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

In the Matter of	)	
July 1, 2010 Annual Access Charge Tariff Filings	)	WCB/Pricing File No. 10-03
Minnesota Independent Equal Access Corporation	)	
Tariff F.C.C. No. 1 Transmittal No. 23	)	

REPLY COMMENTS OF AT&T CORP.

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Pursuant to the Commission's August 9, 2010 Public Notice,[1] AT&T Corp. ("AT&T") respectfully submits these reply comments.

INTRODUCTION & SUMMARY

MIEAC's July 1, 2010 tariff filing included unexplained increases in its uncollectibles expenses ($1.3 million) and corporate operations expenses ($2.1 million) that together inflated MIEAC's revenue requirement – *i.e.*, the amount it collects from ratepayers through rates – by $3.4 million. Although MIEAC still has not documented the source of a large portion of these amounts, MIEAC has admitted that the entire $1.3 million it assigned to uncollectibles and at least $430,000 of the amount it assigned to corporate operations are amounts that MIEAC believes it is owed by a single interexchange carrier, Sprint, and that MIEAC is seeking to recover from Sprint in federal court.

[1] Public Notice, *Comments Sought on AT&T Petition For Reconsideration*, WCB/Pricing File No. 10-03, DA 10-1469 (Aug. 9, 2010).

These admissions confirm that MIEAC's July 1, 2010 tariff is unlawful. The $1.3 million it assigned to uncollectibles are not uncollectibles at all, but amounts that MIEAC admits it fully anticipates collecting from Sprint. As such, MIEAC's tariff violates the Commission's rules that permit a carrier to assign to uncollectibles only amounts that it does *not* anticipate collecting and that are impracticable of collection. It is also clear that MIEAC's tariffed rates are unjust and unreasonable in violation of 47 U.S.C. § 201(b) insofar as MIEAC is seeking to double recover the portions of the $3.4 million related to its dispute with Sprint, once from Sprint and again from its other ratepayers. As for the portion of the $3.4 million that MIEAC still has not documented (about $1.7 million), the Commission has repeatedly held that such unexplained increases are subject to investigation and, if invalid, to prescription. As demonstrated below, MIEAC's attempt to justify its actions only further confirms that its tariff is unlawful.

I. MIEAC HAS UNLAWFULLY INFLATED ITS UNCOLLECTIBLES EXPENSES, AND HENCE RATES, BY $1.3 MILLION DOLLARS.

Under the Commission's rules and orders, a carrier may allocate to the uncollectibles expense category only amounts in outstanding bills "that the [carrier] *anticipates will not be collected* from end-user customers."[2] MIEAC admits that the $1.3 million it used to inflate its uncollectible expenses in its 2010 tariff filing are amounts that it fully anticipates collecting from Sprint.[3] Consequently, the Commission's rules do not permit MIEAC to inflate its rates by assigning those amounts to the uncollectibles expense category.

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[2] Order And Notice Of Proposed Rulemaking, *Universal Service Contribution Methodology*, 21 FCC Rcd. 7518, 2006 FCC LEXIS 3668, *298 (2006). *See also* Petition For Reconsideration of AT&T Corp., *July 1, 2010 Annual Access Charge Tariff Filings, Minnesota Independent Equal Access Corporation, Tariff F.C.C. No. 1, Transmittal No. 23*, WCB Pricing File No. 10-03, at 4-5 (filed July 30, 2010) ("AT&T Petition" or "Petition").

