

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

In the Matter of
Investigation of Certain 2007 Annual Access Tariffs
WC Docket No. 07-184
WCB/Pricing No. 07-10

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: August 24, 2007

Released: August 24, 2007

Direct Cases Due by: September 21, 2007
Oppositions to Direct Cases Due by: October 5, 2007
Rebuttals Due by: October 12, 2007

By the Chief, Pricing Policy Division:

I. INTRODUCTION

1. In this order, we designate for investigation issues regarding the switched access rates contained in the 2007 annual access tariff filings of Reasnor Telephone Company, LLC. (Reasnor) and local exchange carriers (LECs) exiting the traffic-sensitive tariff of the National Exchange Carrier Association, Inc. (NECA). We suspended the switched access rates in these tariff filings on June 28, 2007. As discussed below, we designate these issues for investigation to address allegations that certain access stimulation practices may be leading to such increases in access demand and access profits that the access rates of some of these carriers become unjust and unreasonable. Specifically, pursuant to section 204 of the Communications Act of 1934, as amended (the Act), we designate for investigation: (1) whether Reasnor's switched access rates filed in its 2007 annual access tariff filing are just and reasonable; (2) whether the costs of any direct payments, sharing of revenues, or other forms of compensation to the provider of an access stimulating service are properly included in the revenue requirement used to determine a carrier's switched access rates; (3) whether the rates filed in the

1 The tariffs that were suspended are listed in the Appendix.

2 2007 Annual Access Tariff Filings, WCB/Pricing No. 07-10, Order, DA 07-2862 (Wireline Comp. Bur., rel. June 28, 2007) (Suspension Order). We note that the group of Century Tel companies exiting the NECA pool filed averaged rates along with CenturyTel of Wisconsin, which had an existing tariff. Therefore, we also suspended the tariff of CenturyTel of Wisconsin.

3 47 U.S.C. § 204; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

suspended carriers' 2007 annual access tariff filings will remain just and reasonable if demand increases dramatically; (4) whether the Commission should require carriers subject to this investigation to include language in their tariffs to ensure that it has an opportunity to review a carrier's rates when a significant increase in local switching demand occurs; (5) whether the existing cost support requirements contained in sections 61.38 and 61.39 are adequate to permit the Commission to determine that the revised rates filed as a result of a significant increase in access traffic, pursuant to issue four above, are just and reasonable or whether additional data will be necessary; and (6) whether the rates specified in the suspended tariffs have remained, or will remain, just and reasonable during the investigation. Finally, as we have previously indicated, the Commission is preparing a notice of proposed rulemaking in which it will address access stimulation generally in a comprehensive manner.<sup>4</sup> For purposes of managing this investigation and reducing the burdens on carriers, and without prejudice to that broader proceeding, we will not require any carrier other than Reasnor to respond to issues two through six above if that carrier files tariff language, specified herein, that commits such carrier to modify its tariff in the event it experiences a significant increase in demand. Alternatively, we will not require any carrier to respond to any issue raised in this order if that carrier files a petition for a waiver to join the NECA traffic-sensitive tariff.

## II. BACKGROUND

### A. Tariff Process for Local Exchange Carriers

2. Incumbent LECs are required to file and maintain tariffs with the Commission.<sup>5</sup> Carriers subject to rate-of-return regulation must file tariffs every two years for a two year period as provided in section 69.3(f), but may file tariffs at any time pursuant to the policy that tariffs are carrier initiated.<sup>6</sup> NECA files tariffs each year. Tariffs must be filed in advance of their effective date in order to provide the Commission and the public with notice of changes in carriers' rates, terms, and conditions of service, and to provide an opportunity for interested parties to evaluate and comment on proposed tariffs.<sup>7</sup> Pursuant to section 204 of the Act, the Commission, during the notice period, may suspend the effectiveness of a tariff and initiate an investigation to determine whether the tariff is just and reasonable.<sup>8</sup> In the *Streamlined Tariff Order*, the Commission concluded that the statute "contemplates pre-effective tariff review by identifying specific actions that we can take, i.e., suspension and investigation, prior to the effective date of the tariff [and that] pre-effective review is a useful tool to assure carriers' compliance with sections 201 through 203 of the Act."<sup>9</sup> If a tariff investigation has not been completed within five months of the tariff's specified effective date, then the proposed tariff goes

---

<sup>4</sup> *Establishing Just an Reasonable Rates for Local Exchange carriers, Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, DA 07-2863 at 3, para. 4 (Wireline Comp. Bur., rel. June 28, 2007) (*Call Blocking Order*).

