

STATE OF NEW HAMPSHIRE  
BEFORE THE  
PUBLIC UTILITIES COMMISSION

DT 10-137

**Northern New England Telephone Operations, LLC  
d/b/a FairPoint Communications-NNE**

**Petition for Authority to Disconnect Global NAPs**

**OPPOSITION OF**  
**NORTHERN NEW ENGLAND TELEPHONE OPERATIONS LLC**  
**D/B/A FAIRPOINT COMMUNICATIONS-NNE**  
**TO REQUEST FOR EMERGENCY RELIEF**

NOW COMES Northern New England Telephone Operations LLC d/b/a FairPoint Communications-NNE (“FairPoint”) and hereby submits its Opposition to the Request for Emergency Relief of Destek Networking Group (“Destek” or “Petitioner”). Destek has requested a moratorium on FairPoint’s discontinuance of service on interconnection trunks to Global NAPs, Inc. (“GNAPs”) so that Destek end user customers will be able to place calls to Destek (through some unspecified service provided by GNAPs) until Destek has had time to make arrangements for replacement local exchange service.

**I. INTRODUCTION**

The Commission should deny the Request because Destek has stated no claim against FairPoint for which the Commission can grant relief. Destek has no standing to bring a complaint against FairPoint and, even if it did, FairPoint is not the proper party against which the relief should be granted. The party at fault is GNAPs, and it is GNAPs alone, not FairPoint, that Petitioner and the Commission should hold accountable. Notwithstanding this legal position, FairPoint has

continued to allow Destek's end user customers to originate traffic through GNAPs in order to avoid disrupting Destek's business operations. FairPoint's willingness to allow this access is addressed in Section III below.

## II. FAIRPOINT'S OBJECTION TO DESTEK'S MOTION

Destek is not a party to the dispute and cannot bring an action against FairPoint because it is not a FairPoint customer. The Commission's rules define a "Customer" as "any person, firm, corporation, cooperative marketing association, utility, governmental unit, or subdivision of a municipality, or of the state or nation supplied with telephone service by any telephone utility."<sup>1</sup> Accordingly, FairPoint has no duty to Destek, since FairPoint does not supply telephone service to Destek.

Furthermore, any customer relationship that FairPoint may have had with GNAPs grants no beneficiary rights to Destek or any other party.<sup>2</sup> It is well settled in contract law that no party is the third party beneficiary of a contract unless the contract expresses a clear intent to create this relationship.<sup>3</sup> The FairPoint-GNAPs ICA displays no intent regarding GNAPs' customers. Indeed, it provides that

Except as expressly set forth in this Agreement, this Agreement is for the sole benefit of the Parties and their permitted assigns, and nothing herein shall create or be construed to provide any third-persons (including, but not limited to,

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<sup>1</sup> Rule Puc 402.13.

<sup>2</sup> FairPoint also believes that Petitioner's estimate of up to 6000 affected customers is greatly exaggerated. To the best of the undersigned's knowledge, not a single GNAPs' customer, other than Destek, complained about FairPoint's termination of service to GNAPs. Surely, the Commission or its Staff would have notified FairPoint in the event of an outcry by 6,000 customers worried about the termination of service.

<sup>3</sup> Res. 2d Contracts § 302. "Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."

Customers or contractors of a Party) with any rights (including, but not limited to, any third-party beneficiary rights) hereunder. Except as expressly set forth in this Agreement, a Party shall have no liability under this Agreement to the Customers of the other Party or to any other third person.<sup>4</sup>

Consequently, Destek is merely an incidental beneficiary with “no right against the promisor or the promisee.”<sup>5</sup> Absent any express provision in the ICA regarding FairPoint’s duty to GNAPs’ customers (and there is none), any liability to Destek is solely GNAPs’. GNAPs has taken the Petitioner’s money but, by failing to pay its bills or post the required financial assurance, has lost its right to interconnect with FairPoint and thus failed in its duty to provide reliable service to its customers per Rule Puc 432.01(a). Furthermore, despite having had a minimum of 30 days notice that FairPoint services could be disconnected, GNAPs failed to remedy the problem, failed to provide alternative arrangements for its customers, and failed to provide notice of impending service disruption per Rule Puc 432.18 and Section 13 of its interconnection agreement with FairPoint.

Even if Destek had standing, action against FairPoint would still be inappropriate. FairPoint has no way of affecting or effecting the indeterminate relief requested. Only the Petitioner can arrange for an alternate carrier, and only GNAPs can effect the porting of the numbers, a situation that FairPoint has no control over.<sup>6</sup> Also, if the request is granted, there is no assurance that the moratorium Petitioner requests could not continue indefinitely, further prejudicing FairPoint. The Commission should note that (i) GNAPs has made no payments to FairPoint since this proceeding commenced, (ii) GNAPs has failed repeatedly in the past to pay FairPoint or other local exchange carriers for access to the carriers’ respective networks and (iii)

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<sup>4</sup> ICA § 44.

<sup>5</sup> Res. 2d Contracts § 315.

<sup>6</sup>See, e.g., *In re: Star Net, Inc.*, 355 F.3d 634 (7th Cir. 2004) (GNAPs refuses to port numbers of collocated modem bank serving Debtor) (referred to FCC).

Destek has not offered to pay FairPoint for the substantial amounts due to FairPoint from GNAPs. Granting Destek's motion only serves to increase FairPoint's costs and continues to afford GNAPs access to FairPoint's network without providing due compensation. Such actions do not serve the public good.

The Petitioner, purportedly possessed of a "comprehensive knowledge base & industry experience"<sup>7</sup>, chose to conduct business with GNAPs, notwithstanding proceedings pending before this Commission and judgments rendered throughout the country over GNAPs' failure to pay for its underlying services. FairPoint respectfully suggests that the Commission should direct its enforcement actions against GNAPs, rather than forcing FairPoint to continue to incur costs that it has no hope of recovering.

### **III. TERMINATION OF GNAPS' ACCESS TO THE NETWORK**

FairPoint has attempted and continues to attempt to accommodate Destek. The complete termination of GNAPs access to the network has been delayed on two separate occasions. FairPoint believes that is under no legal obligation whatsoever to further delay this termination and reserves its rights to take any actions necessary to protect against unlawful and unwarranted access to the public switched telephone network ("PSTN").

Notwithstanding the above, FairPoint hereby agrees to delay the GNAPS' termination activities until Monday, August 16, 2010. On that date, FairPoint will terminate any and all remaining access to FairPoint's PSTN by GNAPs. By that date, Destek will have had slightly more than thirty days prior written notice with respect to its need to migrate to another carrier. With this representation, FairPoint respectfully submits that the Commission needs to take no action on Destek's request for emergency relief. Essentially, there is no dispute to adjudicate.

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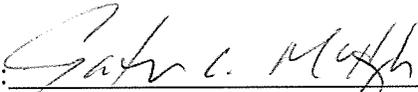
<sup>7</sup> "Benefits of Working with Destek," (<<http://www.destek.net/company/benefits.htm>>) (visited July 28, 2010).

WHEREFORE, FairPoint respectfully requests that the Commission deny the Emergency Request for Relief, understanding that GNAPs is the true perpetrator in this matter. The Commission should not take any action with respect to FairPoint's termination of GNAPs' access to the PSTN.

Respectfully submitted,

Northern New England Telephone Operations LLC  
By its Attorneys,

Dated: July 30, 2010

By:  \_\_\_\_\_

Patrick C. McHugh, Esq.  
Vice President & Assistant General Counsel  
FairPoint Communications, Inc.  
900 Elm Street  
Manchester, NH 03101  
(207) 535-4190

Harry N. Malone, Esq.  
Frederick J. Coolbroth, Esq.  
Devine, Millimet & Branch, P.A.  
43 North Main Street  
Concord, NH 03301  
(603) 226-1000