

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7493

Amended Joint Petition of Ludlow Telephone Company,)
Northfield Telephone Company, Perkinsville Telephone)
Company, Franklin Telephone Company, Inc., and)
Waitsfield-Fayston Telephone Company, Inc., d/b/a)
Waitsfield Telecom, d/b/a Champlain Valley Telecom,)
seeking: (1) a temporary restraining order against)
Global NAPs, Inc. ("GNAPs"); (2) payment of)
interexchange access charges by GNAPs; and)
(3) revocation of GNAPs' Vermont certificate(s) of)
public good for alleged violations of Vermont law -)

Order entered: 12/7/2009

ORDER DENYING PRELIMINARY INJUNCTION

I. INTRODUCTION

In this Order, I deny the request of the Joint Petitioners¹ in this docket for preliminary injunctive relief to prevent Global NAPs, Inc. ("GNAPs") during the pendency of this proceeding from continuing to terminate traffic on the Joint Petitioners' telecommunications networks in Vermont without paying compensation pursuant to the Joint Petitioners' intrastate access tariffs. My decision to deny the requested preliminary injunction rests on two grounds: (1) the nature of the dispute between GNAPs and the Joint Petitioners' concerns an unsettled area of law that does not permit me to conclude at this stage in this proceeding that the Joint Petitioners are more likely than not to succeed on the merits of their claim for compensation against GNAPs; and (2) the Joint Petitioners have not demonstrated sufficient grounds for me to conclude that they will suffer an irreparable injury if preliminary injunctive relief is not granted.

1. The Joint Petitioners are Ludlow Telephone Company, Northfield Telephone Company, Perkinsville Telephone Company, Franklin Telephone Company, Inc., Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, and Waitsfield -Fayston Telephone Company, Inc., d/b/a Champlain Valley Telecom.

II. PROCEDURAL BACKGROUND

On December 5, 2008, the Joint Petitioners filed a Petition (the "Initial Petition")² with the Board seeking a variety of remedial relief based on alleged bad acts by GNAPs. Among other things, the Joint Petitioners sought a temporary restraining order ("TRO") and a preliminary injunction to enjoin GNAPs from terminating traffic on the Joint Petitioners' networks in order to curtail the growth during pendency of this proceeding of the mounting receivables that the Joint Petitioners argue they are due from GNAPs.

On February 11, 2009, a prehearing conference was convened in this docket. At that hearing, the Joint Petitioners indicated that they would seek to amend the Initial Petition to add more petitioners.

On February 20, 2009, the Joint Petitioners filed a *Motion to Amend Petition To Add Proposed Co-Petitioners* (the "Motion to Amend"). Attached to the Motion to Amend was a proposed amended petition (the "Amended Joint Petition"). In the Amended Petition, the Joint Petitioners present updated factual allegations and reiterate their request for a TRO and preliminary injunctive relief.³

On March 27, 2009, an Order was issued granting the Motion to Amend and denying the Joint Petitioners' request for a TRO.

A duly noticed evidentiary hearing on the Joint Petitioners' motion for preliminary injunction was held on July 28, 2009. The following witnesses appeared and gave sworn testimony: Michael Reed, Manager of State Government Affairs for TDS Telecom; James Scheltema, Esq., a consultant for GNAPs; Susan Martin, Utilities Analyst for the Vermont Department of Public Service; and Corey Chase, Acting Telecommunications Director for the Vermont Department of Public Service.

2. The Initial Petition was accompanied by a separate pleading entitled *Joint Petition for Temporary Restraining Order or Preliminary Injunction Against Global NAPs, Inc.* (hereinafter referred to as the "Joint Injunction Petition"). Attached to the Injunction Petition was a supporting affidavit from Michael C. Reed (the "Reed Affidavit").

3. In filing the Amended Joint Petition, the Joint Petitioners incorporated by reference the Joint Injunction Petition and the supporting Reed Affidavit that were filed with the Board on December 5, 2008, as part of the Initial Petition.

At the conclusion of the hearing, I set a deadline of August 21, 2009, for the parties to file comments with regard to the following issues:

1. "Whether or not money damages are sufficient to make the Petitioners whole. . . ."⁴
2. "[I]f there is a substantial basis for feeling that those monetary damages can[not] or never will be paid or that assets have been removed or eliminated with regard to the ability to attach those for compensation that might be ordered, whether that actually meets the burden with regard to that particular prong of the injunctive test."⁵

On August 21, 2009, the Independents filed a memorandum of law addressing the legal issues for which I requested briefing at the end of the evidentiary hearing on July 28, 2009 ("Joint Petitioners' Injunction Brief.").

On August 26, 2009, GNAPs filed a motion seeking an extension of the August 21, 2009, deadline for filing comments on whether a preliminary injunction order should issue in this proceeding.⁶ That same day, GNAPs also filed a reply brief that responded to the Joint Petitioners' timely filed brief dated August 21, 2009.⁷

Also on August 26, 2009, the Joint Petitioners filed comments opposing the Motion to Extend Time.⁸

III. FINDINGS

The preliminary nature of the relief sought here required an evidentiary hearing without benefit of full-fledged discovery and thereby limited the parties' ability to offer testimony with the thoroughness that is customary in a full hearing on the merits. I do not intend that the

4. Tr. 7/28/09 at 223-24 (Burke).

5. *Id.*

6. *Motion for Brief Extension of Time to File the Reply Brief of Global Naps Inc. to The Memorandum of Law in Support of Motion for Preliminary Injunction of Ludlow Telephone Company, Northfield Telephone Company, and Perkinsville Telephone Company, Inc.*, dated August 25, 2009 (hereinafter "Motion to Extend Time").

7. *Reply of Global Naps, Inc. to The Memorandum of Law in Support of Motion for Preliminary Injunction of Ludlow Telephone Company, Northfield Telephone Company, and Perkinsville Telephone Company, Inc.*, dated August 25, 2009 (hereinafter "GNAPs Reply Brief").

8. *Joint Petitioners' Opposition to GNAPs' Motion to Extend Time*, dated August 26, 2009, at 2 (hereinafter "Opposition to Motion to Extend Time.")

findings below be binding on the parties when this docket reaches a determination on the merits. The parties should have, and they will have, a full opportunity to develop these matters in greater detail later. They should also be prepared to carry their respective burdens, in any hearing on the merits, without reliance upon inadmissible hearsay or factual assertions by counsel.

Based on the evidence of record to date, I hereby make the following findings of fact for purposes of deciding the Joint Petitioners' motion for preliminary injunctive relief.

1. The Joint Petitioners are incumbent local exchange carriers in Vermont who receive traffic from GNAPs via tandem switches owned by Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint Communications" or "FairPoint").

Tr. 7/28/09 at 6 (Reed).

2. GNAPs is a Delaware corporation and a public utility holding a Certificate of Public Good, issued by the Board in Docket 6162 on February 16, 1999, authorizing GNAPs to provide intrastate telecommunications services in the State of Vermont. Docket 6162, Order of 2/16/99.

3. GNAPs transmits traffic all across the United States and terminates or exchanges traffic in many other states besides Vermont. Tr. 7/28/09 at 72 (Reed); tr. 7/28/09 at 166 (Scheltema).

4. GNAPs claims to be an "intermediary carrier" that does not provide originating dial tone service and does not terminate telephone calls other than to the internet. Tr. 7/28/09 at 151 and 160 (Scheltema).

5. GNAPs believes that as an "intermediary carrier" it is not liable to pay intrastate access charges pursuant to the Joint Petitioners' tariffs for intrastate access charges. Tr. 7/28/09 at 146 (Scheltema).

6. The GNAPs traffic reaches the Joint Petitioners' telecommunications networks from the world at large through tandem offices owned by FairPoint Communications and located at various places in Vermont, such as Burlington and White River Junction. From these switches, GNAPs' traffic flows over FairPoint trunks and is handed off at switches belonging to the Joint Petitioners, who then route that traffic over their trunks for eventual termination to their customers. Tr. 7/28/09 at 7-8 (Reed).

7. GNAPs has been billed for access charges by the Joint Petitioners since 2003. Tr. 7/28/09 at 18 (Reed).

8. The Joint Petitioners do not have any interconnection agreements with GNAPs. Tr. 7/28/09 at 6 (Reed).
9. The GNAPs traffic is recorded on call detail records maintained by FairPoint Communications (the "FairPoint CDRs"). Tr. 7/28/09 at 8 (Reed).
10. The Joint Petitioners base their access billings on the FairPoint CDRs. Tr. 7/28/09 at 8 (Reed).
11. The Joint Petitioners use the FairPoint CDRs to create monthly invoices for the carriers whose traffic has been terminated for that period on the Joint Petitioners' networks. Tr. 7/28/09 at 9 (Reed).
12. The charges that are billed monthly are calculated based on the Joint Petitioners' interstate and intrastate tariffs that are on file with the Board and the Federal Communications Commission ("FCC"). Tr. 7/28/09 at 10 (Reed).
13. The Joint Petitioners calculate that GNAPs is incurring between \$8,000 and \$11,000 per month in access charges for using their networks. Tr. 7/28/09 at 27 (Reed).
14. GNAPs has not paid any of the bills for access charges that it has received from the Joint Petitioners since 2003. Tr. 7/28/09 at 18 (Reed).
15. GNAPs effectively has had free use of the Joint Petitioners' telecommunications networks in Vermont since 2003. Tr. 7/28/09 at 18-19 (Reed).
16. The Joint Petitioners are incurring mounting expenses to collect the accrued access charges they believe they are due from GNAPs. Tr. 7/28/09 at 26 (Reed).
17. GNAPs would lose revenues and possibly would lose customers if it were preliminarily enjoined from terminating traffic on the Joint Petitioners' networks.
18. If GNAPs were preliminarily enjoined from terminating traffic on the Joint Petitioners' networks, there are alternate carriers who would step in to facilitate the termination in Vermont of traffic previously handled by GNAPs. Tr. 7/28/09 at 41 and 72 (Reed); tr. 7/28/09 at 210-211 (Chase).

IV. DISCUSSION

Injunctive relief is an extraordinary remedy and is not granted routinely.⁹ Board Rule 2.406(D) 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.

Accordingly, it is the Joint Petitioners who bear the burden of proving that issuance of a preliminary injunction is warranted under the circumstances of this case.

In evaluating whether to grant a request for a preliminary injunction, the Board has set forth the following criteria to be considered:

- (1) the likelihood of success on the merits;
- (2) whether the party seeking relief will suffer irreparable injury if the relief is not granted;
- (3) whether the issuance of an injunction will substantially harm other parties; and
- (4) the location of the best interests of the public.¹⁰

With these principles in mind, I turn to consider the Joint Petitioners' request for preliminary injunctive relief.

Likelihood of success on the merits

At the heart of the dispute in this docket lies a factual question about the nature of the GNAPs traffic that traverses and is terminated on the networks of the Joint Petitioners. The Joint Petitioners have alleged that there is GNAPs traffic that terminates in Vermont, and that this traffic is subject to intrastate access charges under the Joint Petitioners' intrastate access tariffs.¹¹

9. Docket 6331, *Petition of Vermont Department of Public Service for a Board investigation into the business practices of MCI WorldCom, Inc.*, Order of 4/20/00 at 4 (citing *Committee to Save Bishop's House v. Medical Center Hosp. of Vermont*, 136 Vt. 213, 218 (1978)).

10. See e.g., Docket No. 5630, *Investigation of Vermont Electric Cooperative*, Order of 9/10/93 at 4.

11. Joint Injunction Petition at ¶ 21.

GNAPs insists to the contrary that, as an "intermediary carrier," its traffic is specifically exempt from the application of intrastate access charges because it is traffic from an Enhanced Service Provider ("ESP").¹² This factual dispute about the nature of GNAPs' traffic, in turn, raises a question in Vermont in an unsettled area of law concerning inter-carrier compensation.

Inter-carrier compensation is an area of telecommunications policy that in large part is shaped by the Federal Communications Commission ("FCC"). There is presently pending before the FCC a proceeding that is considering the question of whether to impose access charges on ESP or Voice over Internet Protocol traffic.¹³ While to date the FCC has not issued a specific decision on this question, the FCC has offered the following general policy guidance:

[A]ny service provider that sends traffic to the [Public Switched Telephone Network] should be subject to similar compensation obligations, irrespective of whether the traffic originates on the [Public Switched Telephone Network], on an IP network, or on a cable network. We maintain that the cost of the [Public Switched Telephone Network] should be borne equitably among those that use it in similar ways.¹⁴

The FCC's inter-carrier compensation proceeding has been pending since 2001. During that time, several state public utility commissions have been required to examine the question of how to equitably resolve certain inter-carrier compensation disputes, several of which have involved GNAPs and other incumbent local exchange carriers in those jurisdictions. The outcomes have varied.¹⁵ It now appears that this docket will require the Board to put its own

12. Tr. 7/28/09 at 160 and 169 (Scheltema).

13. *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001).

14. *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, released March 10, 2004, at ¶ 33.

15. See, e.g., *Hollis Telephone, Inc., et al.*, DT 08-028, Order dated November 10, 2009 (New Hampshire) (granting permission to disconnect service to GNAPs due to non-payment for access to local networks of incumbent and competitive carriers); *Palmerton Tel. Co. v. Global Naps South, Inc., et al.*, Case C-2009-2093336, Order dated August 7, 2009 (Pennsylvania) (claim of wrongful refusal to pay intrastate access charges dismissed for lack of subject-matter jurisdiction); Docket 21905, *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*; Order dated July 31, 2009 (Georgia) (reversing hearing officer order granting contingent permission to disconnect GNAPs, but otherwise upholding conclusion that access charges were due for intrastate traffic); *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case 07-C-0059, Order dated March 20, 2008 (New York) (directing parties to negotiate appropriate compensation

stamp on this question of whether access charges are due to independent local exchange carriers in Vermont for GNAPs' intrastate traffic. This is an issue of first impression in Vermont. Accordingly, at this early stage in this proceeding, I cannot conclude that the Joint Petitioners are able to demonstrate a likelihood of success on the merits.

The Joint Petitioners' claim for unpaid intrastate access charges depends upon their ability to establish as a matter of fact that the telephone traffic for which they are billing GNAPs is, in fact, intrastate telecommunications traffic that is subject to regulation pursuant to state law. To date, the Joint Petitioners have only produced the FairPoint CDRs to demonstrate the intrastate nature of GNAPs' traffic. The FairPoint CDRs, however, were excluded from the evidentiary record on hearsay grounds after the Joint Petitioners failed to demonstrate grounds for invoking the business records exception to the hearsay rule.¹⁶ Going forward, in the course of conducting discovery and filing direct testimony in this proceeding, the Joint Petitioners may succeed in carrying their burden of proof to establish that GNAPs' traffic is of a nature that warrants the imposition of intrastate access charges pursuant to the Joint Petitioners' intrastate tariffs. But for purposes of granting a preliminary injunction, in the absence of a more robust proffer of factual proof regarding the nature of GNAPs' traffic, I must conclude that the Joint Petitioners have failed to carry their burden of proof in demonstrating the likelihood of success on the merits of their claim for intrastate access charges due from GNAPs pursuant to the Joint Petitioners' intrastate tariffs.

agreement).

16. Tr. 7/28/09 at 11-13 (Reed) and at 14-16 (Burke sustaining hearsay objection). GNAPs' rebuttal evidence with which it has attempted to demonstrate that its traffic is exempt from intrastate access charges has been equally unreliable to date. See tr. 7/28/09 at 112-113 (Scheiterna) and at 119 (Burke sustaining hearsay objection and denying admission into evidence of proposed confidential GNAPs exhibit). The absence of qualified expert testimony from both parties on the technical nature of GNAPs traffic is understandable, given the typically truncated nature of proceedings for preliminary injunctive relief. Presumably the parties will address the need for reliable technical evidence through prefiled testimony and cross-examination at the technical hearings to come on the merits of this case.

Irreparable Harm

The showing of irreparable harm is the "single most important prerequisite for the issuance of a preliminary injunction."¹⁷ Irreparable harm must be shown to be imminent, not remote or speculative, and the injury must be such that it cannot be fully remedied by monetary damages.¹⁸

The Joint Petitioners claim they are being irreparably harmed by GNAPs' failure to pay for the use of their telecommunications networks.¹⁹ The Joint Petitioners allege that GNAPs has incurred and continues to incur charges for the use of the Joint Petitioners' telecommunications networks in Vermont to terminate intrastate and interstate toll traffic to exchanges owned and operated by the Joint Petitioners within Vermont.²⁰ The Joint Petitioners estimate that GNAPs has accrued a debt owed to them in an amount totaling between \$159,471.44 and \$212,012.71.²¹ The Joint Petitioners further estimate that GNAPs continues to amass approximately \$8,000 to \$11,000 per month in new terminating charges.²² According to the Joint Petitioners, these charges have been calculated and billed to GNAPs pursuant to lawful tariffs, but GNAPs nonetheless refuses to remit payment, despite efforts the Joint Petitioners have made to negotiate such payment.²³ The Joint Petitioners allege that GNAPs has a history of engaging in deceptive conduct in other jurisdictions to deprive other carriers of lawful payment for their services.²⁴ The Joint Petitioners further allege that GNAPs has represented under oath in other states that it lacks assets to satisfy its financial obligations to other carriers in those states.²⁵ The Joint

17. *Bell & Howell v. Masek Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983).

18. *See Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989).

19. Tr. 7/28/09 at 26 (Reed).

20. Injunction Petition at ¶¶ 16-19.

21. Amended Joint Petition ¶ 20.

22. Finding 13, above.

23. Joint Injunction Petition at ¶¶ 17-18; Reed Affidavit at ¶ 11.

24. Joint Injunction Petition at ¶ 21.

25. Reed Affidavit at 14.

Petitioners contend that if GNAPs' charges remain unpaid and continue to accrue, then these monies may ultimately have to be recovered from the retail ratepayers of the Joint Petitioners in Vermont.²⁶ Thus, the Joint Petitioners assert that a preliminary injunction is necessary "to prevent further substantial, immediate and irreparable harm or loss" to the Joint Petitioners due to GNAPs' alleged continuing bad conduct.²⁷

The Joint Petitioners further argue that money damages alone will not make them whole. In addition to the alleged arrearages for which the Joint Petitioners are seeking payment from GNAPs in this proceeding, the Joint Petitioners have also sought relief for a variety of alleged legal and regulatory violations by GNAPs of (1) the Joint Petitioners' tariffs; (2) the terms of GNAPs' Certificate of Public Good; (3) the Board's Rules; and (4) the Vermont Utilities and Corporations Acts.²⁸ In essence, the Joint Petitioners argue that GNAPs' alleged record of non-compliance with regulatory requirements and alleged unfair and illegal business practices are harming and will continue to "harm the Joint Petitioners' networks and ratepayers and the public switched telephone network as a whole in Vermont."²⁹ According to the Joint Petitioners, no lump-sum payment-in-full by GNAPs would suffice to cure the commercial harm caused to the Joint Petitioners as a result of GNAPs' failure to pay due compensation for the use of their networks over several years.³⁰

