

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 08-028

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

Joint Petition for Authority to Block Traffic from Global NAPs, Inc,

Procedural Order and Order on Motion to Compel Discovery Responses

ORDER NO. 24,894

September 17, 2008

APPEARANCES: Paul J. Phillips, Esq. of Primmer Piper Eggleston & Cramer PC for the TDS Companies; James R. J. Scheltema, Esq. for Global NAPs, Inc.; Darren Winslow for Union Telephone Company; Benjamin Thayer for Freedom Ring Communications, LLC d/b/a BayRing Communications; Frederick J. Coolbroth, Esq of Devine Millimet & Branch PA for Granite State Telephone, Inc., Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc. and Dixville Telephone Company; Frederick J. Coolbroth, Esq of Devine Millimet & Branch PA for Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE; and F. Anne Ross, Esq. for the Staff of the Public Utilities Commission.

I. PROCEDURAL HISTORY

On February 19, 2008, Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company and Wilton Telephone Company, Inc. (collectively the TDS Companies) filed a joint petition seeking to block Global NAPs, Inc. (Global NAPs) traffic from terminating on the local telephone networks of the TDS Companies. On March 3, 2008, the Commission directed Global NAPs to answer the allegations set out in the joint petition before March 13, 2008. On March 19, 2008, Global NAPs filed an answer to the joint petition together with a motion to accept the late-filed answer. The TDS Companies filed a joint response to the Global NAPs answer on April 14, 2008 and, on April 22, 2008, the Commission issued an Order of Notice setting a prehearing conference for May 14, 2008.

On May 9, 2008, Union Telephone Company d/b/a Union Communications (Union), Freedom Ring Communications, LLC d/b/a BayRing Communications (BayRing) and Granite State Telephone, Inc., Dunbarton Telephone Company, Inc., Northland Telephone Company of Maine, Inc., Bretton Woods Telephone Company, Inc. and Dixville Telephone Company (collectively, the Rural ILECs) filed petitions to intervene. On May 14, 2008, the prehearing conference was held as scheduled and the Commission granted all intervention requests.

The Commission approved a procedural schedule by Secretarial Letter on May 20, 2008. The procedural schedule, which had been recommended by the parties and Staff, provided for initial discovery on all parties, a technical session on July 9, 2008, to develop stipulated facts and briefs from all parties by August 1, 2008.

On May 28, 2008, Northern New England Telephone Operations LLC d/b/a FairPoint Communications – NNE (FairPoint) filed a petition to intervene. By Secretarial Letter the Commission granted FairPoint's petition to intervene on June 13, 2008.

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

segTEL, Inc. filed an intervention request with the Commission on July 22, 2008, indicating that some parties opposed the request. On July 21, 2008, the TDS Companies filed a letter opposing segTEL's intervention.

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

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

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

II. POSITIONS OF THE PARTIES

A. TDS Companies

The TDS Companies' joint petition alleges that Global NAPs has refused to pay significant monthly access charges incurred by Global NAPs for terminating its traffic on the TDS Companies' networks. The TDS Companies maintain that intercarrier compensation has historically been determined by the originating and terminating points of the call. The TDS Companies point out that access charges are set out in each of the TDS Companies' respective interstate and intrastate access tariffs. The TDS Companies claim that their records indicate that Global NAPs has terminated both intrastate and interstate calls on the TDS networks from February 2003 through January 2008 and has refused to pay approximately \$192,000 for terminating access.

The TDS Companies allege that Global NAPs' refusal to pay invoiced access charges is a flagrant violation of New Hampshire law and that Global NAPs has engaged in unfair and deceptive business practices inasmuch as it never intended to pay terminating access charges to

the TDS Companies. The TDS Companies further claim that Global NAPs does not meet the minimum standards for a competitive local exchange carrier (CLEC) in New Hampshire.

Finally, the TDS Companies request permission to block terminating traffic from Global NAPs to the TDS local networks.

As for the procedural posture of the case, the TDS Companies oppose an evidentiary hearing. They contend that counsel for Global NAPs agreed to the stipulated facts discussed at the July 9, 2008 technical session and they further contend that striking the disputed fact, number 9, from the stipulated list does no harm because the fact is immaterial. The TDS Companies also argue that Global NAPs' objection to the stipulated facts should be overruled and that its proposed additional facts should be rejected. The Rural ILECs and FairPoint (the Joint Intervenors) generally support the TDS Companies' procedural positions.

