

KILE
GOEKJIAN
REED

 **McMANUS** PLLC
ATTORNEYS AT LAW

1200 NEW HAMPSHIRE AVENUE, NW
SUITE 570
WASHINGTON, DC 20036 USA
202.659.8000 FAX 202.659.8822

OF COUNSEL - SAMUEL V. GOEKJIAN

JOEL DAVIDOW
DIRECT DIAL 202.263.0806
JDAVIDOW@KGRMLAW.COM

June 23, 2010

Harry Malone
Devine, Millimet & Branch
111 Amherst St.
Manchester, New Hampshire
03101

Dear Mr. Malone,

This responds to your letter of June 16, 2010, demanding assurance of payment and threatening a cut off by July 17, 2010. That letter was sent to William J. Rooney, Jr., general counsel of Global NAPs Inc., and copied to me as lead counsel for Global NAPs before the New Hampshire PUC. Global opposes your demand and payment deadline, for the reasons set out below.

It is relevant, at the outset, to retrace the background of this dispute. Global's only business relevant to the payment of FairPoint's bills is delivering internet traffic to New Hampshire. This traffic is delivered from broadband companies, such as Broadvoice, or enhanced service providers, such as Transcom and CommPartners, who transmit either broadband traffic from companies like Vonage or other internet VoIP traffic which they have converted and/or processed.

After FairPoint took over Verizon's interconnection agreement (ICA) with Global in March of 2008, it began to send Global bills for switched access, calculated at tariff rates, for all the traffic it terminated for Global in New Hampshire. Global immediately and regularly protested such bills, explaining that its internet traffic was, due to its nature, not subject to the charges FairPoint sought to impose. Even though both the ICA and the relevant FCC orders referenced in the ICA exempt internet traffic from being subject to tariff rates, FairPoint consistently rejected Global's protests. However, it never informed Global of any reason it had to doubt Global's entitlement to the exemption for internet traffic. Global invoked dispute resolution procedures, pursuant to section 14 of the ICA, a year ago. However, FairPoint replied by unilaterally blocking Global's traffic in Maine and Vermont. FairPoint even blocked Global's dial-up traffic leaving those states, though FairPoint had not and could not claim that Global owed it money for that traffic, which Global terminated for FairPoint. In fact, Global billed FairPoint (rightfully) for terminating such traffic, but FairPoint never paid Global's invoices.

Although Global was convinced that both cut-offs were illegal, *inter alia* because they were carried out in violation of sections 214 and 252 of the Telecommunications Act (TCA), Global

was unable to sue FairPoint for that illegal blocking of its interstate traffic because FairPoint had entered Chapter 11 reorganization.

In New Hampshire, FairPoint chose to intervene in actions brought by various independent telephone companies (ICOs) that did not have ICAs with Global. Subsequently, it moved in the New Hampshire Commission for permission to cut off service to Global based on Global's refusal to pay the access charges FairPoint had billed for terminating the internet traffic Global had sent to the state. Global's motion in opposition to FairPoint's proposed cut off pointed out that FairPoint had ignored the express words of the ICA allowing internet traffic to be billed only at rates promulgated by the FCC. As you know, on June 9, the Commission declined to grant FairPoint's motion for permission to cut off service to Global and instead scheduled a pre-hearing conference and a technical hearing for June 30, 2010.

As we see it, your letter seeks to run away from your discredited contract claim for non-payment and shift to a new demand, namely, for a bond, to assure payment for two months of service, calculated at rates that would apply to Global's traffic if it were not internet traffic and if it were subject to rates for ordinary long distance calls.

Outrageously, you now propose to cut off service to Global two weeks after the pre-hearing conference, apparently regardless of its outcome or of the final outcome. We insist that you first ask the Commission's permission to add this new contention to the issues the Commission should consider. Given that the Commission has scheduled a hearing to determine the issues in dispute here, there cannot be any cut off until you have prevailed on the original issues presented in this dispute, or succeeded in adding this new demand and prevailing on it.

Turning to the merits of your contention, we note initially that the first sentence of section 6 of the contract, "Assurance of Payment" states "upon request by Verizon, GNAPs shall provide to Verizon adequate assurance of payment of *amounts due* (or to become due) to Verizon." Section 6.1. But FairPoint is not "due" the charges it has billed pursuant to tariffed rates. It has billed Global at rates appropriate for terminating landline long distance calls, but Global has sent FairPoint only internet traffic. Section 8.1 of the contract, by its express terms, renders internet traffic immune from the tariff rates at which FairPoint has billed Global's traffic, and permits internet traffic to be billed only at rates allowed by FCC orders and regulations. FairPoint never suggested that there is an FCC-created rate that Global should pay, nor has it ever claimed to have billed Global's traffic at such a rate. Thus, FairPoint has no entitlement to any tariffed payments from Global, non-payment of which could allow it to discontinue service or even demand a bond.

Furthermore, the billed amounts cannot be "due" because they were and are protested. Obviously, amounts are not "due" once they are protested, until the protest is resolved. *See* section 9.3 (stating that a party has to "pay by the due date all *undisputed* amounts") (emphasis added); *See also* section 12, "Default" (stating that a party is in default if it fails to make required payment of "undisputed" amounts under 9.3). The other parts of the contract, sections 9.3, 12, and 14, distinguish between due payments that are in default and protested payments, subject to dispute resolution. Thus, section 6, like sections 9.3 and 12, can only reasonably be read to apply only to non-payment of undisputed bills or undisputed amounts. In this case, as

there is no undisputed amount, no amount can be considered "due." *See* section 9.3, *supra*. Thus, the "assurance of payment" provisions of the contract are inapplicable here and we are back at "Dispute Resolution," which requires a good faith negotiation or a third party resolution of the dispute between Global and FairPoint.

