

Decision 07-09-050      September 20, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Cox California Telcom, LLC (U-5684-C),  Complainant  vs.  Global NAPs California, Inc. (U-6449-C),  Defendant.
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Case 06-04-026  
(Filed April 28, 2006)

**ORDER DENYING REQUEST FOR IMMEDIATE STAY AND THE  
REHEARING OF DECISION (D.) 07-06-044**

**I. SUMMARY**

In this Order, we dispose of the motion for a stay and the application for rehearing of Decision (D.) 07-06-044 filed by Global NAPs California, Inc. (“GNAPs”). Effective 30 days from the issuance of D.07-06-044, the Commission suspended the Certificate of Public Convenience and Necessity (“CPCN”) of GNAPs until such time as GNAPs pays Cox California Telcom, LLC (“Cox”) the sum of \$985,439.38 plus interest on overdue amounts at the rate of one and one-half percent per month, as previously ordered by the Commission in D.07-01-004.

**II. FACTS/BACKGROUND**

On June 22, 2007, the Commission issued Decision (D.) 07-06-044 (“Decision”), suspending the CPCN held by GNAPs until it pays Cox the sum of \$985,439.38 plus interest on overdue amounts at the rate of one and one-half percent per month, as previously ordered by the Commission. The effective date of the suspension was 30 days from the mailing date of the Decision, i.e., July 23, 2007.

GNAPs had been ordered in a prior decision, D.07-01-004, effective January 12, 2007, to pay Cox the aforementioned sum according to the terms of an Interconnection Agreement between the parties. D.07-01-004 granted Cox's motion for summary judgment against GNAPS.

On February 13, 2007, GNAPs timely filed an application for the rehearing of D.07-01-004. On March 2, 2007, nearly two months after the issuance of D.07-01-044, GNAPs filed "Request for Stay or Suspension of D.07-01-004 Pending Ruling on Application for Rehearing."

On March 23, 2007, upon a motion by Cox requesting an order directing GNAPs to pay the judgment entered in D.07-01-004, the assigned Commissioner and the assigned Administrative Law Judge (ALJ) issued a joint ruling granting Cox's motion. The joint ruling set an evidentiary hearing ordering GNAPs to appear to demonstrate that it had paid Cox in compliance with D.07-01-004, or show cause why it should not have its CPCN suspended for failure to comply with the decision. The hearing was held on April 9, 2007.

Another joint ruling was issued on April 12, 2007, ordering GNAPS to supplement the record by identifying any source of funds that creditors could look to for satisfaction of their debts. GNAPs was also directed to explain how it would minimize the effect on its customers of a suspension or revocation of its CPCN. GNAPs responded to the ruling on April 19, 2007, with a declaration reiterating the company's lack of assets, and stating its position that the Commission lacks authority to suspend or revoke its CPCN for failure to comply with D.07-01-004's ordering paragraphs.

On April 16, 2007, in D.07-04-048, the Commission denied GNAPs' application for stay of D.07-01-004.

On June 22, 2007, the Commission issued D.07-06-044, suspending the CPCN held by GNAPs until it pays Cox \$985,439.38 plus interest on overdue amounts at the rate of one and one-half percent per month, as previously ordered by the Commission. The suspension was ordered to take effect 30 days from the date of the Decision's issuance.

On June 26, 2007, with no stays in effect, the Director of the Commission's Communications Division wrote to carriers advising them that they should prepare to disconnect from GNAPs on July 22, 2007, in an attempt to facilitate an orderly transition between carriers. That letter has been withdrawn, first in a subsequent letter from the Director in light of a stay imposed by the California Court of Appeal (since lifted), and then pursuant to an agreement of the parties pending a ruling on the motion for injunctive relief in federal court.

