

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

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.

Order Denying Motion for Stay, Rehearing or Reconsideration

ORDER NO. 25,088

April 2, 2010

I. INTRODUCTION

The moving parties to this case are four independent local exchange carriers (ILECs) who jointly filed for authority to block the termination of traffic from Global NAPs Inc. (Global NAPs). They are Hollis Telephone, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. (collectively TDS). The Commission granted six rural independent telephone companies (Rural ILECs) intervention status as well. Global NAPs is a Competitive Local Exchange Carrier (CLEC) registered with the Commission in accordance with N.H. Code Admin. Rules Puc 431.01. Global NAPs carries both intrastate and interstate communications for its customers who are “Enhanced Service Providers.” According to Global NAPs, it receives voice, data or a mix of the two from Voice over Internet Protocol (VoIP) providers, for further transport and termination of the calls.¹ As discussed in Order No. 25,043 (November 10, 2009) (Order) at page 22, Global NAPs admits that it does not know the original format of the calls and therefore, cannot be certain all the calls it transports and terminates are VoIP.

¹ See *Global NAPs Objection to Stipulation of Facts* at No. 9.

This case arises from a dispute between TDS and Global NAPs regarding an assertion that Global NAPs had failed to pay TDS since February 2003 for carrying and terminating calls from Global NAPs customers on TDS's system. In our Order, the Commission held that Global NAPs' failure to pay for services obtained from the telephone companies violated Commission administrative rules. It required Global NAPs to pay in full any outstanding invoices from TDS within 30 days and authorized TDS to disconnect service to Global NAPs if payment was not made or an agreement for payment was not reached.² The Order directed Global NAPs to pay the full amount due for access to TDS facilities or to otherwise reach agreement with TDS for the continuation of service. To the extent this was not previously clear, we so clarify our Order.

Global NAPs, on December 2, 2009, filed a motion to stay and to reconsider or rehear the Order (Motion for Rehearing) based on Section 251 of the federal Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in 47 U.S.C.) (Telecom Act) regarding interconnection negotiations between Global NAPs and TDS and on "new law and new or corrected" facts pursuant to RSA 541:3. Procedural developments pertinent to this order are stated below; for a complete procedural history see Order at pp. 1-5.

On December 8 and 9, 2009, the Rural ILECs and TDS filed objections; Global NAPs filed a reply on December 10, 2009; and TDS filed an objection to the reply of Global NAPs on December 11, 2009. On December 15, 2009, the Commission issued a secretarial letter suspending its Order pursuant to RSA 541:5 pending further consideration of the issues raised in Global NAPs' motion.³

² TDS filed a letter on November 16, 2009, which calculated the full amount due and owing from Global NAPs as of October 31, 2009, to be \$655,685.86 based on call detail records indicating intrastate and interstate traffic from Global NAPs traversing TDS facilities.

³ On December 16, 2009, the Commission issued a secretarial letter wherein Commissioner Below disclosed a previous professional contact with a recently hired attorney representing Global NAPs and asked that any interested party indicate, prior to December 21, 2009, if it believed good cause or legal basis exists for disqualification and

On December 16, 2009, Global NAPs filed a letter, along with a declaration of David Shaw, offering to post bond in the amount of \$6,000.00 with the Commission. On December 21, 2009, TDS filed a response to the letter and declaration of Mr. Shaw; the Rural ILECs, on December 22, 2009, asked the Commission to strike the same, to which Global NAPs responded on December 23, 2009. On December 24, 2009, James R. J. Scheltema, Esq. filed a motion to withdraw as counsel to Global NAPs in this matter.

Since issuance of our Order, we have received copies of rulings from other jurisdictions: from Global NAPs, a Proposed Order of Hearing Examiner issued by the Public Service Commission of Maryland (filed February 2, 2010) and order of the District Court of the District of Columbia in *Paetec Communications v. CommPartners* (filed February 22, 2010); from TDS, a State of Vermont Public Service Board order in *Amended Joint Petition of Ludlow Telephone Company et. al.* Docket No. 7493 (filed December 17, 2009) and from TDS, a decision of the Pennsylvania Public Utility Commission in *Palmerton Telephone Company v. Global NAPs, Inc.* (filed February 12, 2010).

This order denies the requests of Global NAPs to stay the proceedings, rehear or reconsider the matters before us and reasserts that Global NAPs has terminated traffic on the TDS network without compensation. We again make no determination as to the precise split between intrastate and interstate traffic, as that is not a prerequisite for our finding that TDS is entitled to disconnect Global NAPs for nonpayment for services rendered. The underlying Order left it to Global NAPs to either pay the access bills in full or to reach agreement on a payment

withdrawal from the docket. On December 17, 2009, TDS filed a letter indicating that it did not object to Commissioner Below's continued participation in this docket. No party filed an objection to Commissioner Below's continued participation in this docket.

arrangement for the traffic terminated on the TDS network.⁴ The suspension of our Order is no longer in effect, and all terms apply with the exception of new dates imposed regarding payment to TDS and notice to Global NAPs' customers.

II. POSITIONS OF THE PARTIES

A. Global NAPs

In its Motion for Rehearing, Global NAPs argued that the Commission issued Order No. 25,043 without the benefit of an evidentiary hearing. Global NAPs asserted that in so ruling, the Commission relied on call detail records that fail to distinguish between "regular" voice traffic and Enhanced Service Provider (ESP), or any other Internet Protocol (IP) enabled traffic.

Global NAPs also claimed that the 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." Global NAPs requested a rehearing under RSA 541:3, citing as support recent rulings by an Administrative Law Judge (ALJ) of the Pennsylvania Public Utilities Commission⁵ and a federal judge in a recent trial between Global NAPs and Manhattan Telecommunications (MetTel),⁶ as well as Commission rules.⁷ Global NAPs alleged that its motion is supported on factual grounds by sworn testimony from the New York and Pennsylvania cases, as well as a study Global NAPs has recently done about the actual origination of calls TDS claims originated as landline calls in New Hampshire.

⁴ Global NAPs did not provide evidence to refute the TDS call detail records or the access bills. Accordingly, the Commission did not adjudicate the detail in the access bills.

⁵ *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. A decision of this matter has since been issued, and submitted to the file as noted on page 2 of this Order.

⁶ *Manhattan Telecommunications Corp., v. GLOBAL NAPS, Inc.*, Docket No. 08 CV 3829, USDC for the Southern District of New York.

⁷ Global NAPs stated that 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.'"

Global NAPs charged that the Commission improperly and unconstitutionally shifted the burden of proof to Global NAPs by erroneously finding that the Company was "uniquely in control of data or information essential to resolving the issue or issues raised." Order at 20. Global NAPs stated that the Commission failed to hold an evidentiary hearing at which Global NAPs could have produced 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 unique access to the underlying billing information at issue.

Finally, Global NAPs charged that ordering it to pay in excess of \$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 under those tariffs.

Global NAPs alleged that FCC rulings regarding 47 U.S.C. §251 establish Global NAPs' right to interconnect with incumbent carriers and prohibit a state commission from authorizing disconnection. Subsequent to the Commission's Order, Global NAPs sent a letter to TDS offering to negotiate rates for interconnection. It asserted that TDS must now agree to negotiate interconnection with Global NAPs. According to Global NAPs, the FCC has ruled definitively that ILECs are required to interconnect with competitive carriers that transmit VoIP, and that state commission rulings to the contrary are "inconsistent" with the Telecommunications Act.⁸

Global NAPs maintained that in accordance with the FCC ruling in *Time Warner*, Global NAPs is also "entitled" to interconnection with the rural ILECs involved in this dispute. According to Global NAPs, because it has requested such interconnection, the rural ILECs are obligated to negotiate interconnection agreements with Global NAPs and may not be granted permission to terminate service to Global NAPs in the interim.

⁸ *Time Warner*, paras. 1, 17.

Global NAPs also argued, alternatively, that TDS must meet a burden of proof and show at an evidentiary hearing that, in the face of Global NAPs' evidence to the contrary, it properly billed Global NAPs for intrastate calls and landline-originated calls.⁹ Global NAPs argued that TDS must satisfy its burden of proof to show that calls it billed at Feature Group D rates were actually transmitted over Feature Group D trunks, and that the calls it billed to Global NAPs at intrastate rates actually originated in New Hampshire and were from landline telephones. Global NAPs now claims that it does not transmit traffic on Feature Group D trunks and that, based on a one-week sampling, submitted on December 2, 2009 subsequent to the Order, 84.3% of the minutes of use for all calls sent to TDS came from VoIP, cable, or cell phones, and only 5.64% came from Time Division Multiplexing (TDM) landlines. Global NAPs further asserted that it does not have any Feature Group D facilities and does not connect to TDS by means of such facilities. According to Global NAPs, it connects to TDS through a dedicated line, not a Feature Group D line.

Global NAPs further argued that TDS has the burden to prove that the calls it billed to Global NAPs originated in-state. Global NAPs stated that under the law and the language of standard tariffs, a telephone call is subject to intrastate tariff rates if it begins and ends in the same state. Global NAPs maintained, based on the scenario it presented in its motion, that it is unfair to rate calls lacking an originating number as intrastate without any of the proof that other courts and commissions have required of plaintiffs suing for traditional charges. According to Global NAPs, the local company tariff access rates in New Hampshire are about \$0.10 per minute for intrastate and \$0.01 per minute for interstate. Thus, the \$600,000 Global NAPs has been billed would be at least three times higher than it should be, even if its traffic were not

⁹ *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.

exempt, so long as its traffic was interstate. Global NAPs argued that the Order acknowledges that some of the calls may be interstate, and further stated that there is nothing in the TDS' call detail records to distinguish regular voice traffic from ESP or any other IP-enabled traffic. Global NAPs suggested that the Commission makes no adjustment for that fact, "obviously because not enough facts were developed to quantify the percentages."