Having carefully reviewed the Joint Petitioners' filings and having also considered the evidence presented at the technical hearing on July 28, 2009, I conclude that the Joint Petitioners have not sufficiently established that they "will suffer irreparable damage" if a preliminary injunction is not granted. Fundamentally, the Joint Petitioners are seeking payment of money allegedly due, and to block GNAPs' traffic in order to "stop the bleeding," because, according to

26. Joint Injunction Petition at ¶¶ 20 and 23.

27. Joint Injunction Petition at ¶ 3

28. Amended Joint Petition at ¶¶ 35-48.

29. Joint Petitioners' Injunction Brief at 7.

30. *Id.*

the Joint Petitioners, "the hope of getting paid is slim to none."³¹ At the evidentiary hearing, the Joint Petitioners' witness, Michael Reed, testified that "the irreparable harm is that we are not receiving money for use of our facilities. Our revenues are short because of that."³² Under further questioning, though, Mr. Reed candidly acknowledged that this harm was not "irreparable" in nature.³³ In the context of injunctive relief, financial harm is generally considered to be reparable after the fact.³⁴

A preliminary injunction may issue to preserve assets as security for a potential money judgment where the evidence demonstrates that a party intends to frustrate a judgment by making it uncollectible.³⁵ Such a demonstration of intent to frustrate a judgment has been held to satisfy the requirement of a showing of irreparable harm.³⁶

I recognize that the Joint Petitioners fear GNAPs will be "judgment proof" against any order the Board may ultimately issue that directs GNAPs to compensate the Joint Petitioners for accrued arrearages. As proof, the Joint Petitioners have pointed to statements GNAPs appears to have made in other legal proceedings concerning its inability to satisfy a judgment in excess of \$50 million in Massachusetts and \$5.25 million in Connecticut. The Joint Petitioners understandably draw the inference that if GNAPs represents that it cannot pay two multi-million dollar judgments, then the company may not be able to pay the sums, if any, that are due the Joint Petitioners. However, Mr. Reed also acknowledged at the evidentiary hearing that there may be legitimate reasons why GNAPs to date has not paid the judgments outstanding in other

31. Tr. 7/28/09 at 68 (Reed).

32. Tr. 7/28/09 at 65 (Reed).

33. *Id.* Furthermore, notwithstanding the arguments to the contrary detailed at page 7 of the Joint Petitioners' Injunction Brief, the evidence adduced at the evidentiary hearing leads me to conclude that the Joint Petitioners' claim of irreparable harm is limited to financial harm. Tr. 7/28/09 at 27 (Reed).

34. *See Campbell Irons, Inc. v. Banholser, Turnure & Co., Inc.*, 148 Vt. 1 (1987); Docket 6331, Order of 4/20/00 at 17.

35. *See Republic of the Philippines v. Marcos*, 806 F.2d 344, 356 (2d Cir. 1986); *Signal Capital Corp. v. Frank*, 895 F.Supp. 62, 64 (S.D.N.Y. 1995).

36. *See In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985); *Signal Capital*, 895 F.Supp. at 64.

jurisdictions.³⁷ Therefore, on balance, I conclude that GNAPs' "ability to pay" remains a matter of speculation at this point in this proceeding, and this Board has previously determined that speculation cannot serve as a basis for granting extraordinary remedial relief.³⁸

The Joint Petitioners have raised numerous troubling concerns about GNAPs' corporate citizenship in Vermont that suggest there may be cause to consider revoking GNAP's Certificate of Public Good as part of the ultimate outcome in this docket. However, neither the allegations of bad corporate citizenship nor the allegations of monetary harm amount to persuasive evidence that any harm GNAPs may be causing is irreparable in nature, or that GNAPs intends to frustrate a judgment in this case.

In sum, for the foregoing reasons, I conclude the Joint Petitioners have not successfully carried their burden of proof to demonstrate a likelihood of irreparable harm absent issuance of a preliminary injunction.

