

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
July 1, 2009) WCP/Pricing 09-02
Annual Access Charge Tariff Filings)
)

PETITION OF AT&T CORP. TO SUSPEND AND INVESTIGATE

Pursuant to Section 1.773 of the Commission’s Rules, 47 C.F.R. § 1.773, and the Commission’s Order, DA 09-683, released Mar. 26, 2009,¹ AT&T Corp. (“AT&T”) respectfully requests that the Commission suspend for one day, investigate and issue an accounting order for the interstate access tariff filed by the National Exchange Carrier Association (“NECA”).²

INTRODUCTION AND SUMMARY

There is something seriously wrong with the method used by NECA to compute traffic sensitive rates. In fifteen out of the past sixteen years, NECA’s rates produced returns that far exceed prescribed levels by very substantial margins. When this pattern was brought to the Commission’s attention in 2004, the Commission suspended NECA’s tariff on that basis, finding that such systematic overearnings “raise[] questions about whether NECA’s rates are targeted to realize an 11.25 percent return and the ability of NECA’s rate-of-return reports and data to serve as reliable indicators that rates are not unjust and unreasonable.”³ The Commission emphasized

¹ Order, *July 1, 2009 Annual Access Charge Filings*, WCB/Pricing File No. 09-02, DA 09-683 (rel. Mar. 26, 2009) (setting procedures and filing dates for the 2009 annual access charge filings).

² NECA, Transmittal No. 1245, Tariff No. 5 (filed June 16, 2009).

³ Order Designating Issues For Investigation, *July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd. 18593, ¶ 7 (2004) (“*2004 Designation Order*”); see also Order, *July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd. 12211 (2004) (“*2004 Suspension Order*”).

that where “there is sufficient evidence that a particular methodology for projecting revenue requirements and demand designed to achieve a targeted rate of return is consistently producing overearnings, that methodology may also produce overearnings in the future.”⁴

Now, in 2009, there is an even stronger case for suspending NECA’s tariff. NECA’s rate-making methodology has continued to set rates that result in returns that far exceed prescribed levels. Thus, as in 2004, there is clear evidence that NECA’s rate methodology is fundamentally flawed in that it systematically produces rates that results in substantial over-earnings. The Commission should thus (again) suspend, investigate, and order an accounting of NECA’s tariff filing to address the problems with NECA’s rate-making methodology. Moreover, if NECA again fails to submit information sufficient to allow the Commission to address the fundamental flaws in NECA’s rate-making methodology (as NECA did in 2004), the Commission should, as it did in 2004, expressly deny NECA’s tariff “deemed lawful” status so that NECA’s customers can obtain refunds for any additional substantial over-earnings caused by NECA’s rate hikes.

ARGUMENT

In fifteen of the past sixteen years since 1993, the methodology used by NECA to set traffic sensitive rates has resulted in returns that exceed the Commission-prescribed 11.25 percent by very substantial amounts, resulting in industry-wide overearnings of nearly \$300 million dollars.⁵ NECA’s latest tariffs include another quite extraordinary industry-wide rate increase of \$16.5 million.⁶ NECA’s historical track record of substantial overearnings raises

⁴ Memorandum Opinion And Order, *July 1, 2004 Annual Access Charge Tariff Filings*, 19 FCC Rcd. 23877, ¶ 15 (2004) (“*2004 NECA Order*”).

⁵ See Exhibit A, attached hereto.

⁶ See NECA Transmittal 1245 table titled ‘Derivation of Switched Access Proposed Rate Change,’ Row 7. The Switched access rate change adjusted for the billing effect is 5.81%.

serious questions as to whether NECA's new rate increases are unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b). Accordingly, the Bureau should suspend for one day and investigate NECA's July 1, 2009 tariff filing, and order an accounting.

