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

In the Matter of	)	
	)	
July 1, 2005	)	WCB/Pricing 05-22
Annual Access Charge Tariff Filings	)	

PETITION OF AT&T CORP.

Pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, and the Commission's Order, DA 05-1039, released April 8, 2005, AT&T Corp. ("AT&T") submits this Petition addressed to the annual interstate access tariffs filed on June 16, 2005 by local exchange carriers ("LECs"). For the reasons stated below, AT&T respectfully urges the Commission to suspend and investigate the tariff filed by the National Exchange Carrier Association ("NECA"), which fails to make necessary mid-course adjustments, and the tariff filed by the Telephone Utilities Exchange Carrier Association ("TUECA"), which lacks the required cost support.[1]

I. NECA SHOULD BE REQUIRED TO MAKE MID-COURSE ADJUSTMENTS TO ACCOUNT FOR SUBSTANTIAL OVEREARNINGS DURING THE FIRST HALF OF 2005.

The data that NECA submitted in its Description and Justification demonstrate conclusively that for the first half of 2005, it achieved returns that substantially exceed the

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[1] A tariff is subject to rejection when it is *prima facie* unlawful, in that it demonstrably conflicts with the Communications Act, as amended by the Telecommunications Act of 1996 or a Commission rule, regulation or order. *See, e.g.*, *American Broadcasting Companies, Inc.* v. *AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI* v. *AT&T*, 94 F.C.C.2d 332, 340-41 (1983). Suspension and investigation are appropriate where a tariff raises substantial issues of lawfulness. *See AT&T* (Transmittal No. 148), Memorandum Opinion and Order, 56 RR2d 1503 (1984); *ITT (*Transmittal No. 2191), 73 F.C.C.2d 709, 716 n.5 (1979) (citing *AT&T*, 46 F.C.C.2d 81, 86 (1974)). The Commission should suspend and investigate NECA Tariff F.C.C. No. 5 and TUECA Tariff F.C.C. No. 2.

Commission-prescribed 11.25% rate-of-return and that NECA has failed to correct these overearnings in the rate reductions NECA proposes. NECA therefore should be required to make further downward adjustments to its rates for the calendar year 2005 to bring its overall returns for the 2005-2006 period within the 11.25% range.

NECA concedes that both its current switched and special access rates must be reduced and proposes reductions in each.[2] In particular, to show that its proposed rates have supposedly been reduced by an amount sufficient to produce the authorized rate-of-return on a going-forward basis, NECA provides an attribution analysis of its switched and special access ratemaking methodology. This analysis provides the expected relationships between the revenues that will be produced at current rates and the projected revenue requirements (costs, including an 11.25% rate-of-return). What NECA ignores, however, is that even at the reduced rates it proposes to become effective on July 1, 2005, it will overearn during the calendar year 2005, and consequently, during the full two-year monitoring period. To ensure that NECA does not violate Section 65.700 of the Commission's rules, 47 C.F.R. § 65.700, NECA should be required to further reduce its switched access rates by about $17 million and its special access rates by about $24 million. *See* AT&T Exhibits A and B.

To determine the extent by which NECA will overearn during the present monitoring period AT&T assessed the expected 2005 calendar year results based on NECA's projected growth rates and prior year cost of service (PYCOS) data.[3] AT&T computed NECA's expected 2005 rate-of-return at current rates and projected costs based on the data found in Tables 7 and 8

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[2] NECA, Transmittal No. 1077, Volume 1 Description and Justification, filed June 16, 2005, pp. 32-33.

[3] *See* AT&T Exhibits A and B.

of NECA's D&J.[4] AT&T took the data for the switched current revenue and cost shown in AT&T's Exhibit A, directly from NECA's Table 7, from the rows labeled "Billed Revenue" through "Total RRQ," using the amounts shown in the columns in NECA Table 7, labeled "2004 PYCOS" and "Annual Growth Rates for 05/06 Test Period." Using these data, NECA projects in its Table 7 that during the test period, at current rates, it will earn a switched rate-of-return equal to 14.03%. For its assessment of the special access return, AT&T took the data directly from NECA Table 8, from the rows labeled "Total Revenue" through "Total RRQ," using the amounts shown in the columns labeled "2004 PYCOS" and "Annual Growth Rates for 05/06 Test Period." Using these data for special access, NECA calculates in its Table 8 that projected costs and current rates would produce a rate-of-return of 17.53%.[5]

NECA also shows that if current rates had been in effect during the full year 2004 PYCOS period, NECA tariff participants would have earned, respectively, 12.67% and 13.27% on their switched and special access services.[6] It follows that in the absence of a rate decrease—and the fact that costs will be lower in 2005—NECA participants will necessarily have overearned by an even greater amount during the six-month period ending June 30, 2005, than in 2004. Although NECA's proposed rates are targeted to earn at 11.25% *prospectively,* they have not been reduced sufficiently to counteract the overearnings that will already have occurred during the first six months of 2005. Thus, NECA will likely overearn for the full monitoring period.

[4] NECA D & J, Volume 1, pp. 31, 33.

[5] The Average Rate Base used in both Exhibits A and B, is taken from NECA's Volume 2, Exhibit 2, pp. 6 of 8 (PYCOS) and 8 of 8 (Test Period). *See* NECA Tables 7 and 8.

[6] *See* NECA D & J, Volume 1, pp. 31, 33.

Using the data described above, AT&T estimated the extent of the 2005 NECA overearnings by growing the 2004 PYCOS data to derive 2005 revenues at current rates and 2005 costs based on NECA's annual growth rates.[7] To estimate the effect on a current year basis (*i.e.,* for the first six months of 2005), the 2005 revenue and cost amounts are simply multiplied by one-half. As expected, NECA will have revenues for the calendar year 2005 that exceed the authorized rate-of-return on switched access services by about $17 million, and that will exceed the authorized rate-of-return on special access services by about $24 million.[8]

To ensure that NECA does not overearn during 2005 and during the full two-year monitoring period the Commission should require that NECA reduce its switched and special access rates accordingly. As the Commission has explained:

> "[R]ate-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 or enforcement period). They then file tariffs containing rates for their access services that they believe, given their estimates 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 monitoring 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.*"[9]

NECA has never seriously disputed that mid-course corrections are required. In 2002, for example, NECA sought a "mid-course" correction in its revenue requirements in its 2002

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[7] To develop the growth rate for the Average Rate Base AT&T derived the annual growth rate from Row 410 Volume 2, Exhibit 2, Page 6 of 8 and Row 410 Volume 2, Exhibit 2, Page 8 of 8.

[8] *See* AT&T Exhibits A & B.

[9] *In the Matter of General Communications Inc., Complainant, v. Alaska Communications, Inc. and Alaska Communications Systems, Inc. d/b/a ATU Telecommunications ATU Telecommunications d/b/a Anchorage Telephone Utility,* EB-00-MD-016, Memorandum Opinion and Order, 16 FCC Rcd. 2834, ¶ 5 (2001) ("*GCI v. ACS*") (emphasis added) *citing* MCI, 59 F.3d at 1415; *see In the Matter of Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements, Report and Order*, 1 FCC Rcd. 952, 954, ¶ 10 (1986).

annual tariff filing on the grounds that its overall returns would fall below the Commission-prescribed rate-of-return without such an adjustment.[10] By the same logic, and consistent with the Commission's rules, NECA, which now shows earnings exceeding 11.25%, should have filed, but did not, a mid-course correction to ensure that its returns fall within the Commission-prescribed 11.25% rate-of-return.

In the past, NECA has defended not making *downward* adjustments on the ground that its pools "historically experience earnings erosion" and that returns will decrease to permissible levels as its members report actual data.[11] But that argument is not available to NECA here because the expected overearnings are not based on future projections, but rather on NECA's own historical data.[12]

Recent federal court decisions make it even more critical that rate-of-return LECs implement appropriate mid-course adjustments. Under prior Commission precedent and longstanding tradition, ratepayers were at least partially protected from excessive charges because they were allowed to retroactively collect excess earnings from rate-of-return carriers. However, under *ACS of Anchorage, Inc.* v. *FCC*, 290 F.3d 403, 410-412 (D.C. Cir. 2002) ("*ACS* v. *FCC*"), retroactive refunds are no longer available after a tariff is permitted to take effect without suspension or other "action" specified in 47 U.S.C. § 204(a)(1) because the tariff

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[10] *See National Exchange Carrier, Inc. Tariff FCC No. 5, Transmittal No. 952,* WC Docket No. 02-356, Order, DA 02-3100, ¶ 4 (rel. Nov. 8, 2002).

[11] *See, e.g.,* Reply of the National Exchange Carrier Association, Inc., WCB/Pricing 02-12; NECA Transmittal No. 939, filed June 28, 2002.

[12] NECA's prior claims have, in any event, not panned out. There is no evidence that NECA's earnings in the second year have reduced the return over the monitoring period to the prescribed level. On the contrary, with the exception of a single period during the past several years, if there were substantial overearnings in the first monitoring period, there also were substantial overearnings in the full two-year tariff period. *See* Petition of AT&T Corp., *In the Matter of July 1, 2004 Annual Access Charge Tariff Filings*, WCB/Pricing 04-18, filed June 23, 2004, Exhibit B-2.

is then "deemed lawful" pursuant to 47 U.S.C. § 204(a)(3). In these circumstances, ratepayers can only seek relief on a prospective basis and even that relief is available only if some provision in the tariff is subsequently found to be unlawful.[13] Thus, the principle protection that consumers and ratepayers now have against tariffed rates that produce unlawful returns is a strenuous pre-effective tariff review. The Commission must ensure that its rate-of-return prescriptions are enforced as "a means to achieve just and reasonable rates."[14]

Accordingly, NECA's rates as filed appear unlawful in that they fail to reflect a required mid-course correction. The Commission therefore should suspend NECA's tariff and require NECA to file mid-course rate reductions to reflect the fact that its first half 2005 earnings exceed the Commission's prescribed level. Specifically, the Commission should require NECA to file rates that will produce the prescribed return for the monitoring period.

II. TUECA HAS NOT SUPPLIED REQUIRED COST SUPPORT TO JUSTIFY RATE CHANGES FOR CENTURYTEL OF MONROE COUNTY, LLC, AND CENTURYTEL OF SAN MARCOS, INC.

TUECA has removed CenturyTel of Monroe County, LLC, and CenturyTel of San Marcos, Inc. from NECA Tariff F.C.C. No. 5, and added these carriers to TUECA's Tariff F.C.C No. 2, Access Services, to become effective on July 1, 2005. TUECA has supplied only a cover letter, and a revised list of issuing carriers, yet both of these companies are NECA group B, cost companies, that are required to follow the supporting information requirements of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. Carriers of this size (greater the

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[13] If a tariff has been properly labeled and filed on 15 or 7 days notice, unless "the Commission takes action" prior to its effective date, the tariff will be deemed lawful and in almost all instances will insulate the filing carrier from an obligation to pay refunds to customers who were overcharged.

[14] *ACS* v. *FCC*, 290 F.3d at 410 (*citing Nader* v. *FCC*, 520 F.2d 182, 203 (D.C. Cir. 1975)).

$500,000 gross annual revenues) are required to file explanations and cost data supporting either changes or new tariff offerings, as well as working papers and statistical data, and to comply with the other requirements of Section 61.38. That at least some of the filed rates are suspect is evident, for example, from the fact that CenturyTel of Monroe County, Inc. will be increasing by 60%—from $0.005798 to $0.009278 per minute—its rates in Premium Local Switching rate band 1— a major local switching rate element.[15] No justification is provided for this increase or for any of the other rates similarly filed.

Without the cost support information required by Section 61.38(b), including, among other things, a cost study showing the "[e]stimates of the effect of the changed matter on the traffic and revenues from the service to which the changed matter applies (§ 61.38(b)(1)(iii)), customers like AT&T have no way of knowing if TUECA's rates were developed to earn their prescribed rate-of-return. It appears that TUECA will overearn substantially in the 2003-2004 monitoring period, having reported preliminary results on March 30, 2005, showing a traffic sensitive return of 19.25% and a special access return of 41.42%. It is thus particularly critical to ensure its compliance with the Section 61.38(b) rules. Because TUECA failed to comply with Section 61.38(b)'s cost support requirements, the Commission should suspend TUECA's tariff.

[15] *See* NECA, Tariff F.C.C. No. 5, Section 17.2.3(A), End Local Switching, Page 17-11, effective July 1, 2004, and TUECA, Tariff F.C.C. No.2, Section 17.4.3(A), End Office Local Switching, Page \17-6, effective November 18, 2004.

CONCLUSION

For the reasons stated above, the Commission should suspend for one day and investigate the tariff revisions filed by NECA and TUECA and impose an accounting order.

Respectfully submitted,

AT&T Corp.

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June 23, 2005

Switched Access Overearnings
Calendar Year 2005
(Dollars in Thousands)

Line		Source/Calculation	2004 PYCOS	Annual Growth Rates for 05/06 Test Period	2005 Calendar	Expected 2005 Overearnings Without Midcourse Correction See Note 2
			A	B	C=A*(1+B)	D=C/2
1	Billed Revenue	Col A & B per NECA Table 7, Page 31	$399,085	1.89%	$406,628	$203,314
2	Local Switching Support	Col A & B per NECA Table 7, Page 31	$301,600	0.91%	$304,345	$152,172
3	Total Revenue	Col A & C=L1+L2, Col B=Growth %	$700,685	1.47%	$710,985	$355,493
4	Average Schedule Revenue Requirement	Col A & B per NECA Table 7, Page 31	$213,749	1.57%	$217,105	$108,552
5	Cost Company Revenue Requirement	Col A & B per NECA Table 7, Page 31	$455,810	-1.15%	$450,568	$225,284
6	NECA Expense	Col A & B per NECA Table 7, Page 31	$9,751	-3.36%	$9,423	$4,712
7	Total NECA Pool Revenue Requirement	Sum L4 to L6	$679,310	-0.33%	$677,068	$338,534
8	Average Rate Base	See Note 1	$729,018	-9.15%	$662,294	
9	Authorized Rate of Return		11.25%		11.25%	
10	Rate of Return	((L8*L9)+(L3-L7 adjusted for taxes))/L8	12.67%		13.56%	13.56%
11	Overearning Amount	L3-L7	$21,375		$33,917	$16,958

NOTES:
(1) Annual Growth for Average Rate Base=(Tariff Period Rate Base/Pycos Rate Base)^(2/3) =($638/$729)^(2/3)=.9153
Values for Average Rate Base are taken from PYCOS Exhibit 2 page 6 of 8, Exhibit 2 page 8 of 8 provides the Test Period Average rate base
(2) The actual return and midcourse correction should be slightly less for the first half of the year.

Special Access Overearnings
Calendar Year 2005
(Dollars in Thousands)

Line		Source/Calculation NECA Table 8, Page 33	2004 PYCOS	Annual Growth Rates for 05/06 Test Period	2005 At Current Rates and Projected Costs	Expected 2005 Overearnings Without Midcourse Correction See Note 2
			A	B	C=A*(1+B)	D=C/2
1	Total Revenue	Col A & B per NECA Table 8, Page 33	$407,222	22.86%	$500,313	$250,156
2	Average Schedule Revenue Requirement	Col A & B per NECA Table 8, Page 33	$110,602	19.87%	$132,579	$66,289
3	Cost Company Revenue Requirement	Col A & B per NECA Table 8, Page 33	$272,992	15.15%	$314,350	$157,175
4	NECA Expense	Col A & B per NECA Table 8, Page 33	$5,348	7.69%	$5,759	$2,880
5	Total Revenue Requirement	Sum L2 to L4	$388,942	16.39%	$452,690	$226,345
6	Average Rate Base	See Note 1	$436,511	11.13%	$485,795	
7	Authorized Rate of Return		11.25%		11.25%	
8	Rate of Return	((L6*L7)+(L1-L5 adjusted for taxes))/L6	13.27%		15.98%	15.98%
9	Overearning Amount	L1-L5	$18,280		$47,623.355	$23,812

NOTES:

(1) Annual Growth in Average Net Investment=(Tariff Period/Pycos)^(2/3) =512.486/436.51=1.174^(2/3)=1.1129
Values for Average Rate Base are taken from PYCOS Exhibit 2 page 6 of 8, Exhibit 2 page 8 of 8 provides the Test Period Average rate base

(2) The actual return and overearnings reduction required for the first half of 2005 is expected to be a little less than 1/2 of the annual value.

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2005, I caused true and correct copies of the forgoing Petition of AT&T Corp. to be served on all parties by telecopier and mailing, postage prepaid to their addresses listed below.

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