<sup>5</sup> See 47 U.S.C. § 203. A tariff is a schedule of rates and regulations filed by a common carrier. 47 C.F.R. § 61.3(rr).

<sup>6</sup> 47 C.F.R. § 69.3(f).

<sup>7</sup> See 47 U.S.C. § 203(b).

<sup>8</sup> 47 U.S.C. § 204(a)(1).

<sup>9</sup> *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Order, 12 FCC Rcd 2170, 2197, para. 52 (1997) (*Streamlined Tariff Order*), recon. on other grounds, 17 FCC Rcd 17039 (2002) (*Streamlined Tariff Reconsideration*).

into effect subject to the results of the investigation.<sup>10</sup> At the conclusion of the investigation, the Commission may prescribe rates prospectively and order refunds as necessary for any period in which the tariff was in effect.<sup>11</sup>

3. In the 1996 Act, Congress enacted section 204(a)(3), which provides that LEC tariffs that take effect on seven days notice (when rates are reduced) or 15 days notice (for any other change) after filing are “deemed lawful” unless rejected or suspended and investigated by the Commission.<sup>12</sup> The Commission concluded in the *Streamlined Tariff Order* that a tariff filed pursuant to section 204(a)(3) (a “streamlined” tariff) that takes effect without prior suspension and investigation is conclusively presumed to be reasonable under section 201, and thus protected from retrospective refund liability in a formal complaint proceeding, even if the carrier is ultimately found to have overearned.<sup>13</sup>

#### **B. Methods for establishing tariff rates**

4. Commission rules provide rate-of-return LECs with alternative means for filing interstate access tariffs. Most rate-of-return LECs participate in the traffic-sensitive pool managed by NECA and participate in the traffic-sensitive tariff filed annually by NECA for participating members.<sup>14</sup> The rates in the traffic-sensitive tariff are set based on the projected aggregate costs (or average schedule settlements) and demand of all pool members and are targeted to achieve an 11.25 percent return.<sup>15</sup> Each participating carrier receives a settlement from the pool based on its costs plus a prorata share of the profits, or based on its settlement pursuant to the average schedule formulas. Stated differently, revenues in excess of costs are shared among all pool members. Cost and average schedule carriers may choose to enter or leave the NECA pool on July 1 of any year by providing notice to NECA by the preceding March 1.<sup>16</sup>

---

<sup>10</sup> 47 U.S.C. § 204(a)(1). The Commission is to issue an order concluding a tariff investigation within five months after the date the tariff would have gone into effect. 47 U.S.C. § 204(a)(2)(A). This time limit was intended only to spur Commission action, not to limit its authority. *1993 Annual Access Tariff Filings*, CC Docket Nos. 93-193, 94-65, Order, 19 FCC Rcd 14949, 14960, para. 24 (2004). It does not operate as a statute of limitations, and its violation does not constrain the Commission’s authority to act. *Id.* at 14959-60, para. 22 (citing *Southwestern Bell Tel. Co. v. FCC*, 138 F.3d 746, 748 (8th Cir. 1998)).

<sup>11</sup> 47 U.S.C. § 204(a)(1).

<sup>12</sup> See 47 U.S.C. § 204(a)(3); see also *Streamlined Tariff Order*, 12 FCC Rcd at 2202-03, paras. 67-68.

