirety. GNAPs has failed to meet any of the legal standards required for reconsideration, rehearing or suspension of the PUC’s Order. Instead, GNAPs relies on an entirely unrelated event – namely, a post-judgment request by GNAP for local interconnection, which GNAPs delivered to the Joint Petitioners on November 18, 2009 – as the basis for suspending an Order requiring GNAPs to pay the Joint Petitioners for past-due toll access charges. In addition, GNAPs’ “new or corrected” factual allegations involve information that was readily available to GNAPs during the earlier phases of this proceeding and that GNAPs chose to withhold from the Joint Petitioners and other parties during discovery. None of these contentions provides a basis for reconsidering, rehearing and suspending the PUC’s Order.

The GNAPs Post-Judgment Motion represents the latest attempt by GNAPs to introduce confusion and to delay the prompt resolution of this case. Rather than reward GNAP’ efforts to further delay, confuse and obstruct this case, the PUC should deny the GNAPs Post-Judgment Motion and allow the Joint Petitioners to enforce their judgment against GNAPs forthwith.

II. Argument

A. **The request for local interconnection, which GNAPs delivered on November 18, 2009, is unrelated to the issues of this case and provides no basis for suspending the November 10, 2009 Order.**

By letter to counsel for the Joint Petitioners dated November 17, 2009 and delivered by overnight courier and electronic mail to the Joint Petitioners on November 18, 2009, GNAPs advised the Joint Petitioners that, “[p]ursuant to 47 U.S.C. Sec. 252, Global NAPs, Inc. wishes to negotiate an Interconnection Agreement with Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc.” Post-Judgment Motion, Exhibit A. In its Post-Judgment Motion, which GNAPs characterizes in part as a “Motion to Stay Disconnection and Payment Order,” GNAPs now asserts that “[b]ecause Global has requested such interconnection, the rural ILECs [i.e., the Joint Petitioners] are obligated to negotiate an ICA with Global and may not be granted permission to terminate service to Global in the interim.” Post-Judgment Motion, at 5 (emphasis added). GNAPs invokes an order of the Federal Communications Commission for the proposition that “interconnection is statutorily required and that a state agency allowing disconnection instead is inconsistent with federal law and must be stayed.” *Id.*, at 2 (emphasis added).

PUC Orders are accorded a legislative presumption of reasonableness and are not “lightly to be set aside.” *Complaint of Freedom Ring Communications, LLC d/b/a BayRing Communications*, Docket No. 06-067, Order Denying Motion to Stay (Order No. 24,913, Oct. 31, 2008), at 7 (quoting *Tilton v. Boston & Maine R.R.*, 99 N.H. 503, 504 (1955)). While a stay may be granted, subject to conditions, in the interest of administrative efficiency, a suspension of

a PUC order is not warranted “for the mere fact that an administrative order may cause injury or inconvenience to one or another party.” *Id.*

While the Joint Petitioners take the GNAPs request for interconnection seriously and will respond to the request in accordance with federal law, GNAPs is simply wrong to suggest that this new interconnection request has any impact whatsoever on the enforceability of the PUC's Order in this proceeding. As the Joint Petitioners' claims in this case have shown, GNAPs has for several years terminated traffic to the networks of the Joint Petitioners through the tandem switch operated by FairPoint Communications. The issue for the PUC in this proceeding is not whether GNAPs is entitled under 47 U.S.C. § 251(a) to negotiate a local interconnection agreement with the Joint Petitioners going forward, but rather whether GNAPs will pay the lawful charges for terminating its toll traffic to the Joint Petitioners over the last several years.¹

Section 251(c) obligates incumbent local exchange carriers to interconnect “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” 47 U.S.C. § 251(c)(2)(D). Section 252 establishes the specific standards and procedures, including statutory timeframes and deadlines, that parties must meet when negotiating an interconnection agreement, 47 U.S.C. § 252(a), and further requires the parties to submit their negotiated agreement for review and approval by the state commission 47 U.S.C. § 252(e). Parties unable to reach a negotiated agreement may request mediation by the state commission, 47 U.S.C. § 252(a)(2), and either party may request arbitration on any open issues before the state commission. 47 U.S.C. § 252(b)(1). However, there is no provision of the Telecommunication

¹ The Joint Petitioners take no position in this proceeding on the legal sufficiency of the November 17th letter from GNAPs. TDS intends to respond to GNAPs' request in accordance with applicable state and federal law.

