

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7556

Petition of Global NAPs, Inc. for declaratory judgment)
and request for interim injunctive relief against)
Telephone Operating Company of Vermont, LLC, d/b/a)
FairPoint Communications, for unauthorized billing of)
switched access usage services for termination of voice)
over internet protocol ("VoIP") traffic.)

Order entered: 12/8/2009

ORDER DENYING RECONSIDERATION

I. INTRODUCTION

In this Order, we deny the request of Petitioner Global NAPs, Inc. ("GNAPs") that the Public Service Board ("Board") reverse a procedural order issued by the Hearing Officer in this docket on November 24, 2009 (the "Denial Order"). That Order denied GNAPs' petition for preliminary injunctive relief against Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint"). We affirm the Hearing Officer's decision.

II. PROCEDURAL BACKGROUND

The procedural history in this docket to date is set forth at length in the Denial Order and will not be repeated here. For purposes of this Order, the pertinent procedural details are as follows.

On July 24, 2009, GNAPs filed a petition for declaratory judgment and preliminary injunctive relief against FairPoint.¹ GNAPs' filing was prompted by a letter it had received from FairPoint dated June 15, 2009, in which FairPoint notified GNAPs of FairPoint's intent to cease providing services to GNAPs due to failure to cure certain alleged payment defaults under the

1. The full title of GNAPs' pleading is: *Complaint and Petition for Declaratory Judgment and Request for Interim Injunctive Relief of Global NAPs, Inc. Against FairPoint Vermont, Inc. For Unauthorized Billing of Switched Access Usage Services for Termination of Voice Over Internet Protocol ("VoIP") Traffic*, and is dated July 24, 2009 (hereinafter the "GNAPs Petition").

Interconnection Agreement between FairPoint and GNAPs that has been in effect since February 2003 (the "Interconnection Agreement"), as well as pursuant to a tariff for access services.²

On October 5, 2009, FairPoint filed an answer³ to the GNAPs Petition.

On October 13, 2009, a duly-noticed evidentiary hearing was held on GNAPs' motion for preliminary injunctive relief. At the conclusion of the evidentiary hearing, the Hearing Officer delivered an oral ruling from the bench denying GNAPs' request for preliminary injunctive relief.⁴ At that time, the Hearing Officer stated that a written order would be forthcoming that would elaborate on the oral ruling.

On November 24, 2009, the Hearing Officer issued a written order detailing the following reasons for denying GNAPs' request for preliminary injunctive relief: (1) GNAPs had failed to show that it was more likely than not to succeed on the merits of its claim that it is not liable for certain charges assessed by FairPoint pursuant to the Interconnection Agreement; (2) GNAPs had not sufficiently demonstrated that it will suffer an irreparable injury if preliminary injunctive relief is not granted; and (3) GNAPs did not appear to have exhausted its options "to help itself before seeking the extraordinary equitable relief of a preliminary injunction."⁵

2. GNAPs Petition, Attachment A (Letter from Jeffrey J. Heins, Esq., on behalf of FairPoint, to Joel Davidow, Esq., on behalf of GNAPs, dated June 15, 2009).

3. The full title of FairPoint's pleading is: *Answer of Telephone Operating Company of Vermont LLC d/b/a FairPoint Communications*.

4. Tr. 10/13/09 at 105.

5. Denial Order at 11.

On November 30, 2009, in response to an earlier pleading⁶ filed by GNAPs, FairPoint advised the Board of its view that this proceeding is subject to the automatic stay of the United States Bankruptcy Code.⁷

On December 4, 2009, GNAPs filed a motion appealing to the full Board for a review of the Denial Order.⁸ Among other things, GNAPs maintained that this docket is exempt pursuant to 11 U.S.C. § 362(b)(4) from the automatic stay of the United States Bankruptcy Code.

III. DISCUSSION

In its Reconsideration Motion, GNAPs sets forth three principal arguments for why the Board should reverse the Hearing Officer's determination and grant the requested preliminary injunctive relief. GNAPs argues that the Hearing Officer improperly determined that (1) GNAPs bears the burden of proof in seeking preliminary injunctive relief; (2) the potential harm to FairPoint of granting the injunction was greater than the potential harm to GNAPs of denying the injunction; and (3) GNAPs has made no effort to compensate FairPoint.

The Burden of Proof

GNAPs maintains that the Hearing Officer erred as a matter of law in concluding that GNAPs bore the burden of proof to show that its request for a preliminary injunction should be

6. On November 3, 2009, GNAPs filed a pleading with the following title: *Motion of Global NAPs, Inc. That Public Service Board Should Take Note of FairPoint's Breach of ICA and Accordingly Rescind Authorization for Termination of Interconnection or, Alternatively, to Allow Global to Post a Bond Based on Relevant Rates or Costs*. This unsolicited motion was filed by GNAPs in advance of the issuance of the written Denial Order. This motion remains pending before the Hearing Officer, but appears to have been superceded by the filing of the Reconsideration Motion.

