

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

In the Matter of)	
)	
National Exchange Carrier Association, Inc.)	Transmittal No. 1400
Tariff F.C.C. No. 5)	
)	

**PETITION OF AT&T CORP.
TO SUSPEND AND INVESTIGATE NECA TARIFF No. 5**

Pursuant to Section 204(a)(1) of the Communications Act, 47 U.S.C. § 204(a)(1), and Section 1.773 of the Commission’s Rules, AT&T Corp. (“AT&T”) respectfully requests that the Commission suspend, order an accounting, and investigate the interstate access tariff filed by the National Exchange Carrier Association (“NECA”) on October 23, 2013.¹

INTRODUCTION AND SUMMARY

NECA’s tariff submission is a blatant and unreasonable attempt to make an end run around the Commission’s *Alpine Order*,² in which the Commission held that the plain language of the current NECA tariff expressly prohibits local exchange carriers (“LECs”) from engaging in certain radical forms of “mileage pumping.”

Mileage pumping is a practice in which a LEC unilaterally and artificially changes its point of interconnection (“POI”) for the delivery of interexchange traffic to locations far away from the LEC’s local exchange territory for the purpose of inflating the mileage-sensitive

¹ See NECA Transmittal No. 1400, F.C.C. Tariff No. 5 (filed Oct. 23, 2013) (“NECA Tariff”).

² Memorandum Opinion and Order, *AT&T Corp. v. Alpine Commc’ns, LLC*, 27 FCC Rcd. 11511 (2012) (“*Alpine Order*”).

switched access transport charges that the LEC then bills to interexchange carriers (“IXCs”).³ In the *Alpine Order*, the Commission found that NECA’s current tariff expressly prohibits participating LECs from engaging in a form of mileage pumping under which the LEC designates a POI that is so far away from its local exchange that it is even outside the Local Access and Transport Area (“LATA”) where the LEC’s local exchange is located.⁴ NECA’s proposed tariff revisions specifically seek to circumvent this holding by adding new language that purports to expressly permit participating LECs to choose a POI “in another LATA” or even in “*an adjacent state*” (emphasis added),⁵ thus facilitating the very type of mileage pumping that the Commission otherwise found to be unjust and unreasonable in violation of Section 201(b) of the Communications Act.⁶

NECA’s proposed tariff thus clearly raises substantial questions of lawfulness, and the Commission should suspend, order an accounting, and investigate the NECA Tariff.

ARGUMENT

Section 204 of the Communications Act, 47 U.S.C. § 204, grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness.⁷ As the Commission has recognized, suspension and investigation of tariffs is an especially essential element of the core mandate to

³ *Alpine Order* ¶ 11.

⁴ *Id.* ¶¶ 32-34.

⁵ NECA Tariff, § 6.1.

⁶ *Alpine Order* ¶¶ 39, 44-48 (“[I]f the NECA Tariff were to be interpreted (contrary to our findings in Part III.A) to allow the Iowa LECs to change their POIs as proposed, the NECA Tariff would be unreasonable in th[is] respect”).

⁷ *See, e.g., Order, July 1 2007, Annual Access Charge Tariff Filings*, 22 FCC Rcd. 11619, ¶¶ 6, 9 (June 28, 2007) (“*2007 Access Stimulation Suspension Order*”) (suspending tariffs “[o]n our own motion” because “we conclude that the tariffs . . . raise questions of whether rates would remain just and reasonable”).

ensure just and reasonable rates where, as here, tariffs that raise substantial questions of lawfulness are filed on a streamlined basis.⁸ The Commission’s rules (47 C.F.R. § 1.773) also provide additional grounds for suspending the NECA Tariff (although the Commission need not rely on these rules if it otherwise finds that suspension is appropriate (which it is) under § 204 of the Act).⁹ These rules provide that a tariff may be suspended if: (1) “there is a high probability the tariff would be found unlawful after investigation”; (2) “any unreasonable rate would not be corrected in a subsequent filing”; (3) “irreparable injury will result if the tariff filing is not suspended”; and (4) “the suspension would not otherwise be contrary to the public interest.”¹⁰ These elements are clearly satisfied here because, for the reasons set forth below, there is a high probability the tariff will be found to be unlawful; there is no indication that NECA’s rates are likely to be corrected; irreparable injury can result if the tariffs are not suspended because the excessive rates could be “deemed lawful”; and suspension is clearly in the public interest because it will help to prevent substantial overcharges.

As explained below, there are clearly significant questions as to whether the rates in the NECA Tariff – which has been filed on a streamlined basis – are unlawful. Indeed, the proposed changes to NECA’s tariff are aimed directly at circumventing the Commission’s finding that the

⁸ See, e.g., Memorandum Opinion and Order, *July 1, 2004, Annual Access Charge Tariff Filings*, 19 FCC Rcd. 23877, ¶ 7 (2004) (“2004 NECA Tariff Investigation Order”) (“When tariffs . . . are filed pursuant to the ‘deemed lawful’ provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates”).

⁹ Memorandum Opinion and Order, *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, FCC 84-70, 1983 FCC LEXIS 396, ¶ 8 n.6 (1983) (rejecting argument that a “request for suspension should be denied as premature and not in compliance with Section 1.773” and finding that the Commission “need not reach these arguments, since the Commission has the authority on its own motion to suspend and investigate tariffs, 47 U.S.C. § 204(a), and we [the Commission] have concluded that the circumstances of this case warrant such action”).

¹⁰ 47 C.F.R. § 1.773.

current NECA tariff prohibits certain forms of mileage pumping activities that the Commission has already found to produce unjust and unreasonable access charges.¹¹

As the Commission is aware, mileage pumping schemes are used by unscrupulous LECs to artificially inflate switched access charges above lawful levels.¹² Mileage pumping can occur under a variety of access arrangements. To date, it has typically been employed when LECs interconnect with IXCs indirectly through centralized equal access (“CEA”) arrangements. Under these arrangements, IXCs generally pay the CEA a fixed fee to carry switched access traffic between the IXC’s point of presence and a designated point of interconnection (“POI”) with the LEC, and the IXC separately pays the LEC a mileage-sensitive rate to deliver the traffic between the designated POI and the LEC’s local exchange. Under typical mileage pumping schemes, the LEC designates a POI at a location that is far away from the LEC’s local exchange, thus inflating the number of miles that the LEC purports to carry the traffic, which in turn inflates the mileage-sensitive charges that the LEC bills to IXCs. The Commission has held that mileage pumping schemes are unjust and unreasonable in violation of Section 201(b) of the Act, because they provide no benefit to consumers or IXCs, and serve only to increase the LEC’s billed switched access charges.¹³

In the *Alpine Order*, the Commission held that NECA’s current tariff includes important safeguards against a radical form of mileage pumping. The *Alpine Order* holds that NECA’s current tariff prohibits any participating LEC from moving its POI to a location that is so far away that it is outside the LATA where the LEC’s local exchange is located.¹⁴ With this

¹¹ *Alpine Order* ¶¶ 44-48.

¹² *Id.* ¶ 11.

¹³ *Id.* ¶¶ 44-48.

¹⁴ *Id.* ¶¶ 31-34.

safeguard in place, the maximum distance that a LEC can artificially move its POI away from its local exchange territory is bounded by the contours of the LATA in which the LEC operates. Thus, although mileage pumping LECs can still significantly inflate mileage charges by moving to distant locations inside their LATAs, the safeguard in NECA’s current tariff protects against the type of mileage pumping schemes in which LECs would move their POIs to even more distant locations outside their home LATA boundaries.¹⁵

The facts in the *Alpine* Mileage Pumping proceeding vividly illustrate the harmful, industry-wide impact that can occur when LECs purport to designate POIs in LATAs outside their home LATA boundaries. In that case, certain defendant Iowa LECs had artificially “moved” their POIs from the closest location available to them within their LATA all the way to Des Moines, Iowa, which is well outside of their home LATA boundaries, resulting in enormous unnecessary and arbitrary increases in their transport mileage-sensitive switched access charges, as shown in the following table:

Table 1. Mileage & Rate Inflation From Mileage Pumping Outside LATA Boundaries.¹⁶

Iowa LEC	Miles To Closest POI In LATA	Miles To Des Moines	% Increase in Mileage	% Increase in Transport Charge
Alpine	65	144	122%	120%
Mutual	42	166	295%	274%
Preston	38	173	355%	325%

NECA’s proposed tariff changes would eliminate the tariffed safeguards that currently protect against these types of mileage pumping activities. Indeed, NECA’s proposed tariff

¹⁵ NECA (Current) FCC Tariff No. 5, § 6.1.

