

**HEARING DATE AND TIME: November 18, 2009 at 10:00 a.m.**  
**OBJECTION DEADLINE: November 11, 2009 at 4:00 p.m.**

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d/b/a Great Works Internet

**UNITED STATES BANKRUPTCY COURT  
SOUTHER DISTRICT OF NEW YORK**

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**In re:** :  
: **Chapter 11**  
: **FAIRPOINT COMMUNICATIONS,** :  
**INC., et al.,** : **Case No. 09-16335**  
: **(Jointly Administered)**  
: **Debtors.** :  
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**MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

INTRODUCTION

1. Biddeford Internet Corp. d/b/a Great Works Internet (“GWI”) hereby files this Emergency Motion for Relief from the Automatic Stay, pursuant to 11 U.S.C. § 362(d)(1) and requests the Court to lift, vacate or otherwise modify the automatic stay to permit the continuation of litigation previously commenced in the U.S. District Court in Maine. As noted below the case currently pending in Maine involves a long procedural history and involves unique questions of federal regulatory law and contract interpretation. The pending Maine case has taken on particular urgency because the debtor has threatened to terminate on or before

December 15, 2009 GWI's access to dark fiber loops<sup>1</sup>, a significant threat to GWI's business. Accordingly, GWI requests that it be granted relief from the automatic stay and such further relief as this Court may deem, just, proper and equitable under the circumstances.

### RELIEF REQUESTED

2. GWI seeks relief from the automatic stay as to one of the debtors in this case, Northern New England Telephone Operations, LLC d/b/a FairPoint New England NNE ("FairPoint" or "debtor"), in order to continue to prosecute the pending action in the United States District Court for the District of Maine captioned Biddeford Internet Corp. d/b/a Great Works Internet v. Northern New England Telephone Operations LLC d/b/a FairPoint New England – NNE, Case No. 2:09-cv-468 (the "GWI Action"). Attached hereto as Exhibit A is a true copy of the Complaint (exhibits omitted) filed in the GWI Action.<sup>2</sup>

### JURISDICTION

3. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

### BACKGROUND

4. The background in this matter is set forth in the Complaint and the Declaration of Fletcher Kittredge, attached hereto as Exhibit B (exhibits omitted).<sup>3</sup> Since 2001, GWI has been a

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<sup>1</sup> Dark fiber is fiber optic cable which is not being currently used.

<sup>2</sup> Exhibit A omits the exhibits to the Complaint which are voluminous. The complete Complaint with exhibits may be found at the PACER website of the United States District Court for the District of Maine: Biddeford Internet Corp. d/b/a Great Works Internet v. Northern New England Telephone Operations, LLC d/b/a FairPoint New England – NNE, 2:09-cv-468 (Docket Entry No. 1).

<sup>3</sup> Exhibit B omits the exhibits to the Kittredge Declaration, which are voluminous. The complete Declaration with exhibits may be found at the PACER website of the United States District Court for the District of Maine: Biddeford Internet Corp. d/b/a Great Works Internet v. Northern New England Telephone Operations, LLC d/b/a FairPoint New England – NNE, 2:09-cv-468 (Docket Entry No. 3).

party to an interconnection agreement which provides it access to line sharing and other services for its customers (the “Interconnection Agreement”). The initial agreement was with Verizon New England, Inc. (“Verizon”) and then effective March 31, 2008 with Verizon’s successor-in-interest, Northern New England Operations LLC d/b/a FairPoint New England. The Interconnection Agreement was amended on May 9, 2003 to deal with the provision of “dark fiber” to GWI.

5. On April 1, 2005, FairPoint’s predecessor-in-interest, Verizon filed a complaint in the U.S. District Court for the District of Maine seeking a declaratory judgment that several orders issued by the Maine Public Utilities Commission (“MPUC”) were unconstitutional. Verizon New England, Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission, CV-05-53-B-C (“Verizon I”). Several of the MPUC orders interpreted the GWI and Verizon Interconnection Agreement, as amended, to require Verizon, over its objection, to provide to GWI under Section 271 of the Federal Communications Act certain “unbundled network elements” (“UNEs”) known as line sharing, unbundled OCn level services<sup>4</sup> and dark fiber (including dark fiber loops, transport and entrance facilities) at rates known as TELRIC (“total element long run incremental costs”) rates.

6. On July 18, 2006, in Verizon I, the court granted the MPUC’s motion for summary judgment and held, *inter alia*, that under Section 271<sup>5</sup>, Verizon was required to provide competitive local exchange carriers (“CLECs”), like GWI, certain network elements known as line sharing and dark fiber (including dark fiber loops, transport and entrance facilities)(hereinafter “Section 271 elements”). The court also held that until Verizon filed with the MPUC a wholesale tariff establishing new just and reasonable rates for the Section 271

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<sup>4</sup> OCn refers to optical carrier fiber, with the letter n being a numeric value between 3 and 192.

<sup>5</sup> 47 U.S.C § 271.

elements, TELRIC rates applied.

7. Verizon appealed the District Court's judgment in Verizon I to the United States Court of Appeals for the First Circuit. By decision dated September 6, 2007, the First Circuit vacated the District Court's judgment in Verizon I. The First Circuit did not decide whether the District Court's statutory interpretation of Section 271 was correct; instead, the First Circuit instructed the District Court to seek a reference from the Federal Communications Commission ("FCC") for guidance on the issue. The First Circuit also held that under Section 271, the MPUC had not been given any authority to require that Verizon provide to CLECs (including GWI) Section 271 elements at TELRIC rates. The court held that only the FCC can determine rates for Section 271 elements otherwise not required to be provided under 47 U.S.C. §§ 251, 252. The First Circuit stated:

Although statutory interpretations are the business of the courts, the FCC's view would normally receive Chevron deference, bolstered by its technical expertise and respect for its policy choices in relation to UNE and element pricing.

Verizon New England, Inc. v. Maine Public Utilities Comm'n, 509 F.3d 1, 11 (1<sup>st</sup> Cir. 2007), *reh'g denied*, 509 F.3d 13 (1<sup>st</sup> Cir. 2007).

8. The First Circuit specifically directed the District Court to do the following on remand:

[U]nless the Maine PUC and Verizon agree to some other solution, the district court shall seek to refer the matter to the FCC or stay proceedings to allow the parties to seek a reference. What should be done about Verizon's disputed obligations (provision, not TELRIC pricing) as to line sharing and dark fiber in the interim should be considered in the first instance by the district court if the parties cannot come to an interim accommodation.

*Id.* at 12.

9. Verizon sought reconsideration of the First Circuit's decision and requested the First Circuit delete the requirement that the parties make a reference to the FCC with respect to Section 271 elements and the pricing of those elements. On November 20, 2007, the First

Circuit denied Verizon's request for reconsideration. The court reiterated its directive that the District Court seek a "prompt" answer from the FCC. The court stated:

Whether interim provision of disputed elements should be continued or re-implemented, and if so on what terms and conditions, is for the district court in the first instance. A central issue is whether the MPUC is likely to prevail in the FCC proceeding. Verizon is also free to pursue in the district court its standing and state authority arguments – absent which we would expect the district court to retain jurisdiction and seek a prompt answer from the FCC on the merits.

Verizon New England, Inc. v. Maine Public Utilities Comm'n, 509 F.3d at 15.

10. GWI was never made a party to either Verizon I or the appeal to the First Circuit. The District Court denied GWI's motion to intervene on the basis that GWI's interests were adequately represented by the MPUC.

11. On remand to the District Court, neither Verizon, its successor, FairPoint, nor the MPUC initiated a reference to the FCC on the issues identified by the First Circuit. To date, the District Court has not determined, pending a reference, whether the disputed Section 271 elements should be provided to CLECs, including GWI, and if so, at what price. Since November, 2007 when the First Circuit denied Verizon's petition for reconsideration, first Verizon and then FairPoint continued to provide to GWI the disputed items (except for line sharing) at the prices charged at the time of the filing of Verizon's complaint in Verizon I.

12. On August 25, 2008 as Verizon's successor, FairPoint filed a motion with the District Court to dismiss without prejudice its complaint in Verizon I. FairPoint stated in its motion that "as mandated by the First Circuit, FairPoint and the PUC-Maine intend to refer an outstanding federal regulatory issue underlying this litigation to the [FCC]". FairPoint did not represent to the Court that the MPUC and FairPoint had agreed to a solution as to what should be done pending the FCC's decision with respect to FairPoint providing the disputed Section 271

elements to CLECs such as GWI, and at what rates. As a result of the dismissal of the action, the District Court did not decide whether the disputed Section 271 elements should be provided and, if so, at what price. By order dated August 26, 2008, without comment, the court simply dismissed the complaint without prejudice. *See Verizon I*, Docket No. 131.

13. In March, 2009, FairPoint refused to accept GWI's new orders for dark fiber loops and unilaterally decided to stop processing GWI's new orders for dark fiber loops.

