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

In the Matter of	)	
	)	
July 1, 2004	)	WC Docket No. 04-372
Annual Access Charge Tariff Filings	)	
	)	
	)	

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: September 20, 2004 **Released: September 20, 2004**

Filing Schedule

Direct Case Due: October 12, 2004
Oppositions to Direct Case Due: October 22, 2004
Rebuttal Due: October 29, 2004

By the Chief, Pricing Policy Division:

I. INTRODUCTION

1. On July 1, 2004, the Pricing Policy Division of the Wireline Competition Bureau released an order that suspended for one day and set for investigation several of the incumbent local exchange carriers' (LECs') 2004 annual access tariff filings.[1] On July 30, 2004, we reconsidered, on our own motion, our decision to suspend and investigate those tariffs except for the tariff of the National Exchange Carrier Association, Inc. (NECA).[2] As discussed below, we now designate for investigation three issues related to NECA's tariff -- the first two pursuant to the Commission's authority under section 204 of the Communications Act of 1934, as amended (Act), and the third issue pursuant to the Commission's authority under section 205 of the Act.[3] First, we designate for investigation whether the revised rates in NECA's annual access tariff are unjust or unreasonable in violation of section 201 of the Act,[4] particularly whether NECA's rate development methodology has resulted in consistent overearnings, such that this methodology

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[1] *July 1, 2004, Annual Access Charge Tariff Filings*, WCB/Pricing File No. 04-18, Order, DA No. 04-1997 (WCB/Pricing, July 1, 2004) (*Suspension Order*).

[2] *July 1, 2004, Annual Access Charge Tariff Filings*, WCB/Pricing File No. 04-18, Order on Reconsideration, DA No. 04-2395 (WCB/Pricing, July 30, 2004) (*Suspension Reconsideration Order*).

[3] 47 U.S.C. §§ 204(a), 205.

[4] 47 U.S.C. § 201(b).

produces access rates that are unjust or unreasonable. Second, we designate for investigation whether NECA's entrance facilities rates are calculated using demand projections for entrance facilities that are neither ordered nor used, and whether the resulting rates are unjust or unreasonable under section 201 of the Act.[5] Finally, we designate for investigation whether the language in NECA's tariff relating to entrance facility charges is unjust or unreasonable.[6]

II. BACKGROUND

2. NECA files an annual access tariff as an agent for rate-of-return carriers that do not file separate tariffs or concur in a joint access tariff of another company.[7] Pursuant to section 61.38 of the Commission's rules, NECA files an annual access tariff that reflects averaged rates based on participating carriers' historical and projected costs of providing interstate access services and forecasted demand for these services.[8] LECs charge interexchange carriers for access services at NECA's tariff rates, and NECA settles with participating LECs based on their reported revenues and costs.[9] More specifically, NECA reimburses the LECs for their costs and provides each participating LEC an equal return on its investment.[10]

3. Under section 201(b) of the Act, a local exchange carrier may not charge unjust or unreasonable rates for its provision of access services.[11] To enforce this requirement, the Commission has prescribed an authorized rate of return of 11.25 percent for rate-of-return carriers.[12] To comply with this

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[5] 47 U.S.C. § 201(b). Entrance facilities generally refer to the incumbent local exchange carrier (LEC) transmission facilities that carry switched interstate traffic between an interexchange carrier's point of presence (POP) and the incumbent LEC end-office that serves the POP. *See* 47 C.F.R. § 69.110.

[6] *See* NECA Tariff F.C.C. No. 5, § 6.1.3(A)(1), 3rd Revised Page 6-8.1.

[7] 47 C.F.R. §§ 69.3, 69.601.

[8] 47 C.F.R. § 61.38; 47 C.F.R. §§ 69.601-610. NECA members participate in revenue pooling as either "cost companies" or "average schedule" companies. 47 C.F.R. §§ 69.605-606. Cost companies receive pool revenues for interstate access services based on their actual interstate investment and expenses, calculated each year from cost studies. 47 C.F.R. § 69.605. The pool revenues of average schedule companies are determined on the basis of a series of formulas. 47 C.F.R. § 69.606. For qualifying small companies, the average schedule option avoids the expense of preparing cost studies.

[9] 47 C.F.R. §§ 69.603-69.610. About 1,150 LECs participate in NECA's access charge revenue pools. *See* NECA website.

[10] 47 C.F.R. §§ 69.603-69.610.

[11] 47 U.S.C. § 201(b).

[12] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers,* CC Docket No. 89-624, Order, 5 FCC Rcd 7507, 7532, paras. 1, 216 (1990) (*Rate-of-Return Represcription Order*) (subsequent history omitted). The Commission's rules specify that "maximum allowable rates of return" equal the prescribed rate of return plus .25% on overall interstate access earnings and plus .4% on earnings within any access service category, such as common line, traffic sensitive, or special access. 47 C.F.R. § 65.700(a), (b). The Commission explained that these "buffer zones" above the prescribed 11.25% rate of return recognize the effects that fluctuations in demand and operating costs have on the earnings of rate-of-return LECs, while protecting customers against unreasonably high rates and helping define overearnings. *Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Process*, CC Docket No. 92-133, Report and Order, 10 FCC Rcd 6788, 6851, para. 143 (1995).

prescription, NECA must set its tariff rates at levels that are designed to produce no more than an 11.25 percent return on interstate net investment for NECA's tariff participants during the tariff period.[13] The Commission's rules provide that a carrier's interstate access earnings are measured over a two-year period (the monitoring period) to determine compliance with the maximum allowable rate of return.[14] A rate-of-return carrier may make access rate adjustments during the course of its two-year monitoring period to ensure that it does not exceed or fall short of its maximum allowable rate of return.[15] In addition, during the course of the monitoring period, the Commission may require a carrier to change its rates prospectively.[16]

4. The Commission requires rate-of-return LECs to file earnings reports on Form 492 annually and for two-year monitoring periods.[17] The monitoring period begins on January 1 in odd-numbered years and ends on December 31 in even-numbered years.[18] After the first year, a carrier files an "interim" monitoring report that reflects the rate of return realized during the first year.[19] When the monitoring period ends, a carrier must file a "final" monitoring report by September 30 of the following year, showing total access earnings.[20] NECA reports the aggregated, or overall, rate of return for the carriers that participate in its tariff and revenue pool.[21]

III. ISSUES DESIGNATED FOR INVESTIGATION

A. Issue 1: Whether the revised rates in NECA's annual access tariff are unjust or unreasonable

5. The first issue that we designate for investigation is whether the revised rates in NECA's annual access tariff are unjust or unreasonable in violation of section 201 of the Act.[22] Significant questions were raised concerning whether NECA's rate development methodology has resulted in consistent

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[13] *See, e.g.*, 47 C.F.R. §§ 61.38-39.

[14] 47 C.F.R. § 65.701. Monitoring periods reflect calendar years, while tariffs are filed for one- or two-year periods beginning July 1. *Compare* 47 C.F.R. § 69.3(a) *with* § 65.701.

[15] 47 C.F.R. § 69.3(b). *See, e.g.*, *MCI v. FCC*, 59 F.3d 1407, 1415 (D.C. Cir. 1995) (*MCI v. FCC*); *Virgin Islands v. FCC*, 989 F.2d 1231, 1238-39 (D.C. Cir. 1993); *Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements*, CC Docket No. 86-127, Report and Order, 1 FCC Rcd 952, 954, para. 10 (1986) (*Rate-of-Return Methodologies Order*) (subsequent history omitted).

[16] 47 U.S.C. §§ 205, 208. *See In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2170, 2175-78, 2181-84, 2197, at paras. 8, 11, 12, 19-21, 23, 24, 51 (1997) (*Streamlined Tariff Order*).

[17] 47 C.F.R. §§ 1.795, 65.600, 65.701.

[18] 47 C.F.R. § 65.701.

[19] 47 C.F.R. § 65.600(b) (requiring carriers to file rate-of-return reports by March 31).

[20] 47 C.F.R. § 65.600(b) (requiring that "final adjustments . . . be made by September 30 of the year following the [monitoring] period").

[21] 47 C.F.R. § 65.600.

[22] 47 U.S.C. § 201(b).

overearnings over the past nine years, indicating that this methodology may produce access rates that are unjust or unreasonable.

6. *Position of the parties.* In its annual access filing, NECA proposed a 7.1 percent reduction in switched access rates and a 3.8 percent increase in special access rates for the July 1, 2004 to June 30, 2005 tariff period.[23] NECA contends that its proposed rates were targeted to earn the Commission's authorized rate-of-return of 11.25 percent.[24]

7. AT&T and GCI filed petitions against the NECA tariff, alleging persistent past and current overearnings violations.[25] They contend that NECA's 2004 access filing exceeds the authorized earnings level because it is based on the same kind of faulty forecasting and rate development methodology that has produced consistent overearnings for the past nine years.[26] They assert that NECA's own Form FCC 492 rate-of-return reports filed with the Commission show overearnings for these past years.[27] As a result, they contend, NECA overstates its member companies' revenue requirements and/or understates demand, resulting in inflated access charges.[28] AT&T and GCI also complain that the unavailability of underlying data on which NECA bases its tariff filing prevents a meaningful evaluation of NECA's calculations.[29]

8. In its reply, NECA asserts that data on its Form 492 Reports, on which AT&T and GCI rely, "are not representative of final earnings."[30] NECA states in notes filed with the reports that data initially reflect estimated costs of companies participating in the NECA pool and that, as companies report actual costs, "it is expected that the rates of return reported on NECA's Form 492 report will decline."[31] NECA asserts that its pooling procedures "permit companies to report 'trued-up' actual interstate costs to the Common Line (CL) and Traffic Sensitive (TS) Pools for a period of up to twenty-four months after the

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23 National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 1030, Vol. 1-5 (filed June 16, 2004) (NECA tariff). *See also* July 1, 2004, Annual Access Charge Tariff Filings, National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, Transmittal No. 1030, WCB/Pricing File No. 04-18, Reply at 2, 4 (filed June 29, 2004) (NECA Reply).

24 NECA tariff, Vol. 1 Sec.1 at 1.

25 July 1, 2004, Annual Access Charge Tariff Filings, WCB/Pricing File No. 04-18, Petition of AT&T Corp. (filed June 23, 2004) (AT&T Petition); July 1, 2004, Annual Access Charge Tariff Filings, National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, Transmittal No. 1030, WCB/Pricing File No. 04-18, Petition of GCI to Suspend and Investigate (filed June 23, 2004) (GCI Petition).

26 AT&T Petition at 1-6; GCI Petition at 1-8. GCI contends that NECA's tariff filing fails to show that NECA has adjusted its rate development in light of repeated overearnings. GCI Petition at 1, 5-7, Exh. 1-5. AT&T contends that NECA should be required to make mid-course, downward rate adjustments to bring the overall return for the 2003-04 monitoring period into the 11.25% range. AT&T Petition at 4.

27 AT&T Petition at 4, Ex. B-1; GCI Petition at 5-6, Ex. 1-5.

28 AT&T Petition at 1; GCI Petition at 1, 3.

29 AT&T Petition at 3; GCI Petition at 4-5.

30 NECA Reply at 2.

31 NECA Reply at 3. *See also, e.g.,* Form FCC 492, Rate of Return Report, Additional Statements at para. 4 (filed Sept. 30, 1997) (covering Jan. 1995 to Dec. 1996 cumulative period).

data month."[32] NECA also gives its member companies a 24-month period for submitting revised data related to special access.[33]

9. As a result, NECA explains that it makes rate-of-return adjustments based on updated cost data received from companies after NECA files the final FCC Form 492 report. For example, the final rate-of-return report for the 2001-02 monitoring period was filed September 30, 2003; however, NECA continues to true-up, or adjust, data for the 2001-02 monitoring period until December 2004.[34] NECA asserts that its 24-month true-up process accounts for the difference between the higher rates of return reported on September 30 Form 492s and the lower rates of return that result when cost revisions are submitted by NECA's companies, after the September 30 Form 492s were filed.[35] On this basis, NECA contends that its special access rates achieved returns below authorized levels in several past years and that its 3.8 percent increase for the 2004 annual filing is reasonable.[36] NECA also argues that "tremendous unknowns" due to new technologies such as Voice over Internet Protocol, competition from wireless and Internet usage, and economic uncertainty "make forecasting more difficult and render prior earnings reports -- the principal data presented by AT&T and GCI -- of little use as a predictor of future earnings."[37]

10. *Discussion.* The Communications Act generally relies on a system of carrier-initiated tariff filings to establish applicable rates for services.[38] These rates are subject to review pursuant to section 204 and historically were subject to refund for overearnings upon a complaint. The Telecommunications Act of 1996, however, revised section 204 to provide that, under specified circumstances, rates filed by local exchange carriers would be "deemed lawful."[39] Rates that are "deemed lawful" are not subject to refund.[40] 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

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[32] NECA Reply at 3 n.5.

