

STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DT 10-137

**Northern New England Telephone Operations, LLC
d/b/a FairPoint Communications-NNE
Petition for Authority to Disconnect Global NAPs**

OBJECTION TO MOTION OF GLOBAL NAPs, INC.

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and objects to the Motion of Global NAPs, Inc. (“GNAPs”) Requesting that the Commission Issue an Order to Prevent FairPoint from Disconnecting Global Before Resolution of its Motion to Disconnect (“Motion”). FairPoint has exercised the express contractual provisions under its Interconnection Agreement with GNAPs to demand financial assurances in the form of a cash deposit or a letter of credit. GNAPs did not post the financial assurance demanded (or any financial assurance of any kind in any amount). FairPoint’s demand, in substance, places GNAPs, an entity in receivership, on COD terms. If GNAPs had furnished the cash deposit or letter of credit, FairPoint would have been able to draw against it currently to make sure of being paid for service rendered, after which the financial assurance would then be replenished. By seeking to block the operation of an express contractual provision, GNAPs is requesting relief similar to a preliminary injunction. However, the Motion fails to come close to making the showing necessary for a preliminary injunction.

GNAPs is a company of questionable viability that has been placed in receivership at the request of Verizon New England Inc. (“Verizon”) and Southern New England Telephone

Company (“SNET”).¹ Together, Verizon and SNET are owed more than \$62 million by GNAPs and its affiliates. If FairPoint is not able to put GNAPs on a COD basis, FairPoint simply will never be paid the charges for service rendered -- some of which are not disputed at all, and of those charges which are disputed, are not disputed in good faith. Accordingly, FairPoint respectfully requests that the Commission take no action on the GNAPs Motion.

I. THE GNAPS FILING FAILS TO PROVIDE ANY FACTUAL OR LEGAL SUPPORT FOR THE AMBIGUOUS RELIEF IT REQUESTS.

The GNAPs Motion is yet another example of the misdirection that is the hallmark of its litigation strategy nationwide. The objective is always the same: to obtain service from others without paying for it.

Although styled as a “motion,” the GNAPs filing is an amorphous document that fails to conform to the Commission’s rule Puc 203:07(d) that “[a] motion shall clearly and concisely state: (1) The facts and law which support the motion; and (2) The specific relief or ruling requested.” Instead, it presents no concrete facts and, aside from a few references to rules and cases applying to Commission jurisdiction and control of the docket, it references no law at all that would give the Commission cause to grant the overbroad, unconditional and unspecific remedy of “insisting” that FairPoint “comply with the briefing schedule” and take *no* action against GNAPs until *all* of the issues in DT 10-137 are decided by the Commission.² The Commission can be assured that if GNAPs is granted the license requested, there will be an

¹ See *Global NAPs, Inc. v. Verizon New England Inc.*, No. 02-12489-RWZ, Amended Order for Appointment of Keeper and Receiver (D. Ma. May 13, 2010) (filed in DT 10-137 June 24, 2010).

² See GNAPs Motion at 6.

unending array of issues presented by GNAPs, since this case, like DT 08-028, “presents an example of a proceeding in which one party clearly benefits from delay.”³

In the meantime, while this proceeding creeps forward, charges for continuing service will be added to the stack of past due charges, never to be paid regardless of the outcome of the litigation. GNAPs acknowledged this at the technical session. After GNAPs agreed to stop sending traffic to the TDS companies, the TDS companies inquired about the arrearages. The following exchange ensued:

MR. MURRAY: There's still the question of the arrears, and I'm not sure that's relevant in this whole thing. But --

MS. BAILEY: It sounded to me like he was saying, “if there's no going concern, and they're never going to make money from traffic going to you, you're never going to get paid for that.” That's what I heard.

MR. DAVIDOW: Yes. You are correct.