<sup>13</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2182, para. 18; see also *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412 (D.C. Cir. 2002) (when filed in conjunction with section 204(a)(3), rates are considered to be reasonable for purposes of section 201 without inquiring into a carrier’s rate of return). This contrasts with the legal status of a filed tariff prior to the 1996 Act. Then, tariffs that took effect without suspension or investigation were legal (i.e., procedurally valid), but not necessarily lawful (i.e., substantively just and reasonable). *Id.* at 410-11. Customers that purchased service pursuant to an unsuspended and uninvestigated tariff prior to February 8, 1997, could challenge the tariff’s lawfulness through the formal complaint process, and, if successful could be awarded a refund. 47 U.S.C. § 208.

<sup>14</sup> National Exchange Carrier Association, Inc., Tariff FCC No. 5, Title Pages 1-68.

<sup>15</sup> In lieu of cost studies, average schedule carriers are compensated by formulas that establish settlements for average schedule carriers that are comparable to the settlements received by comparable cost companies. The average schedule settlements are added to the costs of the cost companies to form the revenue requirement for the pool. See *infra* para. 6.

<sup>16</sup> 47 C.F.R. § 69.3(e)(6).

5. Alternatively, a rate-of-return carrier may file access tariffs pursuant to the provisions of section 61.38 (section 61.38 carrier), or section 61.39 (section 61.39 carrier). Under section 61.38, a carrier is required to file access tariffs in even numbered years to be effective for a two-year period.<sup>17</sup> A section 61.38 carrier files tariffed rates based on its projected costs and demand and targets its rates to earn an 11.25 percent return. If the demand of a section 61.38 carrier increases above the level projected by the carrier in its tariff filing during the tariff period, it does not share the increased revenues with any other carrier. Accordingly, a section 61.38 carrier retains the increased revenues to the extent they exceed any increase in costs, protected from retrospective refund liability by the deemed lawful provision of the Act, but earnings over 11.25 percent are subject to complaint, and the Commission can order prospective rate changes.

6. Finally, a rate-of-return carrier that has 50,000 or fewer access lines in a study area may elect to file its access tariffs in accordance with section 61.39 of the Commission's rules (section 61.39 carrier), which was adopted in the *Small Carrier Tariff Order*.<sup>18</sup> A carrier choosing to proceed under this rule is required to file access tariffs in odd numbered years to be effective for a two-year period.<sup>19</sup> The initial rates of section 61.39 carriers are set based on historical costs (or average schedule settlements) and associated demand for the preceding year.<sup>20</sup> These carriers do not pool their costs and revenues with any other carrier. Thus, if demand increases, the carrier retains the revenues to the extent they exceed any cost increase, protected from retrospective refund liability by the deemed lawful provision of the Act. Section 61.39 carriers' rates are required to be just and reasonable, may be challenged in a complaint proceeding, and the Commission can order prospective rate changes for rate-of-return violations.<sup>21</sup> Section 61.39 carriers were required to file tariffs this year.<sup>22</sup>

### C. Prior History of this Proceeding

7. *Tariff Filings*. On June 15, 2007, or June 22, 2007, section 61.39 carriers filed revised interstate access tariffs in accordance with section 69.3(f)(2) of the Commission's rules.<sup>23</sup> In addition,

---

<sup>17</sup> 47 C.F.R. § 69.3(f)(1).

<sup>18</sup> *Regulation of Small Telephone Companies*, 2 FCC Rcd 3811 (1987) (*Small Carrier Tariff Order*).

<sup>19</sup> 47 C.F.R. § 69.3(f)(2). These carriers have the option of filing tariffs pursuant to either section 61.38, or section 61.39. 47 C.F.R. §§ 61.38 and 69.3(f)(1).

<sup>20</sup> 47 C.F.R. § 61.39(b); *See Small Carrier Tariff Order*, 2 FCC Rcd at 3812, para. 7 (noting that this process "should not permit or provide incentives for small companies to file access tariffs producing excessive returns"). For subsequent tariff filings, cost carriers establish rates based on a cost of service study for traffic sensitive elements for the total period since the local exchange carrier's last annual filing, with related demand for the same period, while average schedule carriers establish rates based on an amount calculated to reflect the traffic sensitive average schedule pool settlement the carrier would have received if the carrier had continued to participate in the NECA pool, based upon the most recent average schedule formulas approved by the Commission. 47 C.F.R. § 61.39(b)(2)(ii).

