

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

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

Plaintiffs,

v.

GLOBAL NAPS, INC.,

Defendant

Case No. DT 10-137

**MOTION REQUESTING THAT THE COMMISSION ISSUE AN ORDER TO  
PREVENT FAIRPOINT FROM DISCONNECTING GLOBAL BEFORE  
RESOLUTION OF ITS MOTION TO DISCONNECT**

On May 13, FairPoint requested permission from this Commission to disconnect Global for non-payment of disputed access charges.<sup>1</sup> This Commission did not grant FairPoint's request, but instead set a pre-hearing conference and technical session for June 30. After the conference and technical session, the Commission set a briefing schedule, with final briefs due by July 26. The Commission determined that the issues the parties would brief pursuant to that schedule would be "whether standard access charges are owed under the terms of the FairPoint-Global NAPs Interconnection Agreement" and "whether the ICA provides an exemption for certain types of traffic,

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<sup>1</sup> Motion for Authority to Disconnect Global NAPs, ¶9 (Filed May 13, 2010) ("FairPoint is due \$4,172,844.58 for terminating access charges applicable to the traffic terminated by GNAPs in exchanges served by FairPoint in New Hampshire."); *See also* FairPoint Motion to Strike (Filed June 4, 2010) at 8 ("GNAPS has directed traffic to FairPoint's network and has failed to pay the lawful tariffed charges.").

including VoIP traffic.”<sup>2</sup> Unwilling to await a ruling on its pending motion, FairPoint embraced a new theory, never mentioned in its motion to disconnect Global and not considered at the hearing. FairPoint now claims that it is allowed to cut off service to Global on July 17, 2010 (before the Commission has received either of the scheduled briefs) based on Global’s failure to provide an “assurance of payment” i.e. a bond. FairPoint only demanded this bond in a letter to Global,<sup>3</sup> written after it filed both its motion to disconnect Global and its motion to strike Global’s opposition to that motion.<sup>4</sup> When asked at the hearing whether it intended to proceed with its cut off FairPoint stated that it did. Given that such an action would deprive the Commission of jurisdiction over the dispute, flout the briefing schedule established by the Commission and constitute self-help by FairPoint, FairPoint’s premature cut off should be prohibited by an order protecting the rights of the parties to this proceeding.

By bringing this dispute to the Commission, in its motion for permission to disconnect Global, FairPoint implied that it would not disconnect Global until the Commission had ruled on that motion. Now FairPoint attempts to deprive the Commission of its jurisdiction over the dispute by concocting a new theory to support its proposed cut off remedy. Thus, in order to retain jurisdiction, as well as to protect Global from suffering serious injury that might not be fully remediable if it ultimately prevailed, the Commission should prevent the proposed termination of service.

The Commission should prevent the proposed cut off not only in aid of its jurisdiction but also to protect the integrity of its rules of procedure and the schedule

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<sup>2</sup> See Staff Report on Technical Session (filed July 1, 2010) at 2.

<sup>3</sup> See Demand for Assurances (dated June 16, 2010).

<sup>4</sup> FairPoint also claims it is entitled to disconnect Global based on unpaid facilities charges it has never before mentioned in its briefs or letters to this Commission. It acknowledged at the hearing that it had never before brought up the issue of its facilities charges.

established in this proceeding. PUC rule 203.15(d)(4) states that the Commission may establish a “procedural schedule to govern the remainder of the proceeding.” The Commission has now established such a schedule, intending that the disputed issues identified by the Commission staff be resolved in accordance with that schedule.

PUC rule 203.32(a) states that the Commission will schedule briefing by the parties “if the commission determines that such briefing would assist the commission in its determination of the issues presented.” Having established a briefing schedule, the Commission has clearly determined it needs to review analysis from the parties in order to determine the appropriate resolution of this dispute. FairPoint, however, attempts to avoid the required briefing by raising new issues which it has not briefed and which it never explained in its petition to disconnect Global.<sup>5</sup>

FairPoint has never had to explain to any tribunal why it was entitled to assurance of payment from Global based on the amount of two months’ worth of disputed access charges and unlitigated facilities charges. Even though the charges on which FairPoint’s requested bond is based include facilities charges, FairPoint never attempted to bring up those charges in its briefs and never defended its entitlement to that portion of the bond. FairPoint and Global also have not yet resolved the issue of whether FairPoint is entitled to access charges under the ICA. The purpose of the briefing and the hearing was to determine the amount that FairPoint is due.

