

**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)	
)	

OPPOSITION TO DIRECT CASE

The Official Committee (“Committee”) of Unsecured Creditors of WorldCom, Inc. (“WorldCom”), et al., by its attorneys, respectfully submits this opposition (“Opposition”) to the direct case (“Direct Case”) filed by the National Exchange Carrier Association, Inc. (“NECA”), on behalf of the incumbent local exchange carriers providing services pursuant to Tariff FCC No. 5 (the “NECA ILECs”), in support of NECA’s proposed tariff revisions contained in Transmittal No. 951. These revisions have been suspended and designated for investigation by the Pricing Policy Division (“Division”) of the Federal Communications Commission (“Commission”) Wireline Competition Bureau (“Bureau”) in the above-referenced proceeding.¹

The Committee is an interested party in this proceeding. The Committee is a statutorily created committee appointed by the Office of the United States Trustee in connection with WorldCom’s pending bankruptcy cases and charged with a fiduciary duty to all unsecured creditors of WorldCom. In general, the unsecured creditors’ ability

¹ In the matter of National Exchange Carrier Association, Inc., Tariff FCC No. 5, Transmittal No. 951, WC Docket No. 02-340 (rel. Oct. 31, 2002) (“Designation Order”).

to receive value on the substantial debt they are owed by WorldCom is largely affected by WorldCom's post-bankruptcy value as a going concern, which is, in part, dependent on the amount of WorldCom's cash flow upon its emergence from bankruptcy.

Therefore, the Committee and its constituency are significantly affected by the Division's actions in the instant proceeding, because enactment of NECA's proposed tariff revisions could result in one or more NECA ILECs requiring WorldCom to pay security deposits so substantial, either while in bankruptcy or upon its emergence from bankruptcy, that WorldCom's available cash flow and ability to operate profitably as a going concern would significantly decrease.

The Committee believes that WorldCom and other NECA ILEC carrier and end-user customers are best suited to respond to the individual arguments raised in NECA's Direct Case. However, as a general matter, the Committee urges the Division to find that NECA's proposed revisions are unjust, unreasonable, and discriminatory under Sections 201 and 202 of the Communications Act (the "Act") of 1934, as amended.² If NECA's proposed revisions are permitted to take effect, any NECA ILEC will have the right to require security deposits equivalent to two month's billings from customers (i) who are late with two payments in a twelve month period or (ii) whose creditworthiness falls below a "commercially acceptable" level arbitrarily selected by NECA, defined as (a) a Standard and Poors' (or equivalent rating agency's) corporate debt securities rating of BBB or better or equivalent, or (b) for a customer that does not issue debt securities, a

² 47 U.S.C. §§ 201, 202. Section 201 provides that "all charges, practices, classifications, and regulations for and in connection with [a] communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is . . . unlawful." Section 202 provides that it is "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with [a] communication service."

Dun and Bradstreet composite credit appraisal rating of “good” or a Paydex score of “average.”³ Because interstate access customers who wish to reach a NECA ILEC end user have no choice of provider other than the NECA ILEC, such customers will be forced to accept NECA’s burdensome security deposit provisions absent regulatory intervention. This result is unjust and unreasonable under Section 201 because it unfairly penalizes NECA ILEC’s interstate access customers. In addition, because the carrier customers of NECA ILECs also are, in large part, their competitors, the application of the proposed tariff revisions by NECA ILECs likely will be discriminatory under Section 202. The Committee thus urges the Division to reject wholly NECA’s proposed tariff revisions.

At a minimum, the Committee requests that the Division require NECA to clarify in its tariff that its security deposit provisions do not apply to any customer subject to a pending bankruptcy proceeding or immediately upon its emergence from such a proceeding.

I. THE PROPOSED TARIFF REVISIONS REGARDING SECURITY DEPOSITS ARE UNJUSTIFIED BY THE CURRENT STATE OF THE TELECOMMUNICATIONS INDUSTRY AND SHOULD BE REJECTED AS UNJUST, UNREASONABLE, AND DISCRIMINATORY

NECA asserts that its proposed revisions are warranted due to “financial stress” in the telecommunications industry.⁴ Specifically, NECA argues that “financial weakness” in the telecommunications sector has created a cadre of companies that are “teetering on the brink of bankruptcy,” and that NECA ILECs must protect themselves from the risk of

³ National Exchange Carrier Association, Inc., Tariff FCC No. 5, Transmittal No. 951 (Aug. 21, 2001), Description and Justification at 1-2.

⁴ Id.

those carriers' default.⁵ Although the Committee agrees that risk and uncertainty in the telecommunications market have increased in recent years, NECA's proposed tariff revisions do not reflect an attempt to "reduce risk to more manageable levels,"⁶ but instead reflect the actions of incumbent carriers attempting to insulate themselves from all risk of default by their customers. NECA has proposed revisions to its tariff that are unjust, unreasonable, and discriminatory under the Act and established Commission precedent.

The proposed revisions are unjust and unreasonable because they would allow NECA ILECs to require their customers, even those with a lengthy history of full and timely payment, to assume virtually all of their credit risk. NECA has argued that leaving the security deposit provisions of its existing tariff in place will force NECA ILECs to assume the market risk of underperforming companies.⁷ Therefore, according to NECA, new practices are warranted that will protect NECA ILECs from any risk of uncollectibles. It is reasonable to conclude that a carrier that has a lengthy history of full and timely payment is not a significant risk for non-payment. Nevertheless, NECA, in an attempt to capitalize on fears stemming from the current state of the telecommunications industry, has proposed tariff revisions that will cause NECA ILEC customers, including carriers that have never missed a payment, to unfairly assume all of the risk of default in the interstate access market.

NECA ILEC interstate access customers cannot seek an alternative provider if they find NECA's security deposit policy to be overly burdensome. In the interstate

⁵ Direct Case of the National Exchange Carrier Association, Inc., In the matter of National Exchange Carrier Association, Inc., Tariff FCC No. 5, Transmittal No. 951 (WC Docket No. 02-340) filed Nov. 21, 2002 at 6 ("Direct Case").

⁶ Id. at 8.

⁷ Direct Case at 3.

access service market, a customer seeking to access NECA ILEC end users must use and pay for NECA ILEC interstate access service. As a consequence, absent regulatory intervention, such a customer also must accept NECA's security deposit policy and pay security deposits to the extent any NECA ILEC requires. For a customer that has always made, and continues to make, full and timely payment, but is deemed to have lack creditworthiness under the NECA criteria, this could mean required payment of up to two month's billings. This result clearly is unjust and unreasonable because it is highly likely to "place undue burdens on customers" by requiring substantial payments in excess of payments actually due for services rendered.⁸ Such payments would be a particularly high burden in today's telecommunications market.

The proposed tariff revisions also have the potential to be discriminatory. Given the depressed state of the telecommunications industry, many NECA ILEC customers or their parent companies are likely to have senior debt securities that are rated below the "commercially acceptable level of creditworthiness"⁹ arbitrarily selected by NECA. Under the proposed tariff revisions, NECA ILECs could demand security from these customers. Because many NECA ILEC interstate access customers also are their competitors, the proposed tariff revisions will afford NECA ILECs the opportunity to discriminate against and thereby disadvantage their competitors. Such result is unwarranted by the state of the telecommunications industry and violates Section 202. The effects of such discrimination are exacerbated by the negative impact deposit requirements would have on the balance sheets of NECA ILEC competitors, which

⁸ Annual 1987 Access Tariff Filings, Memorandum Opinion and Order, 2 FCC Rcd 280, 304-305 (1986).

⁹ National Exchange Carrier Association, Inc., Tariff FCC No. 5, Transmittal No. 951 (Aug. 21, 2001), Description and Justification at 1-2.

would make those competitors less attractive to investors. Implementation of NECA's proposed tariff revisions therefore will enable NECA ILECs to hinder both the short-term cash flow and long-term viability of their competitor customers virtually at will.

In sum, the Division should reject NECA's proposed tariff revisions and not allow NECA ILECs an opportunity to unfairly insulate themselves from any risk of default and hinder their competitors' growth.

II. NECA SHOULD CLARIFY OR BE REQUIRED TO CLARIFY IN ITS TARIFF LANGUAGE THAT THE PROPOSED TARIFF REVISIONS ARE NOT APPLICABLE TO ANY CUSTOMER SUBJECT TO A PENDING BANKRUPTCY PROCEEDING

If the Division does not summarily reject all of NECA's proposed tariff revisions, at a minimum, the Committee urges the Division to require that NECA clarify that the security deposit provisions are not applicable to any customer that is subject to a pending bankruptcy proceeding ("Debtor Customer"). By declining to include bankruptcy as a trigger for imposing a deposit requirement, NECA, unlike other incumbent carriers who recently filed proposed revisions to their tariffs, appears to have recognized that such a trigger would be at best inappropriate, and at worst unlawful.¹⁰ However, NECA has not explicitly excluded Debtor Customers from the security deposit requirements in NECA's proposed tariff language, and, in fact, frequently points to the possibility of customer bankruptcy as a justification for its proposed tariff modifications.¹¹ Therefore, to the extent it is permitted to incorporate any new security deposit provisions in its tariff,

¹⁰ See, e.g., Direct Case of Verizon Redacted Public Version, In the matter of Verizon Telephone Companies, Tariff Nos. 1, 11, 14 and 16 (WC Docket No. 02-317) filed Oct. 29, 2002; Direct Case of SBC Communications Inc., In the matter of Ameritech Operating Companies Tariff FCC No. 2, Transmittal No. 1313 et al., (WC Docket No. 02-319) filed on Oct. 31, 2002.

¹¹ See Direct Case at 6, 8, 14, 15 and 22.

NECA must explicitly provide in its tariff that bankruptcy is not a trigger establishing a lack of “creditworthiness” and therefore the imposition of security deposit requirements on a Debtor Customer.

A. The Proposed Tariff Revisions Usurp the Bankruptcy Court’s Exclusive Authority by Allowing any NECA ILEC to Unilaterally Impose a Deposit Requirement on Debtor Customers and are Unnecessary

NECA’s proposed tariff revisions, if left unmodified, would constitute an inappropriate end run around the Bankruptcy Code. First, application of NECA’s proposed security deposit provisions to a Debtor Customer would conflict with the jurisdiction of the bankruptcy court, which has the sole discretion to determine what constitutes adequate assurance of payment and to modify what amount of the deposit or security, if any, is required to provide such adequate assurance.¹² Any tariff that claims to apply to chapter 11 debtors is unlawful because “section 366(b) [of the Code] vests in the bankruptcy court the exclusive responsibility for determining the appropriate security which a debtor must provide to his utilities to preclude termination of service.”¹³ Implementation of NECA’s proposed tariff revisions, which would give NECA ILECs the right to determine unilaterally whether a Debtor Customer could make future payments, would allow NECA ILECs to usurp the bankruptcy court’s authority. This result would harm both the integrity of the bankruptcy process and the Debtor Customer. It is the role of the bankruptcy court, and not NECA or NECA ILECs, to determine what type of adequate assurance is best in a given case.

¹² 11 U.S.C. § 366.

¹³ Begley v. Philadelphia Elec. Co. (In re Begley), 41 B.R. 402, 405-406 (E.D. Pa. 1984), *aff’d*, 760 F.2d 46 (3d Cir. 1985) (emphasis added).

Second, imposition of security deposits against a Debtor Customer is unnecessary, as a NECA ILEC already would be protected as a utility in a bankruptcy proceeding. Specifically, Section 366 of the Bankruptcy Code ensures that a NECA ILEC will not be subject to an unreasonable risk of nonpayment for services provided to a debtor. The requirement of adequate assurance of payment contained in Section 366 does not require payment of a deposit, but simply means that the utility should not be subject to an unreasonable risk of nonpayment for services rendered to a debtor after the commencement of the bankruptcy case.¹⁴ Adequate assurance is not the equivalent of a guaranty of payment, which is exactly what NECA proposes to allow NECA ILECs to demand in the form of a security deposit.¹⁵ Indeed, whether a utility is subject to an unreasonable risk of nonpayment can only be determined by examining the totality of the circumstances and making a “particularized inquiry into the postpetition economics of a debtor’s chapter 11 case.”¹⁶ As noted in Caldor,

In deciding what constitutes “adequate assurance” in a given case, a bankruptcy court must “focus upon the need of the utility for assurance, and to require that the debtor supply *no more than that*, since the debtor almost perforce has a conflicting need to conserve scarce financial resources. Accordingly, ‘bankruptcy courts must be afforded reasonable discretion in determining what constitutes ‘adequate assurance’ of payment for continuing utility services.’¹⁷

¹⁴ See Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646 (2d Cir. 1997), aff’g 199 B.R. 1, 3 (S.D.N.Y. 1996); In re Adelphia Business Solutions, Inc., 280 B.R. 63, 80 (S.D.N.Y. 2002). Although Verizon’s proposed tariff revisions offers the “option” of prepayment in lieu of a cash security deposit, the availability of this option is highly questionable with respect to a Debtor Customer. Prepayment would be particularly burdensome to an entity attempting to reorganize under bankruptcy protection.