Act that requires a state commission, such as the PUC, to stay or suspend the enforceability of any judgments based only upon the delivery of a request for interconnection from one carrier to another, nor has GNAPs cited to any legal authority to support its request.

In the present case, the PUC concluded that GNAPs' refusal to compensate the Joint Petitioners at tariffed rates for GNAPs' use of the Joint Petitioners' networks could subject GNAPs to disconnection from service in accordance with N.H. Admin. Rule Puc 412.19. *See* Order, at 24. There is nothing unjust, unreasonable or discriminatory in the PUC's decision to enforce its usual disconnection rules in the case of a carrier that refuses to pay for the services it uses. While the PUC's Order may inform the Joint Petitioners' response to GNAPs' new interconnection request, the mere existence of the interconnection request itself does not alter the legal outcome of GNAPs' refusal to pay the Joint Petitioners what it owes them.

An analogous interplay between two proceedings involving the same parties arose in a prior case before the PUC, albeit not one involving the interplay of state and federal law. *See Petition of Pennichuck Water Works, Inc.*, Docket No. DW 04-056, Order Denying Motion to Suspend (Order No. 24,371, Sept. 17, 2004), at 7. In that case, Pennichuck's request for a rate increase coincided with the *Petition of the City of Nashua*, Docket No. DW 04-048, in which the City of Nashua sought to acquire the assets of Pennichuck. The City of Nashua intervened in the rate case and moved to suspend the Pennichuck rate request pending the outcome of the City of Nashua's acquisition proceeding, arguing that the PUC should not be setting rates based on assets that are about to change ownership. The PUC denied the City of Nashua's motion to suspend, holding that the statutes under which the two proceedings were commenced "provide separate and distinct rights which each party is free to pursue in the respective dockets." *Id.*

Similarly, in the present case, the Joint Petitioners' right to receive payment for GNAPs' longstanding use of their networks is separate and distinct from any right that GNAPs may have to negotiate a local interconnection agreement with the Joint Petitioners going forward. The PUC should not allow the GNAPs interconnection request to stand in the way of the Joint Petitioners' ability to enforce their claims for payment from GNAPs.

Moreover, GNAPs' argument erroneously suggests that the PUC's November 10th Order authorizing disconnection came *after* GNAPs' November 17th request for interconnection. GNAPs asserts: "[The Joint Petitioners] are obligated to negotiate an ICA with Global and may not be granted permission to terminate service to Global *in the interim*," Post-Judgment Motion, at 5 (emphasis added). GNAPs goes on: "[I]nterconnection is statutorily required and [] a state agency *allowing disconnection instead* is inconsistent with federal law and must be stayed." *Id.*, at 2 (emphasis added). It is inaccurate to represent that the PUC "granted permission to terminate service to Global *in the interim*" following the GNAPs request for interconnection, or that the PUC is "allowing disconnection *instead*" of interconnection. Rather, it is GNAPs that is requesting interconnection *instead* of paying the Joint Petitioners what GNAPs owes them, and is doing so *in the interim* before the PUC's Order becomes final. Contrary to GNAPs' deliberate confusion of the timing, the two events are legally unrelated and should not be conflated merely to delay the enforcement of the PUC's Order in this case.

In any event, disconnection is not even a necessary outcome of the PUC's Order. All GNAPs need do to avoid disconnection under the Order is to make arrangements to pay the Joint Petitioners for the outstanding charges and interest now due and owing. Clearing up its outstanding debt to the Joint Petitioners could even mitigate the obvious concerns about GNAPs'

creditworthiness that could arise in any Section 252 negotiations. See *NuVox Communications, Inc. v. Edgar*, 511 F. Supp. 2d 1198 (N.D. Fla. 2007), *aff'd sub nom. NuVox Communications Inv. v. BellSouth Communications, Inc.*, 530 F.3d 1130 (11th Cir. 2008) (allowing different deposit requirements for interconnecting carriers based on their creditworthiness). As such, the potential for disconnection rests entirely in GNAPs' hands. A decision by GNAPs to interpose an interconnection request does not warrant a suspension of the PUC's Order in this case, and the PUC should overrule GNAPs' Motion as without basis in the law.

