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

In the matter of	)	
	)	
National Exchange Carrier Association, Inc.	)	WC Docket No. 02-356
Tariff FCC No. 5, Transmittal No. 952	)	
	)	

OPPOSITION OF GENERAL COMMUNICATION INC. TO NECA TRANSMITTAL NO. 952

General Communication Inc. (GCI) opposes the National Exchange Carriers Association's (NECA) proposed changes to tariff Transmittal No. 952.

I. Introduction and Summary

Despite its admission that it cannot seek to recover past losses attributable to the highly unusual bankruptcies of WorldCom and Global Crossing – and its history of significant overearnings – NECA seeks an over 2 percent increase in traffic sensitive pool rates based solely on its alleged increase in projected uncollectibles. NECA has not, however, submitted any evidence to supports its claim that its projected uncollectibles have risen by 100,000% since June 2002, when NECA filed its correct annual access tariff. It asserts that the WorldCom and Global Crossing bankruptcies are harbingers of future carrier catastrophes, but does not even attempt to explain how two highly unusual bankruptcies involving allegations of fraud portend the future of other carriers who are not engaged in such misconduct. Nor has NECA pointed to other carriers in its customer base to show that it is even possible – absent bankruptcy by AT&T or Sprint – to reach uncollectibles on the scale of WorldCom and Global Crossing. NECA also relies on a single analyst's report regarding the predicted default rate for 2001 and 2002 for speculative grade, long-term bonds. But while the report might have had some relevance to the market for speculative grade, long-term bonds, it has no relevance to the issue here – default on payments to the traffic sensitive pool. The lack of evidence presented by NECA indicates that, despite protestations to the contrary, NECA's real purpose is to recover past losses resulting from the bankruptcies of WorldCom and Global Crossing.

NECA's attempt to collect an additional $15 million in traffic sensitive revenues per year is particularly troubling given that NECA has on average had significantly more than $15 million in overearnings each year for the last ten years. NECA is thus likely to have significant overearnings even if there is an increase in uncollectibles, and its overearnings would be huge if the predicted massive increase in uncollectibles does not occur. In light of the D.C. Circuit's recent decision indicating that overearnings generally cannot be refunded, the Commission should be careful when approving rate increases that are likely to result in huge overearnings, and should not approve an increase unless truly necessary.

Considering the lack of probative evidence and NECA's history of overearnings, the Commission should find that tariff Transmittal No. 952 is unjust and unreasonable.

II. Background

In tariff Transmittal No. 952, NECA proposes to increase the uncollectible portion of the traffic sensitive test period revenue requirement in its 2002 Annual Access Tariff filing from $15,000 to $15,000,000 – a 1,000-fold increase – which would increase the traffic sensitive switched and special access recurring rate elements in NECA's interstate access tariff by 2.13 percent. NECA requested this increase on September 13, 2002, about three months after it filed its current rates, and less than two months after WorldCom filed for bankruptcy.

NECA's filing, coming so soon after WorldCom declared bankruptcy, is not coincidental. Rather, NECA's request to raise its uncollectibles is a thinly-veiled attempt to recover "bad debt" losses incurred when WorldCom and Global Crossing declared bankruptcy – even though NECA now disclaims any attempt to recover losses related to those bankruptcies.

While the proposed increase would harm all IXCs, and CLECs that purchase NECA's traffic sensitive services, it would have a disproportionate and unreasonable impact on GCI. All of the Alaska ILECs from which GCI purchases exchange access are members of the NECA Common Line Pool, and all but ACS of Anchorage are members of the NECA Traffic Sensitive Pool.[1] However, none of these Alaska ILECs has any exposure to WorldCom uncollectibles because GCI terminates WorldCom's traffic in Alaska. Thus, while GCI is coping with its own outstanding WorldCom debts of over $16 million, the uncollectibles of NECA's Alaskan members have not been affected by the WorldCom bankruptcy at all. And there is no reason to believe that GCI will default on its payments to those ILECs: GCI is a financially healthy company, which has seen its EBITDA increase by nearly 25% from third quarter 2001 to third quarter 2002, and which recently secured a $225 million senior bank loan.

The purpose of NECA is to ameliorate the risk that individual carriers will not earn the 11.25 percent prescribed rate of return. But in the last ten years, NECA's tariff has been more than ameliorative – NECA has earned more than 11.25 percent in each of the last ten years. According to NECA's certified Form 492 filings, NECA's rate of return for the traffic sensitive pool has averaged 12.74 percent a year from 1991 through 2001.[2] This exceptional rate of return

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1 GCI pays nearly $1.1 million in access charges each month to NECA companies.

2 *See* attached Exhibit 1.

has yielded excess earnings averaging $18,000,000 a year, which is significantly more than the increase in uncollectibles sought by NECA.[3]

III. NECA Concedes It Cannot Recover Uncollectibles from the WorldCom and Global Crossing Bankruptcies Through Future Rates

In its petition to reject or suspend tariff Transmittal No. 952, GCI argued that NECA's proposal is an attempt to recover past losses through future rates, *i.e.*, NECA is seeking to engage in retroactive ratemaking.[4] As the D.C. Circuit has made clear, it is " a cardinal principle of ratemaking that a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle."[5] NECA concedes this point in its direct case: it states that its forecast of $15 million in uncollectibles for the current tariff year does not include losses from WorldCom or Global Crossing.[6] According to NECA, its forecast excludes bankruptcy-related amounts that have already occurred and includes only projections of future bankruptcy claims.[7] Thus, to justify its forecast, NECA must demonstrate that its members will have $15 million in uncollectibles due to defaults by other carriers going forward. NECA has not done so.

IV. NECA's Forecasted $15 Million in Uncollectibles Is Wholly Unfounded

NECA's primary justification for drastically increasing the amount allotted to uncollectibles going forward is that its uncollectibles have increased in 2002. In its direct case in tariff Transmittal No. 951, NECA asserts that its members have $17 million in uncollectibles for

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3 *Id.*

4 Petition of General Communication, Inc. to Reject or Alternatively to Suspend and Investigate at 4 (Sep. 6, 2002).

5 *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975).

6 Direct Case of the National Exchange Carrier Association, Inc., WC Docket No. 02-356 at 10 (Dec. 2, 2002) ("*Direct Case*").

7 *Id.* at 11.

the traffic sensitive pool this year through October 2002.[8] However, NECA does not tell the Commission what percentage of these uncollectibles is attributable to WorldCom and Global Crossing – which NECA concedes it cannot now seek to recover through future rates. Given that NECA's traffic sensitive uncollectibles averaged $286,924 a year from 1990 through 2001 inclusive,[9] the vast majority of the 2002 uncollectibles (and possibly part of its 2001 uncollectibles) is undoubtedly attributable to WorldCom and Global Crossing. The $17 million in uncollectibles for 2002 thus appears to be a one-time phenomenon driven by the WorldCom and Global Crossing bankruptcies, and in no way is a harbinger of NECA's future uncollectibles due to IXC bankruptcies.

NECA presents no explanation as to why it expects to see a comparable amount of uncollectibles in future years, nor do they provide any evidence of the number or size of companies that would have to default to create $15 million in uncollectibles for the traffic sensitive pool. NECA's direct case provides no itemization of potentially defaulting customers, and makes no showing that its customers that might be in danger of default approach the size of WorldCom or even Global Crossing. Indeed, NECA admits that its $15 million forecast "cannot be attributed to any specific customers, or class of customers."[10] The reason NECA does not provide any such evidence is because there isn't any: it is a highly unusual circumstance when two large carriers (WorldCom and Global Crossing) declare bankruptcy amid allegations of accounting manipulation and securities fraud, and it is axiomatic that highly unusual circumstances are not the norm. Yet, it would undoubtedly take a major bankruptcy to push

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8 Direct Case of the National Exchange Carrier Association, Inc., WC Docket No. 02-340 at 4 (Nov. 21, 2002) (attached to *Direct Case* as "Exhibit A").

