



Palmerton Telephone Company
v.
Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other
affiliates

C-2009-2093336

PENNSYLVANIA PUBLIC UTILITY COMMISSION

2010 Pa. PUC LEXIS 1812

August 3, 2010, Entered; July 29, 2010, Adopted

PANEL: [*1] Commissioners Present: James H. Cawley, Chairman; Tyrone J. Christy, Vice Chairman; John F. Coleman, Jr.; Wayne E. Gardner; Robert F. Powelson

OPINION: Public Meeting held July 29, 2010

OPINION AND ORDER

BY THE COMMISSION:

I. Introduction

Before the Commission for consideration and disposition is the Petition for Reconsideration of Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates (Global NAPs), to our Opinion and Order entered March 16, 2010 (*March 16 Order*).

II. History of the Proceeding

As stated in the *March 16 Order*, the history of this proceeding is very involved and was set forth by the presiding Administrative Law Judge (ALJ), Wayne L. Weismandel, on pages 1-11 of his Initial Decision. We adopted that History, but provided a summary of the proceeding in the *March 16 Order*. We repeat that summary here but with further updates to reflect the developments in this case up to the present.

On March 4, 2009, Palmerton filed a multi-count Formal Complaint (Complaint) with the Commission at Docket No. C-2009-2093336, against Global NAPs. In its Complaint, Palmerton alleged that Global NAPs: (1) has refused to pay tariffed [*2] access charges for interexchange services provided by Palmerton, in violation of 66 Pa. C.S. § 3017(b); (2) has obtained interexchange traffic termination service from Palmerton without submitting an access service request, in violation of Palmerton's tariff; (3) has asserted a bad faith dispute of the carrier access bills (CABs) submitted by Palmerton for termination of traffic; (4) has failed to pay terminating access bills within thirty days of submission of the bill, in violation of Palmerton's intrastate switched access charge tariff on file with the Commission; (5) is operating as an access provider and/or an interexchange carrier (IXC) without certification by the Commission in violation of 66 Pa. C.S. § 1102(a); and (6) is violating its competitive local exchange carrier (CLEC) certificate from the Commission, by failing to maintain its financial and legal fitness.

Simultaneously with its Complaint, Palmerton filed a Petition for Interim Emergency Order (Petition), pursuant to 52 Pa. Code § 3.6, which requested that Global NAPs be required to provide adequate [*3] assurance of payment ability or to pay all outstanding intrastate, interexchange access bills, pending final resolution of this proceeding.

By Opinion and Order entered May 5, 2009 (*May 5 Order*), we directed the presiding ALJ to schedule this matter for expedited consideration with the goal of completing the proceeding on Palmerton's Complaint within 120 days of the entry date of the Commission's Order.

On April 20, 2009, the ALJ issued an Order joining Verizon as an indispensable party in this case.

On May 18, 2009, the ALJ issued an Order Establishing Financial Security directing Global NAPs to provide documentation no later than May 28, 2009, demonstrating that Global NAPs had obtained a surety bond in favor of Palmerton in the amount of \$ 246,108.20, pending a Final Order by the Commission in the underlying Complaint case.

On May 19, 2009, Global NAPs discontinued terminating Voice over Internet Protocol (VoIP) traffic to Palmerton.

On May 26, 2009, the ALJ reduced the amount of the surety bond to \$ 205,972.79 reflecting the fact that Global NAPs is no longer sending VoIP traffic to Palmerton. However, Global NAPs subsequently failed to file the documentation required by the [*4] ALJ.

On May 29, 2009, Palmerton filed a Request for Sanctions against Global NAPs with the ALJ.

By Opinion and Order entered on June 5, 2009, the ALJ issued an Initial Decision Imposing Sanctions which ordered a civil penalty in the amount of \$ 1,000 per day commencing on May 29, 2009, and accruing until such time as Global NAPs provides documentation to the Commission and to Palmerton demonstrating that Global NAPs has obtained a surety bond in favor of Palmerton in the amount of \$ 205,972.79.

On June 10, 2009, Global NAPs filed Exceptions to the Initial Decision Imposing Sanctions, and on June 15, 2009, Palmerton filed Reply Exceptions.

On June 25, 2009, we denied Global NAPs' Exceptions and adopted the ALJ's Initial Decision Imposing Sanctions.

On July 9-10, 2009, hearings were held with respect to the substantive issues of the Complaint.

On July 20, 2009, Palmerton and Global NAPs each filed and served their Main Brief. Also on July 20, 2009, Verizon filed and served a letter stating that it would not be filing a Main Brief.

On July 27, 2009, Palmerton, Global NAPs and Verizon each filed and served their Reply Briefs.

On August 7, 2009, the ALJ issued his Initial Decision: (1) [*5] dismissing Palmerton's Complaint except as applicable to Global NAPs South, Inc.; (2) imposing a civil penalty of \$ 750 on Global NAPs South, Inc. for three violations of the provisions of 52 Pa. Code § 63.36; (3) imposing a civil penalty of \$ 1,000 per day commencing May 29, 2009, through and including the date of a final Commission Order in this case; and (4) issuing a directive that Global NAPs South, Inc. cease and desist from further violations of the Pennsylvania Public Utility Code (Code) and of the Regulations and Orders of the Commission. The Initial Decision set forth sixty-four Findings of Fact and ninety Conclusions of Law.

As noted, on August 31, 2009, Palmerton and Global NAPs filed Exceptions to the Initial Decision. Verizon filed a letter stating that it would not be filing Exceptions.

On September 10, 2009, Palmerton, Global NAPs and Verizon each filed Reply Exceptions.

Subsequently, the Commission entered the *March 16 Order*. In that Opinion and Order, we sustained the Formal Complaint of Palmerton Telephone Company (Palmerton), directed Palmerton to issue a final bill to Global NAPs consisting of all amounts owed for [*6] intrastate interexchange call traffic transported by Global NAPs and terminated at the facilities of Palmerton, and directed Global NAPs to make full payment to Palmerton with appropriate notification to this Commission and the participating parties in this proceeding. Further, we directed Global NAPs South, Inc. to pay a civil penalty of \$ 750 for three violations of the provisions of 52 Pa. Code § 63.36, and imposed a civil penalty of \$ 50,000 on Global NAPs for failure to comply with the ALJ's directive to obtain a surety bond.

On March 29, 2010, Global NAPs delivered a payment of \$ 750 to the Secretary of the Commission for violations of 52 Pa. Code § 63.36.

On March 30, 2010, Global NAPs filed a Petition for Reconsideration of the *March 16 Order*. On March 31, 2010, Palmerton filed a request for an extension of time in which to file an Answer to the Petition. That request was not opposed by Global NAPs, and on April 1, 2010, Palmerton was advised by a letter from the Secretary of the Commission that an extension of time in which to file an Answer to the Petition had been granted until April [*7] 23, 2010.

On April 9, 2010, Verizon filed an Answer to the Petition for Reconsideration.

On April 13, 2010, Global NAPs filed a document entitled, "Supplemental Authority for Petition for Reconsideration."

At its public meeting of April 15, 2010, the Commission adopted an Opinion and Order which granted Global NAPs' Petition pending further review of and consideration on the merits.

On April 16, 2010, Global NAPs filed a document entitled, "Additional Supplemental Authority for Petition for Reconsideration."

On April 21, 2010, Palmerton filed a letter with the Commission stating that Global NAPs had failed to comply with the *March 16 Order* in that Global NAPs had failed to make payment to Palmerton for Palmerton's final bill submitted to Global NAPs.

On April 23, 2010, Palmerton filed its Answer to Global NAPs' Petition.

On April 29, 2010, Global NAPs filed a document which it characterized as a "Reply to Palmerton's Answer to Global NAPs' Motion [sic] for Reconsideration." On May 12, 2010, Palmerton filed a letter request that Global NAPs' Reply be disregarded as procedurally impermissible.

On June 25, 2010, Palmerton filed a copy of the Opinion and Order of the Public Utilities [*8] Commission of Ohio (PUCO) in the case of *Matter of the Complaint of AT&T Ohio v. Global NAPs, Ohio, Inc.*, Case No. 08-690-TP-CSS (entered June 9, 2010). On June 30, 2010, Global NAPs filed a letter requesting that this Commission disregard that PUCO decision as irrelevant to a determination of Global NAPs' Petition.

III. Discussion

A. Introduction

This case began when Palmerton filed a multi-count formal Complaint alleging that Global NAPs: (1) has refused to pay tariffed access charges for interexchange services provided by Palmerton, in violation of 66 Pa. C.S. § 3017(b); (2) has obtained interexchange traffic termination service from Palmerton without submitting an access service request, in violation of Palmerton's tariff; (3) has asserted a bad faith dispute of the carrier access bills (CABs) submitted by Palmerton for termination of traffic; (4) has failed to pay terminating access bills within thirty days of submission of the bill, in violation of Palmerton's tariff; (5) is operating as an access provider and/or an interexchange carrier (IXC) without certification by the Commission, in violation of 66 Pa. C.S. § 1102(a) [*9] ; and (6) is violating its competitive local exchange carrier (CLEC) certificate from the Commission, by failing to maintain its financial and legal fitness. Simultaneously with its Complaint, Palmerton filed a Petition for Interim Emergency Order (Petition) requesting that Global NAPs be required to provide adequate assurance of payment pending final resolution of this proceeding. As adequate assurance, Palmerton requested that Global NAPs either obtain a surety bond or place in a separate irrevocable bank escrow account the amount of \$ 209,483.34.

B. The *March 16 Order*

In sum, the Complaint concerns a dispute over intercarrier compensation involving the termination of certain calls by Palmerton where those calls have been indirectly transmitted to Palmerton by GNAPs. It is beyond doubt that a number of these calls are Voice over Internet Protocol (VoIP) calls. In the *March 16 Order*, we found that Global NAPs' function of transmitting and then indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service, and the Commission has subject matter jurisdiction. GNAPs' fundamental telecommunications service function [*10] is not *altered* by the fact that GNAPs transports a "mix" of traffic including the "unique type" of VoIP calls. n1

n1 Global NAPs is a competitive local exchange carrier (CLEC) authorized to operate in the service areas of various incumbent local exchange carrier (ILEC) telephone companies. ID at 12. Although Global NAPs is not authorized to operate in Palmerton's service area and does not have a direct interconnection agreement with Palmerton, Global NAPs' transported call traffic indirectly terminates at Palmerton's facilities by transiting the network of Verizon Pennsylvania Inc. (Verizon PA), another ILEC. Verizon PA and Global NAPs have an interconnection agreement. *Petition of Global NAPs South, Inc. For Arbitration pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms and Conditions with Verizon Pennsylvania Inc.*, Docket No. A-310771F7000 (Order entered April 21, 2003).

In the *March 16 Order*, we also concluded that the overwhelming weight of both Pennsylvania [*11] and federal legal authority in this matter supports the legal conclusion that Global NAPs is engaged in the provision of common

carrier telecommunications service in transporting VoIP and other types of traffic calls that are not Internet Protocol (IP) based, e.g., conventional wireline voice call traffic transmitted under time division multiplexing (TDM), wireless calls, asynchronous transfer mode (ATM) traffic, etc. The technical fact that Global NAPs accepts, handles, and transports traffic of *various technical transmission protocols* was established at hearing. n2 The fact that Global NAPs handles and transports IP-based traffic does not detract from the overall common carrier telecommunications service which Global NAPs performs. This Commission found in its landmark *Core* decision n3 that the provision of access to information service providers (ISPs) constitutes "telephone exchange service" and, naturally, a telecommunications service. The Commission stated:

We find the FCC's treatment of dial-up access to ISPs to be more consistent with the *Core* position. That is ISPs themselves, are treated as end users of telecommunications services, while the underlying service [*12] they provide to ISP subscribers, Internet access, is information. n4

n2 Global NAPs Witness Mazuret, Tr. 850, 925. For a technical description of the ATM and TDM types of traffic, see Harry Newton, *Newton's Telecom Dictionary*, 20th ed. (CMP Books, San Francisco, CA 2004), at 78 and 834.

n3 *Application of Core Communications, Inc. for Authority to amend its existing Certificate of Public Convenience and necessity and to expand Core's Pennsylvania operations to include the Provision of competitive residential and business Local exchange telecommunications services throughout the Commonwealth of Pennsylvania, et al.*, Docket Nos. A-310922F0002AmA, A-310922F0002AmB, (Order entered December 4, 2006) at 26, *aff'd Rural Tel. Co. Coalition v. Pa. Pub. Util. Comm'n*, 941 A.2d 751 (Pa. Cmwlth. 2008) (*Core Appeal Decision*).

n4 This observation is not to suggest a particular position on the "one-call" versus "two calls" debate associated with ISP-bound compensation litigation.

[*13]

In affirming the Commission's *Core* decision, the Commonwealth Court relied on applicable federal law, stating:

The FCC Pole Attachment Decisions hold that the offering of *transmission path service on a non-discriminatory basis to the public by a common carrier is telecommunications service*. The FCC Pole Attachment Decisions confirm that internet service is an information service, but that the *transmission path* needed to provide that internet service *is a telecommunications service if the transmission path service is offered to the public by a common carrier*. Thus, the Commission was correct in determining that transmission path service is a telecommunications service *under state and federal law*.

Core Appeal Decision, 941 A.2d at 758 (emphasis added). n5

n5 The Commonwealth Court relied on the following FCC decisions: *In the matter of Fiber Technology Networks, L.L.C. v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-014, 22 FCC Rcd 3392, 2007 FCC LEXIS 1593 (February 23, 2007); *In the matter of DQE Communications Network Services, LLC v. North Pittsburgh Telephone Company*, FCC File No. EB-05-MD-027, 22 FCC Rcd 2112, 2007 FCC LEXIS 1066 (February 2, 2007) (collectively, FCC Pole Attachment Decisions).

[*14]

In the *March 16 Order*, we also concluded that the Commission has subject matter jurisdiction over the intercarrier compensation dispute in this case. The overwhelming majority of available legal authority clearly indicates that both state utility regulatory commissions and various courts have adjudicated intercarrier compensation disputes involving Global NAPs in a number of jurisdictions. The related adjudications took place even though these intercarrier compen-

sation disputes involved the common carrier exchange of VoIP traffic between Global NAPs and other telecommunications service providers. These state utility regulatory commissions and courts conducted these adjudications by asserting the appropriate subject matter jurisdiction over these intercarrier compensation disputes. The fact that the underlying traffic exchanged between Global NAPs and other telecommunications carriers was of the VoIP type did not prove to be determinative of subject matter jurisdiction for these regulatory bodies and courts, nor did it become an insurmountable legal barrier.

Similarly, the fact that the FCC has not yet made definitive pronouncements in its long pending but still unresolved proceedings [*15] relating to intercarrier compensation and the proper classification of IP-based services, including VoIP, did not detract from the adjudication of intercarrier compensation disputes involving Global NAPs by the majority of the state utility regulatory commissions and courts of proper jurisdiction.

Costs attach to the termination of *any type of traffic* that Palmerton receives, and such costs do not "magically disappear" when the traffic includes VoIP calls whether those are of the nomadic or fixed type. Under the existing and so far unaltered premises of both Pennsylvania and federal law, Palmerton deserves compensation for the traffic that it terminates at its facilities.

Furthermore, indirect transmission of such traffic by Global NAPs to Palmerton constitutes a telecommunications service that falls squarely within this Commission's jurisdiction under applicable Pennsylvania and federal law. Pennsylvania's Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, 73 P.S. § 2251.1, *et seq.*, established the Commission's jurisdictional boundaries over VoIP or IP-enabled services. 73 P.S. § 2251.4 [*16]. The Act clearly provides that the Commission retains jurisdiction over "[s]witched network access rates or other intercarrier compensation rates for interexchange services provided by a local exchange telecommunications company." 73 P.S. § 2251.6(1)(iv). And it is the question of "switched network access" that is at issue here for the Palmerton public switched telephone network (PSTN) facilities and the Global NAPs traffic that these facilities terminate. *See also 66 Pa. C.S. § 3017* ("Refusal to pay access charges prohibited. -- No person or entity may refuse to pay tariffed access charges for interexchange services provided by a local exchange telecommunications company.").

In the *March 16 Order*, we also determined that the Commission has *intrastate* subject matter jurisdiction. The fact that Global NAPs transports and indirectly terminates traffic that may have initially originated in IP, inclusive of nomadic VoIP, is largely immaterial to this analysis on whether this Commission has subject matter jurisdiction and whether the appropriate jurisdictional intercarrier compensation should apply. [*17] The available evidence fails to establish that the nomadic VoIP traffic that Global NAPs receives from other entities is somehow already or becomes "enhanced" (significantly changed in form and/or contents)."

In the *March 16 Order*, we also found that based on the case-specific evidentiary record, Palmerton adequately relied on the NPA/NXX origination and termination of the intrastate interexchange call traffic at issue for the jurisdictional classification and billing of such traffic. Such reliance is generally consistent and does not undermine the *Core Appeal Decision* in some other but still rather important respects. *Core Appeal Decision*, 941 A.2d at 758 and n.10 (classification of NXX codes and local calling areas).

With respect to the special traffic study that was carried out by Palmerton in this case, we found that while the study may lack the appropriate degree of statistical validity to be fully representative of terminating traffic patterns at Palmerton's facilities for the full time horizon of the intercarrier compensation dispute at issue, that traffic study should significantly and materially affect the outcome of this proceeding. [*18] Palmerton's special study provided specific information on the various types of entities (e.g., ILEC, CLEC, wireless telecommunications carriers, and cable companies) that had their intrastate interexchange calls transported by Global NAPs and indirectly terminated at Palmerton's PSTN facilities. Consequently, we found in the *March 16 Order* that the special traffic study is of adequate probative value to draw the appropriate inferences regarding the indirect termination of traffic by Global NAPs at Palmerton's facilities and the intercarrier compensation regime that should apply.

The *March 16 Order*, also considered broader issues of regulatory policy. In our *May 5 Order*, we noted that, if "certain competing telecommunications carriers pay intercarrier compensation for VoIP traffic termination, while others take the position that they may avoid such payments for the termination of similar traffic, there can be an anticompetitive environment that artificially and inimically transmits inaccurate price signals to end-user consumers of telecommunications and communications services." *May 5 Order* at 8-9. One of the statutory policy directives in Chapter 30 of the Public [*19] Utility Code mandates this Commission to:

Promote and encourage the provision of competitive services by a variety of service providers *on equal terms* throughout all geographic areas of this Commonwealth without jeopardizing the provision of universal telecommunications service at affordable rates.

66 Pa. C.S. § 3011(8) (emphasis added).

We held in our *March 16 Order* that it is obvious that a telecommunications carrier that needs and obtains Palmerton's intrastate carrier access services at the prescribed jurisdictional rates that the carrier then pays to Palmerton will be competitively but artificially disadvantaged if another carrier obtains the same Palmerton carrier access services and pays no intercarrier compensation.

We found that in view of the specific facts that have been presented, Global NAPs' non-payment of intrastate carrier access charges to Palmerton cannot be condoned as a matter of law and as a matter of sound regulatory policy. This conclusion is based on existing Pennsylvania and federal law and this Commission's subject matter jurisdiction to resolve intercarrier compensation disputes.

C. Global NAPs' Petition for Reconsideration

The standards [*20] for granting a Petition for Reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553 (1982). A Petition for Reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under the Public Utility Code to rescind or amend a prior order in whole or in part. Parties cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them. What we expect to see raised in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission. Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

We note that any issue, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider [*21] expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also see, generally, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

From the outset, we find that Global NAPs fails to meet the *Duick* standard in every particular. Global NAPs has not presented newly discovered evidence, has not alleged errors of law, nor has it established a change in circumstances that warrant reconsideration. After careful review of the Petition, it is inescapable that Global NAPs is attempting to have us review and reconsider the same questions which were specifically decided against Global NAPs in our *March 16 Order*. The Commission would be acting entirely within its discretion to summarily dismiss the Petition on these grounds. That being said, and given the significance of this case, we will make the following observations with respect to the Petition and Global NAPs' claims stated therein.

n6 Anticipating Global NAPs' argument on this point, our profound disagreement with Global NAPs with respect to the state of the law in this controversy does not rise to an "error of law." Unquestionably, a deep rift exists between those that find that indirect transmission of traffic by Global NAPs to Palmerton constitutes a telecommunications service for which compensation should be paid, and those who seek to characterize that traffic in such a way as to avoid state jurisdiction and/or the payment of compensation.

[*22]

In its Petition, Global NAPs asserts that reconsideration of the *March 16 Order* should be granted because: (1) persuasive precedent issued subsequently is contrary to conclusions and findings in the Order, (2) the Order makes incorrect statements about the precedents cited therein, (3) significant factual errors or omissions are present in the Order, and (4) factual developments since issuance of the Order justify reconsideration. Global NAPs also claims that the Order also creates uncertainties concerning the amount, if any, to be paid by Global NAPs to Palmerton. Petition at 1-2.

In support of its first proposition, that persuasive precedent issued subsequent to the briefing is contrary to conclusions and findings in the *March 16 Order*, Global NAPs cites two cases: *Paetec Communications Inc. v. CommPartners, LLC*, Civil Action No. 08-0397 (D.C. Cir. Memorandum Order Filed February 18, 2010) n7 (*Paetec*),

and *Proposed Order In The Matter Of The Investigation, Examination And Resolution Of Payment Obligation Of Global NAPs - Maryland, Inc. For Intrastate Access Charges Assessed By Armstrong Telephone Company - Maryland*, Case No. 9177 (December 30, 2009). Global NAPs [*23] points to the Memorandum Order in *Paetec* for authority that there is an information services exemption from access charges for all VoIP traffic except that which begins in Time-Division Multiplexing (TDM). n8 Petition at 2-3, citing *Paetec* at 7.

n7 In its Answer, Palmerton makes the sound point that *Paetec* is an unreported Memorandum Order and so may not be relied upon for precedential value. Palmerton Answer at 5.

n8 The *Paetec* decision refers to other federal cases as persuasive, *Southwestern Bell v. Mo. Pub. Serv. Comm'n*, 461 F.Supp.2d 1055, 1081-2 (E.D. Mo. 2006) and *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F.Supp.2d 993, 999-1001 (D. Minn. 2003).

Not surprisingly, *Paetec* is another case decided by a federal court that, in the admitted absence of definitive action by the FCC, comes down on the side of exemption from access charges for VoIP traffic. This is, however, no different from the arguments set forth by Global [*24] NAPs, previously. There is nothing novel in *Paetec* that would incline us to reconsider the *March 16 Order*. Global NAPs also invokes the Proposed Order of a Maryland Public Service Commission hearing examiner as nearly identical to those Findings of Fact and Conclusions of Law of our own ALJ in this case, which Findings and Conclusions we either rejected or extensively modified in our *March 16 Order*. n9 Petition at 3-5. Global NAPs does not explain why, having rejected a very similar analysis by one of our own ALJs, we should now reconsider and reverse the *March 16 Order* on the basis of a *Proposed Order* by a hearing examiner in another jurisdiction. In sum, the cases cited by Global NAPs bring nothing new to this controversy. They are merely "make weight," that contain no new or novel argument and only serve to reiterate the same issues which were specifically decided against Global NAPs in our *March 16 Order*.

n9 *Proposed Order In the Matter of the Investigation, Examination and Resolution of Payment Obligation of Global NAPs-Maryland, Inc. for Intrastate Access Charges Assessed by Armstrong Telephone Company -- Maryland* (December 30, 2009).

[*25]

In its second proposition, that the *March 16 Order* makes incorrect statements about the precedents cited therein, Global NAPs contends that we should grant reconsideration because none of the federal court or state commission proceedings the Commission cites serve as valid support for its rulings on Global NAPs' liability for Palmerton's tariffs. Petition at 9. We disagree. It is Global NAPs that is misapplying cases or is misreading our analysis.

Global NAPs cites a case before the New Hampshire Public Service Commission (NH PSC), *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009), which was referred to in the *March 16 Order*. Global NAPs, which in support of its first proposition would have us rely on a hearing examiner's *proposed* order, takes the Commission to task for considering an order adopted but later suspended by the NH PSC. We believe that it was and remains appropriate to have considered the NH PSC case in setting forth our reasoning with respect to this case.

In its Petition, Global NAPS circles back to the case of *Complaint of TVC Albany, Inc. d/b/a [*26] Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case No. 07-C-0059 (NY PSC March 20, 2008) (TVC), which Global NAPs relied on previously and which we rejected in our *March 16 Order*. Petition at 7. Again, Global NAPs shows us nothing new with respect to TVC that we did not consider and reject in our *March 16 Order*.

Similarly, Global NAPs challenges our reference to the *Order of the Georgia Public Service Commission Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision*, Docket No. 21905 (July 29, 2009), in our *March 16 Order* because we missed "two salient facts" with respect to payment calculation in that case. Petition at 7-8. However, we cited the Georgia Commission case in our jurisdictional analysis, not with respect to payments.

Global NAPs argues that in our *March 16 Order*, we inappropriately relied on *Global NAPs Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 73 (1st Cir. 2006), claiming that the *ISP Mandate* referenced in that opinion has been affirmed in the D.C. Circuit, n10 so under the *Hobbs Act*, a decision by the First Circuit cannot [*27] be used to collater-

ally attack a D.C. Circuit Court decision. Petition at 8. We believe that Global NAPs is going very far afield here. We believe that the reasoning in *Global NAPs Inc. v. Verizon New England, Inc.*, was and remains correct, and our *March 16 Order* is not a "collateral attack," on a D.C. Circuit Court decision. This Commission is not the arbiter of a disagreement between two federal courts. It just so happens that we believe that the First Circuit has applied the appropriate analysis to the jurisdictional issue.

n10 *Core Communications, Inc. v. FCC*, Case No. 08-1365 (Decided Jan. 12, 2010).

Global NAPs claims that our reference to *Verizon New York Inc. v. Global NAPs, Inc.*, 463 F.Supp.2d 330, 342 (E.D.N.Y. 2006) is made to support an implication that we make that the Judge in that case ordered Global NAPs to pay access charges on VoIP traffic. Petition at 8. No such implication is made in the *March 16 Order*.

Global NAPs also questions our reference in the [*28] *March 16 Order* to two cases: *In re AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, et al.*, WC Docket Nos. 03-133 and 05-68 (FCC Rel. February 23, 2005), Order and Notice of Proposed Rulemaking, FCC 05-41, *slip op.*, and *In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361 (FCC Rel. April 21, 2004), Order, FCC 04-97, *slip op.* Global NAPs argues that the "enhancements" referred to in those cases are distinctively different from those that Global NAPs claims distinguishes its traffic in the present case. In its Petition, as in the case below, Global NAPs again asserts that specific enhancements performed on Global NAPs' traffic, including removal of background noise, insertion of white noise, insertion of computer developed substitutes for missing content, and added capacity for the use of short codes to retrieve data during a call provide a benefit to the end-user by altering the information the caller transmits. Petition at 9-10. Once again, we believe that Global NAPs' highly selective reading of these cases is overly restrictive so [*29] as to attempt to allow Global NAPs to evade state jurisdiction and the responsibility for compensating Palmerton.

Global NAPs' contention that the *March 16 Order* contains factual misstatements or omissions is, in itself, so flawed as to be without merit and certainly does not support reconsideration. For example, Global NAPs claims that the first misstatement is that Global NAPs never offered to pay any compensation for its traffic, citing the *March 16 Order* at page 32. Petition at 11. The word "offer" or "offered" does not appear at page 32 of the *March 16 Order*. What the Order says is that, "The evidentiary record is clear that GNAPs has not paid *any* access charges to Palmerton" (emphasis in original).

Global NAPs next makes this statement:

An outdated statement in the order is that Global never offered to reach a direct interconnection agreement with Palmerton. (Order, 34-35). In fact, Global sent the attached letter on February 12, 2010 and has received the attached reply. Global filed this letter with the Commission on March 19, 2010.

Petition at 11.

First, the *March 16 Order* does not state, "that Global never offered to reach a direct interconnection [*30] agreement with Palmerton." The *March 16 Order* states:

GNAPs could have approached Palmerton in order to initiate good faith negotiations for a traffic exchange agreement encompassing the subject of IP-enabled traffic. This has not happened.

At the time of the entry of the *March 16 Order*, the Commission's statement was entirely accurate. This attempted manipulation and patent distortion of the *March 16 Order* by Global NAPs is all too indicative of the level of probity in the Petition. n11

n11 As Palmerton states in its Answer, contrary to Global NAPs' claim, this request for interconnection does not render the Complaint case "moot." Any relief that Global NAPs may obtain from an interconnection arbitration is prospective and has no retroactive impact. Palmerton Answer at 3.

Not surprisingly, Global NAPs also takes issue with our discussion of the Palmerton traffic study in the *March 16 Order*. Petition at 11-12. In that Order, we clearly recognized the limitations of that study, but as before, [*31] Global NAPs would have us disregard the study entirely. This we decline to do. Again, Global NAPs has advanced no new and novel arguments, not previously heard or considerations not taken into account in our *March 16 Order*.

In its Petition, Global NAPs makes a final attempt to meet the *Duick* standard by describing a change in circumstances. Global NAPs offers the following:

As stated above, Global has offered to negotiate interconnection with Palmerton. This action should result in one of two outcomes. If the parties agree to interconnect, it should render the Commission's Order moot because the parties will negotiate an appropriate payment for Palmerton's billed minutes. Alternatively, if Palmerton rejects the offer, the Commission must consider the appropriate relief in a situation where a carrier decides to bill a CLEC tariff charges instead of interconnecting as required by 47 U.S.C. § 251.

Petition at 12.

It is a complete answer to the foregoing statement to label it for what it is: sheer conjecture with respect to a possible future event. This is not a change in circumstances. Further, it is not clear how this contention is [*32] in any way relevant to the past conduct of Global NAPs which is the subject of the Palmerton Complaint.

Global NAPs also cites another future event: resolution by the FCC of Global NAPs' *Petition for a Declaratory Ruling and for Preemption of the Pennsylvania, New Hampshire and Maryland State Commissions*, Docket WC No. 10-60 (Filed March 5, 2010) to consider the effect of the FCC's 2004 *Vonage* ruling on the viability of imposing intra-state tariffs on VoIP traffic, and to determine whether to preempt the *March 16 Order* which, of course, had not even been entered when Global NAPs filed its request for preemption with the FCC. Petition at 13. On the basis of that preemption filing, Global NAPs states that we should consider suspending any order against Global NAPs until the requested FCC decision is rendered. Petition at 13. We decline to do so.

Finally, Global NAPs claims that the *March 16 Order* is unclear with respect to the Commission's direction to Global NAPs to pay Palmerton, "all amounts owed for intrastate interexchange call traffic transported by Global NAPs and terminated at the facilities of Palmerton Telephone Company," as set forth in the *March 16 Order* [*33] , Ordering Paragraph No. 5 at 60. Petition at 13-14. Palmerton's Answer is an appropriate response to this contention by Global NAPs:

Early in this proceeding, Palmerton presented its bill as an exhibit (Palmerton Exhibit 3 - Revised), which represents the intrastate portion of the outstanding bill and upon which the Commission relied in setting the surety bond amount. As of the date of that exhibit, May 1, 2009, the amount of \$ 192,594.32 was due and owing. At the entry of the Commission's *March 16 Order*, Palmerton updated its Exhibit 3 to reflect the additional late fees (using the tariff late payment rate) and presented a Final Bill in the amount of \$ 193,063.38. Global NAPs then sent a letter to Palmerton expressing "puzzlement," which (intentional) misconceptions were addressed in Palmerton's reply letter. These documents are self-explanatory and attached hereto.

There is no ambiguity over the appropriate billing method contained in the Commission's Order.

We find that prior management or movement of a call communication is not dispositive of its jurisdictional classification when, as here, the NPA/NXX origin and termination of the call are clearly intrastate on [*34] the basis of available billing information, associated

technologies, and established industry practices for the purposes of establishing the appropriate level of intercarrier compensation.

Based on the case-specific evidentiary record, we find that Palmerton adequately relied on the NPA/NXX NXX origination and termination of the intrastate interexchange call traffic at issue for the jurisdictional classification and billing of such traffic. Such reliance is consistent with the *Core Appeal Decision* in some other but still rather important respects. *March 16 Order* at 42 and 43.

That prescribed billing method was followed by Palmerton in submitting the Final Bill to Global NAPs. Global NAPs owes Palmerton, as of the Final Bill rendering, \$ 193,063.38. The Final Bill does not include interstate charges and payment for interstate services is not sought. No reformulation of the bill is required. What is necessary is that Global NAPs pay the amount.

Palmerton Answer at 4.

We agree. As stated in the *March 16 Order*, Global NAPs is to make full payment to Palmerton Telephone Company with appropriate notification to this Commission and the participating parties in this [*35] proceeding. *March 16 Order*, Ordering Paragraph No. 6 at 60.

D. Filings Subsequent to Palmerton's Answer of April 23, 2010

On April 29, 2010, Global NAPs filed a document which it characterized as a "Reply to Palmerton's Answer to Global NAPs' Motion [sic] for Reconsideration." On May 12, 2010, Palmerton filed a letter request that Global NAPs' Reply be disregarded as procedurally impermissible.

On June 25, 2010, Palmerton filed a copy of the Opinion and Order of the Public Utilities Commission of Ohio (PUCO) in the case of *Matter of the Complaint of AT&T Ohio v. Global NAPs, Ohio, Inc.*, Case No. 08-690-TP-CSS (entered June 9, 2010). On June 30, 2010, Global NAPs filed a letter requesting that this Commission disregard that PUCO decision as irrelevant to a determination of Global NAPs' Petition.

None of the filings submitted by Palmerton or Global NAPs after the filing of Palmerton's Answer on April 23, 2010, are procedurally appropriate. Our Regulation at 52 Pa. Code § 5.572 does not contemplate or permit additional filings after the filing of an Answer to a Petition for Reconsideration. While we acknowledge that counsel for Global [*36] NAPs made reference to 52 Pa. Code § 1.2(c) n12 in filing the "Reply to Palmerton's Answer to Global NAPs' Motion [sic] for Reconsideration," we decline to waive the limitations and to expand Section 5.572 in this case because the "Reply," is nothing more than a re-hash of: (1) the same arguments that Global NAPs has been making throughout this proceeding, and (2) the continued prediction of a successful result (for Global NAPs) in the FCC pre-emption proceeding based on Global NAPs' head-count of commenters. With respect to the filing of the PUCO decision of June 9, 2010, by Palmerton, while we do not agree with Global NAPs that the decision is entirely irrelevant, there has been no showing by Palmerton as to why we should apply 52 Pa. Code § 1.2(c) to accept the filing. Our proceedings are governed by our procedural rules, but even with the application of "liberal construction," there must come a point at which the filing and cross-filing of pleadings and arguments must end. On the basis of the record before us, that end-point came on April 23, 2010, with the filing of Palmerton's Answer to Global NAPs' [*37] Petition for Reconsideration.

n12 "The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party." We note that 52 Pa. Code § 1.2(d) states: "These liberal construction provisions apply with particularity in proceedings involving pro se litigants." While not exclusively applicable to pro se litigants, we do not agree with Global NAPs that consideration of the "Reply" is necessary or appropriate to properly consider and resolve this matter, for reasons stated, above.

IV. Conclusion

Based upon the foregoing discussion, Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates have failed to meet the standards for granting a Petition for Reconsideration set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 et al., 56 Pa. P.U.C. 553 (1982); [*38] **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Reconsideration of Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates of the Commission's Opinion and Order at this docket entered March 16, 2010, is denied consistent with this Opinion and Order.

2. That Global NAPs shall make full payment to Palmerton Telephone Company with appropriate notification to this Commission and the participating parties in this proceeding as required by our Opinion and Order entered March 16, 2010.

3. That if Global NAPs shall not make the payment to Palmerton Telephone Company in accordance with Paragraph No. 2 above, this matter shall be referred to the Law Bureau of the Commission for investigation and further action as deemed necessary.

BY THE COMMISSION

ORDER ADOPTED: July 29, 2010

ORDER ENTERED: August 3, 2010

Legal Topics:

For related research and practice materials, see the following legal topics:

Communications LawInternet ServicesCommunications LawTelephone ServicesLocal Exchange CarriersRatesEnergy & Utilities LawUtility CompaniesGeneral Overview