14. In September 2009, FairPoint told GWI that, within a year, FairPoint would cease providing the disputed Section 271 elements; back-bill for existing dark fiber loops and OCn transport at significantly higher or unspecified rates; and only agree to provide new and existing line sharing arrangements at unspecified rates, terms and conditions to be "negotiated." Later in September 2009, FairPoint issued a back-bill to GWI for dark fiber loops at a rate 19 times the rate in the Interconnection Agreement between the parties, and claimed that unless GWI paid Fairpoint \$3,085,025.00 by October 19, 2009, FairPoint would effective December 19, 2009, terminate all of GWI's dark fiber loop orders.

15. Shortly after receiving FairPoint's termination letter, GWI filed the GWI Action seeking the following relief from the court:

- a. make a referral to the FCC on whether line sharing, OCn transport and loops, and dark fiber (including dark fiber loops, dark fiber transport and entrance facilities) are Section 271 elements and if so, what constitutes a just and reasonable rate for those elements;
- b. pending a decision from the FCC, order FairPoint to provide to GWI the disputed Section 271 elements at the rates set forth in the Interconnection Agreement between the parties;
- c. stay this action pending a decision from the FCC, and once the FCC decision is issued, to review the FCC's decision so as to permit this Court to decide the rights and obligations of GWI and FairPoint with respect to the disputed Section 271 elements, Interconnection Agreement, and rates to be charged; and
- d. award GWI any damages it established under the Interconnection Agreement and such other and further relief,

including equitable relief, and to the extent applicable, costs, interest and attorneys' fees.

16. As a result of FairPoint's unilateral decision to no longer provision new dark fiber loop orders, GWI has been unable to solicit new customers and expand its existing business base by means of dark fiber loops. GWI has also lost business due to FairPoint's refusal to process new orders for dark fiber loop and incurred significant damage to GWI's ability to operate.

17. In the action pending in the U.S. District Court in Maine, GWI is seeking two items of immediate import: i) a referral from the District Court to the FCC of the question of whether FairPoint is required under Section 271 to provide CLECs like GWI line sharing, unbundled OCn level services, dark fiber loops, dark fiber transport and entrance facilities and if so, at what rates, and (ii) pending the reference an order from the court that FairPoint should be required to provide GWI line sharing, unbundled OCn level services, dark fiber loops, dark fiber transport and entrance facilities and setting the terms and conditions of the interim relief.

18. GWI will be severely prejudiced if not granted relief from the automatic stay to allow it to continue its litigation commenced against FairPoint. FairPoint's threat to terminate service on December 196, 2009, as well as the grossly overstated charges noted in its termination letter, will cut GWI off from its customers, potential customers and will substantially eviscerate GWI's business.

#### BASIS FOR RELIEF

19. Section 362(d) of the Bankruptcy Code provides, in pertinent part:

- (d) On the request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay--
  - (1) for cause, including the lack of inadequate protection of an interest in property of such party in interest;

20. The term “cause” is neither defined in the Bankruptcy Code nor in the legislative history of section 362(d), courts must determine whether cause exists on a case by case basis. Manhattan King David Restaurant, Inc. v. Levine, 163 B.R. 36, 40 (Bankr. S.D.N.Y. 1993) (citing In re Sonnax Industries, 907 F.2d 1280, 1286 (2d Cir. 1990)). The “cause” standard set forth in section 362(d)(1) is intentionally broad and flexible to provide courts with the authority to grant appropriate relief from the automatic stay. In re Sentry Park, Ltd., 87 B.R. 427, 430 (Bankr. W.D. Tex. 1988).

21. Congress has recognized that the automatic stay should be lifted in appropriate circumstances:

[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from any duties that may be handled elsewhere.

*See* H.R. Rep. 95-595, 95th Cong. 1st Sess. 341 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 50 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5836, 6297.

In addition the Senate Report regarding the matter states:

The lack of adequate protection of an interest in property is one cause for relief, but is not the only cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is protection of the debtor and his estate from his creditors.

In re Sonnax Industries, Inc. 907 F.2d 1280, 1286 (C.A.2 (Vt.), 1990)(quoting S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838). Other legislative history indicates that the “facts of each request will determine whether relief is

appropriate under the circumstances.” H.R. Rep. No. 595, 95th Cong., 2d Sess. 343-44, reprinted in 1978 U.S. Code Cong. & Admin. News 6300.

22. The automatic stay was never intended to preclude a determination of liability and the attendant damages. It was merely intended to prevent a prejudicial dissipation of the debtor’s assets. In re Todd Shipyards Corporation, 92 B.R. 600, 603 (Bankr. D.N.J. 1988).