This same principal applies to the traffic exchanged with FairPoint. GNAPs never is going to pay FairPoint for past due amounts – even the amounts due which GNAPs never disputed. With the above admission made by Attorney Davidow in legal proceedings before this Commission, the Commission now can be assured that: (i) GNAPs has *no ability* to pay FairPoint (or any other entity) for undisputed past-due amounts; (ii) GNAPs has *no ability* to pay FairPoint (or any other entity) for disputed past-due amounts that this Commission finds to be lawfully owed (such as with the TDS companies); and (iii) GNAPs has *no incentive* to cooperate with the Commission in this proceeding or any other proceeding. And yet, anticipating the continuation of its freeride on FairPoint’s network, GNAPs now fancies itself a champion of the Commission’s procedural schedule, asserting that it is acting to preserve the Commission’s jurisdiction and protect the “integrity” of the Commission’s rules and the procedural schedule.

³ DT 08-028, Order No. 24,894 at 5 (Sep. 17, 2008).

Of course, the result for GNAPs is the same: GNAPs gets free service – which ultimately benefits only Verizon and SNET.

Every aspect of GNAPs' argument is wrong.

A. There is no New Theory of the Case.

First, GNAPs asserts that FairPoint has injected a “new” theory into the case. FairPoint has done no such thing. FairPoint had intervened in Docket DT 08-028. At the conclusion of that docket, the Commission had authorized the TDS companies to terminate intraLATA access service to GNAPs and determined that similarly situated incumbent local exchange carriers should file similar motions. This case arises from FairPoint's motion, in accordance with the Commission's directive in DT 08-028, to disconnect GNAPs for non-payment of access charges under applicable FairPoint tariffs. On the other hand, as described in more detail below, the demand for assurances arises under, and is fully in accord with, the interconnection agreement (“ICA”) between FairPoint and GNAPs. The amount of the demand is based not only on anticipated access charges, but also on unpaid charges for collocation, interconnection trunking and SS7 links. As such, it is an independent claim under the ICA with a separate remedy.

FairPoint has followed the applicable ICA provision to the letter. The financial assurances (which GNAPs did not furnish) are intended to place GNAPs on a COD basis for all services, not simply intraLATA switched access.

B. The Demand for Assurances is not a “Bond” for this Proceeding.

Second, the demand for assurances is not demand for a “bond,” at least in the sense that GNAPs is trying to frame it. While a bond would be appropriate for the injunctive relief that GNAPs is requesting, the demand for financial assurances does not rise to that level. Instead, as described in Section 6 of the ICA, it is a classic cash deposit of only two months anticipated

charges that can be drawn upon in case of non-payment. Not only is this provided for in the ICA, it is a common business practice to avoid extending credit to customers who are not creditworthy.

C. FairPoint is not Engaging in Self Help.

Third, FairPoint is not engaging in “self help.” As the term is used by GNAPS, it implies an extrajudicial, unauthorized remedy imposed unilaterally by a party. Contrary to this depiction, FairPoint’s demand is fully in accord with the ICA. Section 6.2 of the ICA provides (with emphasis added) that:

Assurance of payment of charges may be requested by [FairPoint] if GNAPS (a) in [FairPoint]'s reasonable judgment, at the Effective Date or at any time thereafter, *does not have established credit with [FairPoint]*, (b) in [FairPoint]'s reasonable judgment, at the Effective Date or at any time thereafter, *is unable to demonstrate that it is creditworthy*, (c) *fails to timely pay a bill rendered to GNAPS by [FairPoint]*, or (d) admits its inability to pay its debts as such debts become due, has commenced a voluntary case (or has had a case commenced against it) under the U.S. Bankruptcy Code or any other law relating to bankruptcy, insolvency, reorganization, winding-up, composition or adjustment of debts or the like, has made an assignment for the benefit of creditors *or is subject to a receivership* or similar proceeding. (emphasis supplied).

