

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

In the Matter of)
)
Report on Timing of NECA Pool True-Up)
Submissions and FCC Form 492 Interstate) WC Docket No. 05-29
Earnings Monitoring Reports)
)

COMMENTS OF GENERAL COMMUNICATION, INC

General Communication, Inc. (GCI) submits these comments in response to the Report on Timing of NECA Pool True-Up Submissions and FCC Form 492 Interstate Earnings Monitoring Reports¹ filed by the National Exchange Carrier Association, Inc. (NECA). Pursuant to the Commission’s November 30, 2004 Order terminating the investigation of NECA’s 2004 annual access tariff filing,² the Report addresses the temporal disconnect between earnings reflected on NECA’s final Form 492 monitoring reports, filed 9 months after the close of the relevant period, and NECA’s pool true-up adjustments made 24 months after-the-fact. The Report also outlines internal changes to NECA’s procedures and suggests changes to the Commission’s reporting and tariff filing processes.

In these comments, GCI makes three primary points. First, the current legal interpretation of “deemed lawful” tariffs³ has created a heretofore unparalleled need for comprehensive tariff filings to ensure meaningful pre-effective review — now the *only* means to protect customers against unjustified rates filed under streamlined practices. Detailed filings,

¹ *Report on Timing of NECA Pool True-Up Submissions and FCC Form 492 Interstate Earnings Monitoring Reports*, NECA, WC Docket No. 05-29 (Jan. 28, 2005) (“Report”).

² *July 1, 2004, Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd. 23877 (Nov. 30, 2004) (“Order”), *amended*, Errata, 19 FCC Rcd. 24937 (Dec. 23, 2004).

³ *See ACS v. FCC*, 290 F.3d 403 (D.C. Cir. 2002).

which account for excessive projections in prior periods, are particularly necessary for NECA, which has enjoyed repeated and consistent overearnings over the last ten years based on largely inscrutable tariff documentation. Thus, the Commission should require that NECA's future annual tariff filings contain a full account and analysis of any overearnings in recent prior periods, specifically detailing the steps taken to prevent replication of those excessive returns in the proposed tariff period.

Second, GCI emphasizes what the Commission itself has long recognized — the need to finalize the Form 492 Reports in a timely manner in order to ensure an effective enforcement process. Conceding that its historical practice of allowing 24-months for member true-ups to finalize earnings data is indefensible, NECA instead proposes a 12-month window for true-ups and a four-month extension of the date for filing final Form 492 reports. But there is no reason to believe that many NECA member companies could not comply with the current nine-month window (or an even shorter period) in order to meet Commission expectations. While GCI agrees that the timing of NECA pool true-ups and ICLS and LSS true-ups should be consistent, this consistency can best be achieved by coordinating all carrier adjustments to comply with the 9-month window for filing final Form 492 earnings reports. The Commission must convey an expectation that NECA will finalize its monitoring reports as quickly as possible so that NECA will encourage its member companies to complete their true-up processes without unnecessary delay.

Third, the Commission should make clear that access customers can bring overearnings complaints against NECA on behalf of all its pool participants, rather than being forced to sue individual member companies, in the event of unlawful overearnings. Although NECA acts as its members' agents, such overearnings cases necessarily implicate overall pool returns not an

individual carrier's earnings. Furthermore, to better monitor the enforcement process, the Commission should require NECA to annually report both the total amount of unlawful overearnings and the total amount of refunds and settlements.

I. Meaningful Pre-Effective Review Demands That NECA Explain And Appropriately Adjust For Prior Period Overearnings In Its Annual Access Tariff Filings.

Given the current legal landscape under Section 204, NECA's insufficiently detailed annual tariff filings in the past, and the persistent pattern of overearnings reflected in NECA's final Form 492 monitoring reports, the Commission should require that NECA's future tariff filings include an analysis of any overearnings and an account of how its proposed rates have been adjusted accordingly. Under Section 204(a)(3), as interpreted by the court,⁴ tariffs filed under streamlined conditions "shall be deemed lawful" — and are thus not subject to refund for any later overearnings — unless the Commission suspends and investigates the tariff as provided in Section 204(a)(1). Under this regime, the need for NECA to include the comprehensive tariff documentation required for meaningful pre-effective review by the Commission and its customers cannot be overstated. As the Commission has already recognized:

When tariffs, such as NECA's tariff, are filed pursuant to the "deemed lawful" provisions of the statute, therefore, it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates. The Commission's rate-of-return prescription and the ability to evaluate a carrier's earnings results in a timely manner are essential to ensuring that carriers do not charge unjust or unreasonable rates.⁵

Far from providing sufficient information to enable a thorough review of its tariffs by the Commission or its customers, NECA's tariff filings have been largely impenetrable, effectively precluding any meaningful evaluation of its rate development methodology. And yet, at the

⁴ *ACS*, 290 F.3d at 412 (D.C. Cir. 2002).