[3] Minnesota Independent Equal Access Corporation Comments On Petition For Reconsideration Of AT&T Corp., *July 1, 2010 Annual Access Charge Tariff Filings, Minnesota Independent*

MIEAC claims that Commission Rule 32.1171(a), 47 C.F.R. § 32.1171(a), permits it to inflate its uncollectibles expenses with amounts it expects to collect from Sprint. To the contrary, this rule states that carriers may assign to uncollectibles amounts that "have been found to be *impracticable of collection*,"[4] a standard that MIEAC does not even attempt to satisfy. MIEAC states only that "[a]lthough it firmly believes that it is entitled to collect the disputed amounts from Sprint, it cannot be *certain* that the legal process will result in a favorable outcome."[5] But "impracticable of collection" does not mean "uncertain of collection." "Impracticable" means "incapable of being performed or accomplished by the means employed or at command."[6] The collection of the $1.3 million MIEAC claims it is owed by Sprint is clearly capable of being collected by the means being employed by MIEAC (a lawsuit against Sprint). Indeed, MIEAC "firmly believes" that Sprint's reasons for not paying MIEAC's bills are "without any merit whatsoever" and that MIEAC will successfully collect those amounts from Sprint pursuant to the lawsuit it filed against Sprint seeking payment of those amounts.[7]

Equal Access Corporation, Tariff F.C.C. No. 1, Transmittal No. 23, WCB Pricing File No. 10-03, at 5-9 (filed Sep. 8, 2010) ("MIEAC Comments").

[4] 47 C.F.R. § 32.1171(a).

[5] MIEAC Comments, at 9 (emphasis added).

[6] Merriam-Webster, http://www.merriam-webster.com/dictionary/impracticable.

[7] MIEAC Comments, at 6-9. MIEAC's attempt to equate the word "impracticable" with "uncertain" is also impermissible because it would lead to absurd results, whereas applying the plain meaning of the word "impracticable" would not. *See, e.g.*, *National Ass'n of Broadcasters* v. *FCC*, 740 F.2d 1190, 1202 (D.C. Cir. 1984). No carrier can ever be "certain" that it will collect the amounts in outstanding bills, which means that under MIEAC's proposed interpretation all amounts in any outstanding bill would be impracticable of collection and thus could be assigned to the uncollectibles expense category, producing the absurd result that carriers could inflate rates merely by issuing more bills. MIEAC also cites to a U.S. Securities and Exchange Commission ("SEC") bulletin that states that a company may recognize revenue when "collectability is reasonably assured." MIEAC Comments, at 8-9. But nothing in MIEAC's rate-making calculations, or in AT&T's challenge to those calculations, has anything to do with "recognize[ing] revenue." The issue here is what can be included or excluded from MIEAC's revenue requirement, which is a term of art for a *cost plus return* estimate that has nothing to do

There is likewise no merit to MIEAC's claims that it should be allowed to seek double-recovery of the $1.3 million it has included as uncollectible expenses, once from Sprint (via the lawsuit MIEAC filed against Sprint) and again from rate-payers (who ultimately pay the higher uncollectible expenses through higher rates). As AT&T has demonstrated (Petition, at 4), the Commission, in very similar circumstances has rejected carriers' attempts to inflate their rates by assigning amounts subject to an ongoing dispute to uncollectibles precisely because doing so would result in impermissible "double-recovery: once from the debtor and once from the consumer, *i.e.*, through the cost element included in the compensation amount."[8]

MIEAC complains that if it is not allowed to recover these amounts from ratepayers through higher tariffed rates, then it might never be able to recoup these amounts if it "does not prevail [against Sprint] in court."[9] But that would be the *correct result*. Sprint is disputing MIEAC's bills on the grounds that MIEAC did not perform the services for which it has billed Sprint. If the federal district court agrees with Sprint, then MIEAC is clearly not entitled to recover those amounts from anyone else, including its other ratepayers, either today or later.

MIEAC also complains that its lawsuit against Sprint may not be resolved for some time and that during the pendency of that lawsuit it should be allowed to collect the amounts it believes it is owed by Sprint from its other ratepayers – even if that would ultimately result in double-recovery – because MIEAC "must pay its operating expenses as they come due and

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with any actual revenues. Further, the issues here relate to the Commission's *regulatory* accounting requirements, not the SEC's accounting guidelines.