On June 29, 2007, GNAPs filed a petition for writ of review ("writ petition") in the California Court of Appeal, Second Appellate District, Division Two (Case No. B200164), requesting that the Court stay D.07-06-044. Without a hearing or notice to the Commission, the Court issued a Stay Order on July 11, 2007. The Commission sent a letter brief dated July 16, 2007 to the Court opposing the Stay Order on grounds that the Court lacks jurisdiction, and the Stay Order is defective. The Commission then filed a Motion to Dismiss dated July 19, 2007.

On July 24, 2007, the Court issued an Order dismissing GNAPs' petition for writ of review ("Dismissal Order"). In that Court order, the Court dismissed GNAPs' writ petition because it lacked jurisdiction. Further, the Court vacated its July 11, 2007 Stay Order ("Stay Order"), in its entirety, including its stay of the decision.

On July 26, 2007, GNAPs filed a petition for review pursuant to 47 U.S.C. Section 252 in the U.S. District Court for the Central District of California, as well as an Ex Parte Application for Temporary Restraining Order and for Order to Show Cause Re Preliminary Injunction. The Application sought an order enjoining enforcement of D.07-01-004 and D.07-06-044. Oral argument on the preliminary injunction was held on August 27, 2007.

On July 20, 2007, GNAPs filed an application for the rehearing of D.07-06-044, alleging the following: (1) the Decision is an unlawful use of contempt sanctions; (2) the Decision violates GNAPs' constitutional rights; (3) the Decision is premature because the Commission has yet to rule on GNAPs' rehearing application of D.07-01-004; (4) the Decision was issued and approved as a result of clear bias or prejudice

against GNAPs; (5) the Commission lacked jurisdiction to issue D.07-01-004, or to enforce it through D.07-06-044; and (6) GNAPs is entitled to an immediate stay of D.07-06-044. In its rehearing application, GNAPs also requested an immediate stay of the decision.

Cox filed its Response to GNAPs' rehearing application on August 6, 2007. Cox asserted as follows: (1) the application does not satisfy the standard for applications for rehearing; (2) the application includes legal arguments that the Commission previously considered and rejected; (3) the Commission has authority to suspend GNAPs' CPCN for its failure to comply with a Commission order; (4) the Commission is not required to respond to applications for rehearing in any given time frame; (5) GNAPs did not establish bias on the part of the assigned Administrative Law Judge or the Assigned Commissioner; and (6) the Commission has the authority to suspend GNAPs' California CPCN.

On August 23, 2007, the Commission issued D.07-08-031, denying the rehearing of D.07-01-004. At the federal level, on August 28, 2007, the district court filed its Order Denying Motion for Preliminary Injunction. That Order concluded that GNAPs failed to show that it will likely succeed on its preemption argument, or its contention that the Commission acted arbitrarily and capriciously in interpreting the Interconnection Agreement; therefore, the Court did not address GNAPs' showing of irreparable harm or the balance of hardships.

On September 7, 2007, GNAPs again filed a petition for writ of review in California Court of Appeal, Second Appellate District, Division 3 (Case No. B201860). This time the writ petition challenges D.07-01-004.

### III. DISCUSSION

#### A. GNAPs is not entitled to an immediate stay of D.07-06-044.

GNAPs claims it will suffer immediate and irreparable harm if D.07-06-044 is not stayed because it will result in the loss of GNAPs' entire customer base. GNAPs also contends its reputation and goodwill will be significantly harmed.<sup>1</sup> The irony of this statement is exceeded only by its audacity. If anything, GNAPs' refusal to pay its fair share for using the public switched telephone network (PSTN) will harm its reputation more than any Commission decision possibly could.

GNAPs has made no credible showing of irreparable harm, one of the Commission's requirements for a stay.<sup>2</sup> GNAPs asserts that D.07-06-044 was issued as a result of its inability to pay a money judgment in order to advance its argument that the Commission misused contempt sanctions.<sup>3</sup> Rather, the Commission was concerned that GNAPs had no assets or bank accounts in California and it had no resources with which to pay its debts to Cox, as Findings of Fact Nos. 3 and 4 of D.07-06-044 indicate. GNAPs' fiscal stability, or the lack thereof, carried considerable weight in determining whether GNAPs should be granted a CPCN.