[33] NECA Reply at 4 (NECA projects "that calendar year 2003 special access ROR will true-up to around 9.2% once the pool reporting window closes at the end of 2005").

[34] December 2004 is 24 months from December 2002, the close of the 2001-02 monitoring period.

[35] NECA Reply at 2-4.

[36] NECA Reply at 4 (contending that returns for special access rates were below authorized levels, on average, over the last ten years and in six of the last seven years). AT&T and GCI both point to NECA's interim March 31, 2004 monitoring report that indicates special earnings in the 17% range. AT&T Petition at 5, Exh. B-1; GCI Petition, Exh. 5. NECA contends that earnings for the year so far have decreased to 15.62% as the result of May 2004 true-ups, and NECA expects the 2003 rate-of-return to be about 9.2% once its reporting period for member companies closes at the end of 2005. NECA Reply at 3-4.

[37] NECA Reply at 5.

[38] 47 U.S.C. § 203.

[39] 47 U.S.C. § 204(a)(3).

[40] *ACS of Anchorage v. FCC*, 290 F.3d 403 (D.C. Cir. 2002) (*ACS v. FCC*).

unreasonable rates.[41] For this reason, the Commission requires LECs to file annual rate-of-return reports containing information that allows the Commission to review their earnings.[42]

11. NECA's 2004 annual access filing raises questions about whether NECA's rates are targeted to realize an 11.25 percent return and the ability of NECA's rate-of-return reports and data to serve as reliable indicators that rates are not unjust or unreasonable. For example, based on NECA's March 31, 2004 interim FCC Form 492 for calendar year 2003, NECA would have had to establish special access rates at a level approximately 10 percent lower than the 2003 level to have earned an 11.25 percent rate of return on rate base.[43] Absent compelling reasons for forecasting significant changes in costs or demand going forward, we would have expected NECA to reduce its rates by approximately 10 percent, rather than to increase them by approximately 3.8 percent, in the July 1, 2004 annual access tariff filing in order to target an 11.25 percent rate of return.

12. NECA asserts in its reply that it trues-up data for a 24-month period following the data month and that the September 30 report is filed with a notation that it is not final.[44] NECA has not, however, subsequently filed a revised Form 492 to disclose its "final" data. As a result, neither the Commission nor any interested party is privy to NECA's final rate of return. Now, several years later, we have only NECA's claims that its actual returns are lower than its final September-filed reports, which going back to 1995, indicate that NECA repeatedly exceeded the Commission's prescribed earnings level, particularly in the switched traffic sensitive category.[45] Without further NECA data, we are unable to ascertain how post-September 2004 adjustments affect the assignment of costs between the federal and state jurisdictions and whether only one category or several categories of access rates are affected. As a result, our investigation encompasses all of the access rates in NECA's filing.

13. To examine whether NECA has repeatedly overearned, as AT&T and GCI allege, we must, therefore, seek additional input from NECA regarding its procedures to collect, compute, and report data regarding the aggregate rate of return for its member companies. Reliable data are essential to the Commission's ability to conduct tariff reviews and investigations to enforce its rate-of-return prescription and to ensure just and reasonable rates. To that end, NECA shall provide the data and information requested below.

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41 *ACS v. FCC*, 290 F.3d at 412; *MCI v. FCC*, 59 F.3d at 1414 (citing and quoting 47 U.S.C. § 201(b)).

42 *Amendment to Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements,* CC Docket No. 86-127, Report and Order, 1 FCC Rcd 952, 957, para. 51 (1986) ("We conclude that the filing of FCC Form 492 will be minimally burdensome, and that it is necessary to implement our decision . . . to enforce maximum rate of return prescriptions. . . . [R]eporting for an enforcement period will enable us to monitor carriers' actual performance at the level necessary to assist us in the tariff review process. This reporting system will provide an early warning system if rate adjustments become necessary."). *See also Revision of Filing Requirements*, CC Docket No. 96-23, Report and Order, 11 FCC Rcd 16326, 16343, para. 38 (1996) (reducing the frequency of filing the FCC Form 492 Report from quarterly to annually "without diminishing our ability to monitor rates of return").