Indeed, this is precisely what the Commission did in 2004, when it was confronted with NECA's systematic and substantial excessive returns and a new tariff filing with a rate *decrease*. In 2004, NECA filed tariffs seeking to decrease access rates by about \$30.3 million on an industry-wide basis. At that time, AT&T argued that this reduction was not sufficient and demonstrated that "NECA's 2004 access filing exceeds the authorized earnings level because it is based on the same kind of faulty forecasting and rate development methodology that has produced consistent overearnings for the past nine years."⁷ The Bureau agreed with AT&T and "designated for investigation whether the revised rates in NECA's annual access tariff are unjust or unreasonable in violation of section 201 of the Act, particularly whether NECA's rate development methodology has resulted in consistent overearnings, such that this methodology produces access rates that are unjust or unreasonable."⁸ In particular, the *2004 Designation Order* required NECA to submit to the Commission information sufficient for the Commission to accurately measure NECA's historical returns and to evaluate the methodology used by

Row 1, The Total Test Period Revenue at Current Rates is \$522.997 million. NECA is raising switched access rates by $.0581 * \$522.997 = \16.5 million.

⁷ *2004 Designation Order* ¶ 7.

⁸ *2004 Designation Order* ¶ 1; see also *2004 Designation Order* ¶ 5 ("Significant questions were raised concerning whether NECA's rate development methodology has resulted in consistent overearnings over the past nine years, indicating that this methodology may produce access rates that are unjust or unreasonable"); *2004 NECA Order* ¶ 6 ("Significant questions were raised by AT&T and GCI concerning whether NECA's rate development methodology has resulted in consistent overearnings over past years, indicating that the methodology NECA used in setting its 2004 rates may be flawed and produce access rates that are unjust and unreasonable.").

NECA to develop rates.⁹ As the Commission explained, “[t]hough not as rigorous as an audit, the opportunity for careful review of this information is essential to determining the reliability of NECA’s claimed rates of return.”¹⁰

NECA did not comply with the information requests set forth in the *2004 Designation Order*.¹¹ Instead, NECA argued “that the information that it was directed to produce on earnings levels for prior periods relate to prior rates, not the rates proposed in NECA’s annual access filing, and are, therefore, not relevant here.”¹² The Commission “disagree[d],” explaining that “[p]rior period earnings are relevant in determining whether there is a pattern of overearnings, and, if so, whether the rate development methodology that NECA uses is flawed and may produce rates in the 2004 annual access filing that are unjust or unreasonable.”¹³ The Commission thus “agree[d] with AT&T and GCI that if there is sufficient evidence that a particular methodology for projecting revenue requirements and demand designed to achieve a targeted rate of return is consistently producing overearnings, that methodology may also produce overearnings in the future.”¹⁴

Because NECA failed to produce the “essential” information designated by the Commission, the Commission could not address – and certainly could not fix – any of the underlying systemic problems with NECA’s rate-making methodology. Instead, the

⁹ See *2004 Designation Order* ¶¶ 14-23.

¹⁰ *2004 NECA Order* ¶ 14.

¹¹ See, e.g., *2004 NECA Order* ¶ 24-25.

¹² *Id.* ¶ 15.

¹³ *Id.*

¹⁴ *Id.*

Commission refused to grant NECA's rates "deemed lawful" status, thus ensuring that carriers could obtain refunds in the event that NECA's rates again exceeded permissible levels.¹⁵

NECA clearly has not addressed the systemic problems with its rate-making methodology. As AT&T predicted, NECA's switched traffic sensitive rates have continued to produce substantial overearnings in 2004 (13.07%), 2005 (11.56%), 2007 (14.46%) and 2008 (12.02%).¹⁶ All of these values are the returns reported by NECA. For 2004-2007, these returns reflect the returns reported on NECA's Forms 492. NECA is still in the process of computing its 2008 returns, but in its July 1, 2009 filing it candidly predicts that it overearned for 2008, with a return of 12.02%. In fact, NECA's return for 2008 is likely to be even higher. NECA previously predicted, in March 2009, that its 2008 returns would be 13.32% (not 12.02%), and last year NECA's March predictions turned out to be much more accurate than those in its July 2008 tariff filing.¹⁷ In short, with a single exception (2006) NECA's switched traffic sensitive rates have produced returns that substantially exceed 11.25 percent in every year *since 1993*. And, now, in 2009, NECA has submitted a new tariff seeking to further increase rates by \$16.5 million on an industry-wide basis.