Potential harm to GNAPs and the public interest

Because I have concluded that the Joint Petitioners have not satisfied the elements of likelihood of success on the merits and irreparable harm, I will only briefly examine the two remaining elements of the test for preliminary injunctive relief: potential harm to GNAPs if a preliminary injunction is issued, and the location of the best interests of the public.

If the preliminary injunction requested by the Joint Petitioners is issued at this time, GNAPs claims it "will be put out of business in Vermont" and potentially will lose customers elsewhere because of its ensuing inability to market itself as a carrier that delivers its service within a comprehensive territory that includes Vermont.³⁹ In response, the Joint Petitioners point out that because GNAPs is a national company that operates in many other states, the effect of temporarily enjoining the termination of its traffic in Vermont will likely be limited to a loss of

37. Tr. 7/28/09 at 68 (Reed).

38. Docket 5841/5859, *Investigation into Citizens Utilities Company*, Order of 12/22/00 at 3 (rejecting TRO request supported by speculation concerning respondent utility's poor creditworthiness, alleged inability to pay sums potentially due and possible ensuing rate increases for retail ratepayers). *See also* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.1 n. 8 (2d ed. 1987) (irreparable harm must be likely to occur; speculative injury is not sufficient).

39. Tr. 7/28/09 at 177-178 (Scheltema).

revenue — an impact that would be much like the harm the Joint Petitioners claim to be experiencing due to GNAPs' failure to pay intrastate access charges in Vermont.⁴⁰

With respect to the location of the interests of the public, GNAPs has expressed concerns about possible uneconomic costs for its end-user customers and potential service outages that the customers of the Joint Petitioners could experience until alternate arrangements are made to deal with the impact of preliminarily enjoining the flow of GNAPs' traffic in Vermont.⁴¹ The Joint Petitioners counter — with support from the Department — that their customers would not "be any the wiser" if GNAPs could no longer terminate traffic on the Joint Petitioners' networks, as "least cost" call routing mechanisms would be triggered to fill any gap left by preliminarily enjoining GNAPs' service in Vermont.⁴² According to the Joint Petitioners, the best interests of the public in Vermont and in the nation at large are served by ensuring that "carriers using the network pay for the network."⁴³

Balancing the effects of denying compared to granting the preliminary injunction

As noted above, Board Rule 2.406(D) requires that I balance the effects of denying compared to granting the Joint Petitioners' request for a preliminary injunction against GNAPs.

If a preliminary injunction is denied, then the Joint Petitioners face the threat of continuing to carry GNAPs' alleged unpaid balance of arrearages that will grow unabated during the pendency of this proceeding. The potential harm that may be caused to GNAPs if the preliminary injunction is granted appears to amount to a loss of revenues and a potential loss of customers. While the potential harm to the Joint Petitioners may be substantial, in the end it amounts to a claim for payment of money owed by GNAPs, and therefore is not irreparable in nature.

The potential harm to the Joint Petitioners of denying the request for preliminary injunctive relief must be discounted by the fact that it appears neither more nor less probable at

40. Tr. 7/28/09 at 73 (Reed).

41. Tr. 7/28/09 at 178-179 (Scheltema).

42. Tr. 7/28/09 at 41 and 72 (Reed); tr. 7/28/09 at 210-211 (Chase).

43. Tr. 7/28/09 at 75 (Reed).

this time that GNAPs ultimately will prevail in defending itself against the Joint Petitioners' request for permanent injunctive relief. Thus far, the Joint Petitioners have not been able to show a likelihood of succeeding on the merits of their case, due to the unsettled nature of factual and legal issues that have yet to be examined in this proceeding.

On balance, I am not able to conclude that the Joint Petitioners have established that the harm to them of denying their request for preliminary injunctive relief "will be greater than any injury which the granting of the preliminary injunction will cause" to GNAPs. Accordingly, I conclude that the Joint Petitioners' request for preliminary injunctive relief should be denied.