<sup>21</sup> The Commission indicated that it stood ready to undertake necessary corrective measures if the use of historical data to set rates proved not to be rate neutral in practice, or if switching between the use of prospective and historical costs and demand as a basis for ratemaking appeared likely to violate the principle of rate neutrality in a given case. *Small Carrier Tariff Order* at 3813, para. 14. The Commission exempted section 61.39 carriers from the obligation to file Form 492 and to make automatic refunds. This latter point has been supplanted by the deemed lawful provision of the Act, which protects these carriers from refund liability.

<sup>22</sup> 47 C.F.R. § 69.3(f)(2).

<sup>23</sup> 47 C.F.R. §§ 69.3(h) and 69.3(f)(2); *see Suspension Order* at Appendix A.

several section 61.38 carriers left the NECA pool and filed their own traffic-sensitive access tariffs.<sup>24</sup> AT&T Corp. (AT&T), Qwest Communications Corporation (Qwest), Sprint Nextel Corporation (Sprint Nextel), and Verizon filed petitions to suspend and investigate the tariffs of carriers leaving the NECA traffic-sensitive pool and filing their own tariffs pursuant to section 61.39 of the Commission's rules.<sup>25</sup> AT&T also petitioned to suspend the tariff filing of Reasnor.<sup>26</sup> A number of the LECs filing pursuant to section 61.39 of the Commission's rules filed replies to the petitions.<sup>27</sup>

8. *Suspension Order.* On June 28, 2007, we suspended for one day the switched access rates contained in the 2007 annual access tariff filings of several LECs leaving the NECA traffic-sensitive pool and the switched access rates of Reasnor.<sup>28</sup> We imposed an accounting order, and initiated an investigation into the lawfulness of the switched access rates contained in the suspended tariffs.

### III. ISSUES DESIGNATED FOR INVESTIGATION

#### A. The Reasonableness of Reasnor's Tariffed Rates

9. The first issue designated for investigation is whether Reasnor's switched access rates filed in its 2007 annual access tariff filing are just and reasonable. As presented by AT&T, the revenue requirement Reasnor used in calculating rates showed an extraordinary increase over the prior period, particularly when compared to Reasnor's increase in demand.<sup>29</sup> The increase in the settlement amount produced by the average schedule formula, as noted by AT&T, was more than an eight-fold increase

---

<sup>24</sup> See *Suspension Order*, Appendix A.

<sup>25</sup> July 2007 Annual Access Charge Tariff Filings, Petition of AT&T Corp. to Suspend and Investigate LEC Tariffs Filed Pursuant to Section 61.39, WCB/Pricing No. 07-10 (filed June 22, 2007) (AT&T Petition) (; July 2007 Annual Access Charge Tariff Filings, Qwest Conditional Petition to Suspend and Investigate, WCB/Pricing No. 07-10 (filed June 19, 2007) (Qwest Petition); July 2007 Annual Access Charge Tariff Filings, Petition to Suspend and Investigate of Sprint Nextel Corporation, WCB/Pricing No. 07-10 (filed June 22, 2007) (Sprint Nextel Petition); July 2007 Annual Access Charge Tariff Filings, Petition of Verizon to Suspend and Investigate Tariff Filings, WCB/Pricing No. 07-10 (filed June 19, 2007) (Verizon Petition).

<sup>26</sup> AT&T Petition at 21-25.