Further, paragraphs 6.2 and 6.8 of the contract leave an important question unanswered. They refer to "Verizon" a giant company, with an impeccable credit rating, the creditworthiness of which is not questioned under the contract. However, FairPoint, the company attempting to take advantage of the clauses, is so insolvent that it had to enter Chapter 11. Paragraph 6.2 does not answer the question of whether it is applicable when both parties are experiencing insolvency of similar type or degree.

Lastly, your letter assumes, incorrectly, that Global is unable to pay its bills as they come due. In truth, as the receivership order provides, Global is permitted to earn money from its internet businesses and to pay its business expenses as they become due. Substantial income is received, and payments pass through the Global companies to vendors every month. In fact, there is no reason to view Global's receivership any differently than FairPoint's bankruptcy. Global has to trust that those overseeing FairPoint's Chapter 11 reorganization will allow FairPoint to pay any bills it owes Global for termination of FairPoint's traffic. There is equal reason for FairPoint to trust that Global will be allowed to pay any bills it owes to FairPoint if Global ever sends FairPoint any traffic that is standard long distance traffic rather than internet traffic.

Sincerely yours,



Joel Davidow

Cc:

Debra Howland
Executive Director & Secretary
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH MD 03301-2429

CERTIFICATE OF SERVICE

I hereby certify that I have caused copies of the foregoing to be served on the attached service list.

Executed this day, June 24, 2010.

A handwritten signature in black ink, appearing to read 'Vi R', is written over a horizontal line.

Victoria Romanenko

State of New Hampshire
Before the New Hampshire Public Utilities Commission

DT 10-137

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

SERVICE LIST

Original + 7 copies + email:

Debra A. Howland
Executive Director & Secretary
N.H. Public Utilities Commission
21 S. Fruit St., Suite 10
Concord, NH 03301-2429
Executive.director@puc.nh.gov

Via email

Lynn Fabrizio, Esq.
Staff Attorney & Hearings Examiner
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301
Lynn.fabrizio@puc.nh.gov

Meredith A. Hatfield
Office of Consumer Advocate
21 S. Fruit Street, Suite 18
Concord, NH 03301-2429
meredith.hatfield@puc.nh.gov

F. Anne Ross,
Director, Legal Division
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301
F.anne.ross@puc.nh.gov

Kathryn M. Bailey
Director of Telecommunications
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301
kate.bailey@puc.nh.gov

David Goyette
Utility Analyst II
NH Public Utilities Commission
21 S. Fruit Street, Suite 10
Concord, NH 03301
David.goyette@puc.nh.gov

Joel Davidow, Esq.
Kile Goekjian Reed McManus PLLC
1200 New Hampshire Ave, NW Suite 570
Washington, DC 20036
jdavidow@kgrmlaw.com

v

Stephen R. Eckberg
Office of Consumer Advocate
21 S. Fruit St., Suite 18
Concord, NH 03301-2429
(603) 271-1174
Stephen.R.Eckberg@oca.nh.gov

William Rooney, Jr., Esquire
Vice President & General Counsel
89 Access Road, Suite B
Norwood, MA 02062
wrooney@gnaps.com

Darren R. Winslow, Controller
Union Communications
7 Central St., PO Box 577
Farmington, NH 03835-0577
dwinslow@utel.com
(for Union Telephone and BayRing)

Peter R. Healy, Esq.
Corporate and Regulatory Counsel
TDS Telecom
525 Junction Road, Suite 7000
Madison, WI 53717
Peter.healy@tdsmetro.com

Robin E. Tuttle
Fairpoint Communications, Inc.
521 E. Morehead St., Suite 250
Charlotte, NC 28202
rtuttle@Fairpoint.com

Debra A. Martone
Merrimack County Telephone Company
PO Box 337
11 Kearsarge Avenue
Contoocook, NH 03229-0337
Debra.martone@tdstelecom.com

Frederick J. Coolbroth
Devine Millimet & Branch
43 North Main Street
Concord, NH 03301
fcoolbroth@devinemillimet.com

Paul J. Phillips, Esq.
Joslyn L. Wilschek, Esq.
Primmer Piper Eggleston & Cramer,
100 East State St., PO Box 1309 Montpelier
VT 05601-1309
(802) 223-2102
pphillis@ppeclaw.com
jwilschek@ppeclaw.com

Michael C. Reed
Manager, External Relations
TDS Telecom
24 Depot Square, Unit 2
Northfield, VT 05663-6721
mike.reed@tdstelecom.com

Chris Rand
Granite State Telephone
600 South Stark Highway
PO Box 87
Weare, NH 03281
crand@gstnetworks.com

Patrick C. McHugh
Devine Millimet & Branch
43 North Main Street
Concord, NH 03301
pmchugh@devinemillimet.com

Michael J. Morrissey
Fairpoint Communications, Inc.
521 E Morehead St., Suite 250
Charlotte, NC 28202
mmorrissey@fairpoint.com

William Stafford
Granite State Telephone
600 South Stark Hwy
PO Box 87
Weare, NH 03281
bstafford@gstnetworks.com

Jody O'Marra
NH Public Utilities Commission
21 S. Fruit St., Suite 10
Concord, NH 03301-2429
Jody.omarra@puc.nh.gov

Kath Mullholand
Segtel Inc.
PO Box 610
Lebanon, NH 03766
kath@segtel.com

Ben Thayer
Bayring Communications
359 Corporate Drive
Portsmouth, NH 03801-2888
bthayer@bayring.com

Amanda Noonan
Consumer Affairs Director
NH Public Utilities Commission
21 S. Fruit St., Suite 10
Concord, NH 03301-2429
Amanda.noonan@puc.nh.gov