Joint Petitioners' request for GNAPs to post a bond

In addition to seeking preliminary injunctive relief, the Joint Petitioners have requested that the Board "order GNAPs, at the outset of proceedings in this matter, to post a bond in the amount of \$53,157.15, representing 33 1/3% of the minimum charges due and owing to the Joint Petitioners as of the date of the instant Amended Joint Petition."⁴⁴

Having reached the conclusion that the Joint Petitioners at this time have not demonstrated a likelihood of success on the merits of their claim for payment due from GNAPs, I perceive no basis in equity to require GNAPs to post a bond to secure any judgment for the payment of arrearages that the Joint Petitioners may ultimately secure upon final judgment in this proceeding. I therefore deny the Joint Petitioners' request to compel GNAPs to post a bond pending the resolution of this docket.

GNAPs' Motion for extension of time to file

On August 26, 2009, GNAPs filed a motion seeking an extension of the August 21, 2009, deadline for filing comments on whether a preliminary injunction order should issue in this proceeding. That same day, GNAPs also filed a reply brief that responded to the Joint Petitioners' timely filed brief dated August 21, 2009.

Also on August 26, 2009, the Joint Petitioners filed comments in opposition to the Motion to Extend Time. As grounds, the Joint Petitioners cited the several procedural delays in this docket that have been occasioned by GNAPs' failure "to comply with Board-ordered

44. Amended Joint Petition at 14.

discovery deadlines and attorney-appearance requirements."⁴⁵ The Joint Petitioners further expressed concern that granting the Motion to Extend Time "would disadvantage the Joint Petitioners who complied with the Hearing Officer's briefing deadline"⁴⁶

The Motion to Extend Time is an unsupported request for an extension of time "in which to file a response" post-hearing to the Joint Petitioners' petition for preliminary injunctive relief.⁴⁷ The Motion to Extend Time fails to cite any reason for why GNAPs failed to timely file its brief on August 21, 2009. The filing deadline set at the July 28, 2009, technical hearing contemplated that the parties would file their comments simultaneously. If I were to accept GNAPs' tardy filing of August 26, 2009, I would be affording the company the unwarranted strategic advantage of rebutting the comments of Joint Petitioners. I decline to reward GNAPs' unexplained and therefore unjustified conduct, especially in light of the troubling approach the Company has exhibited to date toward discharging its procedural obligations in this proceeding.⁴⁸ I therefore deny GNAPs' Motion to Extend Time, and I further decline to consider the arguments set forth in the GNAPs Reply Brief.

V. CONCLUSION

For the reasons discussed in this Order, I have denied the Joint Petitioners' request for preliminary injunctive relief. Arguments made by any party that are inconsistent with this Order are hereby rejected.

While I have rejected the Joint Petitioners' request for a preliminary injunction at this time, it is important for all parties to bear in mind that this decision does not constitute a determination on the merits of this proceeding, nor does it otherwise in any way reflect upon the ultimate outcome of this case. I remain concerned by the nature of the allegations the Joint Petitioners have made concerning GNAPs' course of conduct in this jurisdiction. If these

45. *Joint Petitioners' Opposition to GNAPs' Motion to Extend Time* dated August 26, 2009, at 2.

46. *Id.*

47. Motion to Extend at 1.

48. See Docket 7493, Order of 6/3/09 at 2 (noting continued failure of counsel for GNAPs to file a motion for *pro hac vice* admission, notwithstanding representations made four months earlier that this procedural omission would be cured promptly); see also Docket 7493, Order of 7/2/09 at 4-5 (granting two motions to compel filed by the Joint Petitioners, and noting failure of GNAPs to respond to either one of these discovery motions).

allegations are ultimately substantiated by competent evidence, it remains possible that a final order in this docket could result in the termination of GNAPs' CPG for doing business in Vermont.

Dated at Montpelier, Vermont, this 7th day of December, 2009.

s/John D. Burke
John D. Burke, Esq.
Hearing Officer



A true copy:

OFFICE OF THE CLERK

FILED: December 7, 2009

ATTEST: Susan McKeon
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)