<sup>27</sup> July 2007 Annual Access Charge Tariff Filings, National Exchange Carrier Association Reply, WCB/Pricing No. 07-10 (filed June 26, 2007); July 2007 Annual Access Charge Tariff Filings, Reply of Group of Companies Under Consortia Consulting Tariff F.C.C. No. 1 to Petitions to Suspend and Investigate, WCB/Pricing No. 07-10 (filed June 26, 2007); July 2007 Annual Access Charge Tariff Filings, Reply of Alliance Communications Cooperative, Inc. to Petitions to Suspend and Investigate, WCB/Pricing No. 07-10 (filed June 26, 2007); July 2007 Annual Access Charge Tariff Filings, Reply of Elsie Communications, Inc. to Petitions to Suspend and Investigate, WCB/Pricing No. 07-10 (filed June 26, 2007); July 2007 Annual Access Charge Tariff Filings, Consolidated Reply to the Petitions to Suspend and Investigate Filed by Qwest Communications Corporation, AT&T Corp., Sprint Nextel Corporation and Verizon, WCB/Pricing No. 07-10 (filed June 26, 2007).

<sup>28</sup> See *Suspension Order*, Appendix B and C.

<sup>29</sup> In its petition to suspend Reasnor's tariffs, AT&T argues that, although Reasnor's local switching rate has decreased, it has more than offset the decrease by significant increases to other rates, for example, in tandem switching and tandem switched termination. AT&T Petition at 23. AT&T asserts that Reasnor achieved these increases by using the recently approved proposed average schedule formulas. AT&T argues that these formulas were designed to create reasonable rates for carriers whose traffic does not fluctuate, not to create just and reasonable rates for access stimulating carriers like Reasnor. AT&T asserts that Reasnor is claiming a 107,236 percent increase in costs based on a 12,717 percent growth in its access minutes of use.

above the increase in demand. This is inconsistent with the economies of scale generally accepted for local switching, tandem switching, or transport functions. In fact, the incremental costs associated with the increase in demand should be relatively low. This anomalous result suggests that Reasnor's demand was likely to have been outside any parameter used to establish the average schedule formulas. We believe the use of the significantly increased demand as the variable to calculate the new average schedule settlement amount for the 2007 annual access tariff filing was unlikely to have produced a reasonable rate, as evidenced by the relative increases in costs and demand alleged by AT&T.

10. As part of its direct case, Reasnor shall file the tariff support materials it would have filed with its 2007 tariff filing if it had been requested to do so by the Commission.<sup>30</sup> Specifically, Reasnor shall explain in detail how it developed the average schedule settlement amount it used to calculate its switched access rates and shall produce the traffic-sensitive formulas it used to calculate the settlement amounts. Reasnor shall specify the variables that were used in making the calculations and produce the supporting work papers. Reasnor shall explain why it believes that the rates it filed are just and reasonable. As part of that explanation, Reasnor shall provide the observed range of demands that were considered in creating the average schedule formulas that Reasnor used to develop its settlement amount.

11. If we conclude that Reasnor's rates are unjust and unreasonable, it will be necessary to establish an acceptable means of generating a revenue requirement amount. Because Reasnor is an average schedule carrier, it does not have the data necessary to do a traditional cost-of-service study. To assist the Commission in establishing the proper demand and expense factors, we direct Reasnor to file the tariff support materials for the rates it filed in January 2006. As part of its direct case, Reasnor shall provide an estimate of any incremental local switching, tandem switching, and tandem transport investment and expenses in addition to those reflected in its 2006 filing that would be necessary to handle the increased demand. In addition, Reasnor is directed to file its total company balance sheet as of January 1, 2006, and December 31, 2006, and its income statement for 2006. The balance sheet and expense information should be disaggregated to a similar level as that contained in the Class B accounts in Part 32 of the Commission's rules. Reasnor shall also file local switching and tandem switching demand data for each month since January 2006. Reasnor shall identify any investment or expense it incurred during 2006 that exceeded 25 percent of the year-end balance in any asset account or 25 percent of the expenses in any expense account for 2006 and explain why such expenditures are used and useful.<sup>31</sup> If we conclude that the costs produced by the average schedule formula that were used by Reasnor do not produce just and reasonable rates, we may use the average schedule settlements supporting Reasnor's 2006 tariff filing as a base from which to determine reasonable rates. If we take this approach, Reasnor's estimates of additional investment and expenses that are necessary for facilities to handle any increased traffic will be critical to the process. Reasnor bears the burden of justifying its revenue requirement base. We also ask Reasnor to comment on the methodologies and conclusions of the May 1, 2007, declaration of Peter Copeland that estimates the incremental costs of adding significant

---

<sup>30</sup> 47 C.F.R. § 61.39(a).

