

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

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

**REPLY COMMENTS
OF THE
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.**

The National Exchange Carrier Association, Inc. (NECA) hereby submits its Reply in the above-captioned proceeding.¹

I. INTRODUCTION

On January 28, 2005, as directed by the Commission,² NECA filed a *Report* explaining timing differences between submissions of true-up data to the NECA interstate access charge pools and submission of NECA's final September Form 492 Interstate Earnings Monitoring Reports to the Commission.³

NECA's *Report* detailed steps NECA is taking to improve the timeliness of cost study submissions, and suggested process modifications to assure NECA's 492 reports fully reflect final pool results. NECA's *Report* specifically suggested that, if the

¹ Report on Timing of NECA Pool True-Up Submissions and FCC Form 492 Interstate Earnings Monitoring Reports, WC Docket No. 05-29, *Public Notice*, DA 05-323 (rel. Feb. 4, 2005).

² July 1, 2004 Annual Access Charge Tariff Filings, WC Docket No. 04-372, *Memorandum Opinion and Order*, 19 FCC Rcd 23877 (2004).

³ National Exchange Carrier Association, Inc. Report on Timing of NECA Pool True-Up Submissions and FCC Form 492 Interstate Earnings Monitoring Reports, WC Docket No. 05-29 (filed Jan. 28, 2005) (*Report*).

Commission were so to direct, NECA could convert its existing 24-month “rolling” pool adjustment window to a calendar year basis and require all carrier-initiated adjustments to pooling data be complete 12 months after the end of each study period.⁴

NECA’s *Report* also explained greater accuracy in 492 reporting results could be achieved if the Commission were to delay the date for filing NECA’s final pool earnings report from September of the year following a monitoring period to January of the second year following the monitoring period.⁵ This revised filing date would be consistent with the schedule for submission of ICLS and LSS true-ups, and would allow NECA to incorporate all material adjustments to pooling data within its final 492 Reports.

On March 4, 2005, the National Telecommunications Cooperative Association (“NTCA”); the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”); the Independent Telephone and Telecommunications Alliance (“ITTA”); the Western Telecommunications Alliance (“WTA”); and the United States Telecom Association (“USTA”) (collectively, the “Associations”); AT&T; and General Communications, Inc. (GCI) filed comments on NECA’s *Report*.

The Associations support NECA’s initiatives to improve the timeliness of cost study submissions and the accuracy of pool Form 492 Reports, and concur with the findings in NECA’s *Report* regarding challenges faced by their member companies in preparing annual cost studies. The Associations caution the Commission there are always likely to be situations that will make it difficult for rural LECs to finalize cost

⁴ *Report* at 19-20.

⁵ *Id.*

studies according to a rigid schedule and suggest the Commission consider changing the date for filing Form 492 reports from September of the year following a monitoring period to January of the next succeeding year.⁶

AT&T states that it supports most of the changes proposed in NECA's *Report*,⁷ and further acknowledges that it makes sense to require all carrier-initiated adjustments to be finalized on the same schedule as the submission of ICLS and LSS true-ups, as NECA proposes.⁸ AT&T opposes, however, the use of estimated data in final Form 492 earnings reports in cases where companies have not supplied actual cost studies within the required timeframe.⁹

GCI likewise agrees the timing of pool true-ups and ICLS and LSS true-ups should be consistent, but argues 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.¹⁰ GCI also suggests NECA should be required to include in its annual tariff filings a full account and analysis of any overearnings in recent prior periods, specifically detailing the steps taken to prevent replication of excessive returns in the proposed period.¹¹ Additionally, GCI requests the Commission clarify in this proceeding that access customers can bring overearnings complaints against NECA on behalf of all

⁶ Associations' Comments at 3-4. The Associations also support NECA's request for the Commission to establish consistent time frames and procedures for carriers to submit adjustments to cost and revenue data to correct errors and omissions discovered following the filing of all such data. *Id.* at 4-5.

⁷ AT&T at 2.

⁸ *Id.* at 5.

⁹ *Id.* at 4.

¹⁰ GCI at 6-9.

¹¹ *Id.* at 3-6.

its pool participants, rather than require customers to name individual pool participants.¹²

Finally, GCI requests the Commission to direct NECA to provide annual reports on overearnings and the total amounts of any refunds and settlements.¹³

II. DISCUSSION

A. Changes to NECA's Pool Procedures and Form 492 Reporting Dates are Warranted.

The record in this proceeding supports the proposals set forth in NECA's *Report*. As noted above, both AT&T and the Associations agree it would be reasonable to change existing pool settlement procedures to conform to a calendar-year adjustment cycle.¹⁴ Accordingly, NECA is prepared to adopt these measures should the Commission direct it to do so.

The Commission should likewise conform the filing date for final Form 492 reports to the schedule for final ICLS and LSS true-ups set forth in section 54.903 of its rules. NECA's *Report* explained this step will increase the accuracy of final Form 492 reports and reduce the potential need for supplemental filings.¹⁵

¹² *Id.* at 9-10.

¹³ *Id.* at 9-11.

¹⁴ This would involve replacing the current "rolling" 24-month pool adjustment window with one requiring all carrier-initiated monthly adjustments to data affecting a particular calendar year be completed by the end of the following calendar year.

¹⁵ If the Commission revises the deadline for submitting final Form 492 Reports, NECA agrees with AT&T this could alter the time at which a party receives notice of overearnings and therefore the time that the two-year statute of limitations set forth in section 415 of the Act begins to run. NECA does not agree filing of revised earnings reports for a given period would necessarily restart the two-year period, however, particularly in cases where a supplemental filing reflects downward earnings from previously-reported levels.

AT&T agrees extending the date for filing final Form 492 Reports is a logical consequence of changing the pool true-up process to operate on a calendar year basis.¹⁶ GCI, however, objects to extending the current 9-month timeframe for finalizing Form 492 reports. In this regard, GCI notes that the Commission has previously considered, but rejected, the idea of making the Form 492 date consistent with the NECA 24-month window.¹⁷ GCI also claims most NECA pool participants in fact submit cost studies in time for inclusion in NECA's September 492 Report.¹⁸ According to GCI, NECA offers "no explanation" as to why consistency between ICLS, LSS and pool true-ups could not be accomplished by requiring companies to complete ICLS and LSS true-ups within the nine-month timeframe for finalized earnings reports.

The current schedule for submitting initial and final ICLS data was developed in the context of the Commission's MAG proceeding.¹⁹ There, the Commission had originally established July 31st as the date for submitting support true-up data, but later recognized

¹⁶ AT&T at 4. On the other hand, AT&T expresses concern this change would not correct perceived incentives for carriers to underforecast demand and/or overforecast costs when submitting pool estimates, and suggests the Commission consider revising those portions of its rules permitting carriers to earn within a "buffer" zone surrounding the authorized rate of return. *Id.* at 3, *citing* 47 C.F.R. 65.700 (a) and (b). Such changes fall considerably outside the scope of this proceeding.

¹⁷ GCI at 7, *citing* Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements, *Report and Order*, 1 FCC Rcd 952, 954 (1986). Of course, at the time this decision was reached the Commission's rate of return reporting rules contained stringent automatic refund requirements and applied equally to the Bell Operating Companies as well as to smaller NECA pool members. Subsequent regulatory changes, including the elimination of automatic refund procedures, Bell Company conversion to price cap regulation, and the move to annual rather than quarterly 492 reporting, must be considered in evaluating whether the Commission's 1986 findings should continue to apply to NECA pool reports, which currently encompass a far higher percentage of smaller companies, and are thus much more volatile, than they were in the 1980's.

¹⁸ *Id.* at 8. GCI asserts that data contained in NECA's *Report* shows that "about two-thirds of NECA member companies" already submit completed cost studies in time to meet the current September deadline for filing final earnings data. *Id.* In fact, the *Report* shows cost study completion percentages of around 60%.

¹⁹ Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent LECs and IXC's, CC Docket No. 00-256, Federal-State Joint Board on Universal, CC Docket No. 96-45, *Third Order on Reconsideration*, 18 FCC Rcd 10284 (2003).

that a December 31st submission date would “reduce burdens on carriers and minimize the potential need for late filings and corrections.”²⁰ GCI’s approach, if adopted, would precisely reverse this determination. GCI provides no explanation why the Commission should revisit or reconsider decisions made in the MAG proceeding at this time.

Moreover, contrary to GCI’s claims, NECA’s *Report* in fact provided extensive information as to why time frames for submitting final true-up data should not be shortened.²¹ The *Report* explained in detail the complex activities associated with preparing final cost studies, and provided ample illustrations as to why circumstances sometimes prevent rate of return carriers from submitting final studies in time for inclusion in NECA’s September 492 Report.²² NECA’s *Report* recognized certain factors have helped companies complete cost studies on a timely basis (*e.g.*, widespread use of computerized accounting programs, the 2001 “freeze” on separations factors), but described other factors that have made the process substantially more complicated than in prior years.

For example, NECA’s *Report* referenced changes in the telecommunications marketplace as a result of the deployment of advanced switching and transmission technology, introduction of competition, new interconnection arrangements, mergers and

²⁰ *Id.* at para. 5.

²¹ *Report* at 14-19. NECA’s *Report* attached exhibits and letters provided by consultants detailing the complex activities required to complete cost studies and explaining circumstances that sometimes make it difficult for rate of return companies to submit cost studies to NECA in time for inclusion in a September earnings report.

²² In order for a cost study to be incorporated in NECA’s September 492 Report, current NECA procedures specify that cost studies should be submitted by the end of July. Thus, the Commission should recognize that a requirement that companies complete cost studies in time for inclusion in a September 492 Report would, in effect, allow significantly less than a nine-month period for completing the necessary accounting and separations studies.

acquisitions, initiation of new non-regulated services, advent of the Internet, and many other factors. All of these tend, in one way or another, to increase the complexity of the accounting, separations and cost study review processes and make it more likely, in some years, that companies will not be able to complete studies in time for inclusion in a September 492 Report.

NECA continues to believe improvements in the timeliness of cost study submissions are possible. The Commission must nevertheless recognize that some companies, in some years, will simply be unable to submit cost studies according to a rigid time schedule and the Commission should therefore refrain from imposing one.

B. NECA Agrees It Should Incorporate Data on the Accuracy of Prior-Period Forecasts As Part of Its Annual Filing Documentation.

GCI also opposes extending the Form 492 reporting date on grounds that doing so would prevent the Commission from utilizing final earnings data in the tariff review context.²³ GCI explains, by way of example, final Form 492 Reports for the 2003-2004 monitoring period will be available by September of 2005, well within the five-month statutory period for investigating NECA's June 2005 annual access filing.²⁴

NECA recognizes the availability of final earnings reports in the September time frame could assist the Commission in evaluating specific annual tariff filings.²⁵ As NECA has previously explained, however, the accuracy of tariff forecasts covering future

²³ GCI at 9.

²⁴ *Id.*

²⁵ Pursuant to the Commission's Part 65 earnings monitoring rules, final Form 492 Reports covering a two-year monitoring period are due in September of each odd-numbered year, well beyond the scheduled July 1 effective date for annual access filings. Thus, such reports would only be of use in evaluating annual access filings in alternate years, and only in those cases where the Commission has determined a particular filing warrants suspension and investigation.

periods can best be determined by careful analysis of data filed in support of proposed rates, including review of test period cost and demand forecasts based on latest-available actual data.²⁶

NECA agrees with GCI improvements can and should be made to the data submissions accompanying NECA's annual filings, including data allowing the Commission (and interested parties) to evaluate prior period forecast "misses" and explanations as to adjustments or changes NECA is making on a prospective basis to correct for such errors. NECA is currently working on revising its tariff documentation procedures to incorporate such data and will include this information in its 2005 annual access tariff filing.

C. Other Matters.

i. *Use of Estimated Data in NECA Form 492 Reports.*

As noted above, AT&T opposes the use of estimated data in final Form 492 earnings reports in cases where companies have not supplied actual cost studies within the required timeframe. As NECA's *Report* made clear, however, prior interstate earnings monitoring reports have consistently been based solely on actual pool settlement data certified by pool participants and verified according to NECA pooling procedures.²⁷ The *Report* further stated that use of estimates in place of cost studies would represent a "significant departure" from this practice and accordingly did not recommend the Commission adopt this approach.

²⁶ July 1, 2004 Annual Access Charge Tariff Filings, WC Docket No. 04-372, Rebuttal of the National Exchange Carrier Association, Inc. at 2-5 (filed Oct. 29, 2004).

²⁷ *Report* at 19.

On the other hand, if the Commission were to move the date for filing final Form 492 Reports from September to January of the second year after a monitoring period, NECA would be in a position to utilize data obtained from ICLS and LSS true-up filings to project the effects of subsequent true-up payments on the pool rate of return.²⁸ Such adjustments would be made based on final ICLS and LSS true-up data, certified in accordance with Commission rules by the submitting companies.

ICLS and LSS support true-up payments can theoretically have a significant effect on final pool results. Therefore, if the Commission elects to delay the date for reporting final pool results to the following January, as NECA and commenters in this proceeding have suggested, it is important that it also permit NECA to incorporate the effects of all known adjustments in its reports – including the effects of support true-up payments based on submission of final ICLS and LSS data.

ii. *Filing Section 208 Complaints against NECA as Agent for its Pool Members.*

GCI complains it is administratively burdensome to require access customers seeking to file section 208 complaints for recovery of pool overearnings to name individual pool members rather than NECA as agent for the pool.²⁹ As the Commission and the courts have previously recognized, however, NECA is not a common carrier, and it is therefore not directly subject to complaints under section 208 of the Communications Act.³⁰

²⁸ *Id.*

²⁹ GCI at 9-10.

³⁰ See *Communiqué Telecom., Inc. d/b/a Logically, Declaratory Ruling & Order*, 10 FCC Rcd 10399, at para. 31 (1995); *Communiqué Telecom., Inc. d/b/a Logically Application for Review, Memorandum Opinion & Order*, 14 FCC Rcd 13635, at paras. 26, 32 & 34 (1999) (suggesting, since NECA is not a

On the other hand, NECA has in the past acted as agent for its pool members for the purposes of settling overearnings claims against the pool, and could potentially act as agent for service of process on behalf of its pool members as well (provided, of course, NECA is not itself held liable for potential overearnings claims or other damages arising out of a section 208 complaint proceeding). While the Commission could consider ways in which this process can be facilitated in the context of future enforcement actions, in view of the limited record available NECA respectfully suggests the Commission refrain from acting on GCI's suggestion in this proceeding.

iii. *Reports of Settlement Agreements*

Finally, GCI suggests NECA be required to submit annual reports detailing overearnings and the amounts of any refunds or settlements reached with individual carriers. Once again, the Commission should not adopt GCI's suggestion. Settlement agreements have consistently been treated as confidential by the Commission and not subject to public disclosure under FOIA.³¹ As a policy matter, the Commission has found "public disclosure of [settlement] agreements is likely to impair the Commission's ability to obtain necessary information in the future and cause substantial competitive

common carrier, complaints should be filed against NECA's member LECs). *See also American Sharecom v. Southern Bell Tel. & Tel. Co.*, 1989 WL 229397 (D.D.C. Aug. 28, 1989) (finding "there is no statutory authority upon which to base liability against Bellcore and NECA as they are not common carriers."), *aff'd* 1993 WL 260705 (D.C.Cir. Jun 29, 1993); *Allnet v. NECA*, 741 F.Supp. 98 (D.D.C. 1990) (dismissing claim against NECA based on findings NECA is not a common carrier subject to suit for violations of the Act).

³¹ *See* 5 USC sec. 552(b)(4) (excluding from public disclosure under the Freedom of Information Act "trade secrets and commercial information or financial information obtained from a person [that is] privileged or confidential."). *See also* , WorldCom, Inc. and its Subsidiaries (debtors-in-possession), Transferor, and MCI, Inc., Transferee: Applications for Consent to Transfer and/or Assign Authorizations and Licenses, *Order*, 18 FCC Rcd 26338 (2003) (denying requests for disclosure of settlement agreements in a bankruptcy reorganization); *see also* Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report & Order*, 13 FCC Rcd 24816, at para. 8 (1998).

harm” to settling parties.³² Similar considerations should apply here, inasmuch as a requirement to disclose the terms and conditions of individual settlement amounts would substantially disadvantage NECA in negotiating reasonable settlements on behalf of its members and reduce incentives to enter into such agreements.

III. CONCLUSION

The Commission should take prompt action on the recommendations set forth in NECA’s *Report*. Specifically, if the Commission so directs, NECA is prepared to revise its pool procedures so as to change the current “rolling” pool adjustment window to one that operates on a calendar-year basis, resulting in completion of carrier-initiated pooling adjustments by the end of the first calendar year following a study period. Doing so would conform pooling adjustment procedures to existing procedures for ICLS and LSS submissions. The Commission should also revise the date for submission of final Form 492 Reports to January of the second year following a monitoring period. These steps would markedly improve the accuracy of NECA final Form 492 Reports and facilitate the Commission’s ongoing review of rate of return carrier earnings levels.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, Inc.



March 25, 2005

By:

Richard A. Askoff
Its Attorney
80 S. Jefferson Rd.
Whippany, NJ 07981
Tel. 973-884-8000

³² *Id.* at para. 9 (internal footnotes omitted).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the NECA's Reply was served this 25th day of March, 2005 by electronic filing and first class mail, to the persons listed below.

By: /s/ Elizabeth R. Newson
Elizabeth R. Newson

The following parties were served:

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
(via ECFS)

Douglas Slotten
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Leonard J. Cali
Lawrence J. Lafaro
Judy Sello
Mart Vaarsi
AT&T Corp.
Room 3A215
One AT&T Way
Bedminster, NJ 07921

Tina Pidgeon
General Communication, Inc.
1130 17th Street NW, Ste. 410
Washington, DC 20036

John T. Nakahata
Harris, Wiltshire & Grannis LLP
1200 18th Street NW, Ste. 1200
Washington, DC 20036
*Counsel for General Communication,
Inc.*

John N. Rose
Stuart Polikoff
OPASTCO
21 Dupont Circle, NW, Ste. 700
Washington, DC 20037

David W. Zesiger
Independent Telephone and
Telecommunications Alliance
1300 Connecticut Avenue, NW
Washington, DC 20036

Gerard J. Duffy
Blooston, Mordkofsky, Dickens, Duffy
& Prendergast
2120 L Street, NW, Ste. 300
Washington, DC 20037
*Counsel for Western
Telecommunications Alliance*

James W. Olson
United States Telecom Association
1401 H Street, NW, Ste. 600
Washington, DC 20005

L. Marie Guillory
National Telecommunications
Cooperative Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Best Copy and Printing, Inc.
Room CY-B402
445 12th Street, SW
Washington, DC 20554