7. Letter from Peter H. Zamore, Esq., on behalf of FairPoint, to Susan M. Hudson, dated November 30, 2009. On October 26, 2009, FairPoint filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Southern District of New York. That matter is now pending before the Hon. Burton R. Lifland in Case No. 09-16335 (BRL).

8. The full title of GNAPs' pleading is: *Emergency Motion for Preliminary Injunction Requiring FairPoint Communications to Continue Interconnection With Global Naps, Inc. Pursuant to an Interconnection Agreement* (hereinafter the "Reconsideration Motion").

granted.⁹ In making this argument, GNAPs fails to acknowledge the Hearing Officer's citation at page 6 of the Denial Order to Board Rule 2.406(D), which provides:

No preliminary injunction may issue unless the petitioner establishes that the irreparable injury which will be caused to it if a preliminary injunction is denied, discounted by the probability that the respondent will prevail in the proceeding on the permanent injunction, will be greater than any injury which the granting of the preliminary injunction will cause to the respondent.

As our preliminary injunction rule indicates on its face, it is GNAPs who bears the burden of proving that issuance of a preliminary injunction is warranted under the circumstances of this case. GNAPs' attempt to avoid the force of this rule by referring to the interconnection mandate of the 1996 Telecommunications Act is unavailing.¹⁰ GNAPs has cited nothing in the 1996 Telecommunications Act that displaces our procedural rules or otherwise suggests that FairPoint bears the burden of proof with respect to GNAPs' request for preliminary injunctive relief.

GNAPs further argues that the Hearing Officer "wrongly assumed" that FairPoint "was entitled to terminate interconnection based on its mere claims of default."¹¹ We find that GNAPs has mischaracterized the Hearing Officer's treatment of the Interconnection Agreement in the Denial Order. The Hearing Officer did not rule on whether FairPoint was entitled to terminate interconnection with GNAPs.¹² Rather, the Denial Order simply describes the parties' respective positions giving rise to their dispute and then concludes that the resolution on the merits of this disagreement "will require the construction of the terms of the Interconnection Agreement between GNAPs and FairPoint."¹³ In particular, at no point has GNAPs specifically identified the relevant provisions of the Interconnection Agreement and demonstrated how these

9. Reconsideration Motion at 4.

10. *Id.* at 4-5.

11. *Id.* at 4.

12. To the contrary, the Denial Order observes that FairPoint is knowingly assuming the risk of liability to GNAPs for wrongful termination under the Interconnection Agreement. *See* Denial Order at p. 9.

13. Denial Order at 8.

support its conclusion that FairPoint lacks authority to terminate service to GNAPs.¹⁴ We therefore decline to reverse the Hearing Officer's determination that GNAPs is not entitled to preliminary injunctive relief because it failed to carry its burden of proof to show a likelihood of success on the merits of its petition and a likelihood of irreparable harm in the event the requested injunction is not issued.

Balancing Harms

GNAPs argues that the Hearing Officer erroneously concluded that the potential harm to FairPoint of granting the preliminary injunction is greater than the potential harm to GNAPs of denying the requested relief.¹⁵ GNAPs contends that it faces an actual, out-of-pocket, monthly loss of \$20,000 in revenues if the preliminary injunction is denied, while FairPoint's potential monthly loss of \$60,000, assuming the preliminary injunction is granted, consists only of an "alleged opportunity cost of losing the chance to earn revenues" from any replacement carrier who may succeed GNAPs.¹⁶

In making this argument, GNAPs fails to fully account for the legal standard the Hearing Officer was obliged to apply in balancing these respective potential harms. Pursuant to Board Rule 2.406(D), the Hearing Officer discounted the potential harm to GNAPs by the probability

14. In fact, while arguing in the course of this proceeding that FairPoint lacks authority for its actions under the Interconnection Agreement, we note the Hearing Officer's observation that GNAPs never sought to introduce this agreement into the evidentiary record. *See* Denial Order at 8 n. 16. GNAPs waited until December 7, 2009, to provide the Board with a hard copy of the Interconnection Agreement. To date, no effort has been made to enter this document into the evidentiary record of this docket.

15. Reconsideration Motion at 6. This, too, is a mischaracterization of the Hearing Officer's decision. Contrary to GNAPs' argument, the Hearing Officer did not find that the potential harm facing FairPoint is greater than the potential harm facing GNAPs. Rather, the Hearing Officer concluded that GNAPs failed to establish that the harm to GNAPs from denying the preliminary injunction will be greater than any injury to FairPoint from granting the preliminary injunction. Denial Order at 10-11.