B. The PUC should deny GNAPs' Motion for Reconsideration and Rehearing because GNAPs has failed to identify evidence that was unavailable, overlooked or misconstrued at the time of the Order, and because GNAPs has failed to show that the Order is unlawful or unreasonable.

GNAPs seeks rehearing and reconsideration of the PUC's Order on the basis of newly proffered testimony and legal authorities and an assertion of state and federal constitutional rights. The PUC should overrule GNAPs' request, however, because GNAPs failed to provide such evidence when it had prior opportunities during this proceeding and so cannot now offer such evidence in support of post-judgment relief.

For the PUC to grant a motion for rehearing pursuant to RSA 541:3 and 541:4:

“the movant must demonstrate that the order is unlawful or unreasonable. Good cause for rehearing may be shown by new evidence that was unavailable at the time or that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978).

In re: City of Nashua, Docket No. DW 04-048, Order Denying Motion for Rehearing (Order No. 24,448, PUC, Apr. 4, 2005), at 4 (emphasis added). The moving party

“must explain why new evidence could not have been presented in the underlying proceeding. Good reason may also be shown by identifying specific matters that

were either overlooked or mistakenly conceived by the deciding tribunal. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome.”

Application of Comcast Phone of New Hampshire for Authority to Serve Customers in the TDS Service Territories, Docket No. DT 08-013, Order Denying Motion for Rehearing (Order No. 24,958, Apr. 21, 2009), at 10-11 (citations and internal quotations omitted). GNAPs must meet its burden as movant by a clear preponderance of the evidence. *Appeal of Pine Tree Power, Inc.*, 152 N.H. 92, 95 (2005); N.H. Admin. Rule 203.23.

In the present case, GNAPs has entirely failed to satisfy the requirements for the relief it requests. In support of its Post-Judgment Motion, GNAPs has proffered: (1) selected testimony and a memorandum order from a federal court proceeding in New York;² (2) selected testimony and the initial decision of an administrative law judge in a case before the Pennsylvania Public Utility Commission;³ (3) an unnotarized “Declaration”⁴ and a notarized Affidavit, both now being offered for the first time by GNAPs in this proceeding;⁵ and (4) an undated and unattributed document, also offered for the first time by GNAPs in this case, purporting to be “[a]n analysis of the charges of the bills for one recent month” (Post-Judgment Motion, at 16-17) and presumably meant to represent charges from the Joint Petitioners to GNAPs.⁶ In substance, GNAPs has offered to prove that the nature of the traffic that it delivers for termination to the Joint Petitioners should entitle GNAPs to claim an “enhanced services provider” exemption from the obligation to pay terminating access charges to the Joint Petitioners.

² *Manhattan Telecommunications Corp. v. Global NAPs, Inc.*, Docket No. 08-CV-3829 (JSV) (S.D.N.Y). See GNAPs’ Post-Judgment Motion, Exhibits B, C, D, F, H, I, J, K, L and N.

³ See GNAPs’ Post-Judgment Motion, Exhibits M and G.

⁴ Declaration of Keith Herron (not notarized), included as GNAPs’ Post-Judgment Motion, Exhibit E.

⁵ Affidavit of Matthew Thielemann, included as GNAPs’ Post-Judgment Motion, Exhibit P.

⁶ Post-Judgment Motion, Exhibit O.

In the Order, however, the PUC observed that GNAPs was afforded multiple opportunities, during the course of this proceeding, to offer precisely the type of evidence that GNAPs now seeks to submit with its Post-Judgment Motion, and that GNAPs failed to take the earlier evidentiary opportunities it was given. In a lengthy passage in the Order, the PUC stated:

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.

Order, at 22-23 (emphasis added).

Indeed, during the discovery phase of this proceeding, GNAPs responded as follows to a series of data requests from the Joint Petitioners, Staff and other parties in this case:

TDS:Global-2: Please identify the facts and criteria that GNAPs relies upon to establish the status that an ESP is exempt from the payment of terminating access charges for traffic that originates in time division multiplexing ("TDM").

Reply: Global makes no such determination independently, nor could it because Global does not know the format in which the traffic is originated. Instead it relies on its customers' affirmations regarding the traffic which is buttressed by court determinations such as that relating to Transcom.

* * *

Staff 4: Please provide usage data, billing information, SS7 data, or other evidence that supports each of the statements listed below, made by GNAPs in its March 14 Answer to Joint Petition, at paragraph 14:

- a. "Global exchanges traffic which is exclusively interstate in nature."
- b. "Traffic originating from TDS companies is inbound ISP traffic..."
- c. "...traffic terminating to TDS is Enhanced Service Provider traffic."

Response: Because GNAPs does not render bills based on minutes of use, its usage data and billing information is limited. However, upon execution of a confidentiality agreement, GNAPs will provide Staff with a customer list which will indicate that all our customers are either ISPs or ESPs.

* * *

Staff 8: Please identify whether the traffic GNAPs hands-off at the Fairpoint tandem for termination to a TDS end user is data or voice traffic.

Response: Global does not perform such analysis. It merely carries the traffic over its packet-switched network.

* * *

Staff Follow-Up 1: If GNAPs consider VoIP telephony service and its associated traffic to be an enhanced service as defined at 47 CFR 64.702, please provide specific provisions from all relevant decisions of authority on which you rely to support this assertion.

Response: Global objects t these Interrogatories to the extent they seek information not relevant to the dispute between the parties and not reasonably calculated to lead to the discovery of admissible evidence. Several Orders were distributed at the recent Technical Conference, and additional authority may be supplied in any brief subsequently filed, if required.

As the foregoing data requests and GNAPs responses make clear, the purported evidence and legal authorities that GNAPs now seeks to submit to the PUC should have been, but were not, provided to the Staff and the parties in response to their data requests, either in the original responses or in compliance with the requirement of N.H. Admin. Rule Puc 203.09(k) to “reasonably and promptly amend or supplement” its data responses if GNAPs obtains information that would be responsive to the data requests.

GNAPs makes no effort to show that the information it now proffers in support of its Post-Judgment Motion was unavailable at the time of the Order. Instead, GNAPs presents information that was withheld from the Joint Petitioners up until now, and asserts that this information provides an adequate basis to re-open the evidentiary record and thereby delay the judgment that was entered against it by the PUC. The PUC should not allow GNAPs to obstruct and manipulate the adjudicative process in this fashion.

GNAPs attempted a similar strategy in earlier litigation with Verizon New England in Massachusetts, and the analysis of the First Circuit Court of Appeals in that case provides useful guidance to the PUC in the present proceeding. *See Global NAPs, Inc. v. Verizon New England,*

Inc., 489 F.3d 13 (1st. Cir. 2007). The *Verizon* case involved a 2002 order from the Massachusetts Department of Telecommunications and Energy requiring GNAPs to pay Verizon more than \$56 million in access charges for so-called "virtual NXX" traffic that GNAPs improperly terminated on the Verizon network in Massachusetts. After a series of post-judgment motions and appeals, GNAPs unsuccessfully sought to stay the district court's release of a \$16 million GNAPs bond to Verizon and so moved for reconsideration of the court's order releasing the security. The Circuit Court of Appeals first noted that "[t]hese consolidated appeals embody the latest efforts by GNAPs to delay or avoid payment of the sums past due to Verizon. The district court rejected these efforts and so do we." *Id.*, at 18. The Court then went on (applying the federal procedural standard):

As a general matter, a motion for reconsideration may only be granted if the original judgment evidenced a manifest error of law, if there is newly discovered evidence, or in certain other narrow situations. Our review of the denial of such a motion is for abuse of discretion.