¹⁶ *Alpine Order* ¶ 11; Formal Complaint of AT&T Corp., *AT&T Corp. v. Alpine Commc’ns, LLC*, File No. EB-12-MD-003, ¶ 53 (Apr. 12, 2013).

would explicitly *authorize* LECs to designate POIs in far away LATAs – and even to designate POIs in other states – with no requirement of any legitimate justification for doing so.¹⁷

On this record, suspension and investigation of the NECA Tariff is clearly needed because there are significant questions as to whether NECA’s proposed changes to its tariff will result in unjust and unreasonable mileage-sensitive switched access charges, particularly given that numerous unscrupulous LECs today are currently engaged in mileage pumping activities. Indeed, the situation here is remarkably similar to that in 2007 when the Commission correctly suspended several LECs’ tariffs that were clearly designed to enable the LECs to engage in “access stimulation,” another way that LECs have abused the Commission’s access charge rules to artificially inflate their bills to IXCs.¹⁸ In the *2007 Access Stimulation Order*, the Commission explained that suspension of these tariffs was appropriate because, “[i]f these carriers . . . enter into access stimulation activities, [they] . . . can generate increased revenues that likely would result in rates that are unjust and unreasonable.”¹⁹ Likewise, here, to the extent participants in the NECA Tariff take advantage of the new provisions to engage in mileage pumping, that too would generate “increased revenues that likely would result in rates that are unjust and unreasonable.”

It is no answer to say that IXCs are already protected from mileage pumping activities by the Commission’s ruling that mileage pumping is an unreasonable practice in violation of Section 201(b) of the Act.²⁰ The problem with that approach is that permitting the NECA Tariff to take effect without suspension would allow unscrupulous LECs to make new arguments that

¹⁷ NECA Tariff, § 6.1.

¹⁸ *2007 Access Stimulation Suspension Order* ¶¶ 1-7.

¹⁹ *Id.* ¶ 6.

²⁰ *Alpine Order* ¶¶ 32-34.

they are entitled to collect and keep their inflated mileage-sensitive charges until the Commission makes a formal finding in a complaint proceeding that their particular activities are unjust and unreasonable, and that the availability of these new arguments will therefore significantly increase these LECs' incentives to engage in mileage pumping activities.

Specifically, LECs that take advantage of the new NECA Tariff to engage in the radical form of mileage pumping that it purports to authorize would argue that the NECA Tariff, having not been suspended, is "deemed lawful" and that their use of far-away POIs is authorized by that deemed lawful tariff. Then, they would argue that, due to the deemed lawful nature of the NECA Tariff, any later finding that their practices under the tariff are unjust and unreasonable can apply only prospectively, and that they are thus entitled to collect (or retain) any amounts reflecting the inflated mileage-sensitive charges made prior to the time that the Commission found their charges to be unjust and unreasonable. AT&T, of course, would strongly disagree with any such arguments, but these are the types of arguments that LECs have used in the past and the availability of such "deemed lawful" arguments will clearly substantially increase their incentives to engage in the radical form of mileage pumping that NECA's proposed tariff purports to authorize.²¹

Against this significant potential harm, NECA has failed to identify any legitimate benefit from its proposed tariff changes. NECA asserts only in very general terms that the tariff change will help to "address facility exhaust problems, improve network routing efficiency,

²¹ These newly created perverse incentives would also cause additional harm to IXCs. It would force IXCs to incur additional costs of continuous monitoring for mileage pumping activities, investigating such activities, filing a complaint with the Commission to address such activities, and incurring the regulatory risks that the NECA tariff will be "deemed lawful" and may be found to foreclose recovery of retroactive damages. In addition, the increased disputes that would almost certainly follow from permitting NECA's tariff to become effective without suspension would also increase the burden on courts and the Commission, as they would be called upon to resolve such disputes.

provide or enhance network backup capabilities, and/or improve the quality of billing data recordings.”²² But NECA provides no evidence to substantiate these assertions. More fundamentally, however, the Commission specifically rejected similar attempted justifications for mileage pumping in the *Alpine Order*, explaining that such “strained attempts to manufacture . . . reasons for moving the POI utterly lack credibility and do not support the merits of their contention” and that, in all events, “most of the purported ‘advantages’ touted by the Iowa LECs relate to improvements on the LEC side of the POI – i.e., efficiencies that have nothing to do with the facilities/services that are the subject of the leases between INS and the Iowa LECs.”²³

²² NECA Transmittal Letter, at 1.

²³ *Alpine Order* ¶ 46. If anything, the justifications for mileage pumping that the Commission rejected in the *Alpine Order* were more robust than those NECA asserts here. *See id.* (explaining that the mileage pumping LECs in that case purport to identify “‘various advantages’ they accrued from changing their POI,” including “cost savings; more efficient aggregation of traffic; the ability to provide a wider variety of increased, future service, redundancy and the ability to interface with the networks of other telecommunications carriers”).

CONCLUSION

For the foregoing reasons, the Commission should suspend, order and accounting, and investigate NECA's Tariff FCC No. 5 as submitted with Transmittal No. 1400.

Respectfully Submitted,

/s/ Christi Shewman

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Dated: October 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2013, I caused true and correct copies of the foregoing Petition of AT&T Corp. to Suspend and Investigate NECA Tariff No. 5 to be served on all parties as shown on the attached Service List.

Dated: October 30, 2013
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/s/ Rishi P. Chhatwal

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