Without a determination of what amount is due, the ICA does not allow a demand for assurances of any unresolved payments. As stated in Global’s letter in reply to FairPoint’s letter demanding assurances, a copy of which was sent to the Commission:

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<sup>5</sup> See fn. 1, *supra*.

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 . . . 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” (referring to 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*. As it has not been determined that Global actually owes FairPoint the tariffed charges it now demands, 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.<sup>6</sup>

Thus it is clear that section 6 can only be triggered by non-payment of undisputed bills or undisputed amounts and cannot apply to a disputed amount that the Commission has not yet considered. Since the issue of the access charges has not been resolved, FairPoint cannot claim it is currently due charges for two months of access service.

Therefore, FairPoint must defend its contention that it is due the newly mentioned two-month bond pursuant to which it seeks to cut off Global and it must make its case in compliance with the briefing schedule set in this proceeding. It certainly cannot cut off service to Global on July 17, as threatened in its pre-hearing demand letter, before any of the scheduled briefs have been submitted in this proceeding. The PUC rules contemplate no such circumvention of established procedures.

In addition to depriving the Commission of jurisdiction and attempting to avoid the procedure established by this Commission for resolution of this dispute, FairPoint’s

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<sup>6</sup> Global’s Letter in Reply to Demand for Assurances (Dated June 23, 2010) at 2-3.

proposed cut off also constitutes a self-help remedy ,which is prohibited by federal telecommunications law.

The FCC has stated that in access charge disputes, carriers “may not engage in self-help actions such as call blocking.” *See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 F.C.C.R. 11629, 11629 (2007).

Federal law also prohibits self-help in disputes over ICA interpretation. Numerous federal cases have held that ICA disputes must be analyzed by the cognizant state commissions before any enforcement of ICAs can begin and before any breach can be remedied. *See e.g. Core Communications, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 344 (3d Cir. 2007); *Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 549 (E.D. Tex. 2004). In *Core*, the Third Circuit held:

[I]nterpretation and enforcement actions that arise after a state commission has approved an interconnection agreement *must be litigated* in the first instance before the relevant state commissions. A party may *then proceed* to federal court to seek review of the commission’s decision or move on to the appropriate trial court to *seek damages for a breach, if the commission finds one*.

*Id.*, at 344 (emphasis added).<sup>7</sup>

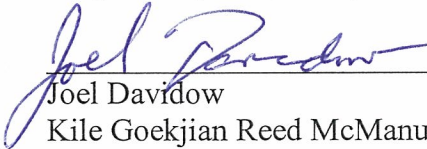
Thus, FairPoint’s claims that Global owes it an assurance of payment, and that it should be permitted to forgo its obligations under ICA due to non-payment of its requested amount, must be litigated before the NHPUC. FairPoint may not proceed to a cut off remedy or abrogation of the ICA until the NHPUC deems it to have prevailed on its theory.

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<sup>7</sup> *See also Z-Tel* at 549, (“Under the Telecommunications Act, state regulatory bodies are charged with making the initial ‘determination’ of any disputes between parties regarding the interpretation and enforcement of interconnection agreements.”)

Given these issues, Global respectfully requests that this Commission insist that FairPoint comply with the established briefing schedule and that it take no action against Global until all of the issues in this dispute are decided by the NHPUC.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Joel Davidow", is written over a horizontal line.

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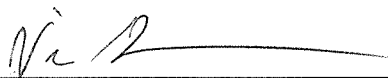
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Dated: July 7, 2010

## **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, July 7, 2010.

  
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Victoria Romanenko

State of New Hampshire  
Before the New Hampshire Public Utilities Commission

DT 10-137

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