

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

DT 08-028

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

JOINT PETITIONERS' REPLY BRIEF

October 6, 2008

Submitted on behalf of:

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

By:

PRIMMER PIPER EGGLESTON & CRAMER PC

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JOINT PETITIONERS' INITIAL BRIEF

NOW COME Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc. (collectively, the "TDS Companies" or "Joint Petitioners") and, in accordance with Order No. 24,894 of the New Hampshire Public Utilities Commission ("Commission"), submit their Reply Brief in the above-captioned proceeding. The Joint Petitioners oppose the procedural and jurisdictional arguments raised by the Respondent, Global NAPs, Inc. ("GNAPs"), in its Initial Brief dated September 29, 2008 (the "GNAPs Brief", and urge the Commission to reject those arguments for the reasons stated hereinafter. The Joint Petitioners respectfully ask that the Commission rule in favor of the TDS Companies in this proceeding and grant them the relief they have requested in this Docket.

I. Argument

- A. Despite repeated requests to do so, GNAPs provided no factual record upon which to base its assertions that the Commission lacks jurisdiction to hear and decide this case.**

In its Initial Brief, GNAPs asserts that "there has been no hearing, no sworn testimony that has been presented for cross-examination, no opportunity for Global to present evidence even on the single most salient issue: the nature of the traffic that Global exchanges with Fairpoint. . . which is subsequently sent by Fairpoint to the Independents." GNAPs Initial Brief, at 2 (emphasis added). GNAPs characterizes the procedural posture of this case as "the Commission's denial of due process" and "the Commission's unwillingness to have a complete factual record." *Id.*, at 3. The TDS Companies disagree with these mischaracterizations, which are an 11th-hour attempt by GNAPs to delay and obstruct the proceedings in this case.

In fact, GNAPs had several opportunities, when presented with specific, repeated requests for information from the other Parties in this case, to create a factual record concerning the nature of the traffic at issue here and to identify witnesses competent to testify concerning such facts. GNAPs not only failed to present any supporting facts, but indeed GNAPs denied having any knowledge that would provide the foundation for admissible evidence concerning the nature of the traffic that GNAPs transports on its network. Moreover, at no time has GNAPs identified a single witness competent to testify on those issues, or indeed on any matters at all, even when specifically directed by the Commission to identify such witnesses. From the GNAPs data responses, the Commission could reasonably find that GNAPs would be wholly unable, at an evidentiary hearing, to offer any admissible evidence whatsoever in support of its claims. An evidentiary hearing in such circumstances would be a waste of the Commission's and the Parties' time. The Commission should rightly conclude that GNAPs' request for such hearings is merely another element of GNAPs' strategy to delay and obstruct the proper outcome of this case.

The Procedural Schedule in this case allowed several opportunities for GNAPs to establish the facts that would support its legal position. The discovery record shows that the Joint Petitioners, the Staff, the NHTA Intervenors, the Union Intervenors, and FairPoint all specifically asked GNAPs to establish the factual basis for its legal and jurisdictional claims concerning the so-called "ESP Exemption." In each instance, GNAPs not only failed to establish any supporting facts but denied having knowledge of such facts.

In the first round of discovery, the Joint Petitioners asked the following questions, and GNAPs provided the following responses, presented here in their entirety:

TDS:Global-1: With reference to the diagram [circulated by GNAPs at the May14th Technical Session], please define the term "Enhanced Service Provider" ("ESP"), as that term is used on the diagram, and explain how each supposed "ESP [that] connects to GNAPs" (as that term is used on the diagram) satisfies such definition.

Reply: Each ESP customer is *self-certified* and has *attested* to its ESP status in a contract with Global NAPs, Inc. It is these same contracts, and same customers, which gave rise to the New York Public service Commission's determination that Global's traffic was VoIP and substantially nomadic. Please refer to the case distributed previously at the Session of May 15, 2008.

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

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

(Emphasis added.)

In an effort to establish whether the GNAPs customers had actually "self-certified," "attested" to and "affirm[ed]" their status as ESPs, the TDS Companies asked the following questions in the second round of discovery, and GNAPs provided the following responses:

TDS:Global-14: In its response to Data Request TDS:Global-2, GNAPs states that "it relies on its customers' affirmations regarding the traffic" as being ESP in nature. Please provide all documents setting forth these "affirmations."

Reply: Such documentation is highly confidential. Notwithstanding these will be provided subject to the Commission's confidentiality provisions. These are being assembled and will be provided as soon as available.

* * * *

TDS:Global-18 Please refer to GNAPs's Response to Data Request TDS:Global-2. Please produce all documents that contain GNAPs's 'customer's affirmations' regarding the classification of their traffic as ESP traffic.

Reply: Refer to the response to #14.

(Emphasis added.) (GNAPs' Responses to the TDS Companies' Follow-Up Data requests are attached here as Exhibit "TDS-5/Part A (Public)" and are admitted into evidence in accordance the Commission's Order No. 24,894, at 6-7.)

Two days after providing the foregoing Response to TDS-Global:14, GNAPs delivered a set of four (4) contracts (the "Four Agreements"), each denominated in its title as a "GLOBAL NAPS, INC. TELEPHONE SWITCH SERVICE AGREEMENT" and submitted with a claim of confidentiality.¹ (The Four Agreements are attached here, under seal, as "Confidential Exhibit

¹ Although the Four Agreements were marked "Confidential" and were attached to a GNAPs e-mail that asserted a claim of confidentiality, GNAPs in fact delivered the Four Agreements to the entire service list, including to Parties with whom GNAPs does not have a Protective Agreement and to many individuals who have not executed

TDS-6 (Part A)" and are admitted into evidence in accordance with the Commission's Order No. 28,904, at 6-7.) No further documentation in response to Data Request TDS-Global:14 has been produced, and the TDS Companies rightly deem the Four Agreements to be "all documents setting forth th[e] 'affirmations'" of GNAPs' customers regarding the customers' traffic being ESP in nature.²

However, contrary to GNAPs' claims, the Four Agreements do not provide "self-certifications" or "attestations" by GNAPs' customers that their traffic is ESP in nature. Instead, as described in the Joint Petitioners' Initial Brief,³ each of the Four Agreements includes only two references to the respective customer's traffic being ESP in nature: first, a description in the preamble that the customer is "an Enhanced Service Provider"; and second, a provision in the "Liabilities" section setting forth the acknowledgement of the signatories that the "Client" (as each contracting customer is referred to in all Four Agreements) is "an Enhanced Service Provider and is providing VoIP services. . . ." But even this "acknowledgement" contains two separate disclaimers by GNAPs: (1) that "Global shall be under no obligation to defend or indemnify Client for claims by third parties arising from the provision of VoIP services" and (2) that "Global makes no representation to Client regarding VoIP services."

the necessary "Schedule 1" protective document. As a matter of law, GNAPs has nullified its claim of confidentiality. See N.H. Admin. Rule Puc 203.08(I). Nonetheless, in deference to GNAPs' wishes and in accordance with the TDS Companies' execution of a Protective Agreement with GNAPs, the TDS Companies file the Four Agreements under seal in furtherance of GNAPs' claim of confidentiality.

² The Joint Petitioners also received, as part of GNAPs' delivery of its Responses to the PUC Staff's Follow Up Data Requests, a letter purporting to be signed by regulatory counsel for one of GNAPs' identified customers. The letter, however, was not referenced in any of the GNAPs Data Responses and so its legal foundation for admissibility has not been established. Although there was no indication in the GNAPs transmittal whether this letter is intended to be confidential, the Joint Petitioners intend to treat the letter as confidential unless advised otherwise by GNAPs.

³ Joint Petitioners' Initial Brief (Sept. 29, 2008), at 16-17.

In none of the Four Agreements are the "Enhanced Service Provider" provisions "certified" or "attested" to in any legally significant way. The Four Agreements are not signed under the pains and penalties of perjury, nor are the signatures notarized or otherwise witnessed. In all respects, the Four Agreements bear every indicia of being "boilerplate" agreements drafted and produced by GNAPs and presented to its customers for their signature.

In its other Data Responses and in the Stipulation of Facts, GNAPs made clear that it could not confirm how its customers' traffic originates because "the call path behind it's [*sic*] ESP customer(s) is opaque to Global."⁴ When asked whether the traffic that GNAPs hands off to FairPoint is data or voice traffic, GNAPs responded: "Global does not perform such analysis. It merely carries the traffic over its packet-switched network."⁵ In the Stipulation of Facts, GNAPs agreed that "Global NAPs has not independently verified and does not independently verify the nature of the traffic being delivered to the Global NAPs affiliated companies."⁶ Thus, GNAPs "does not know the original format of the traffic it receives" and "does not distinguish the format of the traffic it receives."⁷

By its own admission, GNAPs therefore lacks any first-hand knowledge upon which to offer facts concerning the nature of the traffic at issue in this case. Moreover, even if GNAPs had been able to offer such facts, GNAPs has not identified any witness competent to testify concerning the nature of the traffic at issue here or on any other matter. Even after the

⁴ GNAPs Responses to Data Requests TDS:Global-3 and TDS-Global-4, previously submitted as Exhibit TDS-4 to the Joint Petitioners' Initial Brief.

⁵ GNAPs Response to Staff Set 1 Data Request #8, previously submitted as Exhibit TDS-4 to the Joint Petitioners' Initial Brief.

⁶ Stipulation of Facts ¶ 11, at 3. Although GNAPs now refers to "*the Independents'* Proposed Stipulated Facts," *see* GNAPs Initial Brief at 3 (emphasis added), the Stipulation of Facts was developed cooperatively by all the Parties, including GNAPs, during the July 9th Technical Session. Many of the elements of the Stipulation of Facts were initially proposed by the GNAPs representatives at the Technical Session and agreed to by all the Parties.

⁷ Stipulation of Facts ¶¶ 13-14, at 3. *See also* GNAPs Response to Data Request TDS:Global-2, previously submitted as Exhibit TDS-4 to the Joint Petitioners' Initial Brief.

Commission specifically compelled GNAPs, in Order No. 24,894, to identify "an expert competent to testify on the financial condition of the [four GNAPs entities] associated with providing or financing services in New Hampshire," GNAPs failed to do so.⁸

In addition, GNAPs has failed to acknowledge, let alone refute, the evidence that the TDS Companies offered in their data responses to substantiate their claims for access payments from GNAPs. Indeed, GNAPs erroneously asserts, in its Initial Brief, that "[t]here is no evidence in the record regarding the traffic at issue."⁹ But in fact, in Exhibits attached to their Responses to the Staff's Data Requests Staff-TDS-1-1 and Staff-TDS-1-2, the TDS Companies provided

- (1) a sample calculation of the access charges billed to GNAPs for traffic terminating in the Wilton exchange in January 2008 (Attachment to Data Response TDS-Staff-1-1, Part A);
- (2) the applicable pages from Wilton Telephone Company's interstate and intrastate access tariffs showing the rates being charged for the GNAPs traffic (Attachment to Data Response TDS-Staff-1-1, Part B); and
- (3) a sample of call detail records ("CDRs") showing traffic terminated to the TDS Companies from GNAPs on March 8, 2008 (Confidential Attachment to Data Response TDS-Staff-1-2, Parts A-E).¹⁰

In addition, in Exhibits attached to their Responses to GNAPs' Data Request (Set 1) GNAPs-TDS-1-1, the TDS Companies provided GNAPs with:

⁸ See Global NAPs, Inc.'s Responses to Supplemental Discovery from TDS and/or the New Hampshire Public Utilities Commission Staff (submitted Sept. 23, 2008) (attached hereto as Exhibit TDS-5, Part B (Public)).

⁹ GNAPs' Initial Brief (Sept. 29, 2008), at 3.

¹⁰ The TDS Companies' Responses to the Staff's First Set of Data Requests were previously submitted as Exhibit TDS-3 with the Joint Petitioners' Initial Brief. The three referenced attachments are submitted herewith as follows: Public Exhibit TDS-5 (Part C) contains the two-part Attachment to Data Response TDS-Staff-1-1; and Confidential Exhibit TDS-6 (Part B) contains the 5-part Confidential Attachment to Data Response TDS-Staff-1-2.

- (1) the CDRs for Kearsarge Telephone Company for December 2007, as received from Verizon; and
- (2) a subset of those CDRs showing traffic that both originated and terminated in Area Code 603 (New Hampshire) and with the Operating Carrier Number (OCN) supplied by cross-referencing the originating NPA-NXX codes with information from the Local Exchange Routing Guide ("LERG").¹¹

With these Data Responses and supporting documentation, the TDS Companies demonstrated that GNAPs is terminating interstate and intrastate toll traffic to the TDS Companies in New Hampshire, the traffic is being reported on a routine basis to the TDS Companies through Call Detail Records prepared and submitted to the TDS Companies by Verizon (and now by FairPoint), and the TDS Companies are applying their tariffed access rates to such traffic and billing GNAPs in the ordinary course of business for GNAPs' use of the TDS Companies' networks. There is nothing unusual in any of the records that would have put the TDS Companies or Verizon (and now FairPoint) on notice that GNAPs claimed any legal exemption from such lawful access charges. While GNAPs had ample opportunity, during the course of this proceeding, to question, challenge or refute the evidence submitted by the TDS Companies, GNAPs failed to do so. The Joint Petitioners' evidence remains unrebutted in the record.

Given GNAPs' admitted lack of knowledge concerning what it terms "the single most salient issue" in the case, and its failure to identify any witnesses competent to testify about that issue or to challenge the documentary evidence against it, GNAPs cannot credibly claim that the Commission must conduct an evidentiary hearing to vindicate GNAPs' claims. GNAPs had a

¹¹ The TDS Companies' Responses to the First Set of Global NAPs, Inc.'s Data Requests are attached hereto as Public Exhibit TDS-5 (Part D). The two-part Confidential Exhibit to Data Response GNAPs-TDS-1-1 is attached hereto as Confidential Exhibit TDS-6 (Part C).

fair opportunity to offer relevant facts in support of its arguments and has been unable to do so, despite repeated requests from the Parties and from the Commission. The Commission should rightly find that GNAPs is unable to present evidence either to support its legal position or to refute the evidence presented by the Joint Petitioners. In such circumstances, an evidentiary hearing is not warranted, and the Commission can conclude, from the evidence presented, that the Joint Petitioners are entitled to judgment in their favor and to the relief requested in their Initial Brief.

B. Even if GNAPs had provided evidence in support of its legal claims, the Commission would still have jurisdiction to hear and decide this case, under the standard adopted by the First U.S. Circuit Court of Appeals.

Despite its admitted lack of knowledge as to the nature of the traffic at issue in this case, GNAPs nonetheless asserts that such traffic is jurisdictionally interstate and that the Commission therefore lacks jurisdiction to hear the Joint Petitioners' claims.¹² The Respondent relies for its assertion upon a set of state decisions from outside New Hampshire and federal decisions outside the First Circuit, including, notably, a decision of the New York Public Service Commission.¹³ Notably absent from GNAPs' discussion, however, is the 2006 decision of the First Circuit Court of Appeals in *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d. 59 (1st. Cir. 2006) (the "2006 Verizon Decision"), which the Commission in New Hampshire may rely on as establishing the present state of the federal law in this federal circuit.

¹² GNAPs Initial Brief, at 6.

¹³ *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications v. Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case 07-C-0059, Order Directing Negotiation (N.Y. P.S.C. Mar. 20, 2008) (the "TVC Albany Decision"). See Section I(C) of this Reply Brief, below.

In the *2006 Verizon Decision*, the federal appeals court in Boston rejected GNAPs' argument that the FCC's *ISP Remand Order*¹⁴ pre-empted the Massachusetts Department of Telecommunications and Energy ("MDTE") from requiring GNAPs to pay Verizon tariffed intrastate access charges for non-local ISP-bound traffic originating from Verizon's customers.¹⁵ The Court conducted a thorough examination of the procedural development and posture of the *ISP Remand Order* and reviewed an amicus brief filed in the case by the Federal Communications Commission. The Court concluded that, while the *ISP Remand Order* established a new compensation scheme for *local* ISP-bound calls (i.e., calls placed to ISPs located in the same local calling area as the caller), the FCC had not addressed the application of the *ISP Remand Order* to ISP-bound calls *outside* a local calling area.¹⁶ The Court noted that "[t]he FCC has consistently maintained a distinction between local and 'interexchange' calling and the intercarrier compensation regimes that apply to them, and [has] reaffirmed that states have authority over intrastate access charge regimes."¹⁷ Indeed, that Court observed that the *ISP Remand Order* itself expressly "reaffirmed the distinction between reciprocal compensation and access charges."¹⁸ Accordingly, the Circuit Court affirmed the lower court's judgment that upheld the MDTE's ruling ordering GNAPs to pay access charges to Verizon.¹⁹

The *2006 Verizon Decision* addresses continuing state jurisdiction over originating access charges for ISP-bound traffic, rather than the terminating access charges at issue here. But the

¹⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, CC Docket No. 96-98, 2001 WL 455869 (Apr. 27, 2001) ("*ISP Remand Order*").

¹⁵ *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 75 (1st Cir. 2006).

¹⁶ *Id.*, at 74.

¹⁷ *Id.*, at 73.

¹⁸ *Id.*

¹⁹ The ruling meant that Verizon was lawfully due in excess of \$40 million from GNAPs. *Id.*, at 68 f.n. 6.

Circuit Court's reasoning should apply to both elements of the access regime. In the present case, GNAPs has consistently maintained that its pre-emption argument applies equally to inbound ESP traffic to the TDS Companies and outbound ISP traffic from the TDS Companies.²⁰ In any event, if the New Hampshire Commission is inclined to reach GNAPs' jurisdictional arguments in this case, the Commission should adopt the reasoning of the First Circuit Court of Appeals, which held that the *ISP Remand Order* did not broadly pre-empt state authority over intrastate access charges. Just as the First Circuit Court concluded in the Massachusetts case, GNAPs has failed to present clear evidence here in New Hampshire in support of its legal arguments.

C. The New York Public Service Commission's *TVC Albany Decision*, on which GNAPs relies, is distinguishable from the facts of this case.

While entirely ignoring the First Circuit's 2006 *Verizon Decision* and its application to the intercarrier compensation issues raised in this case, GNAPs has repeatedly emphasized the importance of the New York Public Service Commission's *TVC Albany Decision* to the present dispute.²¹ Indeed, rather than offering facts in its Data Responses to support its legal claims, GNAPs instead relied on the *TVC Albany Decision* as being conclusive for this Commission.²²

In the *TVC Albany Decision*, the New York Public Service Commission (the "PSC") concluded that it was entirely pre-empted from authorizing the imposition of intrastate access

²⁰ See, e.g., GNAPs Response (Mar. 19, 2008), ¶14, at 2 ("Traffic originating from TDS Companies is inbound ISP traffic and traffic terminating to TDS is Enhanced Service Provider traffic. Both are subject to the sole and exclusive jurisdiction of the FCC. The most recent decisions at the 8th Circuit and a later clarification by a Nebraska federal court confirm such jurisdiction and the impossibility of a carrier to practically segregate inter versus intrastate even should this Commission desire to do so as Petitioners have suggested.").

²¹ See footnote 10, above.

²² See, e.g., the Joint Petitioner's Data Request TDS:Global-1, and the GNAPs Response thereto, previously submitted with Exhibit TDS-4 to the Joint Petitioners' Initial Brief, and set out in this Reply Brief on page 4, above.

charges on GNAPs' services in New York State "because the *Minnesota/Vonage Order* and the Eighth Circuit Court of Appeals decision establishes that nomadic VoIP service falls under the exclusive jurisdiction of the FCC."²³ The PSC's decision, however, is not binding on the New Hampshire Commission, and particularly when viewed in light of the First Circuit Court's *2006 Verizon Decision*.

Moreover, the PSC relied on facts not in evidence here. In the present case, despite repeated requests that GNAPs provide all documentation in its possession to support its legal claims, GNAPs offered only the Four Agreements, together with GNAPs' disavowals of its own firsthand knowledge of the nature of the traffic at issue here. By contrast, the PSC in New York reviewed "affidavits from [GNAPs'] customers that send traffic to New York representing that the traffic it handles is VoIP, largely for the benefit of Vonage and other similarly situated providers of interconnected VoIP."²⁴ It is not clear why GNAPs would have withheld such documents from discovery by the Parties and Staff in this case if GNAPs had those documents in its possession. But regardless of the reason, the record before the Commission in this case does not support a finding such as that made by the PSC in the *TVC Albany Decision*.

Finally, the PSC's ruling in the *TVC Albany Decision* did not prohibit the relief sought by the Joint Petitioners in this case. Just as in the *TVC Albany Decision*, the Joint Petitioners here have requested authority to block the further termination of GNAPs' traffic in the Joint Petitioners' exchanges in New Hampshire. The PSC in the *TVC Albany Decision* expressly recognized that, notwithstanding its decision that it was pre-empted from imposing intrastate

²³ *TVC Albany Decision*, slip op. at 14. The New York PSC referenced *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utils. Comm'n*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22404 (2004) ("*Minnesota/Vonage Order*"), *aff'd sub nom. Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

²⁴ *TVC Albany Decision*, slip op. at 14.

access charges on the GNAPs traffic, the PSC nonetheless retained the authority to block GNAPs' traffic if GNAPs failed to compensate the petitioner fairly for the use of the petitioner's network. In the PSC's words:

Our preferred course of action in the first instance is for GNAPs and TVC to enter into private contract negotiations on the rates, charges, terms and conditions for the exchange of nomadic VoIP traffic. . . . Absent a private contract, the Commission will consider TVC's request to discontinue accepting incoming traffic from GNAPs. . . . Should negotiations fail, TVC can renew its request to discontinue service to GNAPs.²⁵

The Joint Petitioners contend that GNAPs' reliance on the PSC's *TVC Albany Decision* is misplaced. GNAPs has failed to demonstrate any basis on which the New Hampshire Commission should determine that the GNAPs traffic is any different from the traffic that terminates every minute of every day in the exchanges of the Joint Petitioners, and for which the Joint Petitioners lawfully charge and receive access payments under their access tariffs. In the absence of a basis on which to distinguish the GNAPs traffic, the Commission should rightly conclude that GNAPs is obligated to pay for the use of the Joint Petitioners' networks at their lawfully tariffed rates, and that GNAPs' continuing failure to do so represents a continuing violation of New Hampshire law warranting decisive action by the Commission.

WHEREFORE, the TDS Companies, as Joint Petitioners in this proceeding, submit their Reply Brief and renew their request to the Commission for the relief described in their Initial Brief.

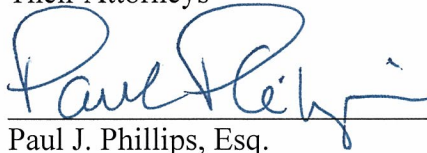
²⁵ *Id.*, slip op. at 16.

DATED at Plymouth, New Hampshire, this 6th day of October, 2008.

Respectfully submitted,

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

By: PRIMMER PIPER EGGLESTON & CRAMER PC,
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A handwritten signature in blue ink, appearing to read "Paul J. Phillips", is written over a horizontal line.

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