Global NAPs also argued that TDS has the burden to prove that the calls for which it billed Global NAPs were landline rather than cable, cell phone or VoIP. Global NAPs stated that it was not possible to tell from looking at records documenting originating numbers whether a call came from a cell phone, cable, or VoIP provider; who originated the call; or how the call began. Global NAPs asserted that Federal law is clear that calls made using cell phone technology are exempt from traditional access charges because cell phone calls are not intrastate and cannot be regulated by states pursuant to 47 U.S.C. § 332(c)(3)(A).¹⁰ In addition, according to Global NAPs, New Hampshire law does not give the Commission jurisdiction over cellular radio communications. *See* RSA 362:6. Global NAPs stated that VoIP traffic is also exempt from traditional charges, as are phone calls originating from customers served by a cable television provider. Thus, Global NAPs argued, because TDS has not proven that Global NAPs traffic does not fall into any of the exempt categories mentioned above, TDS cannot collect traditional access charges for Global NAPs' calls.

Global NAPs asserted that TDS has the burden to prove that it can bill Global NAPs instead of FairPoint for Tandem-Switched traffic. Global NAPs claimed that a further weakness in TDS' claim is that Global NAPs does not send traffic directly to TDS, but to Verizon (now FairPoint), with which it has a contract that says that if traffic that originates with Global NAPs

¹⁰ 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).

is transported through a FairPoint tandem to an ILEC who then charges FairPoint for termination of such traffic, Global NAPs will be liable to FairPoint, and not to the ILEC, for such charges. Thus, according to Global NAPs, TDS ignored the tandem arrangement when it billed Global NAPs rather than FairPoint.

Global NAPs asserted that recent rulings and evidence from tariff-based cases against Global NAPs in New York and Pennsylvania contradict TDS's legal contention and further reveal that the factual predicates of the Commission's order are incorrect and that an evidentiary hearing is required. Global NAPs argued that in the past several months, Global NAPs has been involved in two proceedings where the Global NAPs witnesses established that Global NAPs' traffic is primarily VoIP, or otherwise enhanced, and thus, in its view, is immune from tariff access charges.¹¹ Global NAPs asserted that the judges in both proceedings also ruled that factual hearings were required to establish the nature of Global NAPs' traffic. Global NAPs argued that an evidentiary hearing is legally required and that denial of a hearing is a denial of due process. Furthermore, according to Global NAPs, depriving it of its right to send interstate traffic to New Hampshire without an evidentiary hearing, including confrontation of TDS witnesses and an ability to call third parties, is a denial of due process, in violation of Amendments 5 and 14 of the U.S. Constitution and Articles 2, 14 and 15 of Part I of the Constitution of New Hampshire.

Global NAPs argued that intermediate carriers like Global NAPs can neither be charged with knowledge of the origins of calls nor billed access charges. Global NAPs contended that the Commission's Order suggested that Global NAPs has unique access to information about where calls it forwards originate, but the opposite is true. Global NAPs claimed that it does not have any special knowledge of where or in what form the call began. Global NAPs alleged that

¹¹ On February 11, 2010, the Pennsylvania Commission issued a decision overturning the ALJ decision cited by Global NAPs and ordering Global NAPs and its affiliates to pay all intrastate access charges due, together with fines and penalties imposed for violations of commission orders and regulations.

the FCC has ruled that the intermediate carrier is not liable for any access charges that might be owed by the interexchange carrier who first carried the call.¹²

Global NAPs asserted that the Commission lacks jurisdiction to order payment under federal tariffs or to authorize the cutting off of interstate telecommunications. Global NAPs argued that TDS should have brought federal tariff claims in federal district court because the interpretation of a federal tariff remains a question of federal law.¹³ Global NAPs noted that federal law required the filing of the federal tariffs allegedly at issue here. 47 U.S.C. § 203(a). It asserted that 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.

Global NAPs claimed that TDS even tacitly acknowledges the absence of jurisdiction in their brief by qualifying that if the Commission concluded that it did not have jurisdiction over the interstate charges, it can and should resolve the Joint Petitioner's request with respect to the intrastate charges. Global NAPs asserted that on its website the Commission openly recognizes that its jurisdiction only extends over communications within the state, and has refrained from regulating those services which allegedly affect the provision of interstate communications.

Global NAPs concluded its arguments by stating that its request for interconnection with TDS

¹² 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. *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).

¹³ *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.").

has changed the legal and factual "situation on the ground" which, Global NAPs argues, raises serious questions of law, fact and fundamental due process.

B. TDS

On December 8, 2009, TDS filed an objection to Global NAPs' motion for stay and rehearing. TDS took the position that Global NAPs' claims are without basis, and the motion should be denied. Regarding the requested stay, TDS argued that the motion requests a stay, but does not present the Commission with evidence in support of a stay, or even a statement of the legal standard to be applied by the Commission in ruling on the motion for a stay. TDS claims that the stay should be denied on that basis alone.

TDS argued that the Commission has previously applied by analogy the jurisdiction granted to the Supreme Court to issue a stay pending appeal pursuant to RSA 541:18.¹⁴ According to TDS, the standard articulated by the Supreme Court for granting such a stay is that such an order may be granted if "the plaintiff has demonstrated two conditions are present. First, there must be a showing that the plaintiff will suffer irreparable harm, occasioned by circumstances beyond his control, if the order is given immediate effect. Second, it must be clear that the harm to the plaintiff outweighs the public interest in enforcing the order for the duration of the appeal."¹⁵ "The mere fact that an administrative decision may cause injury or inconvenience to the plaintiff is insufficient to warrant a suspension of the order."¹⁶ TDS asserted that the Commission in the *BayRing* case also cited administrative efficiency as a possible ground, and that Global NAPs has presented no evidence substantiating any such basis for a stay. TDS claimed that there is no showing of irreparable harm, and that there is no public

¹⁴ *Re: Freedom Ring Communications, LLC d/b/a BayRing Communications*, Order No. 24,913 (October 31, 2008) at 7.

¹⁵ *Union Fidelity Life Ins. Co. v. Whaland*, 114 N.H. 549, 550 (1974).

¹⁶ *Id.*

interest in allowing Global NAPs to continue to use the networks of other carriers without paying for that service. It further stated that the rural ILECs are regulated on a rate of return basis and that, to the extent that Global NAPs is allowed to use the rural ILECs' networks without paying for it, other paying customers are exposed to having to make up for the shortfall. TDS argued that the public interest favors paying customers and that administrative efficiency will best be served by rejecting the Global NAPs stay request.

TDS asserted that Global NAPs' motion for rehearing does not address the legal standard pursuant to RSA 541:3, which provides that the Commission may grant a rehearing when the motion states good reason for such relief. Good reason may be shown by identifying specific matters that were either "overlooked or mistakenly conceived" by the deciding tribunal.¹⁷ TDS urged that none of the claims asserted by Global NAPs provide the requisite "good reason."

According to TDS, Global NAPs' request to negotiate an interconnection agreement is irrelevant because (1) the service provided by the TDS companies for which payment is sought is access service governed by the relevant access tariff, not by an interconnection agreement, and (2) this case relates to access service taken and not paid for. TDS argued that whatever the possible future arrangements may be, the current bills are due and owing for access service rendered, and the carriers that provided access service to Global NAPs are entitled to be paid or to discontinue service.

TDS stated that Global NAPs says for the first time that the TDS companies were required to provide evidence that the traffic delivered by Global NAPs to the TDS companies for termination was carried over Feature Group D trunks. It maintained that Global NAPs did not raise this issue in its briefs or as an item to be included in the stipulated facts. TDS asserted that Global NAPs did not even raise the issue in response to the express directive by the Commission

¹⁷ See *Dumais v. State*, 118 N.H. 309, 311 (1978).

for Global NAPs to state specifically the factual issues for which an evidentiary hearing was requested, and that Global NAPs was merely engaging in another dilatory tactic. TDS further stated that there is no requirement in the applicable access tariff that access service be furnished over Feature Group D trunks and therefore TDS had no such burden of proof.

TDS alleged that Global NAPs raises the claim (1) that the TDS companies bear the burden of establishing the nature of the traffic that Global NAPs arranges to deliver to them as access traffic through the FairPoint tandem and (2) that since Global NAPs asserts that some of the traffic is likely “ESP” traffic, the TDS companies bear the burden of showing that it is not. TDS argued that the Commission fully considered this argument in the Order and pointed out that, under the applicable tariffs, the interexchange carrier delivering the traffic for termination must maintain records of percentage of interstate usage and make those records available for inspection. Order at 21. TDS urged that Global NAPs is the party in a position to identify the nature and jurisdiction of the traffic, but that it did not do so in this case. TDS further asserted that the Commission carefully considered this issue and appropriately allocated the burden of proof.

According to TDS, Global NAPs makes a new argument that as an “intermediate carrier” it cannot be charged with knowledge regarding the origins of calls. TDS maintained that this is nonsense, and that by arranging to receive this traffic and deliver it as interexchange traffic to the TDS companies, Global NAPs is performing the service of an interexchange carrier. It argued that the relevant access tariffs make clear that it is the responsibility of the interexchange carrier to structure its arrangements so that it can provide information regarding the jurisdictional nature of the traffic for inspection. TDS also stated that this requirement has been a feature of the service provided by interexchange carriers since the AT&T break-up in 1984, and that there is

nothing here that the Commission has overlooked or which otherwise serves as a basis for rehearing.

C. Rural ILEC Intervenor

The Rural ILECs generally concurred with TDS' position in this docket. They further emphasized that in its post-judgment motion, Global NAPs requests either reconsideration or 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 Global NAPs with respect to local interconnection. The Rural ILECs urged that the Commission reject Global NAPs' requests in their entirety. According to the Rural ILECs, Global NAPs has failed to meet any of the legal standards required for reconsideration, rehearing or suspension of the Commission's Order. They contend that Global NAPs relies on an entirely unrelated event namely, a post-judgment request by Global NAPs for local interconnection, which Global NAPs delivered to TDS on November 18, 2009, as the basis for suspending an Order requiring Global NAPs to pay the TDS for past-due access charges.

The Rural ILECs asserted that Global NAPs' "new or corrected" factual allegations involve information that was readily available to Global NAPs during the earlier phases of this proceeding and that Global NAPs chose to withhold from TDS and other parties during discovery. According to the Rural ILECs, none of these contentions provides a basis for reconsidering, rehearing or suspending the Commission's Order. They urge that Global NAPs' post-judgment motion represents the latest attempt by Global NAPs to introduce confusion and to delay the prompt resolution of this case. They argue that, rather than reward Global NAPs' efforts to further delay, confuse and obstruct this case, the Commission should deny the Global

NAPs' post-judgment motion and allow TDS to enforce judgment against Global NAPs forthwith.

III. COMMISSION ANALYSIS

Global NAPs seeks rehearing, pursuant to RSA 541:3, based upon its assertion that multiple aspects of Order No. 25,043 were unlawful or unreasonable.¹⁸ Global NAPs also seeks a stay of the order. To prevail on a motion for rehearing, a moving party must demonstrate that an administrative agency's order is unlawful or unreasonable. *See* RSA 541:3 and RSA 541:4. Good cause for rehearing may be shown by producing new evidence that was unavailable prior to the issuance of the underlying decision, or by showing that evidence was overlooked or misconstrued. *Dumais v. State*, 118 N.H. 309, 312 (1978). Although Global NAPs makes reference in the title of its motion to reconsideration based on "new law and new or corrected facts," nowhere does it provide an explanation as to why the information was not available during the course of the proceeding, which as noted in our Order entailed months of discovery, technical sessions, a set of stipulated facts and filing of two rounds of briefs. Thus we do not rely on such "facts" in this order.

A litigant may not raise an issue for the first time in a motion for rehearing. *Appeal of Campaign for Ratepayers Rights*, 133 N.H. 480, 484 (1990). Any matter raised in a motion for rehearing must have been "determined in the action, or proceeding, or covered or included in the order..." *Id.*, *citing* RSA 541:3. Further, Global NAPs failed to comply with a Commission order requesting additional data to substantiate its claims prior to issuance of the November 2009 Order. Order at 23.

¹⁸ RSA 541:4 requires that a motion for rehearing "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable."

Because we find that Global NAPs has not met its burden, and that our order was neither unlawful nor unreasonable, we deny Global NAPs' motion for stay and rehearing or reconsideration. Accordingly, we address the arguments raised to the extent that they are relevant to this determination.

A. TDS's Right to Disconnect Global NAPs for Failure to Pay

The record shows that Global NAPs has transmitted at least some intrastate traffic over TDS's network to be delivered to TDS's customers for a number of years and that it has not paid TDS for this service. *See* Order at 21-23. Global NAPs argues that the calls it terminates on the TDS network are interstate and therefore not subject to the intrastate tariffs that fall within our jurisdiction, an argument that was raised and addressed in the underlying proceeding. Global NAPs's view, apparently, is that because there has been no specific delineation of the intrastate versus interstate traffic, it should pay nothing for the totality of the traffic. We disagree. As we held in our Order, a regulated CLEC such as Global NAPs must abide by the administrative rules of this agency and the tariffs on file. Global NAPs has failed to identify any legal obligation on the part of TDS to carry Global NAPs traffic in the absence of payment by Global NAPs for such carriage. Non-payment for services rendered with respect to intrastate traffic is a violation of the applicable tariffs on file with this Commission. Commission rules permit TDS to disconnect service to Global NAPs, a non-residential customer, for violation of a TDS tariff. The rules require neither Commission approval nor an adjudicative hearing prior to disconnection. *See* N.H. Code Admin. Rule Puc 412.19(c).

The Order provided Global NAPs with an opportunity to avoid disconnection by TDS through the negotiation of payment arrangements and terms and conditions for further traffic termination service. If Global NAPs chooses not to pay TDS because it believes the access

charges are erroneous, it makes that choice at the risk of TDS taking action in accordance with the authority granted it under applicable administrative rules.¹⁹ Global NAPs has cited no law or rule that would prohibit TDS from disconnecting for non-payment of either intra- or inter-LATA toll service, the retail equivalent to access service.²⁰

As we noted in Order No. 25,043, “TDS has demonstrated through record evidence that Global Naps’ traffic is traveling across TDS facilities to access TDS end-users.” We found that the evidence provided in the course of the underlying proceeding was sufficient to support our determination on this issue,²¹ and we find here that Global NAPs has not demonstrated that any evidence it now provides to support its reiterated argument that its traffic is wholly exempt from access charges was not available prior to our Order. Accordingly, we find that our decision affirming TDS’s right to disconnect Global NAPs from the TDS local network for non-payment was neither unlawful nor unreasonable. To the extent our Order was not clear, we clarify that we did not determine the exact amount due, but intended that Global NAPs pay the amount asserted by TDS or negotiate payment of a mutually acceptable amount. Failure to pay for its past and ongoing use of the TDS network, however, was unacceptable and would result in disconnection.

B. Burden of Proof

Global NAPs contests our application of the burden of proof in this docket. It cites *Alliance Commc’ns Co-op, Inc. v. Global Crossing*, Nos. Div. 06-4221 et al., 2007 WL 1964217 at 3 (D.S.D Jul.2, 2007), with specific reference to the following quotation:

¹⁹ To the extent GNAPs would have a complaint against TDS, it has available to it the procedures set forth in Commission rules, PART PUC 204, Complaints Against Public Utilities.

²⁰ PUC 402.56 defines the term “toll call” as “a call to any location outside the local service area.” LATA is the acronym for the phrase “local access transport area.” PUC 402.27.

