Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
National Exchange Carrier Association	)	**Transmittal No. 940**
Tariff FCC No. 5	)	
	)	

WORLDCOM PETITION TO REJECT OR,
IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE

I. Introduction and Summary

WorldCom, Inc. (WorldCom), pursuant to Section 1.773 of the Commission's Rules, hereby petitions the Commission to reject or, in the alternative, suspend and investigate the above-captioned transmittal filed by the National Exchange Carrier Association (NECA) on June 27, 2002.[1]

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[1] Rejection of a proposed tariff or proposed changes to an existing tariff is warranted when the proposal is prima facie unlawful in that it can be demonstrated that it conflicts with the Communications Act or a Commission, rule, regulation or order. See, e.g., American Broadcasting Companies, Inc. v. FCC, 633 F.2d 133, 138 (D.C.Cir. 1980); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C.Cir. 1971); MCI v. AT&T, 94 FCC 2d 332, 340-41 (1983); AT&T, 67 FCC 2d 1134, 1158 (1978), recon. denied, 70 FCC 2d 2031 (1979).

Suspension and investigation of a proposed tariff or tariff modification is warranted when significant questions of unlawfulness arise in connection with the tariff. See AT&T Transmittal No. 148, Memorandum Opinion and Order, FCC 84-421 (released Sept. 19, 1984); ITT, 73 FCC 2d 709, 719 (1979); AT&T, 46 FCC 2d 81,86 (1974); see also Arrow Transportation Company v. Southern Railway Company, 372 U.S. 658 (1963).

In Transmittal No. 940, NECA proposes to substantially revise Section 2.4.1(A) of its interstate access tariff. Whereas the existing tariff language specifies that NECA may request a security deposit only from those existing customers that have a history of late payments, the new tariff language would permit NECA to demand a security deposit "[i]f the Telephone Company becomes aware that the customer's credit worthiness has fallen below commercially acceptable levels as determined by an independent credit rating or reporting service."[2]

The Commission should reject or, in the alternative, suspend and investigate NECA Transmittal No. 940 because (1) Transmittal No. 940 violates a Commission prescription; (2) the proposed tariff language is vague and ambiguous in violation of Sections 61.2 and 61.54(j) of the Commission's rules; (3) the proposed tariff language is unjust and unreasonable in violation of Section 201(b) of the Act; and (4) NECA has failed to make the showing required by the Commission's "substantial cause" test.

I. Transmittal No. 940 Violates a Commission Prescription

The existing security deposit language in Section 2.4.1(A) of NECA's interstate access tariff was prescribed by the Commission in its investigation of the post-divestiture access tariffs in 1984. In the Phase I Order, the Commission rejected the security deposit language proposed by the LECs and concluded that "Section 2.4.1(A) must be amended to allow the telco to require deposits only from an 'IC which has a proven history of late payments to the Telephone Company or does not have established credit except for an IC

[2] NECA Transmittal No. 940, proposed 3rd revised page 2-26.

which is a successor of a company which has established credit and has no history of late payments to the Telephone Company . . . ."[3] Reflecting its prescription by the Commission, that language has been found unchanged in NECA's interstate access tariff since 1984.

There can be no doubt that NECA's current tariff language was prescribed by the Commission in the Phase I Order. The Commission not only provided precise tariff language, but (1) the Commission stated that the relevant section of the LECs' tariffs "must" be amended to reflect that language;[4] and (2) the Commission made no provision for the LECs to propose or try to justify alternate tariff language.

Nor can there be any doubt that the tariff language proposed by NECA in Transmittal No. 940 would violate the Commission's prescription. The tariff language prescribed by the Commission in the Phase I Order states that LECs may request a deposit "only" from customers that have a history of late payment or do not have established credit.[5] Consequently, the Phase I Order's prescription prohibits NECA from requesting deposits from customers other than those with a history of late payment or without established credit. In particular, NECA may not request deposits from any of the additional classes of customers named in Transmittal No. 940 -- customers whose gross monthly billing has increased beyond the amount initially used to estimate a security

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[3] Investigation of Access and Divestiture-Related Tariffs, Memorandum Opinion and Order, CC Docket No. 83-1145 Phase I, 97 FCC 2d 1082 (1984) (Phase I Order), Appendix D, discussion of Section 2.4.1(A) (emphasis added).

[4] Phase I Order, Appendix D, discussion of Section 2.4.1(A).

[5] Id.

deposit, or customers whose credit worthiness has been found wanting by a NECA company.

Given that the tariff language proposed in Transmittal No. 940 would violate a Commission prescription, the Commission cannot permit that language to take effect unless the Commission first waives that prescription or adopts an order modifying, suspending, or setting aside the prescription.[6] Because NECA has not even sought such a waiver or order, the Commission should reject Transmittal No. 940 for violating a Commission prescription. It is well-established that the Commission can reject a tariff transmittal that violates a Commission prescription as patently unlawful, and the Commission has done so on several occasions.[7]

II. The Proposed Tariff Provisions are Vague and Ambiguous

The Commission should reject or, in the alternative, suspend and investigate Transmittal No. 940 because the proposed provisions are vague and ambiguous in

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[6] See, e.g., Pacific Northwest Bell Telephone Company, Revisions To Tariff FCC No. 9, Transmittal No. 159, Memorandum Opinion and Order, released October 11, 1985, at ¶ 7. In that order the Commission indicated that it had the discretion to consider certain elements of a tariff filing as a request for modification of a prescription, but declined to do so in that instance. However, the Commission noted that it had previously found that the issues raised by PNB were best addressed in a proceeding that would afford all interested parties the opportunity to present their views and provide the Commission with an adequate record upon which to base its decision. Similarly, because any change to the prescribed security deposit tariff language would affect all LECs and all customers, potential changes to that language should not be addressed in a tariff proceeding.

[7] Pacific Northwest Bell Telephone Company Transmittal No. 159, Memorandum Opinion and Order, released June 10, 1985; Beehive Telephone Company, Inc. Transmittal No. 14, Order, 14 FCC Rcd 1984 (1998); Beehive Telephone Company Transmittal No. 11, Order, 13 FCC Rcd 12647 (1998).

violation of Section 61.2 and Section 61.54(j) of the Commission's rules.[8]

As the Commission explained in the recent Second Global NAPs Order, "[u]nder section 61.2 [of the Commission's rules], a tariff must be clear and explicit on its face as to when it applies, in order to give fair notice to carriers or other customers about the terms under which they might be taking service and incurring charges."[9] Contrary to that requirement, the tariff language proposed in NECA Transmittal No. 940 is not "clear and explicit on its face as to when it applies" because it does not specify either the "independent credit rating or reporting service" or the "commercially acceptable level" of credit worthiness that will be used by the NECA LECs to determine whether to request for a security deposit. Consequently, the language proposed in Transmittal No. 940 does not provide the requisite "fair notice to carriers or other customers" about the conditions under which security deposit requests might be triggered. Even worse, the NECA LECs would have virtually unlimited discretion to change both the credit rating methodology and the "commercially acceptable level" of credit worthiness without notice.

III. The Proposed Terms and Conditions are not Just and Reasonable

Not only does Transmittal No. 940 violate a valid Commission prescription, but the proposed terms and conditions are unjust and unreasonable in violation of Section 201(b) of the Act.

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[8] 47 C.F.R. §§ 61.2, 61.54(j).

[9] Bell Atlantic-Delaware et al. v. Global NAPs, Memorandum Opinion and Order, 15 FCC Rcd 20665 ¶ 23 (2000) (Second Global NAPs Order).

In the Phase I Order, the Commission struck a reasonable balance between protecting LECs against nonpayment and placing excessive burdens on customers. The Commission struck that balance by permitting LECs to request security deposits from two higher-risk categories of customers -- new customers without established credit and existing customers with a history of late payments -- but not from other customers. Moreover, the NECA LECs are further protected against bad debt by the Commission's ratemaking process. As rate of return carriers, the NECA LECs may include an allowance for uncollectibles in the revenue requirement used to develop interstate access rates.

In contrast to the existing security deposit provisions of NECA's tariff, the tariff language proposed in NECA Transmittal No. 940 does not reasonably balance the NECA LECs' interests against the interests of the NECA LECs' customers. As an initial matter, because the credit rating methodology would not be specified in NECA's tariff, there would be no assurance that the credit rating methodology selected by the NECA LECs would represent a reasonable approach for evaluating the risk of nonpayment for interstate access services. The factors and weightings used in commercial "off-the-shelf" credit rating packages are not necessarily appropriate for evaluating the risk of nonpayment for interstate access services.

Moreover, because the proposed tariff language affords the NECA LECs near-complete discretion in selecting the credit rating methodology and threshold score, the NECA LECs would have the ability to set an unreasonably high standard for the credit worthiness that they deem to be "commercially acceptable." Indeed, the NECA LECs could potentially seek a security deposit from virtually any customer. While it would be in

the NECA LECs' interest to craft such an onerous policy, in order to virtually eliminate their risk of nonpayment, such a policy would shift the balance to the NECA LECs at the expense of their customers.

Finally, the overbroad tariff language proposed in Transmittal No. 940 is potentially unreasonably discriminatory in violation of Section 202(a) of the Act. Because the proposed tariff language gives NECA virtually unfettered discretion to decide which customers would be assessed a security deposit, the NECA LECs could, for example, request deposits only from CLECs and unaffiliated IXCs, but not from their own affiliates or from "retail" special access or end user customers.

IV. Transmittal No. 940 Fails to Meet the "Substantial Cause for Change" Test

The Commission should reject or, in the alternative, suspend and investigate Transmittal No. 940 because NECA's proposal to revise the security deposit regulations applicable to existing term plan and contract tariff customers in mid-term fails to meet the Commission's "substantial cause for change" test. As the Commission recognized in the RCA Americom Decisions,[10] customers have "legitimate expectations . . . for stability in term arrangements."[11]

Contrary to term plan customers' expectation for stability, Transmittal No. 940

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[10] RCA American Communications, Inc., Memorandum Opinion and Order, 86 FCC 2d 1197 (1981) (RCA Americom 1981 Order); RCA American Communications, Inc., Memorandum Opinion and Order, 94 FCC 2d 1338 (RCA Americom 1983 Order); RCA American Communications, Inc., Memorandum Opinion and Order, 2 FCC Rcd 2363 (1987) (RCA Americom Final Order).

[11] RCA Americom 1981 Order, 86 FCC 2d at 1201.

would change NECA's tariff to allow NECA carriers to request security deposits from such customers and to discontinue service if those customers did not provide the requested security deposit.[12] The new tariff provisions would clearly represent a revision of material provisions of existing term plans. When existing term plan customers entered into their term arrangements, they relied on NECA's existing security deposit tariff language and on language that permits NECA to discontinue a term plan only in conjunction with a discontinuance of service pursuant to Section 2.1.8 of NECA's tariff.

Pursuant to the RCA Americom Decisions, extensive revisions of a dominant carrier's long-term service tariff will be considered reasonable only if the carrier can demonstrate "substantial cause" for the revisions.[13] The Commission has found that, in order to "balance[] the carrier's right to adjust its tariff . . . against the legitimate expectations of customers for stability in term arrangements," the reasonableness of a proposal to revise material provisions in the middle of a term "must hinge to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time."[14] As the D.C. Circuit has explained, the "substantial cause for change" test requires carriers to show both that increased costs justify the increased rates and that customers, who may have relied on the original tariff, would not be unduly burdened by the higher rates.[15]

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[12] Transmittal No. 940, proposed original page 2-26.1

[13] RCA Americom 1981 Order, 86 FCC 2d at 1201-1202

[14] Id.

[15] Showtime Networks, Inc. et al. v. FCC, 932 F.2d 1, 3 (D.C. Cir. 1991).

NECA has experienced no change in circumstances that could be used to meet the "substantial cause for change" test. In weighing customers' legitimate expectation of stability against carriers' business needs, the Commission has found carriers to meet the requirements of the substantial cause for change test only when they could demonstrate unforeseeable increases in cost or in traffic volume.[16] NECA has not shown that it has experienced any material changes in business circumstances, much less experienced changes in circumstances that would "constitute an injury to [NECA] that outweigh[s] the existing customers' legitimate expectation of stability."[17] As reported in its most recent Form 492, NECA's interstate earnings in 2001 were well above the Commission's prescribed rate of return of 11.25 percent.

NECA apparently believes that its proposal to waive termination liabilities if it discontinues a term plan customer for refusing to pay a security deposit excuses NECA from the requirements of the substantial cause for change test. NECA misunderstands the substantial cause for change test. At most, NECA's waiver of termination liabilities is potentially relevant to the second prong of the substantial cause for change test -- the position of the relying customer.[18] But NECA must meet both prongs of the substantial cause for change test. [19] Even if NECA could meet the second prong of the test, NECA

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[16] RCA Americom Final Order, 2 FCC Rcd at 2367-2368; Hi-Tech Furnace Systems, Inc. and Robert Kornfeld v. Sprint Communications Company, Memorandum Opinion and Order, 14 FCC Rcd 8040, 8046-8047 (1999) (Hi-Tech Order).

[17] 5 FCC Rcd at 6779 ¶ 21.

[18] Hi-Tech Order at ¶ 22.

[19] Showtime Networks, Inc. et al. v. FCC, 932 F.2d 1, 3 (D.C. Cir. 1991)

would still have to meet the first prong of the substantial cause test, which requires the Commission to "examine the carrier's explanation of the factors necessitating the desired changes at that particular time."[20] Because NECA has not demonstrated that application of the security deposit provisions to existing term plan customers is necessary to prevent injury to NECA, NECA has failed to meet the substantial cause for change test.

V. Conclusion

For the reasons stated herein, the Commission should reject or, in the alternative, suspend and investigate NECA Transmittal No. 940.

Respectfully submitted,
WORLDCOM, INC.

/s/ Alan Buzacott

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July 5, 2002

[20] Hi-Tech Order at ¶ 15.

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on July 5, 2002.

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CERTIFICATE OF SERVICE

I, Alan Buzacott, do hereby certify that copies of the foregoing Petition to Reject or, in the Alternative, Suspend and Investigate, were sent via first class mail, postage paid, and by facsimile*, to the following on this 5th day of July, 2002.

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