43 NECA Rate of Return Report, Form FCC 492 (March 31, 2004).

44 NECA Reply at 2-4.

45 *See* September FCC Form 492 Rate of Return Reports filed by NECA for monitoring periods 1995-96, 1997-98, 1999-2000, and 2001-02.

14. For monitoring periods 1993-1994, 1995-1996, 1997-1998, 1999-2000, and 2001-2002 (collectively referred to as the "monitoring periods"), NECA shall submit copies of the FCC Form 492 that NECA filed in September following the two-year monitoring periods (referred to as "September 492s"). NECA shall also identify the following total amounts that NECA companies assigned to the state jurisdiction (as part of the separations process) for each of the monitoring periods: total revenues, total expenses and taxes, operating income,[46] rate base,[47] and rate of return.[48] These amounts should be calculated based on data revised as of the same date as data used for the September 492s. In addition to providing these amounts for two-year monitoring periods, NECA shall provide the requested information for each year of a monitoring period, using data of comparable vintages. For example, for the 1993-94 monitoring period, if the 1994 data in the 1995 September Form 492 reflects activity reported to NECA through August 31, 1995, then the initial 1993 amounts should reflect data reported to NECA through August 31, 1994, and the initial 1994 amounts should reflect data reported to NECA through August 31, 1995. This information shall be provided using the format in Table 1 of Appendix A.

15. For each of the monitoring periods, NECA shall identify NECA companies' final[49] interstate results (based on NECA's 24-month true-up process) for the common line, traffic-sensitive, and special access categories separately as follows: total revenues, total expenses and taxes, operating income, rate base, and rate of return. NECA shall also identify the following final[50] amounts (based on NECA's 24-month true-up process) that NECA companies assigned to the state jurisdiction for each of the monitoring periods: total revenues, total expenses and taxes, operating income, rate base, and rate of return. NECA shall report the data for each year in the monitoring period, as well as the totals for the two years. This information shall be provided using the format in Table 1 of Appendix A.

16. NECA shall explain any differences in the total interstate amounts that NECA reported on its September 492s (in response to paragraph 14 above) and the final amounts identified by NECA in response to paragraph 15 for the common line, traffic-sensitive, and special access categories separately. NECA shall also explain any differences between the paragraph 14 and paragraph 15 responses for these categories: total revenues, total expenses and taxes, operating income, rate base, and rate of return for each of the monitoring periods. NECA shall also explain any differences between the total amounts assigned by NECA companies to the state jurisdictions identified in response to paragraphs 14 and 15 and any differences in these categories: total revenues, total expenses and taxes, operating income, rate base, and rate of return for each of the monitoring periods. The explanations shall address whether there is any pattern evident in the true-ups, the reasons for any such pattern, and whether any such pattern may be expected to recur in subsequent years.

17. NECA shall provide the same data requested in paragraph 14 for year 2003 that reflects the most recent adjustments in its 24-month true-up process. NECA shall also project what it believes the final earnings amount will be for 2003 once the true-ups are finished, including a detailed explanation of how NECA made its estimate. This information shall be provided using the format in Table 1 of Appendix A.

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46 Operating income refers to total revenues minus total expenses and taxes.

47 Rate base refers to average net investment.

48 Rate of return refers to operating income divided by rate base.

49 For the 2001-02 monitoring period, NECA shall identify the most recent results.

50 For the 2001-02 monitoring period, NECA shall identify the most recent results.

18. NECA indicates in its reply that most of the data are reported within 7-12 months of the end of the calendar year.[51] NECA asserts, however, that rate-of-return figures decline significantly as its companies continue to make adjustments to their initial estimated revenues, expenses, and investments during the 24-month true-up period. To provide the Commission with a better understanding of what NECA says is a predictable decline, we ask NECA to describe the pattern it perceives in the flow of revenues, expenses, and investments during the 24-month true-up period. NECA shall show the extent to which each year's return changed during the 24-month true-up period for years 1993 through 2003. NECA shall correlate this pattern with its projection for the 2003 data made pursuant to the previous paragraph. If NECA is correct that rate-of-return figures do decline significantly over the 24-month period, it should be able to provide evidence to this effect by making this showing. If it is unable to do so, or refuses to do so in response to this request, we would be unable to say that there was any evidence of the trend NECA asserts, and this might result in a reduction in NECA's rates.