B. Global NAPs

Global NAPs denies most of the TDS Companies' allegations and further asserts that the Commission's jurisdiction is limited to local and intrastate traffic. Global NAPs takes the position that all of its traffic terminating to the TDS networks is interstate in nature because it is enhanced service provider (ESP) traffic. Global NAPs claims that both in-bound internet service provider (ISP) traffic and terminating ESP traffic are under the exclusive jurisdiction of the Federal Communications Commission (FCC) according to a recent 8th Circuit case as well as a Nebraska federal case.¹ Global NAPs requests that this docket be dismissed and that the disputed issues be referred to the FCC.

As for the procedural posture of the case, Global NAPs seeks an evidentiary hearing. It claims that other parties take issue with the proposed stipulated fact number 9, that "Global NAPs does not originate traffic" and therefore it concludes that an evidentiary hearing is

¹ Global NAPs does not provide citations to these cases in its pleading.

required. Global NAPs contends that the case revolves around the nature and type of traffic exchanged and that a host of legal arguments are premised on the nature and origin of the traffic.

III. COMMISSION ANALYSIS

A. Stipulated Facts

This case presents an example of a proceeding in which one party clearly benefits from delay. This case also highlights the numerous ways in which pre-trial motions and other procedural devices can frustrate the speedy resolution of a dispute. Despite our efforts to streamline this proceeding by establishing a set of stipulated facts that would obviate an evidentiary hearing and form the basis for moving directly to the briefing of the relevant legal issues, we find the process stymied as a result of Global NAPs' renewed requests for an evidentiary hearing arising out of Union Telephone's reluctance to stipulate to proposed fact number 9 as identified at a technical session held on July 9, 2008.

Global NAPS stated in a letter dated July 16, 2008 that there should be a factual hearing with respect to proposed fact number 9, i.e., "Global NAPs does not originate traffic." It followed up on July 24, 2008 with a motion for an evidentiary hearing in which it reported that general concurrence was reached on a number of peripheral issues. Nevertheless, with respect to fact number 9, Global NAPs stated that "[a]lthough this is just one of the noted factual disagreements of the Parties, it is indicative of the need for an evidentiary hearing. The gravamen of Global NAPs case revolves around the nature and type of traffic that is exchanged." *Motion for Evidentiary Hearing* p. 2.

Through an abundance of procedural caution and seeking to avoid a potential due process claim, on July 30, 2008, we directed Global NAPS to address specifically each of the 25 proposed stipulated facts that had been circulated among the parties. In its objection filed on

August 4, 2008, Global NAPs further refined its position on the stipulated facts, creating new subcategories for: admit, admit with explanation, admit in part and deny in part, deny, and deny with explanation. Despite our instruction to describe evidence supporting its objections, Global NAPs either admitted certain facts, or had no evidence upon which to deny other facts. In its objection Global NAPs also proposed additional stipulated facts.

Having reviewed Global NAPs' claims and the opposing views of the TDS Companies, the Rural ILECs and FairPoint, we conclude that proposed fact number 9 shall be stricken as a stipulated fact. We agree with the TDS Companies that the "deletion of the challenged fact simply leaves the proposed stipulation silent on the matter, without raising any implication concerning the origination of traffic by GNAPs." *Joint Petitioners' Opposition to Respondent's Motion for an Evidentiary Hearing*, (July 30, 2008), p.4.

We also conclude that Global NAPs, despite the further refinements of its position in its August 4, 2008 filing, did, in fact, stipulate to the remaining 24 facts emanating from the July 9, 2008 technical session. Global NAPs' agreement to the stipulated facts is evidenced by the statements of counsel in the letter of July 16, 2008, in which Mr. Rooney identified only a single disputed fact, and the motion of July 24, 2008, in which Mr. Scheltema again noted only a single disputed fact, while acknowledging general concurrence on the others.²

In its August 4, 2008 objection, Global NAPs also "denied" the parties' proposal to admit discovery responses and attached exhibits into evidence, which is enumerated as fact number 24.³ Fact number 24, however, is not a fact, but rather an agreement among the parties as to the procedure for admitting discovery materials into the record. We will hold Global NAPs

² Global NAPs attached the proposed 25 stipulated facts as exhibit C to its motion for evidentiary hearing.

³ Global NAPs objection responds to the revised stipulated facts attached as exhibit A to the TDS Companies objection to Global NAPs motion for evidentiary hearing. In the revised stipulation contained in exhibit A the fact originally included as fact 9 was deleted leaving 24 facts.

to its previous commitment to this procedure as well. We remind the parties that our rules provide that a discovery response “offered into evidence by a party other than the party that provided the response, shall be treated as an admission of the party that provided the data response.” N.H. Admin. Code R. Puc 203.23 (i).