GNAPS clearly meets all of the criteria for a demand for financial assurances under this provision. First, it is in receivership for collection of judgments of over \$57 million in Massachusetts and \$5 million in Connecticut. Second, in the face of an \$18 million judgment in California, it has filed court documents that cast doubt on its creditworthiness and viability as a going concern.⁴ Third, as discussed in the following paragraphs, GNAPS has failed to pay

⁴ See *Global NAPs California, Inc. v. California Public Utilities Commission*, Case No. 10-55827, Petitioner-Appellant’s Unopposed Motion to Stay Appellate Proceedings for 90 Days at 2 (9th Cir. June 23, 2010) (“The Receiver has recently informed the parties that he is currently attempting to sell assets of Global NAPs and its related entities and creating a plan for the possible disposition of Global NAPs and its related operating entities. Thus, it would be an unnecessary expenditure of the Court’s time and resources, as well as an undue burden on Global NAPs, the CPUC, and AT&T, to proceed with this matter until the parties know whether Global

undisputed bills as they come due. Considering these factors, putting GNAPs on a COD basis is highly reasonable and prudent.

GNAPs has accumulated hundreds of thousands of dollars in charges that it has never paid and never disputed, despite ample opportunity. For example, on June 9, 2010, GNAPs was ordered by the Commission to produce, within nine days, copies of the notices it provided to FairPoint concerning the amounts in dispute and the specific details and reasons for disputing each item, as well as evidence of payment of any undisputed charges. Furthermore, it was given an additional twelve days to conduct further research and amend or update its submissions.⁵

In its response of June 11, 2010, GNAPs filed 65 pages of dispute forms, apparently listing all amounts invoiced to GNAPs with a basis for its claim being “Does not match ICA”. This is not good faith; it is obfuscation. The legal argument relating to switched access charges is specious. Moreover, the unpaid charges include not only the millions owed for terminating access but also undisputed charges, not included in any GNAPs submission, for collocation of approximately \$3,400 per month that now aggregate over \$80,000, as well as \$40,000 per month for interconnection facilities to bring GNAPs’ traffic to the POI (as ordered by this Commission at pp. 13-14 of its Order No. 24,087 in Docket DT 02-107 regarding the arbitration of the interconnection agreement) aggregating over \$950,000. GNAPs has not paid, offered to pay or provided financial assurances with respect to any of these services.

NAPs will *continue to be a viable business entity going forward*, and whether it will continue to pursue this appeal.”)(emphasis supplied, internal citations omitted) (attached hereto as Exhibit 1).

⁵ DT 10-137, Order of Notice at 3 (June 9, 2010). Note also that when presented with the demand for assurances, rather than inquire as to the rationale for the amount of the demanded deposit, GNAPs single mindedly responded to the demand letter with a reflexive protest related to access charges. See DT 10-137, Letter from J. Davidow, Counsel to GNAPs, to H. Malone, Counsel to FairPoint (June 23, 2010).

II. THE GNAPS FILING FAILS AS A PETITION FOR PRELIMINARY INJUNCTION.

Stripped bare, the GNAPs filing is nothing more than a simple petition for a preliminary injunction. However, it is understandable that GNAPs has not come right out and labeled it that, since GNAPs comes up short in establishing any of the factors that would support this “drastic and extraordinary remedy.”⁶

Courts consider four factors when deciding if a preliminary injunction is warranted: 1) the likelihood of success on the merits; 2) the potential for irreparable harm if the injunction is not granted; 3) the balance of harms (on the moving party if an injunction is denied and on the non-movant if an injunction issues); and 4) the effect, if any, an injunction would have on the public interest.⁷ The GNAPs filing fails completely on all of these factors.

A. GNAPs has No Likelihood of Success.

First, there is no likelihood of success on the threshold issue of whether FairPoint is entitled to adequate assurances. As FairPoint explained in the preceding discussion, FairPoint is entitled, under the current conditions, to assurance of payment by the clear and unambiguous language of the ICA. It is established that a number of those conditions have been triggered.

Accordingly, by the terms of the ICA, there is no question that FairPoint can demand assurances and disconnect GNAPs if they are not received.