There is thus a much stronger case today to suspend, investigate, and order an accounting of NECA's access 2009 tariffs than there was for NECA's 2004 tariffs. There are now four additional years of substantial overearnings to further confirm that NECA's rate making methodology is fundamentally flawed, and this year NECA is seeking a substantial rate *increase*, whereas in 2004 it was seeking a rate decrease.

¹⁵ See, *2004 NECA Order*, ¶ 26.

¹⁶ See Exhibit A.

¹⁷ In March 2008, NECA predicted that its 2007 return would be 12.23%, and in its July 1, 2008 filing, it predicted that its 2007 return would be 11.19%. NECA's most recent filing shows that NECA's 2007 returns are 14.46%.

For these reasons, there is unquestionably a high probability that the tariffs will be found unlawful after investigation, that the unreasonable rates in those tariffs will not be corrected in a subsequent filing, and that suspension, investigation and entry of an appropriate accounting order are necessary to protect the public interest and prevent irreparable harm to ratepayers.

CONCLUSION

For the reasons stated above, the Commission should suspend for one day and investigate the tariff revisions filed by NECA, and impose an accounting order.

Respectfully submitted,

AT&T Corp.

/s/ M. Robert Sutherland

David L. Lawson
Christopher T. Shenk
Sidley Austin LLP
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Gary L. Phillips
M. Robert Sutherland
AT&T Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2057

Attorney's for AT&T Corp.

Please Send and Fax Replies To:

Safir Rammah
Director-Finance, AT&T
Room B-J16.21
3033 Chain Bridge Road
Oakton, VA, 22185
Phone: 703-691-6186
Fax: 908-234-4529

June 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June 2008, I caused true and correct copies of the foregoing Petition of AT&T Corp. To Suspend And Investigate to be served on all parties as shown on the attached Service List.

Dated: June 23, 2009
Washington, D.C.

/s/ Christopher T. Shenk

SERVICE LIST

Raj Kannan
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A221
Washington, D.C. 20554
Raj.Kannan@fcc.gov
(3 paper copies and 1 e-mail copy)

Pamela Arluk
Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5-A225
Washington, D.C. 20554
Pamela.Arluk@fcc.gov
(1 paper copy and 1 e-mail copy)

Best Copy and Printing, Inc.
Portals II
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com
(1 email copy)

J. Dupree
National Exchange Carrier Association (NECA)
80 South Jefferson Road
Whippany, NJ 07981
Tel. (973) 884-8083
Fax. (973) 599-6612
jdupree@neca.org
(by facsimile and by First Class U.S. mail)

HISTORY OF NECA's TRAFFIC SENSITIVE CATEGORY EARNINGS IN EXCESS OF 11.25%
(Dollar Amounts in Thousands)

Variable Information

Line #	Variable Description	2001	2002	2003	2004	2005	2006	2007	2008
1	Company Name (FCC 492 form, line 1)	NECA							
2	Cumulative Period From: (mm/dd/yy) FCC 492 form, line 2(b), CFR 65.701	01/01/01	01/01/02	01/01/03	01/01/04	01/01/05	01/01/06	01/01/07	01/01/08
3	Cumulative Period To: (mm/dd/yy) FCC 492 form, line 2(b), CFR 65.701	12/31/01	12/31/02	12/31/03	12/31/04	12/31/05	12/31/06	12/31/07	12/31/08
4	Multiplicative Factor Used for Annualizing Rate of Return for Cumulative Measurement Period (1/(line 3 - line 2)/365))	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
5	Authorized Rate-of-Return (CFR Part 65, currently 11.25%)	11.25%	11.25%	11.25%	11.25%	11.25%	11.25%	11.25%	11.25%
6	FIT Gross up (currently 35%)	35.00%	35.00%	35.00%	35.00%	35.00%	35.00%	35.00%	35.00%
7	SIT Gross up (5%)	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%

Switched Traffic Sensitive

End Office--For NECA this is all switched categories.