[8] Third Report and Order, and Order on Reconsideration of the Second Report and Order, *Implementation Of The Pay Telephone Reclassification And Compensation Provisions Of The Tele-Communications Act Of 1996*, 14 FCC Rcd. 2545, ¶ 162 (1999).

[9] MIEAC Comments, at 10.

cannot postpone them until the litigation is over."[10] But MIEAC has made no showing that it cannot meet its ongoing obligations during the pendency of its lawsuit with Sprint. Moreover, MIEAC provides no reason at all why its ratepayers – which also have monthly operating costs and other obligations – and not MIEAC, should bear the burden of that $1.3 million during the pendency of MIEAC's litigation with Sprint, particularly when it is MIEAC, not any ratepayer, that is alleged to have billed Sprint for services not provided. Furthermore, MIEAC concedes that if it prevails against Sprint, it may "be entitled to full recovery plus interest," thus compensating MIEAC for both the services provided and the time value of money during the pendency of the dispute, whereas ratepayers have no clear avenue for recovering such amounts.

In the end, MIEAC is forced to try to take this issue off the table by "commit[ing]" to refund any double-recovery to ratepayers through prospective rate decreases or credits.[11] But even if this commitment were credible and binding, MIEAC's proposal would still result in significant double-recovery at the expense of its ratepayers. MIEAC's unbinding commitment is that if it prevails against Sprint, it will "reduce its projected uncollectibles prospectively, recalculate its projected earnings and reduce revenues voluntarily to the extent necessary to prevent its forecasted earnings from exceeding the authorized 11.25% rate of return for the current two-year monitoring period."[12] At best, this proposal could prevent only additional double-recovery; it would not refund any amounts that MIEAC double recovers during the pendency of its lawsuit with Sprint. For example, if MIEAC prevails in that case against Sprint in June 2011, it will already have collected the full $1.3 million from ratepayers. Therefore, even if, starting in July 2011, MIEAC reduces its uncollectibles to zero, and adjusts its

[10] *Id.* at 11.

[11] *Id.* at 11-12.

[12] *Id.*

prospective rates accordingly, its customers will only avoid paying additional amounts related to its dispute with Sprint during the 2011/2012 tariff year. MIEAC will keep the $1.3 it already collected from ratepayers during the current 2010/2011 tariff year, thus allowing it to double recover that amount. Moreover, MIEAC also has not committed to do anything if its dispute is not resolved until after the current two-year monitoring period ends (MIEAC promises only to implement its inadequate plan if the case is resolved during the "current two-year monitoring period").[13]

In addition, MIEAC is not committing to refund any amounts it collects from ratepayers related to its dispute with Sprint if MIEAC loses its lawsuit against Sprint. As demonstrated above, if the federal court agrees with Sprint that MIEAC is not entitled to the amounts that MIEAC billed to Sprint, then MIEAC is not entitled collect – and certainly not keep – any such amounts it collected from its other ratepayers.

Finally, MIEAC asserts that it is aware of other carriers (although it does not name them) that have also inflated their tariffed rates with amounts they are already seeking to recover from the billed customer through litigation. That other carriers may also be violating the Commission's rules and the Act is no justification for MIEAC to do so. In this regard, the Bureau should require MIEAC to identify these other carriers so that the Bureau can investigate their tariffs and make any appropriate prescriptions.

II. MIEAC HAS UNLAWFULLY INFLATED ITS CORPORATE OPERATIONS EXPENSES, AND HENCE RATES, BY AT LEAST $430,000.

MIEAC admits that it has inflated its corporate operation expenses with at least $430,000 in anticipated "legal fees" related to its dispute with Sprint.[14] MIEAC also admits that it has also

[13] *Id.* at 12.

[14] *Id.*

requested that a federal court require Sprint to pay those legal fees to MIEAC.[15] Thus, once again, there is no dispute that MIEAC is seeking to double recover amounts related to its litigation with Sprint, once from Sprint and again from its other ratepayers.

MIEAC fails to offer any legitimate reason for forcing its ratepayers to fund MIEAC's legal action against Sprint and for seeking double recovery of those amounts. It merely asserts that it is uncertain whether its request for legal fees will be granted by the court. But that is beside the point. If the court ultimately agrees with Sprint that MIEAC did not provide the services for which it billed Sprint, then the correct result is that MIEAC, not its ratepayers, bear the burden of any legal fees MIEAC incurs related to such unlawful conduct. If MIEAC prevails and obtains its legal fees, then MIEAC will have double recovered those legal fees, once from Sprint and again from its other ratepayers, and thus should not have collected those amounts from its ratepayers in the first place.[16]

As to the remaining portions of the $2.1 million that MIEAC used to inflate its corporate operations expenses – about $1.7 million – MIEAC still has not documented their source.[17] MIEAC states only that these remaining amounts are due to other legal fees and supposed incentive based compensation and reclassification of some departmental expenses to corporate

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[15] *Id.*

[16] MIEAC asserts that, if it double recovers its legal fees, "it will adjust its rates pursuant to the commitment" described above. MIEAC Comments, at 13. But as demonstrated in the previous section, that commitment, in addition to be non-binding, cannot properly remedy such double recovery.

[17] MIEAC's original tariff filing contained no explanation whatsoever for its unusual $2.1 million increase to its corporate operations expenses. Only after AT&T raised these unexplained increases with the Bureau did MIEAC explain that a "significant" portion of its increases in corporate operations expenses were legal fees related to its litigation with Sprint. And only in its September 8, 2010 Comments in this proceeding did MIEAC finally reveal that the specific amount of legal fees MIEAC has assigned to its corporate operations expenses is $430,000 for the current test year.

operations.[18] But this is an unusually large increase for MIEAC, and given MIEAC's attempts to double recover from ratepayers amounts related to its ongoing dispute with Sprint, there is no basis to take MIEAC's word that the remaining undocumented increases in corporate operations expenses are legitimate. Indeed, the Commission has made clear that unexplained significant increases in a carrier's revenue requirement are grounds for investigation.[19]

III. THE BUREAU HAS AUTHORITY TO INVESTIGATE MIEAC'S TARIFF AND PRESCRIBE JUST AND REASONABLE RATES.

MIEAC has consistently sought to avoid scrutiny by the Bureau of its increases to its uncollectibles and corporate operations expenses. MIEAC had every opportunity to provide ample notice that it intended to inflate its rates to allow it to recover from ratepayers amounts related to its dispute with Sprint. Instead, MIEAC initially concealed that fact and tried to slip it past the Bureau in a 7-day tariff filing. Only after AT&T questioned these then-unexplained increases did MIEAC finally partially reveal their source, but it did so less than a day and a half before MIEAC's tariff was scheduled to take effect, knowing full well that the governing rules precluded a response from AT&T, thus denying the Bureau a full record on which to assess MIEAC's increases and leaving the Bureau scant time to conduct its own investigation and analysis.

Now, MIEAC argues[20] that it successfully slipped these increases through the streamlined tariff process, that the Bureau lacks authority to do anything about it under 47 U.S.C. § 204, and

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[18] Opposition of Minnesota Equal Access Corporation To Petition Of AT&T Corp., *July 1, 2010 Annual Access Charge Filings*, WCB/Pricing File No. 10-03, at 6-7 (filed June 29, 2010).

[19] *See, e.g.*, Order, *Madison River Telephone Company, LLC, Tariff No. 1, Transmittal No. 9*, 17 FCC Rcd. 23939 (2003); Order, *National Exchange Carrier Association, Inc., Tariff FCC No. 5, Transmittal No. 952*, 17 FCC Rcd. 22595 (2002).