GNAPs' motion to reconsider developed two lines of argument that it had cursorily flagged in its opposition to Verizon's motion. First, GNAPs contended that Verizon had used an incorrect billing rate. Second, GNAPs argued that Verizon had overstated the number of minutes for which GNAPs owed access charges: Verizon's affidavits were not limited to the period the injunction was actually in force, Verizon had allegedly billed for certain calls that should have been exempt from the access charges Verizon imposed, and Verizon's private communications with GNAPs had allegedly conceded that Verizon's stated number of minutes was too high. GNAPs provided affidavits in support of its arguments.

The district court did not abuse its discretion in denying GNAPs' motion. Generally, a party is not entitled to present new arguments on a motion for reconsideration. Here there may well have been a strategic choice by GNAPs to cause delay in the release of the security, including by withholding material arguments until reconsideration. Even if the delayed presentation resulted from nothing more than GNAPs having second thoughts about its best arguments, parties are bound by the choices they make.

Id., at 33-34 (emphasis added).

Such a strategy is also disfavored in PUC proceedings in New Hampshire. *See Petition of Briar Hydro Associates for a Declaratory Ruling*, DE 07-045, Order Denying Motion for Rehearing (Order No. 24,960, Apr. 22, 2009), at 16-17. In *Briar Hydro*, the PUC was faced with a petitioner who, like GNAPs, had demonstrated an initial willingness to proceed without evidentiary hearings, on the basis of written pleadings and exhibits, but, following an adverse ruling, sought rehearing on the basis of "new evidence" that purported to demonstrate facts contrary to those relied upon by the PUC. *Id.* The PUC denied the request for rehearing, stating:

Briar Hydro seeks to introduce testimony, which it characterizes as "new evidence," from two individuals involved in the negotiations in 1981 and 1982. Having decided not to present affidavits or testimony from its witnesses earlier in this proceeding, Briar Hydro may not simply change its strategy following an adverse decision and then present such evidence as a basis for a motion for rehearing. Briar Hydro has failed to explain why this evidence could not have been presented at the time Briar Hydro agreed to submit the dispute for resolution on the papers, and therefore this evidence does not constitute "new" evidence or a good reason for rehearing.

Id. (emphasis added).

The PUC should follow the lead of these decisions and refuse to allow GNAPs to engage in manipulation of the record to avoid the PUC's judgment. The PUC should reject GNAPs' motion for reconsideration in the present case and hold GNAPs to the strategic decisions it made throughout the course of these proceedings, rather than entertain a late proffer of "evidence" that GNAPs withheld from the parties during discovery.

C. **GNAPs is not entitled to a hearing under the New Hampshire Constitution or the United States Constitution.**

Finally, GNAPs seeks rehearing under RSA 541:3 on the ground that the PUC's "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." Post-Judgment Motion, at 2. GNAPs asserts that denying GNAPs "its request for an obviously necessary 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." *Id.*, at 14.

As indicated earlier, as the moving party seeking rehearing, GNAPs bears the burden of showing "good reason" to grant a rehearing of the PUC's Order. "Good reason may [] be shown by identifying specific matters that were either overlooked or mistakenly conceived by the deciding tribunal. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome." *Application of Comcast Phone of New Hampshire*, Order No. 24,958, at 10.

In its Order, the PUC held as follows:

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.

Order, at 26.

As the foregoing analysis shows, the PUC did not overlook or misconstrue GNAPs' earlier arguments concerning its request for a hearing.

Rule Puc 412.19 allows a telephone company with filed and approved tariffs for services to disconnect a non-residential customer, with notice but without a hearing, when the customer is in violation of the company's tariffs, such as through non-payment for services. N.H. Admin. Rule Puc 412.19(c)(2). GNAPs has not challenged the facial constitutionality of Rule Puc 412.19, but has asserted that its application to GNAPs in the present case unconstitutionally denies GNAPs its right to a hearing prior to being disconnected by the Joint Petitioners.