16. *Id.* GNAPs also appears to argue that FairPoint's alleged \$60,000 monthly loss actually only amounts to \$20,000 because \$40,000 of the monthly charges are unique to GNAPs and would not be incurred by any successor. Reconsideration Motion at 7. This is a question of fact for which GNAPs cites no support in the evidentiary record. That said, there is no need, at this time, to resolve this matter conclusively. Assuming GNAPs is correct on this point, it is of no consequence, as the balance struck by the Hearing Officer did not depend on these specific dollar amounts. Given the combined weight of the other factors that were considered, *see* Denial Order at 10, we conclude that the Hearing Officer acted reasonably in determining that GNAPs has failed to show it faces the greater harm due to the denial of preliminary injunctive relief.

that FairPoint will prevail in defending itself against any request GNAPs may make for permanent injunctive relief.¹⁷ The evidentiary record shows that GNAPs has acknowledged a payment obligation to FairPoint, and, to date, GNAPs has paid nothing toward satisfying that obligation.¹⁸ Given these circumstances, as well as the hardship to FairPoint of carrying a growing receivable while it is in financial distress, we find the Hearing Officer reasonably concluded that FairPoint would likely be able to defend itself on the merits and that the balance of potential harms cut against GNAPs. GNAPs has failed to offer any persuasive argument to the contrary that would justify a different outcome upon our reconsideration.

Significantly, even if GNAPs could show that, on balance, it is at risk for the greater harm if preliminary injunctive relief is denied, the fact remains that GNAPs has neither challenged nor demonstrated error in the Hearing Officer's conclusion that GNAPs faces no irreparable harm if injunctive relief is denied.¹⁹ A showing of "irreparable harm" is the gravamen of the standard for granting the extraordinary remedy of injunctive relief. Therefore, given GNAPs' failure to demonstrate a likelihood of "irreparable harm," neither the particulars concerning the potential harms, nor the balance struck in weighing them is decisive in this case.

GNAPs' Self-Help Efforts

GNAPs maintains that the Hearing Officer incorrectly concluded that GNAPs should be denied preliminary injunctive relief because it "has made no effort to compensate FairPoint for amounts allegedly owed."²⁰ GNAPs insists it "has done everything reasonable to help itself" because it has "indicated a willingness" to negotiate a certain payment rate with FairPoint.²¹

Once again, GNAP's argument rests on a mischaracterization of the Denial Order. The Hearing Officer did not fault GNAPs for making "no effort" to compensate FairPoint. Rather,

17. Denial Order at 10. *See also* Board Rule 2.406(D), cited herein at 3.

18. Denial Order at 4, findings 12 and 13, and at 10-11.

19. Denial Order at 6-7.

20. Reconsideration Motion at 7.

21. *Id.*

the Hearing Officer concluded that GNAPs was asking for extraordinary equitable relief without first having done "all it could" to help itself.²²

As we noted above, GNAPs has acknowledged that it owes FairPoint money for services rendered but has not paid any amount of money toward that debt. We agree with the Hearing Officer that under these circumstances, GNAPs is not in a position to seek the extraordinary remedial relief of a preliminary injunction. Having acknowledged a payment obligation to Fairpoint, GNAPs' expressed "willingness to pay" is not the same as actually paying at least that sum which GNAPs believes is due to FairPoint. As the Hearing Officer correctly pointed out, it is indeed "a time-honored principle of equity jurisprudence that 'one who seeks relief in equity must come to court with clean hands . . .'"²³ For this reason, we decline to conclude that the equities weigh in favor of protecting GNAPs from the consequences of its own apparent failure to help itself first.

The Board's authority to act in view of FairPoint's bankruptcy proceeding

Finally, we note that GNAPs has raised several legal arguments to support its position that this Board is not stayed from taking action in this docket due to FairPoint's pending Chapter 11 bankruptcy proceeding.²⁴ To date, FairPoint has asserted that the automatic stay in fact does apply, but has offered no legal analysis to support this position.²⁵ It is not our intention to intrude upon the administration of FairPoint's Chapter 11 bankruptcy proceeding. Given that we are being asked to enjoin the disconnection of a utility service, this action appears to us to fall within our traditional police powers. To date, FairPoint has not provided a substantive basis for concluding that such regulatory action is not excepted from the automatic stay of the U. S. Bankruptcy Code. In any event, because GNAPs has characterized the Reconsideration Motion as an "emergency motion," and because our decision today is not adverse to FairPoint, we do not believe it is necessary at this time to resolve this issue.

22. Denial Order at 11.

23. Denial Order at 11 (quoting *Savage v. Walker*, 2009 VT 8 ¶10, 969 A.2d 121, 125).

24. Reconsideration Motion at 8-9.

25. Letter from Peter H. Zamore, Esq., on behalf of FairPoint, to Susan M. Hudson, dated November 30, 2009.

IV. CONCLUSION

For the reasons discussed above, we deny GNAPs' request for reconsideration of the Hearing Officer's decision to deny preliminary injunctive relief. This matter is hereby remanded to the Hearing Officer for further proceedings and determinations on the merits.

SO ORDERED.

Dated at Montpelier, Vermont, this 8th day of December, 2009.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David c. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: December 8, 2009

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.