In its objection, Global NAPs proposed some additional stipulated facts which it numbered 26 through 30. These facts were not part of the original stipulation and contain both legal and factual conclusions. We deny Global NAPs’ request to add these additional items to the list of stipulated facts.

We invite all parties to brief the issues presented in this docket using the remaining 24 stipulated facts as they appear in Exhibit A to the TDS Companies’ July 30, 2008 objection to Global NAPs’ motion for evidentiary hearing. We anticipate that briefs may also refer to discovery responses. We will review the briefs and determine whether to grant or deny the TDS Companies’ petition or, if we determine that additional facts are required in order to make a determination, we will set an evidentiary hearing.

B. segTEL Intervention

segTEL is a CLEC registered to provide service in some areas of New Hampshire. A decision concerning intercarrier compensation between ILECs and CLECs in New Hampshire may impact segTEL. As a result, we find that segTEL’s “rights, duties, privileges, immunities or other substantial interests” may be affected by this docket and we will allow segTEL’s late intervention request. *See*, RSA 541-A:32. As a late intervenor, segTEL must accept the procedural posture of this docket at the time of this order.

C. TDS Companies' Motion to Compel

The TDS Companies ask that we order Global NAPs to respond to five data requests referred to as: TDS:Global-7 (restated in TDS:Global-22), TDS:Global-21, TDS:Global-23 and TDS:Global-26.

In deciding a motion to compel discovery responses we must consider whether the information sought will lead to evidence relevant to the issues in the case. New Hampshire RSA 541-A:33, II states in part.

The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received, but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law.

Our rule on evidence incorporates this statutory standard. *See*, N.H. Code Admin. R. Puc 203.23. “[I]n general, discovery that seeks irrelevant or immaterial information is not something we should require a party to provide.” *City of Nashua*, 91 NH PUC 452, 454 (2006).

Requests 7 and 22 seek information concerning the Global NAPs corporate family. The TDS Companies claim that in other jurisdictions Global NAPs has evaded payment obligations by failing to disclose what entities actually control funds and assets and by allowing judgments to be entered against Global NAPs affiliates having no assets. We direct Global Naps to provide a list of all corporate parents and subsidiaries to the four entities named in stipulated fact number 2.⁴ We find this information relevant because it relates to entities associated with the provision or funding of services offered in New Hampshire.

Request 21 seeks information on all judgments entered against Global NAPs in other jurisdictions. Our primary focus in this docket is upon events occurring in New Hampshire. At

⁴ Stipulated fact 2 is found in Exhibit A of the TDS Companies objection to Global NAPs' motion for evidentiary hearing.

this time, information about out-of-state litigation does not appear relevant to this proceeding and we will deny the TDS Companies' motion to compel this response.

Request 23 seeks information on the officers and directors as well as identification of an expert competent to testify on the financial condition of five entities. The first four are the entities named in stipulated fact number 2 and the fifth is Ferrous Miner Holdings, Ltd. We will require Global NAPs to provide information on the officers, directors and an expert competent to testify on the financial condition of the first four entities because those companies are associated with providing or financing services in New Hampshire. We do not find facts linking Ferrous Miner Holdings, Ltd. to New Hampshire service offerings at this time and therefore we will not require Global NAPs to respond as to that entity.

Request 26 seeks information on CLEC-2 and CLEC-3 forms for Global NAPs for the years 2004 through 2007 and, if not filed, for audited financial statements, including balance sheets, income statements and footnotes. We have asked Staff to file a memorandum describing all filings made by Global NAPs with the Commission. We will require Global NAPs to file the requested financial statements for 2004 through 2007 with the Commission for the Global NAPs entity registered as a CLEC in New Hampshire. If Global NAPs seeks confidential treatment of its financial information it should file a motion for confidential treatment with its response. This financial information is relevant to issues of whether Global NAPs is able to pay any past or future access charges in the event we find that such charges are owed for the traffic at issue in this case.

Based upon the foregoing, it is hereby

ORDERED, that Global NAPs' motion for an evidentiary hearing is denied; and it is

FURTHER ORDERED, that Exhibit A to the TDS Companies' July 30, 2008 objection to Global NAPs' motion for an evidentiary hearing shall constitute the stipulated facts for the purpose of briefing the legal arguments in this proceeding; and it is

FURTHER ORDERED, that briefs shall be due on September 29, 2008, and reply briefs on October 6, 2008; and it is

FURTHER ORDERED, that segTEL's intervention request is granted; and it is

FURTHER ORDERED, that the TDS Companies' motion to compel Global NAPs data responses is granted in part and denied in part as described herein and responses are due on or before September 22, 2008.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of September, 2008.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Clifton C. Below
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary