Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
July 2, 2002	)	WCB/Pricing 03-15
Annual Access Charge Tariff Filings	)	DA 03-1175
	)	
National Exchange Carrier Association, Inc.	)	Transmittal No. 988
Tariff FCC No. 5	)	

PETITION OF GCI TO SUSPEND AND INVESTIGATE

General Communication, Inc. ("GCI"), by its undersigned attorneys and pursuant to Section 204(a)(1) of the Communications Act and Section 1.773 of the Commission's rules,[1] hereby petitions the Commission to suspend and investigate National Exchange Carrier Association, Inc. ("NECA") Tariff F.C.C. No. 5, Transmittal No. 988, which was submitted on June 16, 2003.[2]

As GCI demonstrates below, the NECA tariff filing is unlawful because it fails to make any mid-course correction to adjust its rate development in light of persistent and repeated earnings violations, and thus, raises a substantial question of lawfulness. It is imperative that the Commission consider and address this issue in advance of the tariff becoming effective, or the ability to enforce its prescribed rate of return will be rendered ineffective. For this reason, the NECA 2003 annual access tariff filing should be suspended and set for investigation.

---

[1] 47 U.S.C. § 204(a)(1); 47 C.F.R. § 1.773.

[2] National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 988 (filed June 16, 2003) ("NECA 2003 Annual Access Tariff Filing").

THE NECA ANNUAL TARIFF FILING IS UNLAWFUL BECAUSE IT FAILS TO REFLECT A NECESSARY ADJUSTMENT IN RATE DEVELOPMENT TO CORRECT FOR PERSISTENT OVEREARNINGS

The NECA tariff is unlawful because it does not reflect any adjustment in its rate development methodology in response to persistent and repeated overearnings. As a rate-of-return regulated filer, NECA is required to set and adjust rates to avoid exceeding the Commission's rate of return prescription.[3] The Commission has described that rate-of-return regulation requires that:

> To comply with [the Commission's rate-of-return] prescription, rate-of-return carriers estimate their costs of providing exchange access services and project their demand for such services for a two-year period in the future (i.e., the monitoring period or enforcement period). They then file tariffs containing rates for their access services that they believe, given their estimate of costs and demand, will result in earnings within the prescribed rate of return at the end of the two-year forecast period. During the course of the two-year period, rate-of-return carriers must review how their actual costs and demand calculations compare to their earlier projections, and make rate adjustments, if necessary, to ensure that they do not exceed their prescribed rate of return.[4]

Due to its failure to make any such adjustment, either during recent monitoring periods or in response to repeated earnings violations *in each of the last four monitoring periods*, NECA has consistently filed rates that have proven to be unjust and unreasonable. In the instant tariff filing, NECA has failed to make any rate adjustment to ensure that the rates do not exceed the prescribed rate of return as they have in the past, raising a substantial question of lawfulness.

Indeed, in its March 2002 monitoring report, revealing its earnings for calendar year 2001, NECA reported a 12.25 percent return on common line, a 17.76 percent return on special access, and a 12.74 percent return for switched traffic sensitive traffic (EXHIBIT 4). When GCI

[3] See General Communication, Inc. v. Alaska Communications Systems, Inc., 16 FCC Rcd 2834, 2836 (¶ 5) (2001) ("GCI Order") (citing MCI Telecom. Corp. v. FCC, 59 F.3d 1407, 1414 (D.C. Cir. 1995) ("MCI v. FCC"); Rate of Return Prescription Order, 1 FCC Rcd at 954), aff'd in part, vacated in part, and remanded in part ACS v. FCC, 290 F.3d 403 (D.C. Cir. 2002).

[4] Id. at 2836 (¶ 5) (internal citations and footnotes omitted) (emphasis added).

sought suspension of the tariff on these grounds, NECA replied that its pools have "historically experienced earnings erosion" and "therefore it is expected that the rates of return reported on the Form 492 Report will decline as companies update their studies."[5] One-year later, however, it is plain that NECA's July 2002 rates did not properly take into account its past earnings at unlawful levels. Though NECA implied that subsequent "earnings erosion" would offset its reported unlawful earnings, NECA continued to overearn in every category for the 2001-2002 monitoring period.[6] In its March 2003 monitoring report, revealing its earnings for the 2001-2002 monitoring period, NECA reported a 12.4 percent return on common line, a 14.52 percent return on special access, and a 12.62 percent return for switched traffic sensitive traffic (EXHIBIT 5). This unabated history of overearnings suggests that NECA continues to overstate its member companies' costs, understate demand, or some combination of the two, and the identification of the problem and its resolution is precisely the appropriate focus of Commission investigation. NECA's continued failure to acknowledge and adjust its methodology in response to incontrovertible evidence of overearnings—NECA's own sworn filings—provides sufficient basis for suspension and investigation of the tariff.

The Commission should no longer accept as sufficient that NECA purports to target its test period rates to the 11.25 percent authorized rate of return. NECA claimed to have done so in each of its annual tariffs over the last eight years, but that has not prevented overearnings in each of the last four monitoring periods. NECA's own final monitoring reports for 1995-1996, 1997-

[5] Reply of the National Exchange Carrier Association, Inc., WCB/Pricing 02-12; NECA Transmittal No. 939, dated June 28, 2002 at 10.

[6] It should be noted that in its March 2003 monitoring report, revealing unlawful earnings for 2001-2002, NECA failed to disclose its earnings for calendar year 2002. See EXHIBIT __. As part of its investigation, the Commission should require that NECA provide this information. Failure to do so unreasonably limits NECA's customers to data that places these interested parties at a further disadvantage in reviewing the projections in NECA's annual tariff filing.

1998, 1999-2000, and 2001-2002 all report overeanings in excess of 11.25 percent at least two of the three traffic categories, with unabated overearnings in the switched traffic sensitive category:

Monitoring Period	Common Line	Special Access	Switched Traffic Sensitive	Total Interstate Access
1995-1996[7]	10.79%	11.41%	12.22%	11.46%
1997-1998[8]	11.31%	9.69%	13.67%	12.28%
1999-2000[9]	11.44%	11.48%	12.34%	11.81%
2001-2002[10] (preliminary report)	12.40%	14.52%	12.62%	12.70%

NECA's efforts to "target" its rates to the authorized rate of return apparently have not been successful.

Moreover, the mere fact that NECA has reduced or held constant certain rates in the traffic sensitive and special access categories in the instant tariff filing is an insufficient response. Though NECA has reduced its local switching rate across its rate bands in Transmittal No. 988, the reductions are essentially *de minimis*. For example, for premium local switching, the rate decreases range from 0.000037 (rate band 1) to 0.00011 (rate band 7), but each of the rates were decreased by no more than 0.6 percent.[11] This is hardly the type of adjustment that could resolve the rate setting errors that produced a 12.62 percent return in the switched traffic

---

[7] EXHIBIT 1.

[8] EXHIBIT 2.

[9] EXHIBIT 3.

[10] EXHIBIT 5.

[11] Indeed, even with the instant rate reduction, the local switching rates remain higher than the rates in effect on January 1, 2002.

sensitive category. Likewise, NECA has held constant its special access rates, even though these rates contributed to a 14.52 percent rate of return for the 2001-2002 monitoring period.[12]

It is imperative that the Commission consider these overearnings in connection with the pre-effective tariff review of the instant tariff filing, or NECA's continued earnings violations may be left impervious to challenge, rendering ineffective the Commission's ability to enforce rate-of-return regulation. Indeed, in light of the court's decision in ACS v. FCC, only in this way can the Commission ensure that "the pre-effective review of tariff filings protects against the imposition of unjust and unreasonable practices and rates,"[13] as the court expected. In that decision, the court relied on the Commission's Streamlined Tariff Order to conclude that no retroactive refund liability would be imposed in connection with a tariff that has been "deemed lawful" pursuant to Section 204(a)(3) of the Act. That is, if a tariff is properly filed on 15- or 7-days notice, and the Commission takes no action against the tariff before it goes into effect, then only prospective relief may be available for any provision in the tariff that is subsequently found to be unlawful. If this irreparable injury may occur as a result of the Commission's failure to suspend a tariff that ultimately produces an unlawful return, the Commission must now undertake to consider and protect against overearnings in the pre-effective tariff review process. NECA's persistent collection of unlawful earnings from its customers through unlawfully high rates presents precisely the scenario in which the Commission should intervene in the tariff process.

---

[12] NECA has attempted to disavow its reported overearnings by claiming that its internal true-ups with member companies are open for two years. NECA's election to accommodate this extended true-up period, however, does not provide any basis to ignore NECA's repeated attested admissions of overearnings in the reports mandated by Commission rules.

[13] GCI Order, 16 FCC Rcd at 2857 (¶ 58); Implementation of Section 402(b)(1(A) of the Telecommunications Act of 1996, Report and Order, 12 FCC Rcd 2170, 2183 (1997) ("Streamlined Tariff Order").

Plainly, the Commission's rate-of-return prescription remains in place and in full force and effect,[14] and as the court acknowledged, prescribed rates of return are "a means to achieve just and reasonable rates."[15] In the past, if the Commission failed to suspend a tariff, a customer could be protected to some extent by the later ability to claim damages for overearnings. Today, if the Commission fails to suspend a tariff, then a customer may face irreparable injury.[16] Thus, a filer's recent earnings history can raise a substantial question of lawfulness that requires suspension and investigation when that filer evidences no corrective measures in its rate development to avoid history repeating itself.[17]

Against this background, it is imperative that the Commission consider the issue of overearnings in connection with the pre-effective tariff review of the instant tariff filing. NECA's reports of overearnings have been uninterrupted for at least the prior eight years, but it

---

[14] MCI v. FCC, 59 F.3d at 1414 ("We have repeatedly held that a rate-of-return prescription has the force of law and that the Commission may therefore treat a violation of the prescription as a per se violation of the requirement of the Communications Act that a common carrier maintain 'just and reasonable' rates"); Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements, Report and Order, 1 FCC Rcd 952 (1986) ("Rate of Return Prescription Order"), recon. denied, 2 FCC Rcd 5340 (1987); see also 47 U.S.C. § 205.

[15] ACS v. FCC, 290 F.3d at ___ (citing Nader v. FCC, 520 F.2d 182, 203 (D.C. Cir. 1975).

[16] Previously, Commission decisions not to suspend were considered to be interlocutory because the customer retained the complaint remedy for damages. See Aeronautical Radio Inc. v. FCC, 642 F.2d 1221, 1248 (D.C. Cir. 1980) (finding that customer protection through the complaint process "alone suffices to render the FCC order non-final and unreviewable"), cert. denied, 451 U.S. 920 (1981); see also Nader v. CAB, 657 F.2d 453, 456 n.10 (D.C. Cir. 1981); Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 240 (D.C. Cir.) (finding that the acceptance of a rate filing has been characterized as "decid[ing] nothing concerning the merits of the case; it merely reserves the issues pending a hearing"), cert. denied, 449 U.S. 1061 (1980). Under Section 204(a)(3), decisions not to suspend can no longer be considered nonreviewable.

[17] To the extent that the Commission has previously concluded that "it is usually difficult, if not impossible, to determine, at the time a tariff is filed, whether the rates set forth in the tariff will produce earnings within the prescribed rate of return at some defined point in the future" (GCI Order, 16 FCC Rcd at 2857 (¶ 57) (citing MCI v. FCC, 59 F.3d at 1415)), it will not be possible to conclude that a tariff is lawful during the pre-effective tariff review process.

has failed to make any corresponding adjustment in its forecast methodology. The Commission should not wait any longer to enforce of its rate-of-return prescription and suspend and investigate the instant NECA filing.

CONCLUSION

Based on the foregoing, NECA Transmittal No. 988 raises substantial questions of lawfulness, and the Commission should suspend and investigate the tariff in its entirety.

Respectfully submitted,

GENERAL COMMUNICATION, INC.

____

Tina M. Pidgeon
Vice President, Federal Regulatory Affairs
General Communication, Inc.
1130 17th Street, N.W., Suite 410
Washington, D.C. 20036
(202) 457-8812
(202) 457-8816 FAX

Its Attorney

Dated: June 23, 2002

CERTIFICATE OF SERVICE

I, Tina M. Pidgeon, hereby certify that a copy of the foregoing Petition of GCI to Suspend and Investigate was delivered by facsimile transmission, unless otherwise indicated, on the 23rd day of June, 2003, to the following parties:

Tamara Preiss*
Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Bureau
445 12th Street, S.W., 5-A223
Washington, D.C. 20554
FAX: 202-418-1567

Deena Shetler*
Deputy Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Bureau
445 12th Street, S.W., 5-A223
Washington, D.C. 20554
FAX: 202-418-1567

Judy Nitsche*
Assistant Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Bureau
445 12th Street, S.W., 5-A223
Washington, D.C. 20554
FAX: 202-418-1567

Bill Cook
Director, Access Tariffs & Planning
National Exchange Carrier Association
80 South Jefferson Road
Whippany, New Jersey 07981
FAX: (973) 884-8082

Qualex International**
Portals II
445 12th Street, SW
Room CY-B402
Washington, DC 20554

* By facsimile and electronic mail
** by electronic mail only

Tina M. Pidgeon