9 *Id.*

10 *Direct Case* at 4.

NECA's uncollectibles up to $15 million, which is only $2 million less than what NECA said it incurred in the first ten months of 2002, including the Global Crossing and WorldCom bankruptcies. The uncollectibles caused by the bankruptcies of WorldCom and Global Crossing this year provide no basis for determining that other healthy and solvent carriers are teetering on bankruptcy.

In addition to arguing that the unusual bankruptcies of WorldCom and Global Crossing are predictive of future results for other carriers, NECA relies on a select analyst's report to support its premise that there will be a thousand-fold increase in future uncollectibles. But even the analyst's report does not support the level of uncollectibles posited by NECA. NECA cites a report by Moody's Investor Services that predicted a default rate for speculative grade, long-term bond issuers of 10.2 percent in 2001 and 6.8 percent in 2002.[11] NECA then reasons that because Moody's predicted a 10.2 percent default rate for certain issuers on long term *bonds* in 2001 and two large carriers declared bankruptcy in 2002 in *highly unusual circumstances*, that a default rate of 11 percent on *traffic sensitive pool payments* is reasonable for the 2002/2003 test period.

This reasoning is laughable. First, NECA's own submissions demonstrate that the defaults on bonds are not directly related to defaults on payments to the traffic sensitive pool. If there was a correlation (and assuming Moody's prediction of a 10.2 percent default rate for 2001 was correct, which NECA does for purposes of its calculations), then the 10.2 percent bond default rate would have led to a 10.2 percent default rate on traffic sensitive payments. However, NECA's uncollectibles in 2001 were less than 1 percent of its traffic sensitive pool interstate revenues that year.[12] Second, Moody's predicted that the default rate in 2002 would be

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11 *Direct Case*, Exhibit B at 1.

12 AT&T Corp. Opposition to Direct Case, WC Docket No. 02-340 at 7 (Dec. 5, 2002) ("*AT&T Opposition*").

6.8%, not the 11% sought by NECA. Moody's prediction did not account for the WorldCom and Global Crossing bankruptcies precisely because those bankruptcies were unpredictable, *i.e.*, they were highly unusual, one-time events.[13] Third, the Moody's default predictions are limited to speculative grade bond issuers, and not all of NECA members' customers fall in that category.[14] Indeed, two of the largest IXCs (which presumably make the largest contributions to the traffic sensitive pool), AT&T and Sprint, are not speculative grade bond issuers.[15] Finally, even assuming analyst reports like the Moody's report have some probative value in this context (and they do not), NECA does not cite a single analyst that predicts an 11% default rate, either before or after the WorldCom and Global Crossing bankruptcies.

NECA's projections regarding uncollectibles are suspect for another reason – NECA does not provide any evidence as to the amount of recovery NECA will subsequently obtain on previously defaulted amounts. As AT&T noted in the related proceeding regarding tariff Transmittal No. 951, the WorldCom and Global Crossing bankruptcy proceedings are still ongoing.[16] Because NECA will likely obtain payment through those proceedings for significant amounts of debt currently considered uncollectible, even the amount of past uncollectibles NECA claims for 2002 overstates NECA's actual uncollectibles.[17]

The lack of plausible evidence submitted by NECA demonstrates that its request to increase uncollectibles a thousand-fold is a thinly-veiled attempt to recover past losses caused by

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13 NECA cannot have it both ways. If Moody's 2001 prediction is reliable (as NECA says it is), then NECA should also consider Moody's 6.8 percent prediction for 2002 reliable. Instead, NECA uses Moody's numbers when they suit NECA's position, and discards them when they don't.

14 *AT&T Opposition* at 9 n.4.

15 *Id.*

16 *AT&T Opposition* at 8.

17 *AT&T Opposition* at 8, 8 n.3.

the astonishing bankruptcies of WorldCom and Global Crossing. When WorldCom and Global Crossing are excluded as historical anomalies that are not predictive of future defaults, NECA's own numbers show that it cannot justify $15 million – or even $1.5 million – in projected uncollectibles for the 2002-2003 test period. Before the bankruptcies of WorldCom and Global Crossing this year, NECA's uncollectibles for the traffic sensitive pool never exceeded a million dollars, and averaged only $286,924 year for the reported period. Because NECA has not told the Commission how much of its 2002 uncollectibles are attributable to carriers other than WorldCom and Global Crossing, an omission NECA does not explain, the only reasonable assumption is that the uncollectibles for carriers other than WorldCom and Global Crossing are well below $1 million for the traffic sensitive pool. Thus, when the smoke from the WorldCom and Global Crossing bankruptcies clears, the evidence shows that NECA's uncollectibles will return to historical levels, and that the increased uncollectibles predicted by NECA will never materialize.

V. A Rate Increase Is Not Necessary Given NECA's Historical Excess Earnings

NECA's contention that it needs a 2.13 percent rate increase to offset uncollectibles is particularly misleading given NECA's history of overearnings. Indeed, NECA's excess earnings have typically been higher than even the hyper-inflated amount of future uncollectibles NECA seeks. NECA’s own data shows that it has consistently earned in excess of the 11.25% prescribed rate of return during each of the past 10 years. From 1991 to 2001, NECA averaged $18,000,000 in excess earnings per year for the traffic sensitive pool.[18] For example, in 2001, when NECA had over $900,000 in traffic sensitive uncollectibles,[19] it had $36 million in traffic

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[18] Exhibit 1.

[19] *Direct Case*, Exhibit A at 4.

sensitive excess earnings with a 13.66 percent rate of return.[20] Thus, even assuming NECA's projected $15 million in uncollectibles is accurate (and its not), history shows that NECA would likely still earn more than its prescribed rate of return even without increasing its rates to account for the projected uncollectibles. If NECA's request is approved and its projection proves inaccurate, NECA's already too-high rate of return would be even higher.

Moreover, in light of the D.C. Circuit's opinion in *ACS of Anchorage, Inc. v. FCC*,[21] the Commission should be cautious when addressing requests for rate increases that are likely to result in overearnings. In *ACS of Anchorage* the court indicated that once a rate is declared lawful, "refunds are thereafter impermissible as a form of retroactive ratemaking." It is thus questionable whether the Commission could order refunds for overearnings when the LEC complies with streamlined tariff requirements and does not engage in fraudulent concealment, even when the overearnings are substantial. Given that there is no evidence in the record that NECA would not earn at least 11.25%, even with a modest increase in uncollectibles to reflect the historical average over the past 10 years, the Commission should not approve NECA's request.

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[20] Exhibit 1.

[21] 290 F.3d 403 (D.C. Cir. 2002).

VI. Conclusion

For the foregoing reasons, the Commission should reject NECA's request and find that tariff Transmittal No. 952 is unreasonable and unjust.

Respectfully submitted,

By: ____________________________

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EXHIBIT 1

NECA Excess Revenue Collection

All figures are from NECA Form 492 filings.

Authorized Rate of Return:	11.25%
Tax Gross-up Factor:	1.425

TRAFFIC SENSITIVE (Special Access + Switched TS)

$ in millions

	Monitoring Period					
	1991 - 1992	1993 - 1994	1995 - 1996	1997 - 1998	1999 - 2000	2001
Rate Base	$898	$911	$783	$834	$903	$1,049
Rate of Return	12.17%	12.98%	12.16%	13.28%	12.21%	13.66%
Excess Rate of Return, %	0.92%	1.73%	0.91%	2.03%	0.96%	2.41%
Excess Revenue, million $ /year	**$12**	**$22**	**$10**	**$24**	**$12**	**$36**

Average for 1991 - 2001 period: **$18** million/year

CERTIFICATE OF SERVICE

In addition to being filed via the Electronic Comment Filing System, I hereby certify that on this 16th day of December 2002, the Opposition of General Communication Inc. to Direct Case, NECA Transmittal No. 952, was served on the following:

Richard A. Askoff
National Exchange Carrier Association
80 South Jefferson Road
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