

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

DT 08-028

**Hollis Telephone Co., Inc., Kearsarge Telephone Co.,  
Merrimack County Telephone Co. and Wilton Telephone Co.  
Joint Petition for Authority to Block the Termination  
Of Traffic from Global NAPS**

**MOTION TO STRIKE OR IN THE ALTERNATIVE  
DENY OPPOSITION TO MOTION TO DISCONNECT**

Now comes Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE, (“FairPoint”) in response to the Opposition of Global NAPS, Inc., (“GNAPS”) dated May 25, 2010 (“Opposition”) to FairPoint’s Motion to Disconnect Global NAPS, dated May 13, 2010 (“Motion”). Contrary to the Commission’s directive, the Opposition contains little except arguments that the Commission has already considered and rejected, or “evidence” that the Commission has previously acknowledged and dismissed.

Rather than provide a responsive pleading as specified by the Commission, GNAPS has instead presented a document which, in seventeen densely-packed pages, comprises a demand for interconnection agreement (“ICA”) negotiations, a petition for arbitration, a petition to initiate a rate case, a second request for stay, a motion to reopen the record, a motion for preemption, a notice of billing dispute and, most significantly, a Third Motion for Rehearing (notwithstanding the Second having been declared a “nullity.”) For the reasons presented below, FairPoint respectfully requests that the Commission strike or, in the alternative, deny the Opposition.

## **I. THE COMMISSION SHOULD STRIKE THE PLEADING AS NON-RESPONSIVE.**

On November 10, 2009, the Commission issued its Order No. 25,043 (“Order”) in which it ruled in favor of the original petitioners, the TDS Companies. In particular, the Commission found, among other thing, that:

- GNAPS failed in its burden of proving its arguments against the TDS Companies’ claims;
- The TDS Companies demonstrated through record evidence that GNAPS’ traffic travels across TDS facilities to access TDS end-users;
- Despite more than ample opportunity, GNAPS offered no evidence to refute the TDS Companies’ argument that the intrastate traffic in question is identified and treated as exchange access traffic subject to intrastate tariffed access charges;
- GNAPS made no payments under either tariff for the access the TDS Companies provided to terminate GNAPS traffic; and
- Puc 412.19 permits a carrier to disconnect service to a non-residential customer, where that customer has violated a provision of the utility’s approved tariff.

Furthermore, the Commission found it to be “in the best interest of New Hampshire ratepayers and telecommunications carriers alike” to authorize the intervenors in this proceeding to also pursue disconnection of service to Global NAPS within the State of New Hampshire and file motions accordingly.<sup>1</sup> Accordingly, FairPoint filed its Motion for Authority to Disconnect Global NAPS (“Motion”) on May 13, 2010. As provided in the Order, GNAPS filed its Opposition on May 25, 2010.

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<sup>1</sup> Order at 25.

The Order directs GNAPS to provide in its Opposition “*evidence* that it is not in violation of the Commission’s rules,”<sup>2</sup> otherwise, the Commission will authorize the moving carriers to disconnect service to GNAPS under the same 30 day condition as provided for TDS. However, in its Opposition, GNAPS has introduced not a scintilla of evidence that it has not violated the Commissions rules by failing to pay for FairPoint’s tariffed services. Instead, it has merely regurgitated its previous pleadings in this docket, portraying itself as the blameless and misunderstood victim of circumstances. It continues to press for a hearing that has been denied and it proffers, but still does not produce, evidence that GNAPS has promised but withheld throughout the proceeding. As such, its Opposition is abjectly non-responsive to the Commission’s directive that it provide “*evidence*.” As such, FairPoint respectfully requests that it be struck in its entirety.

## **II. THE COMMISSION SHOULD DENY THE OBJECTION ON GROUNDS THAT IT IS AN UNTIMELY *THIRD* MOTION FOR REHEARING.**

Many of the arguments that GNAPS puts forth in its Opposition have already been made by GNAPS in previous submissions (sometimes verbatim) and rejected by the Commission, either in the Order, in the Commission’s Order No. 25, 088, dated April 2, 2010 (“Rehearing Order”), which denied the GNAPS Motion for Stay and Rehearing, dated December 2, 2009 (“First Rehearing Motion”), or in the Commission’s Secretarial Letter, dated April 27, 2010, acknowledging GNAPS’ Motion for Rehearing or Reconsideration and Request for Clarification and Mediation (“Second Rehearing Motion”) and declaring it a “nullity.”<sup>3</sup> By continuing to advance these arguments in its Opposition in disregard of previous Commission action and the

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<sup>2</sup> Order at 26 (emphasis supplied).