⁵ *July 1, 2004, Annual Access Charge Tariff Filings*, Order Designating Issues for Investigation, 19 FCC Rcd. 18593 (rel. Sept. 20, 2004) ¶ 10; *See also* Order ¶¶ 7-9.

same time, NECA's final September Form 492 monitoring reports reveal consistent and repeated overearnings over the past ten years, particularly for the switched traffic sensitive category.⁶ Moreover, even accounting for NECA's purported after-the-fact adjustments following the 24-month true-up process, NECA's switched traffic sensitive rates of return have still consistently exceeded both the prescribed rate of return and the maximum allowable rate of return for each of the last five monitoring periods.⁷

This persistent pattern of overearnings plainly suggests a systematic bias in NECA's rate development methodology: where past rates have yielded rates of return above the maximum permitted rate of return it is likely that the same methodology, applied to calculate the following year's rates, will yield the same result — rates above the maximum allowable rate of return. Thus, an analysis of such prior period earnings is essential to the Commission's pre-effective review of NECA's annual tariff filings. The Commission recognized this connection in investigating NECA's 2004 annual access tariff, explaining that it must examine NECA's prior period earnings data "for the purpose of determining the accuracy and reliability of the methodology NECA employs to set rates for the current tariff period and whether NECA's rates are just and reasonable."⁸

While NECA, in the Report, now acknowledges the Commission's need to use Form 492 earnings data to evaluate NECA's annual access tariff filings, it proposes some generally stated "enhancements" to future filings that simply do not go far enough. This is not a surprise: NECA

⁶ Specifically, NECA's final Form 492s reflect rates of return for switched traffic sensitive service of 13.02 % for 1993-94; 12.23 % for 1995-96; 13.66 % for 1997-98; 12.34% for 1999-2000; and 12.76 % for 2001-02. Opposition to Direct Case of National Exchange Carrier Association by GCI, WC Docket No., 04-372 at 7 (chart) (filed Oct. 22, 2004).

⁷ According to NECA, after the 24-month true-up process, rates of return for switched traffic sensitive service were 12.93 % for 1993-94; 12.11 % for 1995-96; 13.46 % for 1997-98; 12.17 % for 1999-2000; and 13.14 % for 2001-02. *Id.*

⁸ Order ¶ 15.

has never provided the Commission with adequate information with which to review NECA's rates. The information NECA has provided in its tariff submissions and in response to FCC investigations has been so paltry that, even after a full five month tariff investigation, the Commission has been unable to conclude that NECA's rates are lawful.⁹ Under these circumstances, the Commission should expressly require NECA to provide more information with its initial tariff filings, which then can be investigated in greater detail should the Commission decide to suspend and investigate the tariff.

In addition to the prior and projected earnings data and any analysis NECA now intends to submit, GCI urges the Commission to require that NECA's tariff filings include a full evaluation of prior period overearnings. First, NECA should tally and account for any excess returns earned in the most recent closed monitoring period or year for which final 492s have been filed and any excess earnings projected for any year for which a final 492 has not yet been submitted. Second, NECA must explain the reason for the inaccuracy, i.e., whether it overstated projected revenue requirements (including the components of investment and expenses), understated demand projections, or some combination of the two, and why its actual results (or projected result in the case of a monitoring period for which final 492s have not yet been filed) exceeded authorized levels. Finally, NECA must detail adjustments it has made to its rate development methodology in the proposed period to correct for such estimation errors and prevent them from recurring. These self-analyses should be certified by a senior NECA official, under penalty of perjury. Moreover, these analyses must be publicly available for any interested party for review, so that parties can have the benefit of this information in presenting any petitions to suspend and investigate to the Commission. Only with such a detailed self-analysis of recent overearnings will the Commission and other interested parties be able to undertake the

⁹ *Id.* ¶ 24.

meaningful review of proposed rates necessary to protect against unjust and unreasonable rates in the short time before they become effective.

In addition, the Commission should make crystal clear what is already the law: that Section 204(a)(3) does not immunize NECA against the duty to make mid-course corrections during a monitoring period by adjusting its rates prospectively when NECA concludes that it may earn more than 11.5% across all access categories or 11.65% in any single access category.¹⁰ NECA has routinely filed tariffs during later portions of a monitoring period that target an 11.25% rate of return during the period covered by the tariff, rather than targeting an 11.25% rate of return for the overall monitoring period. NECA must meet its obligation to target its rates to achieve an 11.25% rate of return over the two-year monitoring period.¹¹

The cumulative effect of GCI's proposal would be, to the extent possible given Section 204(a)(3), to force NECA to comply with the law and to provide an open and transparent record with which to evaluate NECA's tariffs. The status quo under which NECA routinely charges rates that result in returns far in excess of allowable levels, can be immunized against refunding those ill-gotten gains, and then can shroud its entire rate development process in mystery and secrecy is intolerable. The Commission must ensure that its ratemaking reviews are open, transparent and capable of holding carriers accountable.

II. The Commission Should Encourage NECA And Its Member Companies To Finalize Earnings Data As Fast As Possible.

In its Order, the Commission directed NECA "to explore how true-ups could be conducted in a manner that enables NECA to file its final rate of return by September 30 after the

¹⁰ See 47 C.F.R. §§ 65.700-702; *see also MCI Telecom. Corp. v. FCC*, 59 F.3d 1407, 1415 (D.C. Cir. 1995) (discussing the general process carriers follow in setting rates to comply with the rate-of-return prescription).

¹¹ 47 C.F.R. § 65.701.

close of a monitoring period.”¹² Instead, NECA urges the Commission to amend its rules to push back the deadline for filing final earnings reports by four additional months to January of the succeeding year.

GCI objects to such an unwarranted extension of the current 9-month timeframe because, as the Commission has long held, Form 492 reports must be finalized in a timely manner to ensure effective enforcement.¹³ The Commission made this plain when it adopted the existing 9-month time frame for out-of-period adjustments, explaining that a “cut-off date for interperiod adjustments and revisions is necessary for us to utilize the rate of return reports for enforcement purposes in a timely manner.”¹⁴ In that rulemaking, the Commission expressly considered making that cut-off consistent with the 24-month timeframe used by NECA for true-ups, but rejected that approach for good reason — the countervailing need for an effective enforcement process. The Commission understood NECA’s position that the 9-month window may not accommodate the cost-study schedules of some small exchange carriers, but explained that “[b]ecause the bulk of the adjustments are normally identified in the first few months after the quarter ends, we believe this process is a satisfactory compromise and will capture virtually all of the adjustments.”¹⁵

NECA’s Report now concedes that the 24-month true-up window, apparently a relic of decades-old contracts with its member companies, is “excessive” and that the process can be

¹² Order ¶ 31.

¹³ *Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements*, Report and Order, 1 FCC Rcd 952, 954 (¶ 21) (1986) (“*Amendment of Part 65*”); *See also* Order ¶ 30 (“Rate-of-return reports must be filed in a timely manner and provide the most current data possible if they are to assist the Commission and other interested parties that rely on them.”)

¹⁴ *Amendment of Part 65*, 1 FCC Rcd. at 954 (¶21).

¹⁵ *Id.* at 954 (¶ 26).

considerably shortened.¹⁶ As detailed in the Report, about two-thirds of NECA member companies already submit the completed calendar year cost studies that form the basis for NECA’s Form 492 reports by August of the following year — in time to meet the current September deadline for the final earnings report.¹⁷ Moreover, NECA “believes it . . . should be possible for more companies to complete the cost study process and submit completed studies in time for those studies to be reflected in NECA’s September Form 492 report.”¹⁸ Indeed, for tax purposes or, in some cases, to comply with Securities and Exchange Commission regulations, NECA member companies most likely already complete financial audits that require them to finalize much of the same information in an even faster timeframe.

But instead of bringing its procedures into compliance with existing Commission rules for final Form 492 filings, NECA proposes that it change its pool procedures to require final carrier adjustments by December of the year following the study year and that the Commission amend its rules to move the deadline from the September after the close of the two-year monitoring period to the following January. NECA’s primary reason for these changes is to coordinate the timing of NECA pool true-ups and ICLS and LSS true-ups.

GCI agrees that these timeframes should be consistent. But NECA offers no explanation for why this temporal consistency could not be accomplished by requiring its member companies to complete ICLS and LSS true-ups as well as the pool true-ups within the Commission’s carefully selected 9-month timeframe for finalizing earnings reports. Requiring NECA member carriers to complete *all* true-up adjustments for a completed calendar year by the following

¹⁶ Report at 19-20.

¹⁷ *Id.* at 15-16.

¹⁸ *Id.* at 17.

September would achieve the desired coordination and improve the accuracy of NECA's final Form 492 reports, without sacrificing the timely finality so essential to effective enforcement.

Furthermore, as experience with the recent NECA tariff investigation showed, delaying filing of the final Form 492 until the end of the calendar year after the year to which the Form 492 applies will mean that the Commission *never* receives a final Form 492 while it is actively considering a tariff. Take, for example, the tariff to be filed in June, 2006, to be effective July 1, 2006. This is the second tariff to be filed during the 2005-2006 monitoring period. Under current law, NECA must file its final Form 492 for calendar year 2005 by September 2006. Thus, should the FCC decide to suspend and investigate NECA's June 2006 annual access tariff filing, the FCC can have the benefit of that Form 492 filing while it conducts its five month tariff investigation. NECA's proposed filing schedule would, however, result in NECA filing its final 492 for 2005 in January 2007, long after the FCC will have had to complete any investigation of the July 2006 annual access tariff. NECA's schedule defeats rather than promotes meaningful tariff investigations and review.

Thus, GCI urges the Commission to reject NECA's suggestion to extend the deadline for final Form 492 reports and instead reaffirm what it has long recognized as the need to finalize earnings data in a timely manner. The Commission should convey to NECA an expectation that earnings must be finalized as quickly as possible such that NECA, in turn, will expect its members to conduct their studies efficiently and submit their final adjustments expeditiously.

III. NECA Should Be Directly Accountable For, And Required To Report, Unlawful Overearnings.

In its effort to improve NECA's reporting and tariffing process, the Commission should take this opportunity to clarify that, in the event of any unlawful overearnings, access customers can bring a complaint directly against NECA. In the past, NECA has taken the position that

customers can only bring overearnings actions against individual member companies. This makes no sense. NECA, a creature of the Commission, is required by the Commission's rules to prepare and file tariffs on behalf of its members.¹⁹ Although NECA functions as an agent of its members, who remain ultimately liable for any overearnings, customers seek refunds, and overearnings are determined, based on overall returns for the pool, not an individual carrier's earnings. Moreover, under NECA's settlement procedures, member carriers reconcile earnings on a monthly basis and remit any excess earnings to NECA. And even when complaints are brought against individual members, any refunds awarded would ultimately lead to settlement adjustments between the member and the NECA pool, effectively transferring the financial responsibility for the refund from the individual carrier to all the pool members. Thus, by clarifying that customers may seek refunds directly from NECA, the Commission can better ensure that customers receive refunds to which they are entitled while increasing the efficiency of overearnings proceedings.

In addition, the Commission should require NECA to file a report with the Commission detailing, for all refund-eligible tariffs, the total amount of unlawful overearnings, the portion of overearnings retained by NECA and its members, and the portion of overearnings returned to access customers through refunds and settlements. That report should be filed annually based on NECA's final Form 492 reports for each prior closed period and certified as accurate by a responsible officer or employee of NECA. This additional accounting and reporting requirement will improve the Commission's ability to monitor the overearnings enforcement process.

Finally, in the event that NECA's final Form 492 report indicates unlawful overearnings, the Commission should require that NECA provide to its customers all of the information necessary for interested parties to calculate refunds, such as the marginal tax rate for the pool.

¹⁹ 47 C.F.R. § 69.601 *et. seq.*

Requiring such increased disclosure will not only allow customers to validate their claims, but also increase the accuracy and efficiency of overearnings proceedings.

IV. Conclusion

Recent experience with NECA's 2004 annual access tariff demonstrates that NECA's current tariffing and reporting efforts are woefully inadequate. The Commission should take the steps outlined above to ensure that NECA discloses, in a timely manner, all of the information necessary for the Commission and NECA's customers to perform meaningful annual access tariff reviews and to ensure, through effective tariffing, reporting, and enforcement procedures, that NECA's rates are just and reasonable.

Respectfully submitted,

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