In fact, the grant of GNAPs' CPCN was based in part on GNAPs' parent company's guarantee that GNAPs had on hand at least \$100,000 in cash or cash equivalents plus sufficient additional cash or cash equivalents to cover deposits required

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<sup>1</sup> GNAPs' Rhg. App., p. 11.

<sup>2</sup> See D.07-04-048 at 1. As with D.07-01-004, GNAPs delayed in requesting a stay at the Commission. GNAPs waited nearly a month after the issuance of D.07-06-044 when it filed its rehearing application to request a stay at the Commission. Instead of filing at the Commission, GNAPs filed a request on June 29, 2007 for a stay in state appellate court.

<sup>3</sup> GNAPs' Rhg. App., p. 3. Ironically, GNAPs uses its alleged inability to pay the judgment in order to challenge the Commission's purported use of contempt sanctions, rather than as a reason why the Commission should be concerned about its continuing operations because of fiscal instability. See GNAPs' Rhg. App., pp. 5-6.

by other telecommunications carriers in order to provide the proposed service.<sup>4</sup> In granting the CPCN, the Commission stated:

“To be granted a CPCN, an applicant for authority to provide facilities-based local exchange and/or interexchange services must demonstrate that it has a minimum of \$ 100,000 of cash or cash equivalent to meet the firm's start-up expenses. An applicant must also demonstrate that it has sufficient additional resources to cover all deposits required by other telecommunications carriers in order to provide the proposed service. Applicant provided a guarantee by its parent company, Global NAPs, Inc., that demonstrates that Applicant has sufficient cash to satisfy the financial requirements.”<sup>5</sup>

Based on the above, the record suggests that GNAPs was unable or unwilling to pay its debts. Since GNAPs alleged the inability to pay, the Commission concluded that “a fine is ineffectual as a response to this violation.” (D.07-06-044, p. 3.) Further, under such circumstances, the Commission could have moved to suspend or revoke GNAPs’ CPCN based on its lack of financial fitness. Fiscal soundness and stability are requirements not only to obtain a CPCN, but also to keep it.

Despite GNAPs’ claims of inability to pay and alleged looming irreparable harm, as supported by the Gangi Declarations of April 9 and April 19, 2007, the Commission correctly insists that its orders must be obeyed. Just as filing for rehearing is no excuse for failing to obey a Commission order, neither is an alleged inability to pay – particularly when the Commission has made good faith attempts to reach an accommodation, as indicated below.

Moreover, the loss of GNAPs’ CPCN is within GNAPs’ control. GNAPs could have deposited the disputed funds into an escrow account, as requested by Cox, or

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<sup>4</sup> See *In the Matter of Application of Global NAPs California, Inc. for Authority to Operate as a Provider of Resale and Facilities Based Telecommunications Service Within the State of California* [D.00-12-039, p. 3 (slip op.) (2000) \_\_\_ Cal.P.U.C.3d \_\_\_, 2000 Cal.PUC LEXIS 1010, at \*3.

<sup>5</sup> *Id.*

negotiate terms, both of which GNAPs failed to do.<sup>6</sup> GNAPs also ignored the Commission's agreement not to impose sanctions if the money was escrowed or if a bond was posted.<sup>7</sup> Yet, GNAPs insists on maintaining that it would suffer business losses if it were forced to discontinue the very activity that triggered the order suspending its CPCN, i.e., its failure to obey a Commission order. Courts have repeatedly held that self-inflicted harm deserves little weight.<sup>8</sup>

Nor has GNAPs established a likelihood of success on the merits, the other Commission requirement for a stay. The Court requires that a party demonstrate either probable success on the merits and possible irreparable injury, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief.<sup>9</sup> If the balance of harm tips decidedly toward the plaintiff (as GNAPs would have us believe), then the plaintiff need not make a robust showing of success on the merits, but "[n]o chance of success at all, however, will not suffice."<sup>10</sup>

GNAPs has not demonstrated any chance of success on the merits. GNAPs has already sought a stay and a preliminary injunction in state and federal courts, respectively. The state appellate court initially granted a stay *ex parte*, but vacated it when it dismissed GNAPs' writ petition for lack of jurisdiction. The federal district court of the Central District of California also denied GNAPs' request for a preliminary injunction in a decision filed on August 28, 2007.<sup>11</sup>

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<sup>6</sup> We note that if GNAPs were to place the money owed in an escrow account pending the outcome of the administrative and court challenges, further implementation of D.07-06-044 would be unnecessary.

<sup>7</sup> Assigned Commissioner and Assigned ALJ Ruling of March 22, 2007, p. 4.

<sup>8</sup> *A & L Technology v. Resound Corp.*, (1995) 1995 U.S. Dist. LEXIS 22442, \*11.

<sup>9</sup> *City of Anaheim, California v. Kleppe* (9<sup>th</sup> Cir. 1979) 590 F.2d 285, 288.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Global NAPS California Inc., v. Pub. Util. Comm'n of California* (2007) Western Division, Central Dist. of Calif., Case No. CV 07-04801 MMM (SSx).

For all of the above reasons, we deny the stay of D.07-06-044, which enforces D.07-01-004.

**B. The Commission has jurisdiction to enforce D.07-01-004 through D.07-06-044.**

GNAPs asserts that the Commission lacks jurisdiction to issue the decisions at issue because the traffic exchanged between GNAPs and Cox is deemed jurisdictionally interstate.<sup>12</sup> GNAPs is wrong about the Commission's authority to issue D.07-01-004 and D.07-06-044. The Commission has authority consistent with state and federal law to resolve interconnection disputes. The Commission is a constitutionally-created agency charged with regulating industries critical to the public welfare, and with securing an affordable, reliable, high-quality, interconnected telephone network for all Californians.<sup>13</sup>

On the federal level, the Telecommunications Act of 1996 (1996 Act) contemplated that states would play a vital role in the dual regulation of telecommunications.<sup>14</sup> Pursuant to Sections 251 and 252 of the 1996 Act, all telecommunications carriers must interconnect with each other, including incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). If the parties cannot agree on the terms of such an interconnection agreement, they may request arbitration to be conducted by a state public utilities commission.<sup>15</sup> State commissions are authorized to arbitrate any open or unresolved issues. State commissions have the power to arbitrate, interpret and enforce interconnection disputes.<sup>16</sup>

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<sup>12</sup> We address the preemption issue only in the context of the Commission's authority to enforce D.07-01-004.

<sup>13</sup> Cal. Const., Art. XII.

<sup>14</sup> Telecom Act Pub. L. 104-104, 100 Stat. 56, 47 U.S.C. § 151 *et seq.*

<sup>15</sup> 47 U.S.C. Section 252(b)(1).

<sup>16</sup> *Pacific Bell v. Pac West Telecomm, Inc.* (9<sup>th</sup> Cir. 2003) 325 F.3d 1114, 1126-27. Citing 47 U.S.C. Section 252, the Court held that the Commission's power to regulate was limited to arbitrating, approving and enforcing interconnection agreements. *See also, Southwestern Bell Tel. Co. v. PUC* (5<sup>th</sup> Cir. 2000) 208 F.3d 475, 479-80, where the Court noted that "the Act's grant to the state commissions of plenary authority to approve or disapprove