8	Total Revenues (FCC 492 form, line 1, column D, cumulative)	\$ 869,705	\$ 715,022	\$ 730,743	\$ 702,157	\$ 660,067	\$ 623,858	\$ 619,837	
9	Total Expenses and Taxes (FCC 492 form, line 2, column D, cumulative)	\$ 766,679	\$ 603,704	\$ 619,581	\$ 610,549	\$ 586,059	\$ 572,220	\$ 543,512	
10	Operating Income (Net Return) (line 8- line 9)	\$ 103,026	\$ 111,318	\$ 111,162	\$ 91,608	\$ 74,008	\$ 51,638	\$ 76,325	\$ 66,702
11	Rate Base (Average Net Investment) (FCC 492 form, line 4, column D, cumulative)	\$ 822,378	\$ 816,450	\$ 771,955	\$ 700,835	\$ 640,063	\$ 583,083	\$ 527,722	\$ 554,922
12	Rate of Return Annualized ((line 11 / line 12) x line 4)	12.53%	13.63%	14.40%	13.07%	11.56%	8.86%	14.46%	12.02%
13	Annualized Authorized Return ((line 41 x line 5) / line 4)	\$ 92,518	\$ 91,851	\$ 86,845	\$ 78,844	\$ 72,007	\$ 65,597	\$ 59,369	\$ 62,429
14	Total Interstate Access Overearnings (line 10 - line 13)	\$ 10,508	\$ 19,467	\$ 24,317	\$ 12,764	\$ 2,001	\$ -	\$ 16,956	\$ 4,273

Total Switched Overearnings

14	Total Switched Overearnings (line 14)	\$ 10,508	\$ 19,467	\$ 24,317	\$ 12,764	\$ 2,001	\$ -	\$ 16,956	\$ 4,273
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Income Tax Gross-up

15	FIT Gross-up (line 14 / (1-line 6) - line 14)	5,658.41	10,482.43	13,093.80	6,872.96	1,077.41	-	9,130.30	2,300.79
16	SIT Gross-up (line 14 / (1-line 7) - line 14)	553.08	1,024.60	1,279.85	671.79	105.31	-	892.44	224.89

Adjustment for Taxes

17	Total Interstate earning in excess of 11.25% w/o Interest (line 14 + line 15 + line 16)	\$ 16,720	\$ 30,974	\$ 38,691	\$ 20,309	\$ 3,184	\$ -	\$ 26,979	\$ 6,799
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Cumulative Switched Annual Overearnings

		\$ 164,908	\$ 195,882	\$ 234,573	\$ 254,882	\$ 258,066	\$ 258,066	\$ 285,045	\$ 291,843
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1993-2000 Final Data is per Exhibit 2, Neca Direct Case, WC Docket No. 04-372, filed Oct. 12, 2004.

2001 calculated based on NECA 492 filed January 28, 2005.

2002 calculated based on NECA 492 filed January 28, 2005.

2003 calculated based on NECA 492 filed January 2007.

2004 Overearnings per NECA 492 filed January 2007.

2005 based on NECA 492 filed February 13 2009.

2006 Overearnings per NECA 492 filed January 2007.

2007 Overearnings based on NECA 492 filed March 31, 2009.

2008 Overearnings Per NECA 492 filed March 31 2009. 2008 Overearnings calculated based on NECA's projected rate of return of 12.02 per Table 9 of transmittal 1245.

HISTORY OF NECA's TRAFFIC SENSITIVE CATEGORY EARNINGS IN EXCESS OF 11.25%
(Dollar Amounts in Thousands)

Variable Information		1993	1994	1995	1996	1997	1998	1999	2000
Line #	Variable Description	NECA							
1	Company Name (FCC 492 form, line 1)								
2	Cumulative Period From: (mm/dd/yy) FCC 492 form, line 2(b), CFR 65.701	01/01/93	01/01/94	01/01/95	01/01/96	01/01/97	01/01/98	01/01/99	01/01/00
3	Cumulative Period To: (mm/dd/yy) FCC 492 form, line 2(b), CFR 65.701	12/31/93	12/31/94	12/31/95	12/31/96	12/31/97	12/31/98	12/31/99	12/31/00
4	Multiplicative Factor Used for Annualizing Rate of Return for Cumulative Measurement Period (1/((line 3 - line 2)/365))	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
5	Authorized Rate-of-Return (CFR Part 65, currently 11.25%)	11.25%	11.25%	11.25%	11.25%	11.25%	11.25%	11.25%	11.25%
6	FIT Gross up (currently 35%)	35.00%	35.00%	35.00%	35.00%	35.00%	35.00%	35.00%	35.00%
7	SIT Gross up (5%)	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%
Switched Traffic Sensitive									
End Office--For NECA this is all switched categories.									
8	Total Revenues (FCC 492 form, line 1, column D, cumulative)	\$ 856,234	\$ 826,257	\$ 842,335	\$ 849,178	\$ 834,604	\$ 882,696	\$ 848,143	\$ 844,088
9	Total Expenses and Taxes (FCC 492 form, line 2, column D, cumulative)	\$ 737,093	\$ 719,739	\$ 734,447	\$ 747,427	\$ 738,961	\$ 769,277	\$ 748,768	\$ 751,723
10	Operating Income (Net Return) (line 8 - line 9)	\$ 119,141	\$ 106,518	\$ 107,888	\$ 101,751	\$ 95,643	\$ 113,419	\$ 99,375	\$ 92,365
11	Rate Base (Average Net Investment) (FCC 492 form, line 4, column D, cumulative)	\$ 865,644	\$ 879,191	\$ 900,949	\$ 829,582	\$ 780,195	\$ 773,399	\$ 781,243	\$ 793,921
12	Rate of Return Annualized ((line 11 / line 12) x line 4)	13.76%	12.12%	11.97%	12.27%	12.26%	14.67%	12.72%	11.63%
13	Annualized Authorized Return ((line 41 x line 5) / line 4)	\$ 97,385	\$ 98,909	\$ 101,357	\$ 93,328	\$ 87,772	\$ 87,007	\$ 87,890	\$ 89,316
14	Total Interstate Access Overearnings (line 10 - line 13)	\$ 21,756	\$ 7,609	\$ 6,531	\$ 8,423	\$ 7,871	\$ 26,412	\$ 11,485	\$ 3,049
Total Switched Overearnings									
14	Total Switched Overearnings (line 14)	\$ 21,756	\$ 7,609	\$ 6,531	\$ 8,423	\$ 7,871	\$ 26,412	\$ 11,485	\$ 3,049
Income Tax Gross-up									
15	FIT Gross-up (line 14 / (1-line 6) - line 14)	11,714.80	4,097.16	3,516.82	4,535.48	4,238.26	14,221.64	6,184.32	1,641.71
16	SIT Gross-up (line 14 / (1-line 7) - line 14)	1,145.06	400.47	343.75	443.32	414.27	1,390.08	604.48	160.47
Adjustment for Taxes									
17	Total Interstate earning in excess of 11.25% w/o Interest (line 14 + line 15 + line 16)	\$ 34,616	\$ 12,107	\$ 10,392	\$ 13,402	\$ 12,524	\$ 42,023	\$ 18,274	\$ 4,851
Cumulative Switched Annual Overearnings		\$ 34,616	\$ 46,723	\$ 57,114	\$ 70,516	\$ 83,040	\$ 125,063	\$ 143,337	\$ 148,188