Thus the question is not one of whether FairPoint may demand assurances and disconnect GNAPS if it does not receive them, it is merely one of whether the amount demanded is reasonable. Here, GNAPs is in no better a position. As also explained above, GNAPs owes

⁶ *Murphy v. McQuade Realty, Inc.*, 122 N.H. 314, 316 (N.H. 1982).

⁷ *Matrix Group Ltd., Inc. v. Rawlings Sporting Goods Co.*, 378 F.3d 29, 33 (1st Cir. 2004); *see also Murphy*, 122 N.H. at 316. Moreover, courts typically require a bond, *see, e.g.* NH Sup. Ct. R. 161(c).

FairPoint over \$1 million in undisputed charges for collocation, interconnection trunks and SS7 links, charges that continue to accumulate at the rate of almost \$45,000 per month. At no point does GNAPs claim that it does not owe these facilities charges, or that they have even disputed them. (Curiously, however, the GNAPs filing does describe these charges as “unlitigated” – a statement revealing the GNAPs credo that no bill, however legitimate, is due until, at the very least, GNAPs has been sued for it, has fully litigated the claim, and has lost.) GNAPs ordered these services and used these services, and it has no likelihood of establishing that it does not owe these amounts for them.

As for the disputed access charges for traffic termination, GNAPs relies entirely on its new theory based on the definition of “Internet Traffic” in the ICA. It does so notwithstanding the fact that the Massachusetts ICA between GNAPs and Verizon, under which GNAPs has been found liable for \$57 million in access charges for interexchange calls to internet service providers, has identical language. Therefore, it is clear that the ICA does not support the GNAPs interpretation in this Circuit. Consequently, GNAPs has not come close to demonstrating any likelihood of success on its intraLATA switched access charge claim, much less a reasonable request for two months of charges as a financial assurance.

This should end the inquiry, for while all of the factors for granting a preliminary injunction are important, “when — as in this case — the moving party cannot show a likelihood of success on the merits, then ‘the remaining factors become matters of idle curiosity.’”⁸ However, even if the Commission believes further analysis is required, GNAPs fails on all of the other factors as well.

⁸ Air Line Pilots Assoc., Int’l v. Guilford Trans. Indus., Inc., 399 F.3d 89, 95 (1st Cir. 2005) (citations omitted).

B. GNAPs cannot be Irreparably Harmed.

Even if a likelihood of success on the merits can be demonstrated, the moving party must make a particularized showing of irreparable harm based on “something more than conjecture, surmise, or a party’s unsubstantiated fears of what the future may have in store,”⁹ and there must be no adequate remedy at law for the harm.¹⁰ It is well settled law that the payment of money does not constitute irreparable harm, since an action at law to recover the money is always available.¹¹ However distasteful it may be to GNAPs to let any money leave its coffers, it has adequate means of recovering these payments in the unlikely event that they prove invalid, and thus cannot be irreparably harmed by payment of a lawful deposit.

C. The Balance of Harms Favors FairPoint.

The balance of harms favors FairPoint as well, since to grant an injunction would force FairPoint to continue to provide services, even those with undisputed charges, at no cost to GNAPs. Given the massive judgments against GNAPs in other jurisdictions, and its admission that the Receiver will not pay past due bills,¹² there is no hope that FairPoint would ever be compensated.

D. The Public Interest Favors FairPoint

Finally, the public interest favors FairPoint for, since the Commission has already concluded in DT 08-028 that if GNAPs does not pay for access to the local exchange carrier, those costs must be absorbed by the LEC. “Such a result is untenable where the law is clear that

⁹ Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004).

¹⁰ Murphy, 122 N.H. at 316.

¹¹ “The mere threat of danger which can be quantified and compensated by money damages after it occurs will not form the basis for issuance of an injunction.” R. Wiebush, New Hampshire Practice and Procedure § 19.07 (1997).

¹² *Infra* at 3.

carriers must compensate for such access.”¹³ Or, as the Second Circuit Court of Appeals stated in a New York case against GNAPs,

where a company does not own the infrastructure and is not willing to pay for using another company’s infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.¹⁴

III. IF THE COMMISSION GRANTS THE REQUESTED RELIEF, IT SHOULD AT THE VERY LEAST REQUIRE AN IRREVOCABLE BOND.

If, notwithstanding reasons to the contrary as set forth above, the Commission grants the injunctive relief that GNAPs has requested, then the Commission should conform to normal practice and require an irrevocable bond issued by a financial institution licensed to write surety bonds in New Hampshire. The rules of the New Hampshire Superior Court are instructive in this instance.¹⁵ Rule 161(c) provides that:

Unless the Court, for good cause shown, shall otherwise order, no restraining order or preliminary injunction shall issue except upon the giving of an injunction bond by the applicant, in such sums as the Court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

It is well established at this point that GNAPs is in no position to pay past due charges and FairPoint has no hope of it being paid for any services going forward without adequate assurance of payment. If the Commission will not permit FairPoint to demand a deposit as provided in the ICA, it should at the very least grant it the protection of a bond. Assuming that, like in DT 08-

¹³ DT 08-028, Order 25,043 at 24.

¹⁴ *Global NAPs, Inc. v. Verizon New England, Inc., et al.*, 454 F.3d 91, 103 (2d Cir. 2006).

¹⁵ The Commission has acknowledged in the past that “the Superior Court Rules are not directly applicable to Commission proceedings,” but has still “[found] the standards of the rule[s] to be persuasive.” *Public Service Company of New Hampshire*, DF 84-200, Third Supplemental Order No. 17,307, 69 NH PUC 649 (1984) (applying Superior Court Rule 44 (Depositions)). *See also City of Nashua Petition for Valuation*, DW 04-048, Order No. 24,486 (July 8, 2005) (applying Superior Court Rule 35 (Discovery)).

028, there will be briefs, reply briefs, a Commission Order, and at least one motion for rehearing, FairPoint suggests that this proceeding could take an additional four months, and that its “costs and damages as may be incurred or suffered” will amount to at least four months of charges, or \$788,428. Accordingly, the Commission should require a bond of this amount as an express condition of any requirement precluding FairPoint from taking lawful actions as may be permitted under the terms of the Interconnection Agreement. Absent the posting of a bond within a narrowly defined time frame, such as 48 hours, the Commission should take no action with respect to GNAPs’ request for what amounts to essentially injunctive relief. Should this proceeding take longer than four months, FairPoint would expect this amount to be supplemented.

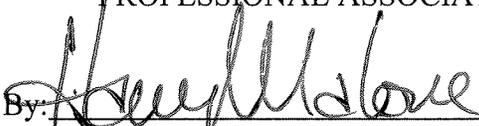
IV. CONCLUSION

For the reasons explained herein, the GNAPs filing is factually incorrect, logically unsound and legally unsupported. FairPoint respectfully requests that the Commission take no action on it. In the alternative, the Commission should condition any ruling granting GNAPs’ relief (in whole or in part) upon the posting of a bond consistent with FairPoint’s arguments contained in Section III above.

Respectfully submitted,

Northern New England Telephone Operations LLC
By its Attorneys,
DEVINE, MILLIMET & BRANCH,
PROFESSIONAL ASSOCIATION

Dated: July 14, 2010

By:  _____

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EXHIBIT 1

Global NAPs California, Inc. v. California Public Utilities Commission, Case No. 10-55827,
Petitioner-Appellant's Unopposed Motion to Stay Appellate Proceedings for 90 Days
(9th Cir. June 23, 2010)

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11
12 **UNITED STATES COURT OF APPEALS**
13 **FOR THE NINTH CIRCUIT**
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15 GLOBAL NAPS CALIFORNIA, INC.,

16 Petitioner-Appellant,

17 v.

18 PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA,

19 Respondent-Appellee.
20
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Case No. 10-55827

D.C. No. CV 09-1927 ODW (PJWx)
U.S. District Court for Central
California, Los Angeles

**PETITIONER-APPELLANT'S
UNOPPOSED MOTION TO STAY
APPELLATE PROCEEDINGS FOR
90 DAYS; DECLARATION OF
YAKUB HAZZARD IN SUPPORT
THEREOF**

22 PACIFIC BELL TELEPHONE
23 COMPANY D/B/A AT&T
CALIFORNIA,

24 Intervenor-Appellee.
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ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
ATTORNEYS AT LAW
LOS ANGELES

1 Petitioner-Appellant Global NAPs California, Inc. (“Global NAPs”), through its
2 undersigned counsel, hereby moves, pursuant to Federal Rule of Appellate
3 Procedure 27 and Circuit Rule 27-1, for an order staying the appellate proceedings
4 in the above-captioned matter for a period of 90 days. Specifically, Global NAPs
5 requests a continuance of all of the appellate proceedings, including but not limited
6 to a continuation of the June 23, 2010 deadline to order the reporter’s transcript,
7 and the July 20, 2010 telephone settlement assessment conference, for a period of
8 90 days.

9 **I. THIS MOTION IS UNOPPOSED**

10 Neither Respondent-Appellee the California Public Utilities Commission
11 (“CPUC”) or Intervenor-Appellee Pacific Bell Telephone Company d/b/a AT&T
12 California (“AT&T”) opposes an order staying all of the appellate proceedings for a
13 period of 90 days. *See* Declaration of Yakub Hazzard (“Hazzard Decl.”) at ¶¶ 5-6.

14 **II. GOOD CAUSE EXISTS FOR A STAY OF APPELLATE**
15 **PROCEEDINGS**

16 Good cause exists for the issuance of a stay because on May 13, 2010,
17 Federal Judge Rya W. Zobel in the District of Massachusetts in *Global NAPs, Inc.*
18 *v. Verizon New England, Inc.*, Civ. A. Nos. 02-12489-RWZ, 05-10079-RWZ (D.
19 Mass.) entered and Order appointing Carl F. Jenkins as the Receiver over Global
20 NAPs’ parent company, Global NAPS, Inc. The Receiver has recently informed
21 the parties that he is currently attempting to sell assets of Global NAPs and its
22 related entities and creating a plan for the possible disposition of Global NAPs and
23 its related operating entities. *See* Hazzard Decl. at ¶¶ 3-4. Thus, it would be an
24 unnecessary expenditure of the Court’s time and resources, as well as an undue
25 burden on Global NAPs, the CPUC, and AT&T, to proceed with this matter until
26 the parties know whether Global NAPs will continue to be a viable business entity
27 going forward, and whether it will continue to pursue this appeal.
28

1 **III. CONCLUSION**

2 For the reasons set forth above, Petitioner-Appellee respectfully requests that
3 the Court grant its Motion to Stay Appellate Proceedings for 90 Days. Specifically,
4 Global NAPS requests a continuance of all of the appellate proceedings, including
5 but not limited to a continuation of the June 23, 2010 deadline to order the
6 reporter's transcript and the July 20, 2010 telephonic settlement assessment
7 conference, for a period of 90 days.

8 RESPECTFULLY SUBMITTED this 23rd day of June, 2010

9 **ROBINS, KAPLAN, MILLER & CIRESI L.L.P.**

10 By: _____/s/_____

11 Yakub Hazzard
12 Jeanine Percival Wright

13 **Attorneys for Petitioner**
14 **GLOBAL NAPS CALIFORNIA, INC.**

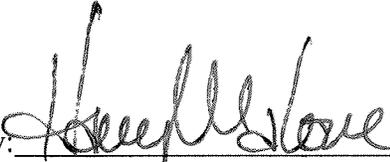
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

Dated: July 14, 2010

By: 

Harry N. Malone, Esq.