<sup>3</sup> It is important to note that GNAPS did not take appeals of the Order or the Rehearing Order to the New Hampshire Supreme Court. Accordingly, these orders are final and not subject to appeal, and all determinations by the Commission within them are *res judicata*.

Commission's directive to provide evidence, GNAPS has in essence filed a *third* motion for rehearing. The Commission should treat this motion as it did the Second Rehearing Motion and declare it a nullity as well.

For example, GNAPS insists throughout its Opposition that the traffic at issue is VoIP traffic, for which it has "unrebutted proof,"<sup>4</sup> and which is outside the jurisdiction of the Commission.<sup>5</sup> However, this argument has been rejected as both contradictory and irrelevant by the Commission. In the Reconsideration Order, the Commission noted that "Global NAPs admits that it does not know the original format of the calls and therefore, cannot be certain all the calls it transports and terminates are VoIP,"<sup>6</sup> and it referred to the Order, in which it found that

[d]espite multiple opportunities to support its arguments with data and information through discovery, technical sessions, and two rounds of briefing, as well as mandated compliance with a Commission order requesting further information, Global NAPs [*sic*] failed to produce any evidence to substantiate its claims that the calls carried over TDS' network are ESP traffic and exempt from access charges."<sup>7</sup>

GNAPS also reiterates its complaint from the First and Second Rehearing Motions that it has proffered relevant evidence that should be considered.<sup>8</sup> Like in the Second Rehearing Motion, it again drags out the Maryland, PAETEC and MetTel cases, in spite of the Commission's recent declaration that the Second Rehearing Motion is a "nullity" and that nowhere does [GNAPS] provide an explanation as to why the information was not available during the course of the proceeding, which as noted in our Order

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<sup>4</sup> Opposition at 6

<sup>5</sup> See, e.g. *id.* at 9.

<sup>6</sup> Reconsideration Order at 1

<sup>7</sup> Order at 23

<sup>8</sup> Opposition at 8.

entailed months of discovery, technical sessions, a set of stipulated facts and filing of two rounds of briefs.<sup>9</sup>

The Commission has already concluded that it will not rely on such “facts,”<sup>10</sup> and it should continue to do so.

GNAPS also attempts to resurrect its discredited effort to shift the burden in this proceeding, complaining that FairPoint “produced no evidence” regarding the nature of GNAPS traffic<sup>11</sup> and that FairPoint has “not yet attempted to negotiate a VoIP rate with GNAPS,”<sup>12</sup> (despite no evidence that the traffic is VoIP.) The Commission has already addressed this issue as well, holding that

Global NAPs confuses the burden of persuasion with the burden of proof and misconstrues our ruling. . . . Rather than withholding evidence germane to the very essence of the argument that its traffic is exempt from any access charges, Global NAPs should have brought that evidence forward in the underlying proceeding. For whatever reason, it did not do so . . . . For these reasons, we confirm that our determination on the burden of proof in this docket was reasonable and lawful.<sup>13</sup>

GNAPS also deludes itself that it is somehow entitled to request another stay, despite its original request for stay, the termination of that stay in the Reconsideration Order, and the rejection of GNAPS’ Second Rehearing Motion. Nevertheless, it attempts to characterize FairPoint’s legitimate demand for payment or disconnection as “pre-judgment relief” and laments the potential harm to GNAPS of disconnection.<sup>14</sup> (Ironically, GNAPS cites loss of revenue as one harm, oblivious to the revenue it has denied FairPoint, TDS and the other

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<sup>9</sup> Reconsideration Order at 14.

<sup>10</sup> *Id.* at 14.

<sup>11</sup> Opposition at 11.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> Reconsideration Order at 17-18.

<sup>14</sup> Opposition at 15-16.

intervenors.)<sup>15</sup> However, the Commission has already considered and rejected GNAPS’ original request, and it should ignore GNAPS’ repeated attempts to argue the balance of harms.