23. Courts also have addressed the issue of lifting the automatic stay for “cause” and indicated the following factors are considered when deciding a motion for relief from the automatic stay predicated on cause:

- (1) whether relief would result in a partial or complete resolution of the issues;
- (2) lack of any connection with or interference with the bankruptcy case;
- (3) whether the other proceeding involves the Debtor as a fiduciary;
- (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;
- (5) whether the Debtor's insurer has assumed full responsibility for defending it;
- (6) whether the action primarily involves third parties;
- (7) whether litigation in another forum would prejudice the interests of other creditors;
- (8) whether the judgment claim arising from the other action is subject to equitable subordination;
- (9) whether movant’s success in the other proceeding would result in a judicial lien avoidable by the Debtor;
- (10) the interests of judicial economy and the expeditious and economical resolution of litigation;
- (11) whether the parties are ready for trial in the other proceeding;
- and,
- (12) impact of the stay on the parties and balance of harms.

In re Sonnax, 907 F.2d at 1286 (quoting In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984)). Factors 1, 2, 4, 7, 10 and 12 are applicable to this Motion.

24. The first of the Curtis factors favors granting relief to GWI and permitting the GWI Action to move forward because it would result in the complete resolution of the issues between

GWI and FairPoint. The GWI Action was filed to request a definitive ruling from the FCC on the terms and conditions under which FairPoint must supply Section 271 services to GWI. As the First Circuit noted in the Verizon I case, this is a determination solely for the FCC and would result in a final resolution of the questions raised in the GWI Action.

25. This motion also satisfies the second factor. While the GWI Action is tangentially related to the bankruptcy case, but will cause no interference in the administration of the estate. In fact, a resolution of this dispute would be beneficial to the estate, since a determination of the rights of the parties will clarify the obligations of each and provide greater certainty to the parties as to the future business between them.

26. The fourth factor is a critical component to the relief requested here. The First Circuit has previously ruled that the FCC has jurisdiction over the Section 271 elements which are the heart of this matter. The GWI Action specifically requests a reference to the FCC as required by the First Circuit's Order in Verizon 1. As the agency with specific oversight of the Section 271 elements, the FCC is the equivalent of a special tribunal for purposes of resolving the underlying questions posed by the GWI Action. Accordingly, the most efficient course of action would be to allow the GWI Action to move forward with the requested referral.

27. The seventh factor is easily satisfied. Permitting the GWI Action to move forward will have no effect on other creditors since it is primarily an action requesting declaratory and injunctive relief between these parties which will have no substantial effect on the assets of the Estate. GWI is not seeking an attachment or other lien which would affect the priority or interests of other creditors.

28. The tenth and twelfth factors also militate toward granting this Motion. Given the complicated nature of the GWI Action and the Maine U.S. District Court's familiarity with the

facts and regulatory scheme at issue, the most efficient forum to hear this action is the Maine U.S. District Court and the FCC. As a result of the prior Verizon I litigation, the Maine U.S. District Court is fully familiar with the background of this matter and it is in a position to act expeditiously both with the request for a reference as well as with the request for interim relief. As noted above, the First Circuit has already decided that the underlying question should be referred to the FCC. Thus, permitting the Maine U.S. District Court to hear this dispute promptly will serve both judicial economy and the expeditious resolution of the dispute.

29. The balance of harms also clearly favors granting the requested relief. Any substantial delay in a resolution of this underlying case, particularly the requested interim relief, will be extremely harmful to GWI's business since the ability to access dark fiber loops is critical to the survival of its business. Thus, the continuation of the automatic stay will work a substantial hardship to GWI and will severely prejudice its business. By contrast, no hardship to the debtor would result from continuing to litigate the GWI Action in the Maine U.S. District Court. The relief sought in the pending action will have no immediate effect on the property of the debtor or the existence, priority or validity of any lien. Rather, if the Maine U.S. District Court grants the interim relief GWI requests the result will only be to maintain the status quo. Furthermore, because the pending GWI matter is primarily concerned with establishing the rights and responsibilities of GWI and the FairPoint, the debtor, with regard to the Interconnection Agreement and particularly GWI's access to dark fiber loops, it does no harm to the debtor's continuing operations.

30. No prior request for the relief sought herein has been made to this or any other court.

WHEREFORE, it is respectfully requested that the Court lift, vacate and/or modify the automatic stay to permit the continuation of the GWI Action and for such other and further relief as this Court may deem, just.

DATED: October 30, 2009.

Respectfully submitted,

/s/Christian T. Chandler

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2009, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send the notification of such filing to the following: debtors counsel, James T. Grogan, Esq. ([jamesgrogan@paulhastings.com](mailto:jamesgrogan@paulhastings.com)), Luc A. Despins, Esq. ([lucdespins@paulhastings.com](mailto:lucdespins@paulhastings.com)), and all other registered participants in this case.

I further certify that I caused service by placing a copy of same into my law firm's internal mail system causing same to be mailed to them by United States first class mail, postage pre-paid and addressed to:

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