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

In the Matter of	
July 2007 Annual Access Charge Tariff Filings	WCB/Pricing File 07-10 DA 07-1483
National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5	Transmittal No. 1172

PETITION OF GCI TO REJECT OR, IN THE ALTERNATIVE TO
SUSPEND AND INVESTIGATE TARIFF FILING

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 reject or, in the alternative, suspend and investigate National Exchange Carrier Association, Inc. ("NECA") Tariff F.C.C. No. 5, Transmittal No. 1172, which was submitted on June 15, 2007.[2]

As GCI demonstrates below, NECA's 2007 Annual Access Tariff Filing unlawfully proposes increasing rates for DS1 high capacity lines and other special access services by 11.6%-12.9% while holding ADSL rates constant.[3] This rate structure would impermissibly shift cost recovery from a competitive service – DSL – to noncompetitive special access services. NECA admits its proposed DSL rates are designed to maintain market-based pricing for DSL services,

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

[2] *National Exchange Carrier Association, Inc., Access Service, Tariff F.C.C. No. 5, Transmittal No. 1172* (filed June 15, 2007) ("NECA 2007 Annual Access Tariff Filing").

[3] *NECA 2007 Annual Access Tariff Filing* Vo1. 1 at 10 (Table 3).

explaining that its DSL rates are "set with the consideration of prevailing market rates."[4] The impropriety of NECA's rate structure is confirmed by its supporting cost calculations, which show that DS1 costs have increased by approximately 1.2%, or about one-tenth the rate of its proposed increase. This rate structure is of particular concern as it appears that NECA's DSL rates may not recover the direct costs of providing DSL service.

The Commission should be particularly wary of allowing cost-shifting between competitive and noncompetitive (and, in some cases, tariffed and nontariffed) services in light of the evolving broadband and special access marketplaces. Permitting this cost-shifting distorts both of these sensitive markets, and threatens to artificially inflate non-DSL special access rates. As an interexchange carrier and a new entrant in markets served by carriers relying on the NECA tariff, GCI would be twice-harmed if NECA succeeded in recovering costs from ADSL through increases in special access rates. First, as a payor of special access, GCI would be forced to pay rates that are higher than necessary for cost recovery. Second, as a competitor, GCI would be forced to compete with below-cost rates that are based on the misallocation of costs to non-competitive services. In light of the very different market conditions facing DSL and non-DSL special access services, the Commission should reject NECA's cost-shifting and adopt structural protections that reflect the different competitive conditions faced by these services.

I. THE 2007 NECA ANNUAL ACCESS TARIFF FILING IS UNLAWFUL BECAUSE IT RECOVERS EXCESSIVE COSTS FROM NONCOMPETITIVE SERVICES.

NECA's 2007 Annual Access Tariff Filing proposes a rate increase of 11.6% for DS1 High Capacity Circuits, a rate increase of 12.8% for DDS 56kbps, and a rate increase of 12.9%

[4] *NECA 2007 Annual Access Tariff Filing* Vol. 5 at 12-13.

for Voice Grade-2W.[5] At the same time, NECA proposes *no increase* in ADSL Voice Data rates.[6] This sharp disparity in rate adjustments suggests that NECA is impermissibly recovering any increased costs of provisioning ADSL Voice Data elements from the pricing of special access services such as DS1 High Capacity Circuits.

NECA's filing indicates that the proposed ADSL Voice Data rate is held at current levels in order to gain an improper advantage in the marketplace. Most NECA pool members face no competition in the market for special access services like DS1 High Capacity Circuits, but many face competition from cable companies or other providers in the market for end-user broadband services. In its supporting documents, NECA explains that its proposed special access rates are "set with the consideration of prevailing market rates."[7] NECA further explains that to "encourage continued deployment of broadband services" it has held the rates for DSL "at current levels."[8] NECA, in short, acknowledges that it has made a decision to price competitive services differently than noncompetitive services, strongly suggesting that it is recovering costs associated with competitive services through unjustified increases in the rates for noncompetitive services.

Not surprisingly, NECA's cost showings do not justify the sharp rise in DS1 rates such as Special Access Channel Termination charges. For example, NECA proposes to increase the common DS1 High Capacity Channel Termination charge (which is the same rate as the switched DS1 Entrance Facility charge) by 11.6% over last year's rate. From data in the NECA

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[5] *NECA 2007 Annual Access Tariff Filing* Vol. 1 at 10 (Table 3).

[6] *Id.*

[7] *NECA 2007 Annual Access Tariff Filing* Vol. 5 at 12.

[8] *Id.* at 12-13.

tariff filing, GCI estimates that the underlying cost of this service has only increased by about 1.2%, far less than the proposed rate increase.[9] This suggests that the primary driver behind the need for special access rate increases is *not* increased channel termination costs. The more likely cause of increased special access costs is ADSL investment and expenses.

NECA's supporting documents suggest that NECA may not be correctly attributing direct costs to its DSL services.[10] In particular, it appears that NECA is assuming a 100% utilization rate for equipment used to provide DSL services. This assumption – which is no doubt incorrect, as it typically takes years to achieve full utilization of DSLAMs and similar equipment – creates an inaccurate picture of the actual cost of providing service. Using a high utilization rate drives the direct cost of DSL service down and would enable NECA to claim that it can both hold DSL rates constant and cover the direct cost of DSL service. At minimum, the Commission should suspend and investigate NECA's 2007 Annual Access Tariff Filing to determine whether, in fact, NECA's DSL rates are sufficient to cover direct costs.

[9] GCI's estimate of a 1.2% growth in DS1 Channel Termination costs is derived from the following analysis. A DS1 channel termination typically consists of two copper pairs with HDSL electronics on both ends of the pairs. Therefore, changes in the cost of this service are due to changes in the cost of loops and changes in the cost of HDSL electronics. From Table 1 (page 6) in Volume 1 of the NECA filing, Common Line (loop) revenue requirement is shown to be increasing by 0.2% per year. However, Table 2 (page 8) of the same volume shows access lines declining by 3.4% per year. Therefore, cost per loop is increasing at a rate of 3.6% per year (0.2% + 3.4%). This is one of the cost elements of the DS1 channel termination. HDSL electronics is the other cost element of the DS1 channel termination. Workpaper 1 of Exhibit 6 in Volume 5 shows the direct cost of channel termination equipment for DS1 to be $56.26 per month. From last year's NECA filing, Workpaper 1 of Exhibit 11 in Volume 5 shows the equipment cost to be $57 per month (*National Exchange Carrier Association, Inc., Access Service, Tariff F.C.C. No. 5, Transmittal No. 1129* (filed June 16, 2006)). This implies a -1.3% cost change for HDSL electronics. Averaging the loop cost change of 3.6% with the HDSL electronics cost change of –1.3% gives an overall DS1 channel termination cost change of 1.2%. The equal weighting of loop cost and HDSL electronics is supported by the relative monthly unit costs shown in Workpaper 3 of Exhibit 6 in Volume 5 (*NECA 2007 Annual Access Tariff Filing*).

[10] NECA asserts that it "develops a direct cost factor for use in ensuring that various proposed rates cover all direct costs plus a share of overhead costs." *NECA 2007 Annual Access Tariff Filing* Vol. 5 at 13.

In the *Video Dialtone Reconsideration Order*, the Commission expressed "concern regarding possible effects of video dialtone investment on basic regulated telephone rates," and proclaimed its commitment "to implementing video dialtone in a manner that does not subject basic telephone ratepayers to unreasonable rate increases or allow improper cross-subsidization."[11] While the Commission identified the price cap regulatory regime as the "primary means of protecting telephone consumers," it found that rate of return carriers, like NECA pool participants, wishing to offer video dialtone service "will bear the burden of demonstrating to us how they will ensure that the costs of video dialtone will not be improperly recovered in the rates charged for other interstate services."[12] The Commission expressed concern about LEC "incentive[s] to understate . . . direct costs in order to set unreasonably low prices and engage in cross-subsidization."[13] The Commission also, however, indicated that an allocation of "an extremely low proportion" of "common costs of shared plant" would not be reasonable.[14]

While the world has changed dramatically from that envisioned by the *Video Dialtone Reconsider Order*, the incentive for rate of return carriers to cross-subsidize competitive services

[11] *Telephone Company-Cable Television Cross-Ownership Rules*, Order on Reconsideration, 10 FCC Rcd. 244, 322 (¶ 162) (1995) ("*Video Dialtone Reconsideration Order*").

[12] *Id.* at 324 (¶ 168). In addition, the Commission adopted certain safeguards for both price cap and rate of return carriers, including "a data collection system" that was "necessary to ensure that telephone ratepayers do not bear the costs of VDT and that would also help to protect cable operators from potential LEC anti-competitive conduct." *Reporting Requirements on Video Dialtone Costs and Jurisdictional Separations for Local Exchange Carriers Offering Video Dialtone Services*, 10 FCC Rcd 11292, 11295 (¶ 5) (Common Carrier Bureau 1995). Such data, the Commission explained would "be especially useful during the tariff review process." *Id.*

[13] *Id.* at 344 (¶ 216).

[14] *Id.* at 345 (¶ 218). The Commission likewise indicated that it would require "a strong justification for allocation of extremely low overhead." *Id.* at 346 (¶ 220)

by allocating investment costs to noncompetitive services remains the same. These concerns demonstrate that it is improper for NECA to set rates for a competitive service by taking into consideration "prevailing market rates" while allowing rates for a noncompetitive service such as DS1 High Capacity Circuits to rise by more than 11%, or nearly ten times the increase necessary to cover increased costs. The Commission should not allow such practices where rate-of-return regulated carriers are participating in both competitive and noncompetitive markets, even if such distortions are achieved only by unreasonable allocations of common costs. Moreover, the Commission should take this opportunity to recognize the changing mix of competitive and noncompetitive services offered by rate-of-return carriers and require rate-of-return carriers to appropriately tariff both services. GCI thus urges the Commission to reject, or suspend and investigate, NECA's tariff and to require NECA to "demonstrate that the costs of" DSL investment "will not be improperly recovered in the rates charged for" special access services.

As a competitor and new entrant, GCI would be doubly harmed by such cost-shifting. GCI relies on incumbent participants in the NECA pool for DS1 tail circuits and other special access services. NECA's proposed rates would require GCI to pay prices for these services that cannot be justified by actual increases in cost. In addition, GCI is a competitive provider of broadband services in markets served by NECA pool participants. In those markets, NECA's proposed ADSL rates will provide GCI's competitors with an unfair advantage, as they, unlike GCI, will be able to use costs recovered from rates for noncompetitive services (rates paid in part by GCI and similarly situated competitors) to keep the prices for competitive services artificially low.

The Commission should address NECA's improper allocation of costs to noncompetitive services by rejecting or, at minimum, suspending and investigating NECA's 2007 Annual Access

Tariff Filing. As the Commission is well aware, pre-effectiveness review is now the only means that the Commission has to protect consumers against unjustifiable rates under the current legal interpretation of Section 204(a)(3).[15] Tariffs that are properly filed under streamlined conditions "shall be deemed lawful" unless the Commission suspends and investigates the tariff as provided in Section 204(a)(1). This has two dilatory effects. First, overearnings from the unlawful rates are not subject to refund for any later overearnings. 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 from overearnings. Today, if the Commission fails to suspend a tariff, the consumer has lost that remedy. Because prescribed rates of return are "a means to achieve just and reasonable rates,"[16] the Commission should not hesitate to suspend and investigate NECA's tariff to enforce its rate-of-return prescription. Otherwise, that prescription will be rendered meaningless.

Second, "deemed lawful" treatment insulates the filer from damages, even in response to a Section 208 complaint proceeding. Thus, any remedy for the unlawful rate or practice will be limited to prospective relief only, *i.e.,* required revision of the rate or discontinuance of the bad act. Absent Commission action, the consumer injury from NECA's unlawful rates will be irreparable and irremediable. As the Commission has explained: "When tariffs, such as NECA's tariff, are filed pursuant to the 'deemed lawful' provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates."[17]

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[15] *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412 (D.C. Cir. 2002) ("ACS").

[16] *Id.* at 411 (citing *Nader v. FCC*, 520 F.2d 182, 203 (D.C. Cir. 1975)).

[17] *July 1, 2004, Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd. 23,877, 23,880 (¶ 7) (Nov. 30, 2004).

To remedy NECA's misallocation of costs, the Commission should both require a DS1 rate reduction and adopt structural accounting protections that prevent cost misallocation between competitive DSL services and noncompetitive special access services. Specifically, the Commission should either separate DSL and noncompetitive special access services, or, alternatively, select an appropriate benchmark year and prohibit any increase in allocation of common costs to special access above the allocation level in that benchmark year.

This remedy would also limit the ability of carriers exiting the NECA DSL tariff to misallocate costs from newly unregulated DSL offerings to regulated offerings. Such misallocations may be contributing to NECA's distorted rates for special access services. Neither the 1996 Telecommunications Act (the "Act") nor the Commission's rules permit carriers to "use services that are not competitive to subsidize services that are subject to competition."[18] Instead, the Commission has adopted a detailed approach to the proper separation of costs between regulated and nonregulated services.[19] In the *Wireline Broadband Order*, the Commission specifically anticipated that rate-of-return carriers would continue to tariff broadband services and therefore did not address the appropriate treatment of nontariffed broadband offerings by rate-of-return carriers.[20] Now that such detariffing has taken place, the Commission must adopt structural safeguards such as separating competitive and noncompetitive services or adopting a benchmark year to cap common costs. Such safeguards would address any misallocation of costs between regulated and unregulated services, and ensure that NECA pool carriers comply with the requirements of the Act and Rule 64.901.

[18] 47 U.S.C. § 254(k); 47 CFR § 64.901(c).

[19] 47 CFR § 64.901.

[20] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14927 (¶ 138) (2005).

CONCLUSION

For the foregoing reasons, NECA's 2007 Annual Access Tariff Filing raises substantial questions of lawfulness with respect to ADSL Voice Data and Traffic Sensitive Special Access services, and the Commission should reject or, at minimum, suspend and investigate the tariff for those categories.

Respectfully submitted,

By: ______________________

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CERTIFICATE OF SERVICE

I, Brita D. Strandberg, hereby certify that a copy of the foregoing Petition of GCI to Suspend and Investigate was delivered by email, unless otherwise indicated, on the 22nd day of June, 2007, to the following parties:

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