GNAPs' argument overlooks that, before it can assert a due process claim, it must first demonstrate that it has been deprived of a protectable property interest. *See American Manufacturers Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process."). In the present case, GNAPs is authorized by the PUC to provide local exchange telecommunications service in certain areas of the State of New Hampshire. *See* Joint Petition (Feb. 19, 2008) ¶ 9, at 3 (referencing Docket No. DE 98-024, Order No. 22,976 (July 8, 1998)). GNAPs is not registered under Puc 451.01 as a competitive intra-LATA toll provider (CTP).
Order, at 14.

The Joint Petitioners contend that GNAPs' authority to offer local telephone service in New Hampshire has *not* created a protectable property interest in GNAPs' use of the Joint

Petitioners' networks. Indeed, by having its approved tariffs on file at the PUC, the Joint Petitioners have made clear that customers wishing to use the Joint Petitioners' networks must at all times comply with the rates, terms and conditions of those tariffs. GNAPs' longstanding failure to abide by those tariffs voided any right it might have had to continue receiving service from the Joint Petitioners, as the PUC has now recognized in its Order.

Nonetheless, even assuming *arguendo* that GNAPs somehow has a protectable interest in its use of the Joint Petitioners' network, GNAPs still cannot assert a predeprivation right to a disconnection hearing.

Generally, a hearing must be made available before the state or its agents deprive a citizen of her property. *See Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). The right to a pretermination hearing, however, is not absolute, *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 40 L. Ed. 2d 406, 94 S. Ct. 1895 (1974). "The timing and nature of the required hearing will depend on appropriate accommodation of the competing interests involved. These include the importance of the private interest and the length or finality of the deprivation, the likelihood of governmental error, and the magnitude of the governmental interest involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982) (citations omitted).

Hatteras v. Southwestern Bell Telephone Co., 774 F.2d 1341, 1343 (5th Cir. 1985). In *Hatteras*, the plaintiff operated a telephone escort service and sued the telephone company on due process grounds when she was disconnected from service without a hearing following her indictment for prostitution. Even though the Court presumed that the plaintiff's telephone service was essential to her livelihood and that the importance of her property interest in continuing her telephone service therefore "cannot be minimized," the Court nonetheless held that her interest was outweighed by "the state's interest in protecting the public welfare without the attendant delay of a pretermination hearing." *Id.*, at 1344.

In the present case, the PUC properly concluded that GNAPs' continued refusal to pay the Joint Petitioners for GNAPs' use of their networks posed a significant risk of harm to the Joint Petitioners and their networks and customers. "Payment for services rendered," the PUC observed,

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.

Order, at 18-19. The PUC went on: "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." Order, at 24.

The PUC's disconnection rule applies uniformly to all carriers and customers and reflects the proper balancing of the state's interest and the interests of the carriers and their customers. To the extent GNAPs has a cognizable interest in continued use of the Joint Petitioners' networks, any such interest is voided when GNAPs refuses to pay for its network usage and is outweighed by the interests of other users of the network in fundamental fairness, cost-sharing and network integrity.

GNAPs has not shown that the PUC overlooked or misconstrued GNAPs' arguments concerning its purported right to a hearing. Furthermore, GNAPs has failed to demonstrate that Rule Puc 412.19 is unconstitutional as applied to GNAPs, or that GNAPs has any protectable

interest in its use of the Joint Petitioners' networks, or that any such interest is outweighed by the public interest in ensuring the integrity of the public switched telephone network in New Hampshire. Accordingly, the PUC should overrule GNAPs' motion for rehearing.

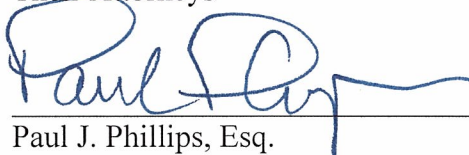
For the foregoing reasons, the Joint Petitioners object to GNAPs' Motion for Stay, Reconsideration and Rehearing and ask the Public Utilities Commission to overrule the GNAPs' Motion in its entirety.

DATED at Plymouth, New Hampshire, this 8th day of December, 2009.

Respectfully submitted,

HOLLIS TELEPHONE COMPANY, INC.,
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MERRIMACK COUNTY TELEPHONE COMPANY,
and WILTON TELEPHONE COMPANY, INC.

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