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ATTORNEYS AT LAW

June 29, 2005

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: July 1, 2005 Annual Access Charge Tariff Filings – National Exchange Carrier Association Tariff No. 5: Petitions of General Communication Inc. and AT&T to Suspend and Investigate Transmittal No. 1077, WCB Docket No. 05-22

Dear Ms. Dortch:

GCI hereby replies to NECA's contentions that if the Commission were to require NECA to set its rates to target an 11.25% rate of return for the 2005-2006 Monitoring Period, as prescribed in Rule 65.701, the Commission would run afoul of Rule 61.38, and the general principles against retroactive rulemaking.

With respect to Rule 61.38, grant of GCI's petition and requiring NECA to target an 11.25% rate of return for the 2005-2006 Monitoring Period would not require the Commission to use cost or demand data (whether actual past year data or projected data for the test period) other than that specified in Rule 61.38. The cost data specified in Rule 61.38 determines NECA's revenue requirement. The demand data specified in Rule 61.38 provides the quantities against which proposed rates are applied. The prescribed rate-of-return is a test against which proposed rates are evaluated: the rate-of-return is an externally specified number that is plugged into the determination of permissible rates. If the proposed rates yield an excessive rate-of-return, then the rates are adjusted downward (and conversely, if the proposed rates yield a return below the prescribed rate of return, the carrier can propose higher rates). Use of a rate of return targeting 11.25 for the entire 2005-2006 Monitoring Period would still result in ratemaking "based upon test year projections." Order, *Commission Requirements for Cost Support Material to be Filed with 1993 Annual Access Tariffs*, 8 FCC Rcd 1936, 1937 (¶ 8) (CCB 1993). Changing the level of the permitted rate of return for the twelve-month period continues to use the same cost and demand data supplied pursuant to Rule 61.38.

Nor is requiring NECA to target an 11.25% rate of return for the entire 2005-2006 Monitoring Period – or at a minimum to demonstrate how its currently proposed rates that target 11.25% for the 2005 Tariff Year will not result in rates that exceed the prescribed maximum of 11.65% -- an exercise of retroactive ratemaking. In the first instance, NECA's rates for the first

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six months of 2005 are merely legal rates, and have never been found to be lawful, nor have they been deemed lawful.¹ As the D.C. Circuit pointed out in *ACS of Anchorage v. FCC*, 290 F.3d 403 (2002), “a rate’s legality is not enough to establish its substantive reasonableness or ‘lawfulness.’” It is only a “lawful” rate, not merely a “legal” rate, that is protected against future retroactive reductions. *Id.* at 411, citing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370, 387-389 (1932). As “legal” but not “lawful” rates, NECA’s rates for the first six months of 2005 are therefore not protected by the doctrine against retroactive ratemaking.

In any event, even were NECA’s rates ones which had been “deemed lawful,” the Commission’s rate of return prescription still sets the time frame against which compliance with the prescription is judged with respect to the future rates now being proposed. Under *Arizona Grocery*, lawful rates are protected against refunds because, and only to the extent, they comply with the Commission’s prescription—prescriptions that the Commission has adopted on delegation from the Congress. *Arizona Grocery*, 284 U.S. at 388. As the D.C. Circuit instructed in *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993)(“*Vitelco*”), the “temporal dimension” is a critical part of the rate of return prescription, with the prescribed rate of return applied only in the context of the two-year Monitoring Period. *Id.* at 1238-9. Thus, when examining whether NECA is proposing rates that are within the lawful prescription, the Commission must look to NECA’s anticipated performance for the entire Monitoring Period.

Put differently, but consistent with *Vitelco* and *Arizona Grocery*, what the Commission has prescribed is not a single rate of return applicable to any given 12-month tariff year, as NECA would have the Commission apply its rules. What the Commission has prescribed (and thus what is lawful under *Arizona Grocery*) is a rate-of-return measured (or in the case of proposed tariffs, projected) over an entire 24-month period, as Rule 65.701 specifies. In any given period of less than two years, that prescription may result in a higher or lower permissible rate-of-return for that period. Thus, even if NECA earns 16% for the first 6 months of 2005, if its overall rate of return for the entire 24-month period is below 11.65%, its rates meet the rate-of-return prescription and are therefore lawful. The lawfulness of NECA’s proposed, prospective rates for the upcoming 12-month period can similarly only be judged according to that same prescribed 24-month period.

What GCI has sought in its Petition is for NECA to be required to justify how its proposed rates will plausibly comply with the rate of return prescription over the Monitoring Period. NECA has submitted nothing to suggest that its current rates will achieve a 24-month return targeting 11.25% or even below the 11.65% maximum. Given NECA’s substantial earnings for the first six months of 2005, it is likely that NECA’s proposed rates will ultimately lead to NECA exceeding the maximum rate of return for the 2005-2006 Monitoring Period. Accordingly, there is a substantial question of lawfulness as to NECA’s proposed rates in Transmittal No. 1077, and those rates must be suspended and investigated.

¹ Indeed, the Commission expressly stripped “deemed lawful” status from these rates. *July 1, 2004, Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd. 23877 (¶24) (Nov. 30, 2004) (“Order”), amended, Errata, 19 FCC Rcd. 24937 (Dec. 23, 2004).

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In accordance with FCC rules, a copy of this letter is being filed electronically in the above-captioned docket.

Sincerely,

/s/

John T. Nakahata
Counsel to General Communication Inc.

cc: Ms. Michelle Carey, Legal Adviser to the Chairman
Mr. Tom Navin, Chief, Wireline Competition Bureau (WCB)
Ms. Tamara Preiss, Chief, Pricing Policy Division, WCB
Ms. Judy Nitsche, Assistant Chief, Pricing Policy Division, WCB
Mr. Jay Atkinson, Pricing Policy Division, WCB
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