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HELEIN & ASSOCIATES, P. C.

ATTORNEYS AT LAW

8180 GREENSBORO DRIVE
SUITE 700
MCLEAN, VA 22102

(703) 714-1300 (TELEPHONE)

(703) 714-1330 (FACSIMILE)

mail@helein.com (EMAIL)

cc
Docket # 99-290

WRITER'S DIRECT DIAL NUMBER:

(703) 714-1300

WRITER'S DIRECT EMAIL ADDRESS:

mail@helein.com

October 4, 1999

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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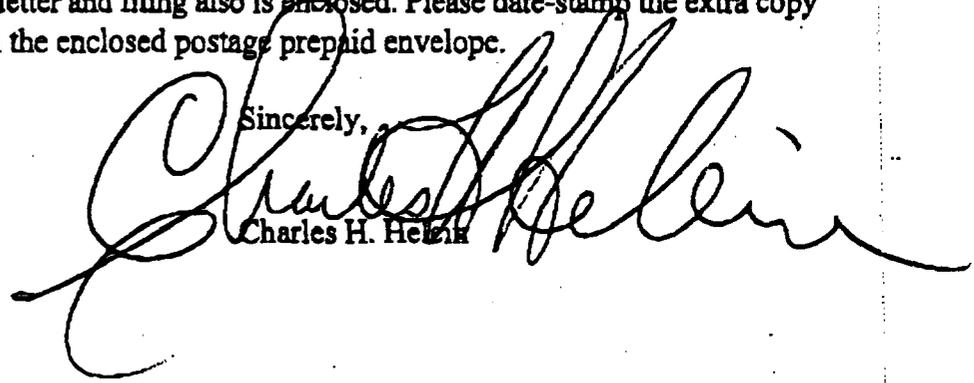
Re: *In the Matter of Communique Telecommunications, Inc. d/b/a Logically Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau - InterContinental Telephone Corp. Petition for Declaratory Ruling on National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5 Governing Universal Service Fund and Lifeline Assistance Charges FCC 99-80*

Dear Ms. Salas:

Enclosed herewith for filing are an original and eleven (11) copies of Communique Telecommunications, Inc. d/b/a Logically and InterContinental Telephone Corp.'s Reply to NECA's Opposition to Petition For Reconsideration in the above-captioned matter.

An additional copy of this letter and filing also is enclosed. Please date-stamp the extra copy and return it to the undersigned in the enclosed postage prepaid envelope.

Sincerely,



Charles H. Helein

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

In the Matter of)	
)	
Communique Telecommunications, Inc.)	
d/b/a Logical)	
Application for Review of the)	
Declaratory Ruling)	
and Order Issued by the)	
Common Carrier Bureau)	
)	
InterContinental Telephone Corp.)	FCC 99-80
Petition for Declaratory Ruling on)	
National Exchange Carrier)	
Association, Inc.)	
Tariff F.C.C. No. 5)	
Governing Universal Service Fund)	
and Lifeline Assistance Charges)	

REPLY TO OPPOSITION

Communique Telecommunications, Inc. ("CTI") and InterContinental Telephone Corp. ("ITC") (hereinafter referred to as "Petitioners"), by their attorneys, submit this reply to the Opposition of the National Exchange Carriers Association ("NECA"), to Petitioners request that the Commission reconsider its Memorandum Opinion and Order, FCC 99-80 (released August 9, 1999) ("Order") in the above-referenced proceeding.

In its Opposition, NECA takes the predictable position that Petitioners' request for reconsideration reargues points the Commission rejected in its Order. In this reply, Petitioners will show that NECA's Opposition is ill-founded and self-serving. As pointed out in the Petition for Reconsideration, the Commission's Order simply fails to address many of Petitioners' substantive

arguments; uses conclusory statements in place of reasoning; relies on irrelevant facts to reach conclusions which simply beg the question.

Contrary to NECA's self-serving assertions that Petitioners reargue rejected points, Petitioners' reconsideration request points out that the Order is plainly contrary to law, factually in error, contradicted by case precedents and relies on novel theories for which no support in logic or sound reasoning exists. The legal and factual errors which permeate the decision need no further extensive argument because the main arguments advanced by Petitioners have not, to date, been dealt with in any substantively valid manner. In reply then to NECA's Opposition, which in its perfunctory and self-serving way, indicates it too has no answers to the issues raised, the following will show once again the issues which Petitioners submit have yet to be addressed in a reasoned, decision-making manner.

In dismissing Petitioners' challenge to the authority of a non-carrier (NECA) using the tariffing provisions of the Communications Act to levy charges for communications services NECA does not provide, and for which NECA cannot be challenged under the Act's complaint process, the Commission failed to deal with directly applicable judicial precedents. Notable among such precedents are the decisions of the D.C. Circuit in two cases cited by Petitioners -- *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) ("*MCI Telecommunications Corp.*") and *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995) ("*Southwestern Bell Corp.*").¹ These two cases hold that the Commission is required to adhere to and thereby apply only the "express language and clear meaning" of Section 203 of the Act. *Id.* Section 203 mentions only

¹ Petition for Reconsideration @ 3, 8-11 (hereinafter "Petition").

common carriers as subject to the tariffing provisions and says nothing whatsoever about non-carriers or agents of carriers.

In addition, the Order did not address the Petitioners' reliance on the U.S. Supreme Court decision in *Reiter v. Cooper*, 507 U.S. 258 (1993) ("*Reiter*")²; dismisses without rational basis the patent discriminatory treatment Petitioners are subjected to by being denied the same largess of NECA in having forgiven nonpayment of USF and LA charges calls for another interexchange carrier; ignores the holdings of the federal courts that NECA, as a non-carrier, is not subject to the Act's complaint process; and ignores the inherent problems with the old USF program, problems the Commission itself highlighted in its decisions adopting the replacement USF regime after the enactment of the 1996 Telecommunications Act. *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776 (1997), aff'd in part, rev'd in part, and remanded in part, *Texas Office of Public Utility Counsel v. FCC*, 1999 WL 556461 (5th Cir. July 30, 1999).

One of the most fundamental problems with the Order is its rationale that each local exchange carrier ("LEC") is the actual issuing carrier of NECA's tariff and that NECA is each of those LECs' agent. While exhibiting surface appeal, the rationale breaks down quickly and cannot be sustained when juxtaposed with the following realities. The courts have recognized that NECA is a non-carrier. As a non carrier, NECA is not subject to the requirements of Title II of the Act, most importantly, its complaint process. It has long been recognized that Congress intended Title II to strike a substantive balance as between a carrier and its customers. See e.g., *American Telephone & Telegraph Co., v. FCC*, 487 F.2d 865, 880 (2d Cir. 1973). That is, quite plainly, that

² Id @ 3.

carriers and customers both have rights and obligations under the statutory scheme. But the Order provides NECA with rights and no obligations and customers with no rights and only obligations. The Commission's powers under section 4(i) are indeed broad, but do not include the authority to change the fundamental scheme enacted by Congress. *MCI Telecommunications Corporation v. American Telephone & Telegraph Company*, 512 U.S. 218 (1994); *MCI Telecommunications Corp., supra*; *American Telephone & Telegraph Co., v. FCC, supra*.

The Order's finding that there is a long-standing industry practice of using tariff filing agents which, in turn, is found thereby to be consistent with Section 203 of the Act, is based on an irrelevant analogy which succeeds only in begging the fundamental questions posed. The Order uses AT&T as an example of such a tariff filing agent. Fine. But this fact, howsoever true, is irrelevant because AT&T is what NECA has never been, a common carrier.

Equally deficient is the Order's companion justification which finds that section 203 establishes a role for agents in tariff filing by exempting "connecting" carriers from the tariff filing requirement because the "issuing" carrier is required to show all charges for both itself and its "connecting" carrier. The Order fails not only to define what a "connecting" carrier is, but also fails to demonstrate how NECA could be considered as such. In any event, it seems clear that NECA is not a "connecting" carrier. It has no plant nor facilities physically connected to any LEC facilities and, therefore, is not a "connecting carrier." *Comtronics v. Puerto Rico Telephone Co.*, 553 F.2d 701 (1st Cir. 1977). ("*Comtronics*") Moreover, if it were, this only compounds the problem, because, according to the First Circuit in *Comtronics, supra*, Congress immunized "connecting carriers" from liabilities for damages under the Act, thereby exacerbating the unevenness of rights and obligations between NECA and Petitioners.

The issues left unaddressed by this rationalization are hardly inconsequential for other reasons as well. Following the Order's logic to its ultimate extent would mean that switchless resale carriers would be "connecting" carriers with their underlying carriers. This would mean that switchless resellers could then advertise themselves as an AT&T, MCI or Sprint connecting carrier and place that designation in their tariffs. While this may not be contrary to any public interest standard, it certainly does not comport with industry practice and is likely not to find ready acceptance by underlying carriers.

The Order's reliance on the use of LECs and private billing companies to bill and collect for interexchange carriers is based on the view that billing and collection is primarily a mechanical function often conducted by agents. This too misses the point. In cases in which billing agents are used, they bill according to the carrier's tariff for whom they are acting as agents, not their own tariffs, as is the case with NECA. The Order hints its own recognition that it has missed the point when, in rejecting the argument that NECA should be precluded from billing and collection given its exemption from complaint liability, it is stated that there is no "statutory entitlement to a perfectly balanced regulatory scheme." This is a ruling that flies in the face of such decisions as *American Telephone & Telegraph Co. v. FCC*, supra. In addition, it runs contrary to cases which recognized the *sine qua non* connection between a carrier's tariff and its rights to collect its charges. See e.g., *Western Union International, Inc. v. Data Development, Inc.* 41 F.3d 1494 (11th Cir. 1995) (A carrier's claim for charges is necessarily predicated upon its tariff.); and *MCI Telecommunications Corp. v. Graham*, 7 F.3d 477 (6th Cir. 1993) (A carrier's ability to collect money owed it is premised upon complying with the Act's tariff provisions).

In response to Petitioners' argument that the difficulties with the NECA regime cannot be solved by complaints being filed against the LECs for which NECA is agent, is to use the problem itself as justification. Rather than dealing with issues raised by a non-carrier using the rights of Title II with no obligations, the Order simply asserts that complaints could be filed against NECA's principals, the LECs, for any violations of the Act.

Further begging the question, the Order failed to rule on the lawfulness of the self help provisions because no LEC is shown as having sought to collect these charges and that if that occurs, Petitioners may file a formal complaint and put in issue the lawfulness of the provisions. The Order further recites the preference for making determinations as to lawfulness of tariff provisions in complaint proceedings or tariff investigations as opposed to declaratory ruling proceedings. Here again the Order is based on misinformation. NECA has a pending collection action³ which was pending at the time the Order was issued. Indeed, NECA's court action was referred to the Commission under the doctrine of primary jurisdiction. And, importantly, in the court's decision making the referral to the Commission, the court held that NECA is not a common carrier.

These developments create further problems for the rationale of the Order. Since NECA is not subject to the complaint process, what meaning does the Order's holding that Petitioners may file a complaint have? One conclusion is that Petitioners should file a complaint with the Commission. That option is being considered, but clarification on reconsideration would aid the more efficient administration of the Commission's processes.

³ National Exchange Carrier Association v. Communique Telecommunications, Inc., d/b/a "Logically," (D.N.J. No. 95-5742) and National Exchange Carrier Association v. Intercontinental Telephone Corporation, (D.N.J. No. 96-49) and cited by NECA in its Opposition at 4.

The Order also fails to articulate a reasonable basis for its rejection of Petitioners' argument that LECs are precluded from invoking the self help provisions because the lawfulness of the underlying charge is being challenged. Oddly relying on the filed tariff doctrine, which in other contexts the Commission appears committed to undo, the Order puts an interesting spin on the Supreme Court ruling in *Reiter* by holding that this decision merely gives the customer a right to have its claim that the filed rate is unlawfully adjudicated at the same time the carrier seeks judicial or administrative enforcement of a filed rate. No precedent is provided in support of this conclusion and the logic on which it may be based is not immediately discernable.

In rejecting the arguments based on NECA's exoneration of another carrier for these USF charges, the Order rests on a novel theory. The Order finds no harm sufficient to warrant its consideration because the Petitioners failed to show detrimental reliance on the exoneration of Allnet. The provisions outlawing discrimination under Section 202 of the Act have never before been hinged on a customer's having to show detrimental reliance on the preferred treatment of another customer. The Commission cannot seriously intend to attempt to defend such a ruling as this on judicial review.

This error is then compounded by the Order's finding that the failure to pay one's lawful debts does not constitute detrimental reliance. Not only are the concepts of detrimental reliance and the payment of debts in relation to detrimental reliance unprecedented in the tariffing context, they are totally incongruous with the Supreme Court's holding in *Reiter* that a filed rate cannot be recovered if the reasonableness of the rate is being challenged. In such context, there is no lawful debt because the tariff charges are merely the "legal rates," not "lawful rates," the latter requiring review and approval by the Commission or a court as the Order itself points out.

This confusion is continued in the Order in its treatment of Petitioners' challenges to the USF funding mechanism. While defending the old USF funding mechanism as reasonable and that by pursuing a new mechanism, Petitioners' request to revisit USF policies and programs has been granted, the Order leaps to the conclusions that since the USF was reasonable at the time that NECA tariffed the charges, NECA's actions were reasonable in seeking to collect those charges based on the old mechanism. This reasoning is inconsistent. Petitioners raised the issue of the unreasonableness of the old USF mechanism in their original Petitions for Declaratory Ruling. Petitioners also pointed out that the Commission itself strongly criticized the old mechanism and considers the movement to the new mechanism as a means to cure the deficiencies of the old one. All this means that the Commission agrees that the old mechanism was, is, or may be, unreasonable, a conclusion totally contradictory to its conclusion that NECA acted reasonable because the old mechanism was reasonable. The old mechanism cannot be both reasonable and unreasonable at the same time. At minimum, the Order fails to demonstrate how such a contradiction can be justified or explained.

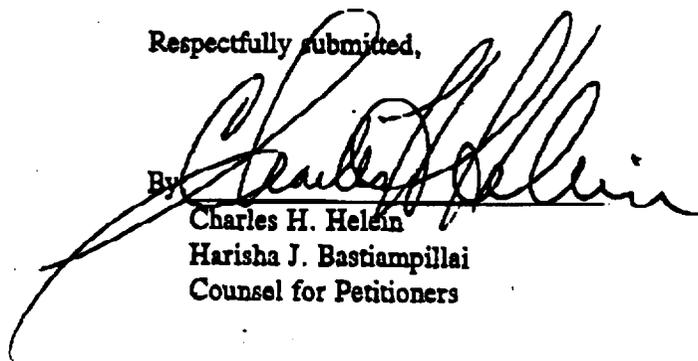
Finally, while the Order addresses the Petitioners' claims on equal protection based on the disproportionate impact on small carriers, it dismisses these claims as unmeritorious because no suspect classifications or fundamental rights are involved. This is not reasoning, it's a conclusion which the Order fails to show is supported by the facts of record. The fundamental rights infringed are the very disproportionate burden the USF charges imposed on small carriers like Petitioners who, by growing their business, are then deprived of their profits by these charges, the reasonableness of which have never been determined and the process of their collection being unlawful. It is undebatable that agencies have discretion to engage in "a process of line drawing" in the area of

economic regulation. It is another matter entirely when the result of such line drawing imposes adverse impacts through the use of unlawful means.

CONCLUSION

For these reasons, Petitioners respectfully request that the Commission deny the Opposition of NECA and reconsider its Order in this proceeding.

Respectfully submitted,

By 

Charles H. Helein
Harisha J. Bastiampillai
Counsel for Petitioners

Of Counsel:

THE HELEIN LAW GROUP, P.C.
8180 Greensboro Drive, Suite 700
McLean, Virginia 22102
Telephone: (703) 714-1300
Facsimile: (703) 714-1330

Dated: October 4, 1999

Certificate of Service

I, Suzanne Helein, a secretary in the law firm of The Helein Law Group, P.C. do hereby certify that on this 4th day of October, 1999, copies of the foregoing Reply to Opposition were delivered by first class, postage pre-paid mail upon the following:

See Attached Service List


Suzanne Helein

SERVICE LIST

Dorothy Atwood
Chief, Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Deena Shetler
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Jennifer Kashatus
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Lawrence Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Richard A. Askoff
Regina McNeil
National Exchange Carrier Association, Inc.
100 South Jefferson Road
Whippany, NJ 07981

Jeffrey P. Flynn
Gibbons, Del Dco, Dolan, Griffinger
& Vecchione
One Riverfront Plaza
Newark, NJ 07102-5497

ITS, Inc.
1919 M Street, N.W.
Washington, D.C. 20554