19. NECA shall explain the differences between the means used by carriers to report their initial data to NECA and the means used to calculate the trued-up data. For example, how does a carrier estimate its initial data submission prior to performing a cost study? Are there any growth or inflation factors built into the process?

20. To evaluate the revised earnings data, we must understand the nature of the adjustments that occur subsequent to each year's data included in the response to paragraph 14. For each year 1993 through 2002, we direct NECA to provide as part of its direct case the 120 largest adjustments made to each pool subsequent to each year's data included in response to paragraph 14.[52] This list of adjustments should not include data reflecting the submission of the initial cost study performed for the year in question, but should reflect adjustments made subsequent to the submission of such cost study data. For each adjustment identified, NECA shall provide the date the adjustment was reported to NECA, the month(s) to which it is applied, and the cause of the adjustment.

21. Of the 120 largest adjustments per year for years 1993 through 2002, NECA shall identify the two companies that submitted the greatest number of adjustments and the two companies with the largest aggregate amount of adjustments. (To avoid possible duplication, the second set of carriers shall be selected from the subset of companies that excludes the first set.) Information for the four carriers shall be provided for the 1999-2000 and 2001-2002 monitoring periods in accordance with the instructions to Table 2 of Appendix A. A separate chart shall be used for each carrier for each monitoring period, i.e., one chart for the 1999-2000 monitoring period and one chart for the 2001-02 monitoring period. In identifying these carriers, if a carrier is affiliated with another carrier or participates in a common tariff, only the carrier with the largest aggregate amount of adjustments or the one with the largest number of adjustments shall be used.

22. NECA shall explain what options carriers had in reporting adjustments to NECA and to what period (months) carriers applied their data, including whether carriers used the month underlying the transaction, the month the error or true-up was identified, or some other date. NECA shall provide a justification for why such carrier discretion is appropriate, and what steps it takes to monitor compliance with any guidelines it issues.

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[51] NECA Reply at 3.

[52] We are uncertain as to the number of data points that will make the necessary showing because NECA has the data in its possession. If the 120 largest adjustments represent more than 80% of the total true-ups, NECA need only provide the data representing 80% of the true-up totals. On the other hand, if the number of data points is insufficient to reflect the nature of the true-ups, NECA should submit additional true-ups.

23. Finally, we note that the true-up process for Interstate Common Line Support must be completed within 12 months of the close of a calendar year.[53] NECA shall explain how a 12-month time frame following the close of a calendar year for true-ups of ICLS is consistent with a 24-month true-up process for the NECA pools, given that both are presumably based on the same separations and cost studies.

B. Issue 2: Whether NECA's entrance facility charges include inappropriate demand projections and are unjust or unreasonable

24. The second issue that we designate for investigation is whether NECA's entrance facilities rates are calculated using demand projections for entrance facilities that are neither ordered nor used, and whether the resulting rates are unjust or unreasonable under section 201 of the Act.[54] This issue arises in situations where the access customer is collocated in the end office of the NECA member local exchange carrier and the customer uses cross-connects for interconnection.

25. *Position of the parties*. GCI states that it has collocated pursuant to section 251 of the Act in three end offices operated by NECA tariff participants ACS of Fairbanks, Inc., and ACS of Alaska, Inc. (ACS).[55] GCI contends that it pays ACS for collocation-related facilities and services and for necessary cross-connect cables from the main distribution frame to GCI's collocation cage and from the trunk ports on ACS' switch to GCI's collocation cage.[56] GCI asserts that it provides switched access services using its collocation space to interconnect its own multiplexing and transport facilities to a cross-connect running to a trunk port on ACS' end office switch.[57] According to GCI, it delivers interstate traffic to ACS for termination through this arrangement.[58]

26. GCI contends that, even though it neither orders nor uses any ACS entrance facilities, GCI incurs entrance facilities charges because NECA's tariff provides that "[t]his charge will apply even if the customer designated premises and the serving wire center are collocated in [ACS'] Telephone Company building."[59] GCI argues that NECA's entrance facilities rates are unjust and unreasonable because NECA includes in its calculation of entrance facilities rates the demand for entrance facilities when only interconnection "cross-connect" facilities are provided, for which GCI pays separately.[60] In its own case, GCI argues that no entrance facility charge is warranted.[61] NECA responds that its tariff provisions

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53 47 C.F.R. § 54.903(a)(4).

