

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
)
National Exchange Carrier Association)
FCC No. 5)
Transmittal No. 952)

**PETITION OF GENERAL COMMUNICATION, INC.
TO REJECT OR ALTERNATIVELY TO SUSPEND AND INVESTIGATE**

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General Communication, Inc. ("GCI"), pursuant to Section 1.773 of the Commission's rules, hereby respectfully requests that the Commission reject, or alternatively, suspend for the full five month period permitted under Section 204(a) of the Act and institute an investigation of the tariff revisions filed by the National Exchange Carrier Association ("NECA") on August 30, 2002 under the above-captioned transmittal wherein NECA seeks to increase all of its traffic sensitive access rates by over 2%.

I. INTRODUCTION & SUMMARY

Proclaiming a newfound realization that bankruptcies are occurring in the telecommunications sector, NECA now makes a late, brazen attempt to profit from the WorldCom bankruptcy by seeking, under cover of the Labor Day holiday, to impose an across-the-board 2% increase in its traffic sensitive rates. NECA bases its proposed increase on its

assertion, made without support, that it must now increase rates filed in June and that became effective July 1, 2002, by \$15 million in order to offset "anticipated increases in uncollectible revenues."¹ Although it is not explicit in NECA's filing, it appears that this is a late attempt to recover "bad debt" amounts already incurred and owed by Global Crossing and WorldCom for services already rendered – *i.e.* NECA's past losses. NECA nowhere details its development of this reserve amount, whether it is for anticipated uncollectibles or uncollectible amounts that have already incurred, or provides any indication of the likelihood of its payment for these amounts in bankruptcy proceedings or through other workouts.

NECA's tariff must be rejected for at least three reasons:

- NECA ignores the requirements of rule 61.38 with respect to required support;
- NECA's Transmittal No. 952 is an attempt at impermissible, unlawful retroactive ratemaking; and,
- To the extent that it is changing estimates of *future* expenses, NECA provides no support for its new estimates.

NECA's proposed tariff changes would be particularly harmful to Alaska consumers and to GCI because GCI terminates all of WorldCom's traffic in Alaska. Thus, GCI has paid, or will pay in the ordinary course, all Alaska ILECs that are members of the NECA TS pool access charges to terminate WorldCom's traffic to Alaska. These ILECs have no exposure to WorldCom uncollectibles. However, the NECA proposed rate increases would increase GCI's access charges to cover asserted but unsupported uncollectibles elsewhere in the country. GCI then receives a competitive "double whammy" because, due to Section 254(d) rate averaging requirements, it cannot deaverage its toll rates between Anchorage, which is not served by a

¹ Description and Justification at 3 ("D&J").

member of the NECA TS Pool, and the rest of Alaska, which is served by members of the NECA TS Pool, and it must also compete with carriers forced to average their retail long distance offerings with areas served by low cost non-NECA carriers in the lower 48 states.

GCI is already coping with outstanding WorldCom debts of over \$16 million. It should not now be required to pay WorldCom's debts to NECA and for NECA's own mismanagement.

II. NECA'S PROPOSED TARIFF SHOULD BE REJECTED, OR AT A MINIMUM SUSPENDED AND INVESTIGATED

A. NECA'S Transmittal No. 952 Violates Rule 61.38.

NECA's transmittal must be rejected because NECA has failed entirely to comply with the requirements of Rules 61.38(b) and (d). Rule 61.38(b)(1) requires that the carrier submit "complete explanations of the bases for the estimates." Rule 61.38(d) requires NECA, for a tariff change of this magnitude covering multiple items, to submit "all additional cost, marketing and other data underlying the working papers to justify a proposed rate increase. The carrier must submit this information in suitable form to serve as the carrier's direct case in the event the rate increase is set by the Commission for investigation."

NECA has not supplied the required information. NECA's proposed tariff rate increases depend entirely on NECA's assertion that it must "increas[e] its traffic sensitive revenue requirement for the current test period by \$15 million."² NECA states that "this increased amount is solely attributable to anticipated increases in uncollectible revenues."³ NECA, however, nowhere supports its derivation of an additional \$15 million in revenue requirement. It attaches no working papers, let alone other "additional cost, marketing and other data underlying the working papers." Indeed, it appears that NECA has pulled this number from thin air. It

² D&J at 3.

³ *Id.*

provides no detailed explanation of the amounts it is owed, the steps it is taking to make collection, the alternative avenues available for possible collection, the status of the applicable bankruptcy proceeding or any other basis for its calculation of \$15 million.

The complete lack of support for NECA's derivation of its proposed \$15 million increase in revenue requirement directly contravenes Commission Rule 61.38. On this basis alone, NECA's proposed tariff changes should be rejected. NECA's utter lack of support for its increase is also particularly egregious because it has invoked Section 204(a)(3)'s abbreviated tariff approval procedures, under which the Commission has only 15 days to reject or suspend a tariff after which the tariff becomes effective and is "deemed lawful." NECA's lack of support for its proposed \$15 million rate increase is a blatant attempt to deprive affected parties and the Commission of any opportunity for meaningful, if abbreviated, review, while at the same time attempting to insulate these unjustified rate increases from refund liability. The Commission should not sanction such abusive tactics.

B. NECA's Transmittal Appears to be an Unlawful Attempt at Retroactive Ratemaking to Recover Prior Shortfalls.

As the D.C. Circuit has recognized, "It is, of course, a cardinal principle of ratemaking that a utility may not set rates to recoup past losses...." *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975); *Town of Norwood, Massachusetts v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995) ("If a utility includes an estimate of certain costs in its rates and subsequently finds out that the estimate was too low, it cannot adjust *future* rates to 'recoup past losses'") (emphasis in original). Yet that appears to be precisely what NECA is seeking to do. NECA filed its annual access tariff in June 2002, with a \$15,000 reserve for uncollectibles. Although NECA's filing is utterly inspecific as to derivation of its \$15 million reserve, NECA apparently seeks to increase its rates by \$15 million to cover any uncollectibles that result from the pre-bankruptcy operations of

Global Crossing or WorldCom. To the extent that there will ultimately be uncollectibles as a result of pre-petition debts owed by Global Crossing or WorldCom, an assertion for which NECA also offers no support, these are clearly “past losses,” and not prospective shortfalls, and thus cannot now form the basis of a rate increase. Accordingly, the NECA transmittal must be rejected.

What NECA seems to be seeking now is a preemptive “bailout” from its own projections made two and a half months earlier when it filed its existing rates. Such a bailout is not allowed, even if these events were unforeseen. However, these bankruptcies were not even unforeseen. The Global Crossing bankruptcy had already occurred long before NECA prepared its annual access filings. Even the WorldCom bankruptcy, although spectacular in the manner in which it finally came about, had been rumored for months. If NECA erred in its projections, it cannot now transfer the burden of that error to its ratepayers.

C. NECA Provides No Basis for Estimating Future Uncollectibles at \$15 Million.

To the extent that NECA is seeking to establish a higher reserve against uncollectibles that may result from future bankruptcies or the prospective (and hence post-petition) obligations of WorldCom and Global Crossing, it makes absolutely no showing that such an additional reserve is necessary. The Bankruptcy Court in both cases has found that telecommunications utilities such as NECA have an adequate assurance of payment with respect to their post-petition debts of WorldCom and Global Crossing. *See, In re WorldCom, Inc.*, No. 02-13533 (AJG), slip. op. at 2-6 (Bankr. S.D.N.Y. Aug. 14, 2002); *In re Global Crossing LTD.*, Nos. 02-40187 (REG) through 02-40241 (REG), slip. op. at 2-3 (Bankr. S.D.N.Y. Mar. 25, 2002). *See also In re Adelphia Business Solutions, Inc., et al.*, 280 B.R. 63 (Bankr. S.D.N.Y. 2002) (describing *Global*

Crossing, Nos. 02-40187 (REG) through 02-40241 (REG)). Thus, the proposed reserve is unwarranted and will serve only to increase NECA's already high rates of return.

Even if NECA eventually ultimately refiles its transmittal with a more complete justification and makes clear that it is not seeking recovery of past losses, the Commission should still not let any increase for speculative “bad debt” take place without vigorous and rigorous review. The Commission has had sad experience with permitting “interim” rate increases that proved to be unjustified and did nothing but pad the carrier’s bottom line.

As the Commission’s experience with Virgin Island Telephone Corp. (“Vitelco”) showed, granting interim rate relief based on “conventional wisdom” can subject access purchasers to unjust and unreasonable rates without any adequate remedy. The Commission granted Vitelco a temporary rate increase to reductions in interstate access demand that Vitelco believed would occur in the aftermath of Hurricane Hugo.⁴ At the same time the Commission approved the interim request, it suspended the interim rates for one day and initiated an investigation.⁵ Within three months, it became clear that the expected decline in demand never materialized, and in fact that it exceeded pre-hurricane projections.⁶ The Commission then attempted to order refunds based on overearnings during the six month interim rate period, but was reversed on appeal by a Court of Appeals that held that the FCC could not itself order refunds for overearnings based on a six month period.⁷

⁴ *Virgin Island Tel. Corp. v. FCC*, 989 F.2d 1231, 1234 (D.C. Cir. 1993) (“*Vitelco*”).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1239-40. A subsequent case has left open the issue of whether a less than two year period could be used to calculate overearnings when a review period was truncated by ILEC action. See *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002).

Vitelco teaches that the Commission should not simply assume that uncollectibles will increase without evidence. NECA has tools available to it, both before and during bankruptcy, that it can use to reduce, or even eliminate, the amount of bad debt. Indeed, Verizon recently announced that it had negotiated payment of pre-petition debts as part of a deal to provide billing and collection services. The Commission has, with respect to other proposed tariff changes that were proffered based on justifications of a bad-debt "crisis," suspended those proposals and initiated investigations.⁸

Finally, NECA's historical rates of return on switched access services such as those covered by the NECA TS Pool should make the Commission particularly leery of approving rate increases without a specific basis and investigation. For the last complete monitoring period, 1999-2000, for example, NECA's reported rate of return for switched access services was 12.34%, 109 basis points above the authorized rate of return.⁹ NECA's preliminary Form 492, which it filed in March 2002 to cover 2001, reported a 13.66% rate of return for traffic sensitive revenues, 241 basis points above the authorized rate of return.¹⁰ Even if NECA needs to increase its resources for uncollectibles, it may well be able to do so without increasing its rates, and still earn the authorized rate of return.

⁸ See *In the matter of The Verizon Tel. Cos. Tariff FCC Nos. 1, 11, 14, and 16, Transmittal No. 226*, DA 02-2055, 2002 FCC LEXIS 4154 (rel. Aug. 22, 2002); *In the matter of Ameritech Operating Cos., Tariff FCC No. 2, et al.*, DA 02-2039, 2002 FCC LEXIS 4062 (Aug. 16, 2002); *In the matter of BellSouth Telecomms., Inc., Tariff FCC No. 1, Transmittal No. 657*, DA 02-1886, 2002 FCC LEXIS 3779 (rel. Aug. 2, 2002).

⁹ FCC Industry Analysis and Technology Division, *Non-Price Cap Companies, Rate of Return Summary*, January 1, 1999 - December 31, 2000. NECA's overall reported interstate rate of return was 11.81%.

¹⁰ NECA's overall reported interstate rate of return was 12.90%.

