

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	
National Exchange Carrier Association, Inc.)	WC Docket No. 02-340
Tariff FCC No. 5, Transmittal No. 951)	
)	

COMMENTS ON DIRECT CASE

The Independent Alliance, an informal association comprised of several small, rural Local Exchange Carriers (“LECs”) furnishing originating and terminating access to interexchange carriers, hereby provides its comments in support of the “Direct Case of the National Exchange Carrier Association, Inc.” (“Direct Case”).

On August 21, 2002, the National Exchange Carrier Association (“NECA”) filed proposed tariff modifications to enhance its ability to protect itself against financially troubled customers unwilling or unable to pay for essential access services provided to, and used, by those customers to furnish services to their customers. Those modifications were suspended by the Commission,¹ and later designated for investigation.² Interested parties were invited to file comments or

¹ *Order*, DA 02-2141, rel. September 4, 2002.

² *Order*, DA 02-2948, rel. October 31, 2002.

oppositions responsive to the Direct Case that was submitted by NECA on November 21, 2002.³

NECA asserts that “[t]he telecommunications industry has changed” and that it merely is seeking to conform its tariff to the changed market.⁴ The Independent Alliance agrees. When the interexchange industry was healthy, slow-paying customers were an annoyance; and non-paying customers were rare. With that the case, tariff provisions addressing “security” and “discontinuance” requirements were little changed over nearly two decades. The tariff provisions NECA is seeking to modify seemed to be adequate because there seldom arose any need to apply them.⁵ That has changed. Slow-payers (and even good-payers) tend to become non-payers in the months preceding bankruptcy, as they undertake to hoard cash in order to enter bankruptcy with funding sufficient to sustain them during the initial bankruptcy phase. This results in an inability on the part of access providers to receive payments for the “pre-petition” amounts owed them. Instead, they must stand as unsecured creditors,

³ *Id.*, at Para. 29.

⁴ *Direct Case* at 2. NECA later states, in this regard, that “[t]elephone companies are facing greater financial risks than at any period since 1984, when access charges were introduced.” *Id.*, at 8.

⁵ Some have argued that the current tariff provisions pertaining to security deposits and service discontinuance were “prescribed” by the Commission and that any carrier-initiated modifications of those provisions may not occur unless the prescription is lifted. A review of the decision that led to the current language, however, reveals that no prescription exists, such that exchange access providers are not under any prior constraint to propose tariff modifications pertaining to payment security matters. In fact, the Commission could have prescribed the tariff language currently in widespread use and contained in NECA’s current tariff, but it chose not to do so. *See* Investigation of Access and Divestiture-Related Tariffs, 97 FCC2d 1082, 1145 (1984). Instead of prescribing tariff language, the Commission merely directed “clarification and justification” of the then-proposed tariff deposit provisions, indicating that a tariff proposal viewed as deficient could be dealt with “from a number of options to remedy the defects” including either prescription, a “directive” to carriers to correct the unlawfulness – which it did then, or taking such other action as deemed to be necessary under Section 4 (i) of the Communications Act. *Id.*, at 1110.

even though their bankrupt customers used the essential services they provided to serve and collect from their customers. The dramatic increase in non-payments is highlighted by NECA when it forecasts that its 2002 “uncollectibles” will increase by fifteen-fold over 2001 amounts as a result of just the Global Crossing and WorldCom bankruptcies.⁶

The Commission can, and certainly should, take notice of the impact of these bankruptcies, which have been widely reported in the press and reflected in paid advertisements such as the one in which WorldCom claims it has accumulated some \$1.4 billion in cash largely as a result of its ability to deny payment of its pre-petition obligations to its access providers, among others. Under the circumstances, it is incomprehensible that the Commission would deny access providers the ability to implement fair and measured tariff protections like those developed and proposed by NECA, while observing WorldCom boast about its “cash-stash” and possible emergence from bankruptcy as a debt-free competitor. The irony here is twofold: first, access providers are among those relegated to financing the bankrupts’ survival and return; and, potentially worse, they will be similarly affected adversely when other interexchange carriers are forced into bankruptcy protection out of competitive necessity.⁷ It is absolutely essential that the Commission recognizes these financial and marketplace realities when it evaluates attempts by carriers to better protect their financial interests. Unless it does, it will become a party -- however unintended -- to

⁶ *Direct Case* at 4-5.

shifting the cost of preserving interexchange competition to hundreds of small access providers and, ultimately, their customers.

Perhaps the best indicator of how inadequate and commercially unfair the antiquated tariff provisions have become is the NECA presentation that, for service charges billed in arrears, 97 days of outstanding charges would exist on the day service could be discontinued under the current tariff provisions.⁸ To minimize the risk associated with these non-payments, at least a two-month deposit mechanism is fully warranted.

The provisions proposed by NECA are commercially reasonable and widely used – at least outside of the telecommunications arena – to better protect vendors against non-payment for goods and services provided. And, the adverse effects of non-payment on smaller carriers like those comprising the Independent Alliance are significant. This is because, as a percentage of their total revenues, amounts unpaid represent a higher proportion than for larger access providers.⁹ When their revenue requirements are not being met, these smaller carriers have no choice other than to attempt to bridge the shortfall by raising prices for service to their other customers and/or to reduce service – alternatives that further no one's interests.

⁷ As NECA correctly notes, “. . . there are several other companies still teetering on the brink of bankruptcy.” *Direct Case* at 6. And, while these are highly critical of the current bankrupts, they also are envious of their potential “debt-free” status upon emergence from bankruptcy.

⁸ *Direct Case* at 12-13, Exhibit C. For charges billed in advance, the number of days is 67.

⁹ For the Second Quarter, 2002, Verizon, which had revenues of \$16.8 billion, has indicated it wrote off \$183 million, or approximately one percent of its revenues, due to WorldCom's bankruptcy. This percentage is higher for smaller carriers whose exchange access service revenues from WorldCom represented a larger percentage of their overall revenues.

Independent Alliance members recognize the policy implications of what is occurring in these unprecedented times, and they have no quarrel with the Commission's desire to minimize any adverse impact on competition or end-user customers of interexchange carriers experiencing financial turmoil. However, actions that effectively shift losses from interexchange carriers to small access providers are not an acceptable solution. If exchange access providers are required to fulfill their obligation to furnish essential services to these carriers, as they are, without a reasonable opportunity to obtain what is owed them for those services, the ills affecting the interexchange industry will spread to the exchange access industry as well. Accordingly, the Independent Alliance fully supports NECA's position that the Commission must allow exchange access carriers a realistic opportunity to protect their legitimate business interests, which includes the timely payment of amounts owed them.

A fair assessment of the proposed NECA tariff modifications reveals they are not unlawfully vague, arbitrary or over-reaching, and that they comply with the requirements of Sections 201 (b), 202 (a) and 203 of the Communications Act and implementing Commission Part 61 rules.¹⁰ The two parties that originally challenged NECA's proposed tariff, WorldCom and Sprint, include in their remaining tariffs service deposit and discontinuance provisions to which the Commission's tariffing rules apply equally, since those requirements do not

¹⁰ With regard to compliance with the anti-discrimination provisions of Section 202 (a) of the Act, it is important to note that, in applying the proposed tariff criteria to determine credit-worthiness, one NECA member company determined that it would need to subject its affiliate to the proposed deposit requirement because the affiliate had less than a commercially acceptable credit rating. *See Direct Case* at 21. With that the case, it seems unfair in the extreme to even suggest that the carrier would not apply its deposit requirements indiscriminately because of the corporate relationship.

provide any distinctions regarding tariff substance and integrity based on whether a carrier is “dominant” or “non-dominant.”

In this regard, it is instructive to examine the payment and security provisions contained in the current telecom service contracts of WorldCom and Sprint.¹¹ Relevant WorldCom and Sprint payment provision language is reflected in Attachments A and B, respectively. The sweeping breadth, lack of specificity, and overall vagueness in these provisions should be compared to the specificity contained in NECA’s proposed modifications. It can only be concluded that the latter are far more compliant with the Commission’s tariffing requirements. And, as noted, the same substantive tariffing requirements apply to *all* tariffing carriers, and the requirements of Sections 201 (b) and 202 (a) continue to apply to the service contracts of non-dominant interexchange carriers.

Finally, as NECA correctly notes, the tariff modifications it is proposing are not foreclosed by *RCA American Communications, Inc.*, 86 FCC 2d 1197 (1981) (“*RCA Americom*”) and related cases.¹² Those cases required that, in situations where carriers seek to modify material tariff provisions governing long-term service arrangements, greater justification, *i.e.*, “substantial cause,” needs to be demonstrated in order to sustain the proposed changes. As NECA suggests, the events themselves leading to the proposed modifications, particularly their impact

¹¹ On July 31, 2001, all interexchange carriers were required to “detariff” their services and provide them under contract to existing and new customers. On information and belief, the payment provisions contained in current WorldCom and Sprint “contracts” substantively mirror the provisions previously contained in their federal tariffs covering interexchange services and in their current exchange access tariffs.

¹² *Direct Case* at 23-24.

on its member companies, serve to provide substantial cause.¹³ Furthermore, NECA's proposed changes will not affect the length of service commitments or service pricing, which were the kinds of tariff "changes" that led to adoption of the "Substantial Cause Doctrine." Even though customers entering into long-term service arrangements have "legitimate expectations ... for stability in term arrangements,"¹⁴ their reasonable expectations do not encompass the terms being proposed by NECA. To find otherwise would unduly interfere with the right of carriers to initiate tariff changes permitted by statute. Suffice it to say, the "Substantial Cause Doctrine" was never intended to apply to tariff changes that are immaterial in that they do not affect the essence of service arrangements entered between carriers and their customers. It is one thing to propose changes such as NECA has done here versus, for example, filing tariff modifications that would double the customer's service term or prices for service. Whatever else might be decided here, the Commission should exercise extreme care not to expand the "Substantial Cause Doctrine" to include such secondary matters as deposit and payment timing terms.

¹³ *Id.*

In view of the foregoing, the Commission is requested to take into account these Comments in connection with its consideration of NECA's Direct Case in this proceeding.

Respectfully submitted,

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Dated: December 5, 2002

¹⁴ *RCA Americom*, 86 FCC 2d at 1201.

ATTACHMENT A

WorldCom

Section 4.A: ...

- .03 Payment Period: Invoices are due and payable in U.S. dollars within thirty (30) days of the invoice date If the Company becomes concerned at any time about the ability of a Customer to satisfy its payment obligation, the Company, in its sole discretion, may require that the Customer pay its invoices within a specified number of lesser days and to make such payments in cash or the equivalent of cash. A late payment charge equal to the lesser of: (i) one and one-half percent (1.5 %) per month, compounded, or (ii) the maximum amount allowed by applicable law will be applied against past due amounts.
- .04 Security Deposits: Customers or prospective Customers whose financial condition either is not known or not acceptable to the Company may be requested and required at any time to provide the Company with a security deposit. Such deposit must be paid in cash or the equivalent of cash in an amount equal to the applicable installation charges, if any, and/or up to three month's actual or estimated usage charges for the service to be provided. Any Customer or prospective Customer may also be required at any time, whether before or after the commencement of service, to provide such other assurances of, or security for, the payment of charges for its services as the Company may deem necessary including, without limitation, advance payments for service, third party guarantees of payment, pledges or other grants of security interests in the customer's assets, and other similar arrangements. The Company also may establish toll usage limits for Customers or prospective Customers, or it may require from the Customer a commercial credit card account number against which future usage can be charged. Any required deposit or toll usage limits may be increased or reduced by the Company as a result of its experiences with the Customer. In the case of a cash deposit, simple interest at the rate of six percent (6%) annually will be paid for the period during which the deposit is held by the Company, unless a different rate has been established by the appropriate legal authority in the jurisdiction in which service is being provided. At the Company's election, a deposit may be refunded by crediting it against the Customer's account at any time.
- .05 Security Compliance: The Company may refuse to accept or process service orders between the time of its request for a security deposit or commercial credit card account number against which service charges can be applied and the time of a Customer's compliance with the request.
- .06 Past Due Accounts: The Company may refuse to furnish service if any Customer account with the Company is past due.

Sprint

2.8 Deposits

Each applicant for service will be required to establish credit. Any applicant whose credit has not been duly established to the sole and exclusive satisfaction of the Carrier may be required to make a deposit to be held as a guarantee of payment of charges at the time of application. In addition, any existing subscriber may be required to make a deposit or increase a deposit presently held.

A deposit is not to exceed the estimated charges for six (6) months plus installation.

Sprint Schedule No. 8, Original Page 27, effective August 1, 2001

CERTIFICATE OF SERVICE

I, Donald J. Elardo, hereby certify that copies of the foregoing “Comments On Direct Case” were, unless otherwise noted, mailed, first-class, postage prepaid, on December 5, 2002, to:

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