54 47 U.S.C. § 201(b). GCI also contends that "because entrance facility rates are calculated by dividing the revenue requirement by projected demand, these added entrance facilities unjustly increase the projected demand and decrease rates. This means that, with all other factors held constant, rates for entrance facilities actually ordered and used are too low, distorting and harming competition in interstate transport." GCI Petition at 10.

55 GCI Petition at 8; 47 U.S.C. § 251(c)(6).

56 GCI Petition at 8.

57 GCI Petition at 8.

58 GCI Petition at 8-9.

59 GCI Petition at 9.

60 GCI Petition at 9-10.

61 GCI Petition at 10.

imposing entrance facility charges on collocated competitors have been in effect since 1993 and that NECA is not required to tariff a cross-connect charge in lieu of an entrance facility charge because its member companies have not proposed geographic deaveraging of transport.[62]

27. *Discussion.* Section 51.515 of the Commission's rules provides that access charges shall not "be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services."[63] Elements include "network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements."[64] If NECA believes that imposing entrance facilities charges on customers who have interconnected pursuant to section 251(c)(6) of the Act does not violate the Commission's rules, it shall present a thorough explanation in support of its position.

28. As part of its direct case, NECA shall explain in detail the manner in which the two ACS companies provide collocation and entrance facility arrangements to GCI, as well as other interexchange carriers, in the identified offices in Fairbanks and Juneau. NECA shall indicate any divergent treatment in provisioning or charging that occurs, depending on whether GCI or other carriers take UNEs, resell ACS services, or provide their own transmission facilities. NECA shall provide a diagram showing the facility provisioning of collocation and entrance facilities in the central offices. NECA shall specify the charges assessed for collocation arrangements and entrance facilities and shall associate the appropriate charges with the facilities on the diagram. To assist the Commission in evaluating any claims that may be made, we direct NECA to file, or arrange to have filed, the interconnection agreement between ACS and GCI governing the provision of collocation pursuant to section 251(c)(6) of the Act, including the appropriate charges, whether set forth in the agreement or referenced elsewhere.[65]

29. NECA shall identify any facility or function for which charges for both collocation and entrance facilities are assessed upon GCI. In such instances, NECA shall explain why requiring GCI to pay both collocation and entrance facility rates is lawful and does not over-recover costs for these assets or activities. NECA shall explain its legal basis for recovering both collocation and entrance facility rates for any facility or function.

C. Issue 3: Whether the language in section 6.1.3 of NECA Tariff FCC No. 5 relating to entrance facility charges is unjust or unreasonable

30. The third issue we designate for investigation pursuant to section 205 of the Act is whether the language relating to entrance facility charges in section 6.1.3(A)(1) of NECA F.C.C. Tariff No. 5 is unjust or unreasonable.[66] The tariff states:

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[62] NECA Reply at 9-10 (citing *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service*, CC Docket Nos. 00-256, 96-45, Report and Order and Second Further Notice of Proposed Rulemaking, 19 FCC Rcd 4122, 4137-38, para. 31 (2004)).

[63] 47 C.F.R. § 51.515(a).

[64] 47 C.F.R. § 51.501(b).

[65] 47 U.S.C § 251(c)(6).

[66] 47 U.S.C. § 205 (authorizing the Commission to establish just and reasonable charges and practices); NECA Tariff F.C.C. No. 5, § 6.1.3(A)(1), 3rd Revised Page 6-8.1.

> The Entrance Facility recovers a portion of the costs associated with a communications path between a customer designated premises and the serving wire center of that premises. . . . [The entrance facility charge] will apply even if the customer designated premises and the serving wire center are collocated in a Telephone Company building.[67]

31. In the event that the Commission concludes with respect to Issue 2 that it is unreasonable to assess an entrance facility charge on a collocated carrier, it must also determine whether the tariff language concerning entrance facility charges is either inconsistent with the requirements of Commission rules or so ambiguous that it is unreasonable. For this purpose, we incorporate the record developed pursuant to Issue 2 as part of the record for this issue. NECA may defend the present language as it deems appropriate. As part of its direct case, however, we direct NECA to file draft language that could be used to revise section 6.1.3 of NECA's tariff to reflect the assessment of entrance facility charges if the Commission reaches a decision that is adverse to NECA on Issue 2. The language should address cases in which carriers that are members of the NECA traffic-sensitive pool provide collocation pursuant to section 251(c)(6) of the Act.[68]