¹⁵ See Caldor, 199 B.R. at 3 (“The statute does not require an ‘absolute guaranty of payment.’”); Adelphia Business Solutions, 280 B.R. at 80 (“[A] bankruptcy court is not required to give a utility company the equivalent of a guaranty of payment.”); In re Global Crossing Ltd., et al., Nos. 02-40187 through 02-40241, slip op. (Bankr. S.D.N.Y. March 15, 2002) (REG).

¹⁶ See In re Adelphia Business Solutions, Inc., et al., Ch. 11 Case No. 02-11389, slip op. at 32 (Bankr. S.D.N.Y. 2002).

¹⁷ Caldor, 117 F.3d at 650 (emphasis in original; citations omitted).

It is not unusual for a bankruptcy court, after considering the particulars of a debtor's chapter 11 case, to determine that utilities are adequately assured of payment for future services without any deposits because, among other reasons, (i) the debtor's post-petition financing arrangements provide sufficient liquidity, (ii) utilities have a greater ability to monitor the financial strength of a debtor due to, among other things, the monthly operating reports a debtor is required to file, and (iii) all services provided by a utility to a debtor are entitled to administrative expense priority status pursuant to section 503(b) of the Code.¹⁸ The proposed tariff revisions, if enacted without clarification, would override the Code and the bankruptcy court's authority by allowing any NECA ILEC to mandate exorbitant deposits in a chapter 11 case, regardless of whether a bankruptcy court determined that the NECA ILEC in question would be adequately assured of payment for future services under Section 366 without a deposit from the customer. The proposed tariff revisions are therefore in conflict with bankruptcy law and should be rejected or, at a minimum, clarified.

B. The Proposed Tariff Revisions would be Inconsistent with the Purpose of the Bankruptcy Code and would Allow NECA ILECs to Discriminate Against Debtor Customers

Application of NECA's proposed security deposit provision to Debtor Customers would be inconsistent with the primary purpose of bankruptcy law, which is designed to afford a company a "breathing spell" to reorganize.¹⁹ In fact, application of NECA's proposed security deposit provisions to a Debtor Customer essentially would constitute a

¹⁸ See Caldor at 2; In re WorldCom, Inc., et al., No. 02-13533 (AJG), slip op. at 3 (Bankr. S.D.N.Y. October 2, 2002); Adelphia Business Solutions, 280 B.R. at 68; In re Global Crossing Ltd., et al.; see also H.R. Rep., No. 95-595 at 350 (1977).

¹⁹ See, e.g., In re Ionosphere Clubs, Inc., 105 B.R. 773 (Bankr. S.D.N.Y. 1989) ("The purpose of the protection provided by Chapter 11 is to give the debtor a breathing spell, an opportunity to rehabilitate its business and to enable the debtors to generate revenue").

penalty for filing for bankruptcy, which would frustrate the purpose of bankruptcy protection by saddling the company seeking to reorganize with an additional substantial expense.

Further, it must be remembered that NECA ILECs are in direct competition with many of their customers. NECA ILECs' "additional interest as competitors, and in eliminating unwanted competition, distinguishes them from the utilities in most other section 366 disputes, where the utility would benefit from the debtor's successful reorganization" ²⁰ Thus, by asking for approval of a tariff that could unnecessarily restrict the liquidity and the ability of a competitor customer to reorganize under the Code, NECA actively is attempting to discriminate against temporarily financially disadvantaged customers in the hopes of eliminating unwanted competition. The Division should not allow NECA ILECs to use the NECA tariff for this discriminatory, anti-competitive purpose, and should require that NECA clarify the tariff so as to explicitly provide that bankruptcy is not a trigger for establishing a "lack of creditworthiness" and that new security deposits can not be imposed against a debtor customer.

III. CONCLUSION

Based on the foregoing, NECA ILECs should not be allowed to use the NECA tariff to make an end run around the jurisdiction of the bankruptcy court or discriminate against their competitor customers in violation of the Code. Therefore, at a minimum, NECA must be required to explicitly state in its tariff that a customer's bankruptcy is not

²⁰ Adelphia Business Solutions, 280 B.R. at 79-80.

a trigger for requiring security deposits. More importantly, the state of the telecommunications industry does not justify the unjust, unreasonable, and potentially discriminatory security deposit provisions which NECA proposes to include in its interstate access tariff. Therefore, the Committee requests that the Division summarily reject NECA's proposed tariff revisions.

Respectfully submitted,

**OFFICIAL COMMITTEE OF
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