*(footnote continued on next page)*

GNAPs relies on two primary sources to support for its contention that this Commission is without jurisdiction to adjudicate this complaint case that resulted from GNAPs' failure to honor its Interconnection Agreement with Cox. The first source is the Federal Communications Commission's ("FCC") *Notice of Proposed Rulemaking ("NPRM") on IP-Enabled Services* (2004) 19 FCC Rcd 4863, 4864-68. GNAPs asserts that the *NPRM* preempted all regulation of Voice over Internet Protocol (VoIP) traffic. The other source is *In the Matter of Vonage Holdings Corp* (2004) 19 FCC Rcd 22404, aff'd by *Minn. Pub. Util. Comm'n v. FCC* (8<sup>th</sup> Cir. 2007) 483 F.3d 570, 579. In *Vonage*, the FCC preempted a regulation promulgated by the Minnesota PUC that required Vonage (a VoIP provider) to comply with state regulations governing telephone services. The Eighth Circuit upheld the FCC's ruling as reasonable because it was impractical or impossible to separate VoIP service into interstate and intrastate components.

GNAPs asserts that *Minn. PUC* upheld the FCC's determination that VoIP is jurisdictionally interstate and subject to the FCC's exclusive jurisdiction.<sup>17</sup> While *Vonage* and *Minn. PUC* did indicate that state commissions cannot require VoIP providers to comply with state statutes and regulations governing telephone service within their jurisdiction, they did not conclude that state commissions cannot enforce interconnection agreements that require the payment of interconnection charges on VoIP calls that terminate on the PSTN. Thus, GNAPs' reliance on *Vonage* is misplaced. Vonage was solely a VoIP provider which sought to avoid regulation by the Minnesota PUC, whereas GNAPs is not a VoIP provider. The federal district court concluded in its *Order Denying Motion for Preliminary Injunction* in this proceeding that "[t]he fact that Global NAPs may use Internet protocols to receive traffic from its ESP customers before transmitting that traffic to an end point on the PSTN through Cox's facility does not

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(footnote continued from previous page)

these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved."

<sup>17</sup> GNAPs' Rhg. App., p. 9.

make it a VoIP provider.”<sup>18</sup> Rather, GNAPs is a certificated carrier, licensed by this Commission, and subject to its jurisdiction.

Moreover, just because traffic may be jurisdictionally interstate does not preempt the Commission from review and enforcement of the interconnection agreements. GNAPs claimed that interstate traffic was preempted in the context of ISP-bound traffic, which is deemed to be interstate, and the Court rejected it.<sup>19</sup> The Court noted that the *ISP Remand Order* “reserve[d] state commission authority in certain relevant matters,” including the arbitration, review and enforcement of interconnection agreements, even where they dealt with ISP-bound (interstate traffic).<sup>20</sup> This Commission also rejects GNAPs’ argument.

Nor does the use of IP-enabled services in the transport of a call result in the states being deprived of jurisdiction.<sup>21</sup> The *AT&T IP Decision* involved calls that were transported in part over IP circuits, although they began and ended as landline-based phone calls over the PSTN. It was argued that the pending NPRM on IP-enabled services preempted state access charges for such calls, similar to GNAPs’ argument here. Recognizing that the issue of applying access charges to traffic that uses IP was being considered in the NPRM, the FCC nevertheless held that intrastate access charges applies to these calls:

We are undertaking a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues, in the *IP-Enabled Services* rulemaking proceeding. *In the interim, however, to provide regulatory certainty, we clarify that AT&T’s specific service is subject to interstate access charges...AT&T obtains the same circuit-switched interstate access for its*

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<sup>18</sup> *Global NAPS California Inc. v. Pub. Util. Comm’n of California* (2007) Case No. CV 07-04801 MMM (SSx), *supra* at 18.

<sup>19</sup> *Global NAPS IV* (2<sup>nd</sup> Cir. 2006) 454 F.3d 91, 100.

<sup>20</sup> *Id.* at p. 100.

<sup>21</sup> *See Order, In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges* (2004) 19 FCC Rcd 7457, 7464-65.

specific service as obtained by other interexchange carriers, and, therefore, *AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN, pending resolution of these issues in the Intercarrier Compensation and IP-Enabled Services rulemaking proceedings.*<sup>22</sup>

This statement makes clear that the mere use of IP in the transport of calls does not result in federal preemption, nor does the pendency of the NPRM on IP-enabled services.

In sum, this is a complaint proceeding involving a dispute about the terms of an interconnection agreement. When Cox filed a complaint with the Commission alleging a breach of its Interconnection Agreement with GNAPs, the Commission properly exercised its jurisdiction to resolve the dispute and determine whether and how much compensation was owed under the terms of the Agreement. The Commission is acting in accordance with the Court's recognition that "state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252."<sup>23</sup> Therefore, the Commission's actions interpreting the Interconnection Agreement and issuing enforcing orders as a result of that interpretation are just as the 1996 Act intended.<sup>24</sup>

Accordingly, we do not find GNAPs' argument challenging the Commission's jurisdiction on the ground that the traffic was jurisdictionally interstate to

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<sup>22</sup> *Id.*, ¶15 (emphasis added).

<sup>23</sup> *Iowa Util. Bd. v. FCC* (8<sup>th</sup> Cir. 1997) 120 F.3d 753, 804, reversed in part on other grounds by *AT&T Corp. v. Iowa Utils. Bd.* (1999) 525 U.S. 366, 385.

<sup>24</sup> See *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.* (7<sup>th</sup> Cir. 1999) 179 F.3d 566, 573. The Court stated that in deciding a dispute between a CLEC and an ILEC over whether ISP calls were local traffic, the state commission "was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements."

be persuasive. The aforementioned demonstrates that the Commission has the authority to enforce D.07-01-004.

**C. GNAPs did not establish that bias entered into decisionmaking in this proceeding.**

GNAPs alleges that D.07-06-044 was issued and approved as a result of bias or prejudice against it. GNAPs points to the hearing of April 9, 2007 and a press release issued on June 21, 2007 as support. GNAPs also noted that it has filed a motion seeking the disqualification of two Commissioners based on the statements they made in the press release.<sup>25</sup> There is no merit to any of GNAPs' allegations of bias.

GNAPs' claim that the April 9<sup>th</sup> hearing was not impartial rests on the statement that "ALJ Bemserderfer admitted on the record that he does not find Global NAPs 'appealing'."<sup>26</sup> As to the press release on June 21, 2007, GNAPs takes offense at the words "unscrupulous," "scofflaws," and a purported pledge by a Commissioner never to allow GNAPs to do business in California again. These assertions comprise a very thin reed upon which to base claims of bias.

Agency decisions are presumed to be valid.<sup>27</sup> GNAPs has the burden of proving that bias exists. To establish a claim of bias, a party must "overcome a presumption of honesty and integrity" on the part of the decisionmaker.<sup>28</sup> A party must establish the actual bias of the adjudicator; the mere "appearance of bias" will not suffice except in situations where the judicial officer has a personal or financial stake in the outcome or under other limited circumstances.<sup>29</sup> Rather than the appearance of bias, the

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<sup>25</sup> Today's Order is not intended to dispose of or prejudge the pending Motion to Disqualify Commissioners Chong and Bohn from the proceeding.

<sup>26</sup> GNAPs' Rhg. App., p. 7, citing Hearing Transcript, p. 17, lines 7-17.

<sup>27</sup> *Industrial Union Dept v. American Petroleum Inst. et al.* (1980) 448 U.S. 607, 705.

<sup>28</sup> *Haas v. County of San Bernadino* (2002) 27 Cal.4<sup>th</sup> 1017, 1027, citing *Withrow v. Larkin* (1975) 421 U.S. 35, 47.

<sup>29</sup> *Stivers v. Pierce* (9<sup>th</sup> Cir. 1995) 71 F.3d 732, 741.

Court stated that the “Constitution is concerned not only with actual bias but also with ‘the appearance of justice.’”<sup>30</sup> Here, GNAPs received justice.

A party attempting to establish actual bias must allege concrete facts demonstrating that the judge is prejudiced or biased; bias may never be implied, but must be established by clear averments.<sup>31</sup> The prejudice must be against a particular party and sufficient to impair the judge’s impartiality so that it appears probable that a fair trial cannot be held. In determining whether bias exists, California courts apply the following two-part test:

“The first inquiry consists of deciding whether the moving party has set forth legally sufficient facts to demonstrate the bias of the judicial officer. After that determination, the challenged judicial officer or reviewing court must still decide whether such bias or prejudice must be ‘sufficient to impair the judge’s impartiality.’ To be sure, once the existence of bias has been established, it will not be difficult to demonstrate that a fair and impartial trial or hearing appears improbable.”<sup>32</sup>

Merely commenting that GNAPs is “not appealing” would not cause a reasonable person, aware of all the facts, to entertain doubts about the decisionmakers’ impartiality.<sup>33</sup> The facts are that GNAPs abused the process here at the Commission, and pushed it beyond reasonable limits. In *Colfor Ins. V. National Labor Relations Board*, the ALJ was accused of using vituperative language and of being biased. The Court of Appeal concluded that the claim was baseless, citing the principle that a party who

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<sup>30</sup> *Ibid.*, citing *Exxon Corp. v. Heinze* (9<sup>th</sup> Cir. 1994) 32 F.3d 1399, 1403.

<sup>31</sup> *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792-93. In *Andrews*, the court distinguished between judicial and administrative standards, ruling that the administrative law officer should not be disqualified. *Accord Schweiker v. McClure* (1982) 456 U.S. 188, 197, where the court also refused to apply judicial disqualification standards in an administrative context.

<sup>32</sup> *Id.* at p. 792.

<sup>33</sup> *Flier v. Superior Court of Contra Costa County* (1<sup>st</sup> Dist. 1994) 23 Cal.App.4<sup>th</sup> 165, 170. Cited in *People v. Panah* (2005) 35 Cal.4<sup>th</sup> 395, 446.

attacks a judge's impartiality must demonstrate that the alleged bias "stem[s] from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from his participation in the case."<sup>34</sup> Whatever opinion was expressed by the ALJ may have resulted from participation in a very trying case.

Nor does commenting that an entity is "unscrupulous" or a "scofflaw" cause a reasonable person to entertain doubts, considering GNAPs' actions. The fact is that GNAPs has not paid for the services it has received, which services may have to be subsidized by Cox, other carriers, and California ratepayers. GNAPs has shown contempt by failing to comply with the Commission's order. Furthermore, as to the Commissioners, a single Commissioner cannot determine whether an entity can do business in California. Decisions are made by the Commission as a body. A majority of the Commissioners did not express any opinion in press releases. Even if they had, it would not be sufficient to sustain a claim of bias.<sup>35</sup> GNAPs has failed to carry its burden of proving that actual bias entered into the issuance of D.07-06-044.

**D. The Decision did not violate GNAPs' constitutional rights, nor did it unlawfully use contempt sanctions.**

In challenging the Decision, GNAPs places great reliance on its contention that the Decision is unlawful because it is an illegal use of contempt sanctions to enforce a money judgment. GNAPs uses the contempt sanctions issue as a well-spring from which other allegations flow. For example, GNAPs states that the Decision is unlawful because it imposes contempt sanctions in the absence of a charging affidavit, as required by the Code of Civil Procedure ("CCP") Section 1211, *et seq.*<sup>36</sup> GNAPs also claims that its constitutional rights were violated by the Commission when it allegedly imposed

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<sup>34</sup> *Colfor Ins. v. Nat'l Labor Relations Bd.* (6<sup>th</sup> Cir. 1968) 838 F.2d 164, 166, citing *U.S. v. Grinnell Corp.* (1966) 384 U.S. 563, 583.

<sup>35</sup> *Assoc. of Nat'l Advertisers, Inc. v. FTC* (D.C. Cir. 1979) 627 F.2d 1151 *cert. denied* (1980) 447 U.S. 921 [Even having "an unalterably closed mind" on matters critical to rules being adopted was not sufficient to disqualify the Chairman of the Federal Trade Commission.]

<sup>36</sup> GNAPs' Rhg. App., p. 5.

contempt sanctions without permitting GNAPs to be confronted by the witnesses against it, as well as a right to cross-examine them. All of these allegations are meritless.

The Commission is endowed by Article XII, Section 2 of the California Constitution with the authority to establish its own rules and procedures.<sup>37</sup> The Commission's Rules of Practice and Procedure do not require the Commission to follow the procedural requirements of CCP 1211 *et seq.* Thus, GNAPs incorrectly insists that that the Commission must apply these standards in the Code of Civil Procedure.

Furthermore, the Decision did not use the term "contempt" except to rebut GNAPs' mischaracterization of the proceeding. Thus, we did not intend to be drawn into an endless discussion of whether the Commission imposed contempt sanctions. What the Commission did was to arbitrate an interconnection agreement, issue a decision, and seek to have that decision enforced.

The underlying issue is whether GNAPs was provided due process at the Commission. The fact is that GNAPs has been afforded notice and opportunity to be heard prior to the Commission's issuance of D.07-06-044. The U.S. Supreme Court has said that "[Due] Process is flexible and calls for such procedural protections as the particular situation demands."<sup>38</sup> Under the situation that presents itself here, as detailed above, GNAPs has been accorded extensive process.<sup>39</sup>

#### **E. The Decision is not premature.**

GNAPs argues that D.07-06-044 is premature because the Commission has not ruled on the rehearing application of D.07-01-004. This assertion has been mooted by the issuance of D.07-08-031 on August 23, 2007, which denies the rehearing of D.07-01-004.

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<sup>37</sup> Article XII, Section 2 of the California Constitution provides in pertinent part that the Commission may establish its own procedures, subject to statute and due process. (Cal. Const. art XII, Sec. 2) This provision is also contained in Pub. Util. Code, Section 1701(a).

<sup>38</sup> *Schweiker v. McClure et al.* (1982) 456 U.S. 188, 200, citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 481.

<sup>39</sup> See also, D.07-06-044, pp. 2-3.

Moreover, a party is not relieved from obeying a Commission order on the ground that rehearing is pending. As D.07-06-044 makes clear, Public Utilities Code Section 702 requires every public utility to obey and comply with every order, decision or rule made or prescribed by the Commission.<sup>40</sup> The filing an application for rehearing does not excuse compliance with a Commission order or decision:

“An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs.”<sup>41</sup>

GNAPs can put an end to this matter by complying with the Commission’s order to pay Cox the sums due it, pursuant to the Commission’s order in D.07-01-004. D.07-06-044 must necessarily enforce that order.

#### **IV. CONCLUSION**

For all of the above reasons, GNAPs has failed to demonstrate grounds for the rehearing of D.07-06-044, or a stay of that Decision. Therefore, the request for stay and the application for rehearing should be denied.

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<sup>40</sup> D.07-06-044, p. 3.

<sup>41</sup> Pub. Util. Code Section 1735. See also Rule 16.1(b) of the Commission’s Rules of Practice and Procedure, which reinforces the obligation of all parties practicing before the Commission to comply with its orders and decisions. It provides that the “[f]iling of an application for rehearing shall not excuse compliance with an order or a decision” of the Commission. (Cal. Code Regs., tit 20, §16.1, subd. (b).)

**THEREFORE IT IS ORDERED** that:

1. The request for a stay of D.07-06-044 is denied.
2. GNAPs' application for the rehearing of D.07-06-044 is denied.

This order is effective today.

Dated September 20, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
TIMOTHY ALAN SIMON  
Commissioners

Comr. Bohn recused himself from this Agenda item and was not part of the Quorum in its consideration.

Comr. Chong recused herself from this Agenda item and was not part of the Quorum in its consideration.