IV. PROCEDURAL MATTERS

32. Filing Schedules. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth below shall apply. NECA is named as a party to this investigation. NECA shall file its direct case no later than October 12, 2004. The direct case must present NECA's position with respect to the issues described in this designation order. When NECA provides information responsive to a particular paragraph, including supporting documents, NECA shall segregate and identify the information as "Responsive to Paragraph ___ ," corresponding to the paragraph numbers in this order. Pleadings responding to the direct case may be filed no later than October 22, 2004, and must be captioned "Oppositions to Direct Case" or "Comments on Direct Case." NECA may file a rebuttal to oppositions or comments no later than October 29, 2004.

33. All pleadings may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[69] Pleadings filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/. Generally, only one copy of an electronic submission must be filed.[70] In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, which in this investigation is WC Docket No. 04-372. Parties may also submit an electronic pleading by Internet e-mail. To get filing instructions for e-mail pleadings, parties should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.[71]

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[67] NECA Tariff F.C.C. No. 5, § 6.1.3(A)(1), 10th Revised Page 6-8, 3rd Revised Page 6-8.1.

[68] 47 U.S.C. § 251(c)(6).

[69] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322, 11326, para. 8 (1998).

[70] If multiple docket or rulemaking numbers appear in the caption of a proceeding, however, parties must transmit one electronic copy of the comments to each docket or rulemaking number.

[71] If multiple docket or rulemaking numbers appear in the caption of a proceeding, however, parties must submit two additional copies for each additional docket or rulemaking number.

34. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

35. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002.

-The filing hours at this location are 8 a.m. to 7 p.m.

-All hand deliveries must be held together with rubber bands or fasteners.

-Any envelopes must be disposed of before entering the building.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554.

-All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

36. Regardless of whether parties choose to file electronically or by paper, parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street S.W., CY-B402, Washington, DC 20554 (telephone 202-863-2893, facsimile 202-863-2898, email www.bcpiweb.com).

37. Parties are strongly encouraged to file pleadings electronically using the Commission's ECFS. Parties are also requested to send a courtesy copy of their pleadings via e-mail to marvin.sacks@fcc.gov and douglas.slotten@fcc.gov. If parties file paper copies, parties are requested to send two (2) copies of the pleading to Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, Room 5-A221, Washington, DC 20554.

38. Documents in WC Docket No. 04-372 are available for public inspection and copying during business hours at the Federal Communications Commission Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554, and will be placed on the Commission's Internet site. The documents may also be purchased from Best Copy and Printing, Inc., telephone 202-863-2893, facsimile 202-863-2898, email www.bcpiweb.com.

39. *Ex Parte* Requirements. This proceeding will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under section 1.1206 of the Commission's rules.[72] Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.[73] Other rules pertaining to oral and written presentations are set forth in section 1.1206(b). Interested parties are to file any written *ex parte* presentations in this proceeding with

[72] 47 C.F.R. § 1.1206.

[73] *See* 47 C.F.R. § 1.1206(b)(2).

the Commission's Secretary, Marlene H. Dortch, 445 12th Street, S.W., Room TW-B204, Washington, DC 20554, and serve with three copies: Pricing Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A452, Washington, DC 20554, Attn: Marvin Sacks and Douglas Slotten. Parties shall also serve with one copy: Best Copy and Printing, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, DC 20554, email www.bcipweb.com.

40. Paperwork Reduction Act. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

41. For further information, please contact Marvin Sacks, Pricing Policy Division, Wireline Competition Bureau, at 202-418-1530 or marvin.sacks@fcc.gov.

V. ORDERING CLAUSES

42. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, and pursuant to the authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

43. IT IS FURTHER ORDERED that NECA SHALL BE a party to this proceeding.

44. IT IS FURTHER ORDERED that NECA SHALL INCLUDE, in its direct case, a response to each request for information that it is required to answer by this designation order.

FEDERAL COMMUNICATIONS COMMISSION

Tamara L. Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau