

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

In the Matter of)	
)	
July 1, 2004)	WCB/Pricing 04-18
Annual Access Charge Tariff Filings)	DA 04-1049
)	
National Exchange Carrier Association, Inc.)	Transmittal No. 1030
Tariff F.C.C. No. 5)	

PETITION OF GCI TO SUSPEND AND INVESTIGATE

General Communication, Inc. (“GCI”), by its undersigned attorneys and pursuant to Sections 201(b) and 204(a)(1) of the Communications Act of 1934 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. 1030, which was submitted on June 16, 2004.²

As GCI demonstrates below, the NECA tariff filing fails to show that NECA has adjusted its rate development in light of persistent and repeated earnings violations, and thus, raises a substantial question of lawfulness. NECA’s overearnings have not been just a one-year phenomenon, but have persisted over the past nine years, particularly in the switched traffic sensitive rates. Moreover, NECA’s rate-of-return for special access services in 2003 was a stunning 17.08 percent. It is imperative that the Commission consider and address this issue in advance of the tariff becoming effective. Once this tariff takes effect, having been filed on 15 days notice, there will be no possibility of refunds as a remedy for overearnings generated for the period that the instant tariffed rates are in effect. The harm will thus be irreparable.

¹ 47 U.S.C. §§ 201(b) and 204(a)(1); 47 C.F.R. § 1.773.

² National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 1030 (filed June 16, 2004) (“NECA 2004 Annual Access Tariff Filing”).

Further, the NECA tariff filing continues to include unlawful charges for entrance facilities. The demand used to calculate these entrance facility charges is excessive because NECA has been engaging in the unjust and unreasonable practice of charging GCI (and presumably other parties) for entrance facilities that GCI has not requested and does not use at end offices where the interconnecting party has collocated its own multiplexing and transport facilities. The Commission should direct NECA to exclude this unlawful demand from its tariff computations, and to cease and desist from assessing GCI – or any other party – fees for entrance facilities that are neither ordered nor used. For these reasons, the NECA 2004 Annual Access Tariff Filing should be suspended and set for investigation.

I. THE NECA 2004 ANNUAL ACCESS TARIFF FILING IS UNLAWFUL BECAUSE IT FAILS TO REFLECT A NECESSARY ADJUSTMENT IN RATE DEVELOPMENT TO CORRECT FOR PERSISTENT OVEREARNINGS

The NECA 2004 Annual Access Tariff Filing 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 explained that rate-of-return regulation requires that:

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)).

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

NECA does not appear to be making any changes to its tariff development methodology to try to adjust for its repeated and consistent overearnings – which span at least *each of the last four monitoring periods*. This raises a substantial question of lawfulness.

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 4).

Subsequently, in its March 2004 monitoring report for calendar year 2003, NECA reported a 12.35 percent return on common line, while its returns on special access (17.08 percent) and switched traffic sensitive traffic (13.47 percent) (EXHIBIT 5) increased even further above the Commission-prescribed 11.25 percent rate-of-return.

This unabated history of overearnings suggests that NECA continues to overstate its member companies' revenue requirement, understate demand, or some combination of the two; the identification of the problem and its resolution is precisely the appropriate focus of Commission. The Commission should investigate NECA's forecasting methodology, both for the revenue requirement and demand.

NECA's descriptions of its demand development methodology for local switching MOUs show, for example, that NECA is systematically manipulating its assumptions to bias downward

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

its projections of demand. NECA appears to be including estimates of wireless substitution, including changes in demand that result from changes in the price of wireless services.⁵ However, despite a long-term, well-documented decline of long distance prices,⁶ NECA does not include a demand response in its forecasts.⁷ NECA feebly explains that it has excluded demand response because “NECA is unable to determine the degree to which interexchange carriers (IXCs) will change their rates.”⁸ Yet NECA presumably has no greater knowledge of wireless prices, which it includes as an independent variable, than it does long distance prices, which it apparently excludes. This type of “cherry-picking” of assumptions should not be permitted. NECA can use FCC data to forecast long distance price changes and resulting demand changes. Should these lead to demand estimates that are too low, NECA can always update its tariff later to increase its prices, to the extent it can show that demand is lagging.⁹

There also is no way, from the data supplied by NECA with its tariff, to meaningfully evaluate its revenue requirement calculations. NECA’s revenue requirements for the cost companies (Groups B and C) are based on data supplied by the participating companies, which are not available for public scrutiny.¹⁰ Indeed, NECA gives participating companies the option of developing their own forecast data or providing budget and separations data to NECA for

⁵ See NECA 2004 Annual Access Tariff Filing, Volume 3 at 6 n. 6.

⁶ See “Trends in Telephone Service,” FCC Wireline Competition Bureau, Industry Analysis and Technology Division at Table 13.4 (May 2004).

⁷ See NECA 2004 Annual Access Tariff Filing, Volume 3 at 2.

⁸ *Id.*, Volume 3 at 2 n.2.

⁹ NECA’s offer to update its tariff in the event that long distance carriers announce price changes is an empty promise. Long distance carriers change prices all the time by introducing new calling plans and promotions. NECA does not indicate that it actually monitors those plans, nor is it likely that it could do so meaningfully.

¹⁰ See NECA 2004 Annual Access Tariff Filing, Volume 1 at 11.

NECA to forecast.¹¹ Although NECA states that it analyzes this data against historical growth trends,¹² analyzing year-over-year growth simply allows overearnings to perpetuate into the future. Nor is data presented in any way that allows the carriers that will be gouged to actually review the calculations: Volume 2, Exhibit 5 presents raw data on historical revenue requirement, but without the many adjustments that NECA subsequently makes to calculate actual revenue requirement. Moreover, NECA does not present its adjustments on a year-by-year basis, so there is way to determine whether these forecasts have been generally reliable.

While this type of “trust-me” approach might have been appropriate when NECA was subject to overearnings refunds, these scanty justifications cannot be considered sufficient when there has been consistent overearning and refunds are no longer available. Notably, NECA purports to target its test period rates to the 11.25 percent authorized rate of return. But NECA claimed to have done so in each of its annual tariff filings over the last eight years, and that has not prevented overearnings in each of the last four monitoring periods. NECA’s own final monitoring reports for 1995-1996, 1997-1998, 1999-2000, and 2001-2002 all report overearnings in excess of 11.25 percent in at least two of the three traffic categories, with unabated overearnings in the switched traffic sensitive category.

¹¹ *See id.*, Volume 1 at 11 n. 27.

¹² *Id.*, Volume 2 at 10-11.

Monitoring Period	Common Line	Special Access	Switched Traffic Sensitive	Total Interstate Access
1995-1996 ¹³	10.79%	11.41%	12.22%	11.46%
1997-1998 ¹⁴	11.31%	9.69%	13.67%	12.28%
1999-2000 ¹⁵	11.44%	11.48%	12.34%	11.81%
2001-2002 ¹⁶	12.05%	12.57%	12.76%	12.71%
2003 ¹⁷	12.35%	17.08%	13.47%	14.45%

Likewise, the 2003 monitoring report shows that the level of NECA's overearnings is increasing over time. Accordingly, NECA's efforts to "target" its rates to the authorized rate-of-return apparently have not been successful.

Pre-effectiveness review is now the only means that the Commission has to protect consumers against unjustifiable rates filed under streamlined procedures. In light of the court's decision in *ACS v. FCC*, "the pre-effective review of tariff filings protects against the imposition of unjust and unreasonable practices and rates,"¹⁸ as the court expected. Because of that decision, no retroactive refund liability can 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. Moreover, the Commission's complaint process would not

¹³ EXHIBIT 1.

¹⁴ EXHIBIT 2.

¹⁵ EXHIBIT 3.

¹⁶ EXHIBIT 4.

¹⁷ EXHIBIT 5.

¹⁸ *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").

be completed in less than six months, and would be further hampered by the need to obtain discovery as to NECA's calculations and processes, none of which is presented in a transparent manner in its tariff filing.

Thus, consumer injury will be irreparable and irremediable. 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.¹⁹ 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.²⁰ The Commission's rate-of-return prescription remains in place and in full force and effect,²¹ and as the court acknowledged, prescribed rates of return are "a means to achieve just and reasonable

¹⁹ 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.

²⁰ 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.

²¹ *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.

rates.”²² The Commission should not hesitate to suspend and investigate NECA’s tariff to enforce that earnings prescription. Otherwise, its prescription will be meaningless.

II. NECA HAS FAILED TO CHANGE ITS UNLAWFUL ENTRANCE FACILITY CHARGES

NECA has also unlawfully failed to change terms of its tariff following the *Second MAG Order*.²³ As a result, NECA members are permitted to exercise market power to charge competing providers of transport for entrance facilities that they do not use. In lieu of such charges, NECA should be tariffing a cross-connect, as the *Second MAG Order* makes clear. NECA has not done so. At a minimum, NECA must eliminate charges for entrance facilities that its members do not actually provide.

Using its rights under Section 251 of the Communications Act, GCI has collocated in three end offices operated by NECA Traffic Sensitive Tariff participants, ACS of Fairbanks, Inc. (“ACS-F”) and ACS of Alaska, Inc. (“ACS-AK”) (collectively “ACS”).²⁴ Under its Section 251 interconnection agreements, GCI pays ACS for all collocation-related facilities and services, including the rental of the collocation space, power, and necessary heating and air conditioning. GCI also pays ACS for necessary cross-connect cables running from the main distribution frame to GCI’s collocation cage, and from the trunk ports on ACS’ switch to GCI’s collocation cage.

GCI provides switched access services using its collocation space to interconnect its own multiplexing and transport facilities to a cross-connect running to a trunk port on ACS’ end office switch. At present, GCI uses this arrangement of its own transport facilities cross-

²² *ACS v. FCC*, 290 F.3d at 411 (citing *Nader v. FCC*, 520 F.2d 182, 203 (D.C. Cir. 1975)).

²³ *Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket Nos. 00-256, 96-45 (¶ 31) (rel. Feb. 26, 2004) (“*Second MAG Order*”).

²⁴ These end offices are Globe, Juneau-Main and Sterling.

connected to ACS' end office switch to deliver interstate traffic to ACS for termination.²⁵ When GCI uses its own transport facilities interconnected to ACS' end office switch through a collocation space and a cross-connect, GCI neither orders nor uses any ACS entrance facilities.

Nonetheless, NECA has consistently claimed that its tariff requires ACS to impose these superfluous entrance facility charges regardless of request, need or use. Indeed, with respect to switched access entrance facility charges in particular, NECA has relied on its tariff, which states that “[t]his charge will apply even if the customer designated premises and the serving wire center are collocated in a Telephone Company building.”²⁶ Now, in its 2004 annual access tariff filing, NECA has once again included demand for entrance facilities – even when members of the NECA pool do not provide the transport – into their demand projections, stating that “One flat-rate charge applies for each Entrance Facility that is terminated at a customer-designated premises *even when the customer’s serving wire center and customer-designated premises are collocated.*”²⁷

The inclusion of this demand is in conflict with the Commission’s reasoning in the *Second MAG Order*. In that Order, the Commission responded to GCI’s concerns about NECA’s practice by clarifying that “a rate-of-return carrier wishing to geographically deaverage transport or special access rates must establish a cross-connect element providing for interconnection and may not charge collocated providers for entrance facilities or channel terminations when the entrant provides its own transmission facilities.”²⁸ Importantly, this policy makes sense even in

²⁵ The same GCI collocation arrangements and cross-connects are used to deliver terminating intrastate traffic to ACS. ACS delivers originating interstate traffic to GCI’s point of presence over transport facilities that GCI purchases from ACS pursuant to ACS’ access tariff.

²⁶ NECA Tariff F.C.C. No. 5, § 6.1.3(A)(1), 3rd Revised Page 6-8.1.

²⁷ See NECA 2004 Description and Justification, Volume 5, Section 2 at 4 (emphasis added).

²⁸ *Second MAG Order* at ¶ 31.

those situations where the rate-of-return ILEC does not seek to geographically deaverage its transport rates. As the Commission recognized, “a rate-of-return carrier that could assess such a charge for the combined facilities” even when a collocated carrier neither orders or uses those facilities “would still clearly possess some degree of market power, and would be attempting to use that power in an anti-competitive manner.”²⁹ That is the case in Fairbanks and Juneau today, where ACS-F and ACS-AK continue to assess GCI through the NECA Tariff F.C.C. No. 5 for entrance facilities that GCI does not want or need.

The unjust and unreasonable imposition of these charges for superfluous entrance facilities impermissibly distorts the calculation of proper rates for channel terminations and entrance facilities. As applied to the facilities GCI has neither ordered nor used, the rate is excessive because no charge is warranted. Moreover, because entrance facility rates are calculated by dividing the revenue requirement by projected demand, these added entrance facilities unjustly increase the projected demand and decrease rates. This means that, with all other factors held constant, rates for entrance facilities actually ordered and used are too low, distorting and harming competition in interstate transport.

In short, NECA Transmittal No. 1030 includes rates for entrance facilities that are unjust and unreasonable under Section 201(b) of the Communications Act because they are calculated using demand projections based on the unjust and unreasonable practice of charging GCI and other competitive carriers for entrance facilities that they neither order nor use. These unjust and unreasonable charges for entrance facilities must be excluded from the demand quantities used to calculate NECA’s annual access tariff, and the tariff must be recomputed. Moreover, in order to prevent NECA carriers from adding insult to injury by recomputing the rate and then continuing its unjust and unreasonable practice, the Commission should order NECA carriers to cease and

²⁹ *Id.*

desist charging for entrance facilities that are not ordered or used, consistent with the reasoning of the *Second MAG Order*.

CONCLUSION

Based on the foregoing, NECA Transmittal No. 1030 raises substantial questions of lawfulness, and the Commission should suspend and investigate the tariff in its entirety.

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Dated: June 23, 2004

CERTIFICATE OF SERVICE

I, John T. Nakahata, 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 23th day of June, 2004, to the following parties:

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