²¹ See, *inter alia*, *TDS Brief at 2, Confidential Attachment to Staff-TDS-1-2*, attached to *TDS’ Brief*, Exh. TDS-3, *TDS Petition at 6-7, Global NAPs Objection to Stipulated Facts at 5, #12-14 and 6, #15-16, TDS’ Reply Brief at 4-5 and Exh. TDS-5/Part A and TDS-6/Part A, Global NAPs Brief at 4, and TDS’ January 20, 2009 Letter.*

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.”

Global NAPs’ argument is misplaced. The cited holding alters neither our Order nor the dispositive circumstance that Global NAPs is in unique control of the information necessary to identify in detail which traffic is interstate and which is intrastate. In fact, when Global NAPs offers on pages five through ten of its Motion for Rehearing an array of factual assertions and exhibits that it had never previously produced, it bolsters our finding that it was in a position to uniquely control the data necessary to support its arguments. As noted in our Order at 23, Global NAPs had multiple opportunities to support its arguments with data and information through discovery, technical sessions and two rounds of briefing, as well as by compliance with a Commission order requesting further information.²²

Global NAPs here protests our allocation of the burden of persuasion to it with respect to the nature of the traffic it sends to the TDS network. In its argument, Global NAPs confuses the burden of persuasion with the burden of proof and misconstrues our ruling. As noted in our order, such allocation is in accord with an established policy of shifting the burden to the party with unique access to relevant evidence, particularly with respect to the operation of public utilities. *See* Order No. 24,043 at 20-21 and, *e.g.*, *Wilton Telephone Co., et al*, Order No. 23,744 (July 26, 2001). If, as it now appears, Global NAPs had records to support its argument that it was exempt from access charge billing from TDS, it had an obligation to do so pursuant to statute, as well as our order in the underlying proceeding. *See* RSA 374:18, RSA 374:8 and :13.

²² Global NAPs has failed to explain why it could not have produced the data it now proffers in the underlying proceeding with respect to the issue of whether or not it has unique control over evidence that calls billed at Feature Group D rates were actually transmitted over Feature Group D lines, and that the calls billed by TDS at intrastate rates actually originated in New Hampshire.

Global NAPs also suggests that unless TDS identifies the origination of every call a Global NAPs customer puts on the system, the Commission is powerless to require compensation. We disagree. Global NAPs is not exempt from an obligation to pay for use of TDS's network. We left to Global NAPs the option to pay in full or otherwise reach agreement with TDS for the continuation of service, but made clear that Global NAPs could not continue to use the system without compensation, which, ultimately, harms TDS ratepayers and owners.

Global NAPs fails to demonstrate that any of the new evidence that it proffers now could not have been presented before we issued our November 2009 order. Global NAPs has made no claim that this evidence was unavailable or that it was somehow prevented from being able to obtain it sooner. All of this evidence could have been submitted during the discovery, stipulation of fact and memoranda phases of the proceeding, but Global NAPs chose not to do so. Rather than withholding evidence germane to the very essence of the argument that its traffic is exempt from any access charges, Global NAPs should have brought that evidence forward in the underlying proceeding. For whatever reason, it did not do so, and by bringing evidence to light now, without explaining why it was not produced earlier, Global NAPs fails to meet the standard for rehearing or reconsideration. For these reasons, we confirm that our determination on the burden of proof in this docket was reasonable and lawful.

C. Due Process

Global NAPs claims that its federal and state constitutional due process rights were violated because it was not afforded an evidentiary hearing.²³ In assessing the process due in any particular case, the New Hampshire Supreme Court has held that:

In determining whether particular procedures satisfy the requirements of due process, we typically employ a two-prong analysis. Initially, we ascertain

²³ Because Global NAPs has asserted no statutory, regulatory or other legal requirement for an evidentiary hearing, we limit our analysis to the federal and state constitutional due process issue.

whether a legally protected interest has been implicated. We then determine whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest. . . . [A] successful due process claim must be based upon a protected liberty or property interest. *In re Town of Bethlehem*, 154 N.H. 314, 328 (2006) (citations omitted).

“The hallmark of a legally protected property interest is an individual entitlement grounded in State law.” *In re Town of Bethlehem*, at 329. Global NAPs has not demonstrated such entitlement. While federal statute establishes mandatory and conditional obligations among carriers, including the requirement that every telecommunications carrier “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers,” 47 U.S.C. §251(a), the Federal Communications Commission (FCC) and the courts have interpreted the interconnection obligation to include only the provision of physical interconnection of carrier networks, not the exchange of traffic over those networks. *Competitive Telecommunications Ass’n v. F.C.C.*, 117 F.3d 1068, 1071-72 (8th Cir. 1997). TDS and Global NAPs have an indirect physical interconnection through the FairPoint tandem. Thus, TDS has complied with 47 U.S.C. § 251(a) with respect to Global NAPs. The physical connection that permits Global NAPs’ traffic to travel along TDS’s facilities occurs between FairPoint and TDS. At that point FairPoint passes Global NAPs traffic on to the TDS network, and then TDS delivers the traffic for termination of calls to end-user customers. The delivery services TDS provides are governed by intrastate and interstate tariffs on file with this Commission and with the FCC, respectively.

In our Order we recognized that TDS is permitted under New Hampshire law and Commission rules to disconnect non-residential customers, such as Global NAPs in this case, for violation of applicable tariff provisions, including non-payment for services rendered. *See* Puc 412.19. The word “disconnect” in this context refers to the suspension or interruption of service

that leaves direct and indirect physical network links intact and capable of carrying authorized traffic.

Accordingly, we authorized TDS to interrupt traffic, not to physically sever network paths available to Global NAPs. The suspension or interruption of service, termed “disconnection” under our rules is fully compliant with the interconnection mandate set forth in 47 U.S.C. §251. The rules do not require any action by this Commission prior to a utility disconnecting service under any of the delineated circumstances. In this case, in fact, TDS was not required to petition the Commission for authority to cease allowing Global NAPs’ traffic to terminate on its network.

Absent an interconnection or other appropriate agreement with TDS, Global NAPs is subject to the intrastate and interstate access service rates offered by TDS through tariffs on file with this Commission and the FCC. Global NAPs seizes on the question of which tariff applies as a way to avoid all compensation to TDS, to the detriment of the TDS ratepayers and owners who bear the cost of uncompensated use of the network. Global NAPs has failed to make even a *prima facie* showing that that TDS has any obligation to allow the flow of Global NAPs traffic over its network without compensation, or that TDS is prohibited from disconnecting such service. The uncontested evidence in this docket indicates that Global NAPs has used the TDS network since February 2003 without any compensation to TDS. The fact that Global NAPs has used the TDS network free of charge for years does not give it a legally protected right to continue using the TDS network without paying.

Global NAPs has failed to show that it has a legally protected interest in transmitting traffic over TDS’ network without charge, or that the lack of an evidentiary hearing in the underlying proceeding constitutes a wrongful deprivation of due process rights. As outlined in

our order, GNAPs had ample notice and opportunity to be heard throughout the underlying proceeding. Moreover, Global NAPs raised the same due process arguments in that proceeding. Repeating its arguments in a motion for rehearing or reconsideration does not rise to the level required to grant such motion here.

D. Global NAPs Request for Interconnection Agreement and Motion for a Stay

Global NAPs asserts that the invocation of its right to negotiate interconnection agreements with TDS requires a stay of our order allowing TDS to disconnect service. *Motion for Rehearing* at 2. We disagree. None of the authorities cited by Global NAPs support the assertion that requesting an interconnection agreement should stay an order to require payment by a wholesale provider for past and ongoing use of an ILEC's network. Negotiation of an interconnection agreement is a forward-looking exercise. Parties generally do not expect to engage in the exchange of traffic across interconnected networks until such an agreement is in place. The authorities cited by Global NAPs support the requirement of a physical interconnection under 47 U.S.C. § 251(a), not a requirement to exchange traffic without compensation.

There is no dispute that Global NAPs and TDS have a physical network interconnection in place and that tariffs governing rates for intra- and inter-LATA traffic were on file prior to Global NAPs' formal request to TDS for interconnection. Those tariffs continue to govern traffic exchanged between TDS and Global NAPs unless and until they are replaced by terms negotiated in an interconnection agreement. Merely requesting that TDS negotiate an interconnection agreement does not give Global NAPs any right to begin exchanging traffic, or in this case, to continue exchanging traffic to the economic detriment of TDS. If the nature of the Global NAPs traffic is such that it is not subject to existing access tariffs – as Global NAPs

argues – Global NAPs may not transmit traffic until it has made appropriate inter-carrier arrangements with TDS. *See* Order at 15. Global NAPs is not entitled to continue to use TDS's local networks free of charge while it litigates the nature of its traffic or negotiates different charges to apply to that traffic.

Should a dispute arise as a result of Global NAPs' request to TDS to negotiate an interconnection agreement, Global NAPs may make whatever filings it deems necessary to protect its rights. In the meantime, Global NAPs' November 17, 2009 request for an interconnection agreement does not affect our determination here regarding its motion for rehearing. We therefore deny the motion for a stay.

E. Rulings and Evidence from New York and Pennsylvania

Global NAPs makes reference in its motion to proceedings in two other states (New York and Pennsylvania) stating that "judges in both proceedings . . . ruled that factual hearings were required to establish the nature of Global's traffic." Motion for Rehearing at 11. Global NAPs outlines in detail the findings made in each of those proceedings, in each of which Global NAPs provided witnesses and evidence to support its claims. Global NAPs fails to explain why it could not provide either witnesses or relevant evidence in our proceeding through the procedures agreed upon at the start of the docket. Not only did Global NAPs assert in our proceeding that it did not have the data to demonstrate that its calls were interstate, it could provide no customer attestations to support its arguments as it did in New York. Further, Global NAPs failed to submit to us the study it now offers pertaining to the actual origination of calls that TDS claimed originated as landline calls in TDM in New Hampshire. Neither the production of available evidence nor the submission of witness attestations requires a formal evidentiary hearing in an administrative proceeding that includes discovery, briefing, and Commission requisition of

documents. Global NAPs glosses over the very fundamental point that it failed to provide any evidence or propose any witnesses to support its arguments before us. Though not highlighted by Global NAPs, the submissions from other states also make clear that Global NAPs is under challenge in other jurisdictions for similar use of the network without compensation.²⁴

F. Pending Motions, Objections and Related Filings

TDS and Rural ILECs filed objections to Global NAPs' motion for rehearing on December 8 and 9, 2009, respectively. Global NAPs filed a reply to the same on December 10, 2009, to which TDS objected on December 11, 2009, for Global NAPs' failure to seek leave to file such reply. Because Global NAPs did not seek leave to file its December 10, 2009 reply, we strike it.

Regarding the December 16, 2009 letter and declaration of David Shaw filed by Global NAPs as to the proposed \$6000.00 bond, intended to satisfy a claim in excess of \$600,000, and the Rural ILECs' December 22, 2009 request to strike those documents, we deem the issue moot based upon our denial of the request for a stay. Finally, we grant Attorney Scheltema's December 24, 2009 motion to withdraw as counsel for Global NAPs.

IV. CONCLUSION

We reassert our finding that Global NAPs has terminated traffic on the TDS network without paying any compensation to TDS for termination services. Global NAPs has raised no new arguments in its motion and has failed to explain why it could not have produced, during the underlying proceeding, the evidence it now seeks to offer in support of its recast arguments. We further confirm that a finding as to the split between interstate and intrastate access minutes of Global NAPs traffic terminated on TDS networks is not a prerequisite for our finding that TDS is entitled to disconnect GNAPs for non-payment for past services rendered, especially when the

²⁴ See citations above at 3.

intrastate tariff implicated here provides that interexchange carriers “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” and Global NAPS has failed to do so. Order at 21. TDS is operating properly within the bounds of state law when it disconnects service to Global NAPs for non-payment in violation of filed tariffs. To reinstate service, the parties are free to negotiate an agreement on the percent interstate usage and the associated rates to be charged for future traffic and to reach agreement on payment for Global NAPs’ past use of TDS’s network. The remedy and notice provisions of our Order remain in effect as of the date of this order except that the notice provided by Global NAPs to its customers shall read as follows:

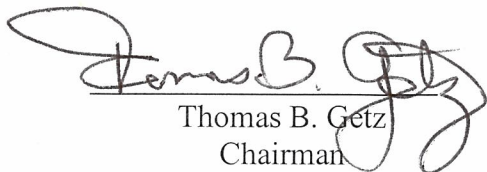
The New Hampshire Public Utilities Commission has adjudicated a dispute between Global NAPs and the TDS Companies and concluded that Global NAPs owes TDS compensation for terminating calls on the TDS network. Global NAPs has until May 3, 2010 to pay agreed amounts to TDS. If payment is not made by that 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.


Based upon the foregoing, it is hereby

ORDERED, that Global NAPs’ motion to stay disconnection and for reconsideration or rehearing is DENIED; and it is

FURTHER ORDERED, that if, by May 3, 2010, 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 on May 4, 2010.

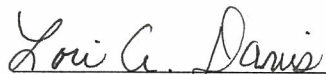
By order of the Public Utilities Commission of New Hampshire this second day of April,
2010.

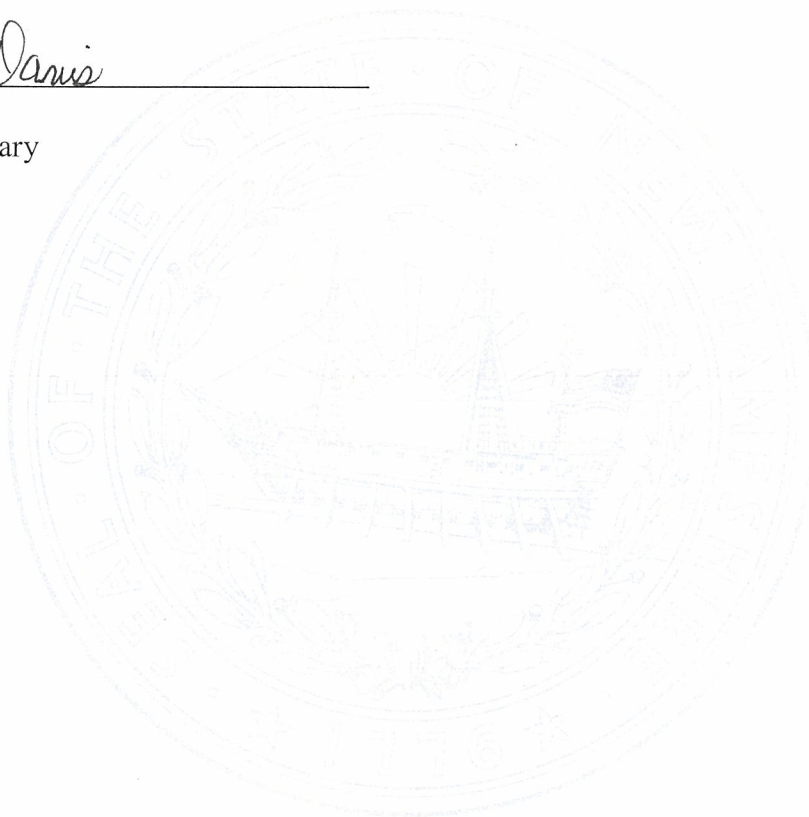

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Chairman


Clifton C. Below
Commissioner


Amy L. Ignatius
Commissioner

Attested by:


Lori A. Davis
Assistant Secretary



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