GNAPS also strives to jumpstart another aspect of its Second Rehearing Motion to launch a rate case, claiming almost verbatim that FairPoint must “demonstrate that its rate is based on out-of-pocket costs for terminating GNAPS traffic.”<sup>16</sup> The Commission dismissed this, along with the Second Motion, as a “nullity,” without needing to consider the fact that FairPoint’s charges are based on a valid tariffed rate, and that “out-of-pocket” costs have never been the standard in any known rate case.

Finally, GNAPS reintroduces, also verbatim from its Second Rehearing Motion, the argument that Section 253 prohibits the Commission from allowing FairPoint to disconnect GNAPS and thus impairing its ability to provide service<sup>17</sup> -- as if Section 253 inoculates GNAPS from its payment obligations. This is another argument that the Commission has previously considered and rejected, declaring that

[p]ayment for services rendered, however, cannot be construed as an excessive regulatory burden. . . . Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment is an unjust burden for New Hampshire’s local exchange carriers, and can create unfair market competition where other carriers are paying for those same services.<sup>18</sup>

### **III. THE COMMISSION SHOULD DENY THE OBJECTION AS IRRELEVANT.**

GNAPS has steadily sought to hijack this proceeding by fabricating a number of unrelated issues, and it continues to do so. Some of these issues are old, and have already been

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<sup>15</sup> Opposition at 16.

<sup>16</sup> *Id.* at 15; Second Motion at 21. GNAPS also makes the ludicrous statement that FairPoint’s damages (for non-payment of tariffed charges) should be based on its costs, not its tariffed rates. Opposition at 15.

<sup>17</sup> Opposition at 12.

<sup>18</sup> Order at 18-19.

dispensed with by the Commission, *e.g.* purported lack of evidentiary record, burden of proof, the effect other state proceedings, and Section 253 prohibitions. In its Opposition, GNAPS has also introduced some new issues.

Primary among these is GNAPS' assertion that the ICA governs this dispute because FairPoint's case is "based on the claim that Global has violated the parties' ICA"<sup>19</sup> or, in the alternative, that the ICA is implicated because the traffic at issue is Internet traffic.<sup>20</sup> Numerous GNAPS arguments are rooted in this assertion, namely that this dispute must be brought before Commission in a separate proceeding,<sup>21</sup> that service disconnection is not valid remedy,<sup>22</sup> and that this dispute is governed by the FCC's Internet related orders and rules.<sup>23</sup>

GNAPS is wrong on all counts. In the first case, nowhere in its Motion does FairPoint rely on, or even mention, its ICA with GNAPS. Second, as discussed above, the Commission has repeatedly rejected GNAPS baseless contentions that the traffic is Internet or VoIP traffic. Consequently, any ICA related arguments in the GNAPS Opposition are negated. FairPoint's and the other intervenors' claims are and always have been grounded in their tariffs, which the Commission has found GNAPS to have violated.<sup>24</sup>

There are other minor issues that, altogether, merely amount to chaff tossed into the air to create a diversion. For example, GNAPS complains that FairPoint sends dial up traffic to GNAPS for nothing, but does not aver that it has ever bothered to send FairPoint a bill.<sup>25</sup> It

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<sup>19</sup> Opposition at 12.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> Opposition at 4.

<sup>24</sup> Reconsideration Order at 15.

<sup>25</sup> Opposition at 5.

twists Section 214 of the Communications Act, which deals with the extension of lines and carrier authority, into a bar on the disconnection of individual customers,<sup>26</sup> and states that disconnection for non-payment is a “call blocking” violation.<sup>27</sup> Besides their obvious frivolousness, they are all issues that could have been raised below, and should now be disregarded.

#### IV. CONCLUSION

The Commission has held that

a regulated CLEC such as Global NAPs must abide by the administrative rules of this agency and the tariffs on file. . . . Non-payment for services rendered with respect to intrastate traffic is a violation of the applicable tariffs on file with this Commission. . . . The rules require neither Commission approval nor an adjudicative hearing prior to disconnection.”<sup>28</sup>

As FairPoint established in its Motion, GNAPS has directed traffic to FairPoint’s network and has failed to pay the lawful tariffed charges. FairPoint respectfully requests that the Commission approve the Motion and permit FairPoint to disconnect GNAPS.

Respectfully submitted,

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By their Attorneys,  
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<sup>26</sup> Opposition at 14.

<sup>27</sup> *Id.*

<sup>28</sup> Reconsideration Order at 15.