[20] *See* Minnesota Independent Equal Access Corporation Motion To Dismiss Petition For Reconsideration Of AT&T Corp., *July 1, 2010 Annual Access Charge Tariff Filings, Minnesota*

that the Bureau erred when it invited petitions for reconsideration of its non-action on MIEAC's tariff filing.[21] This argument is a red herring. Regardless of whether the Bureau has authority to reconsider its non-action on MIEAC's tariff filing under 47 U.S.C. § 204, the Bureau clearly has authority to investigate MIEAC's tariff and prospectively prescribe just and reasonable rates pursuant to 47 U.S.C. §§ 201(b), 205. Even MIEAC admits elsewhere in its comments that "the Commission has the power to compel such rate reduction[s] under Sections 201(b) and 205."[22] And that is precisely the relief AT&T requested in its Petition.[23]

Independent Equal Access Corporation, Tariff F.C.C. No. 1, Transmittal No. 23, WCB Pricing File No. 10-03 (filed Aug. 9, 2010) ("MIEAC Motion").

[21] Public Notice, *Protested Tariff Transmittals, Action Taken*, WCB/Pricing File No. 10-03, DA-1252 (rel. July 1, 2010) ("[a]pplications for review and petitions for reconsideration of this decision may be filed within 30 days from the date of this Public Notice in accordance with sections 1.115 and 1.106 of the Commission's rules, 47 C.F.R. § 1.115, 1.106.").

[22] MIEAC Comments, at 11.

[23] AT&T Petition, at 3. In addition, MIEAC's analysis of the Commission's authority under § 204 is incomplete. MIEAC asserts that the Bureau's non-suspension order is interlocutory and therefore not subject to reconsideration. But that argument cannot be reconciled with MIEAC's own view that its July 1, 2010 tariff is "deemed lawful" and that any subsequent determination of the lawfulness of its rates will be prospective only. Thus, under MIEAC's view, the Bureau's non-suspension was a final decision as to the lawfulness of its tariff for the period from July 1, 2010 up to the date of any future determination that they are unlawful. MIEAC quotes a 1986 Commission decision stating that "an order declining to reject a tariff is an interlocutory action that is not subject to petitions for reconsiderations." MIEAC Motion, at 2. But the issue here relates to a non-suspension, not a non-rejection. And, more fundamentally, this 1986 decision was issued *prior* to the addition of the deemed lawful provisions of 47 U.S.C. § 204, and thus does not account for the impact of the deemed lawful provisions on the finality of a non-suspension of a streamlined tariff filing (such as MIEAC's tariff filing). MIEAC also relies on that same 1986 decision for the additional proposition that § 204, by its terms, precludes reconsideration of a non-suspension. But MIEAC ignores subsequent court decisions finding potential exceptions to that proposition, including the D.C. Circuit's finding that § 204 may not preclude such actions where a carrier "furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations." *ACS of Anchorage* v. *FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002).

CONCLUSION

For the foregoing reasons, the Commission should reconsider its July 1, 2010 Action and suspend for one day, investigate and order an accounting of MIEAC's July 1, 2010 tariff filing. In the alternative, the Bureau should investigate and prescribe just and reasonable rates pursuant to Section 205 of the Act, 47 U.S.C. § 205. In particular, the Bureau should (1) require MIEAC to remove the entire $1.3 million related to its dispute with Sprint from its uncollectibles expenses; (2) require MIEAC to identify and document the portion of the $2.1 million increase in corporate operations expenses related to the litigation costs that it is already seeking from Sprint and to remove that amount from corporate operations expenses; and (3) require MIEAC to explain, document, and justify any remaining increase in its corporate operations expenses, and to remove any invalid amounts. The Bureau should then prescribe rates based on these adjustments to MIEAC's revenue requirement.

Respectfully submitted,

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September 23, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September, 2010, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all persons shown below.

Dated: September 23, 2010
Washington, D.C.

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