<sup>31</sup> In evaluating whether proposed rates are just and reasonable, the Commission employs the "used and useful" doctrine and its associated prudent expenditure standard. See generally *American Telephone and Telegraph Co.*, Docket No. 19129 Phase I, 38 FCC 2d 213 (1972), *aff'd sub nom.*, *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1974); *Phase II*, 64 FCC 2d 1 (1977) (*Docket No. 19129 Phase II*), *recon. in part*, 67 FCC 2d 1429 (1978); *Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers*, CC Docket No. 86-497, Report and Order, 2 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989). Under these principles, the Commission examines whether the expense promotes customer benefits, or is primarily for the benefit of the carrier.

amounts of switched access traffic.<sup>32</sup> If Reasnor is unable to file rates that can be determined to be just and reasonable, or if it appears that repeated tariff filings will be necessary because of swings in demand, Reasnor should comment on whether it would be appropriate for the Commission to forbear from deemed lawful status for its tariff for the remainder of the two-year tariff period.

12. In addition to the materials requested above, Reasnor may file any additional materials or arguments that it believes address the question of what would be just and reasonable switched access rates for Reasnor.<sup>33</sup> If Reasnor files additional data, it should present the data in a manner comparable to the requirements specified above for similar data.

#### **B. Compensation to the Provider of the Stimulating Activity**

13. The second issue designated for investigation is whether the cost of any direct payments, sharing of access revenues, or other forms of compensation to the provider of an access stimulating service, or the cost of directly providing the access stimulating activity, is properly included in the revenue requirements used to develop switched access rates. It is unclear what these costs have to do with the provision of exchange access. Including such costs as a cost of exchange access may be an unreasonable practice that violates section 201(b) and the prudent expenditure standard.<sup>34</sup> To the extent that a carrier includes payments to the providers of the access stimulating activity, such as direct payments, the cost of revenue sharing arrangements, or any other form of compensation, or the costs of directly providing the stimulating activity itself, in its operating expenses, it would increase its revenue requirement and thereby its access rates. In these cases, the customer using the access stimulating service is not paying separately for the service. If compensation costs, or the direct costs of providing the access stimulating activity, are included in operating expense and thus bundled with access costs, the IXCs are paying for the costs of the access stimulating service through the higher access charges assessed by the LEC.

14. We direct the carriers subject to this investigation to indicate as part of their direct cases whether they have included any such compensation in their switched access revenue requirements, and, if so, indicate the amount of such payments. Each carrier subject to this investigation shall indicate if it has entered into any agreement to pay compensation, or to provide anything of value, to an entity to stimulate access traffic, or if it intends to enter into such an arrangement. Any carrier subject to this investigation that has entered into such an arrangement shall file a copy of the contract or contracts as part of its direct case. Any party believing that such expenses are appropriate expenses of exchange access should explain its theory of why such expenses should be included in the revenue requirement for exchange access. If we conclude that including such compensation in the revenue requirement for switched access is an unreasonable practice, any carrier that has included such amounts in its revenue requirement may be required to file revised rates.

---

<sup>32</sup> This declaration was filed in support of a formal complaint in *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, File No. EB-07-MD-001 at Exh. C (filed May 2, 2007). The declaration is hereby incorporated in this proceeding.

<sup>33</sup> We note that, once Reasnor's rates are established at just and reasonable levels, it will be subject to the conclusions reached on the other issues designated in this order.

<sup>34</sup> *See supra* n. 31.

### C. Demand Range Over Which Rates May Be Presumed to Be Just and Reasonable

15. The third issue designated for investigation is whether the rates filed in the suspended carriers' 2007 annual access tariff filings will remain just and reasonable if demand increases dramatically. Section 201(b) of the Act requires that rates be just and reasonable. In establishing rates for rate-of-return carriers, rates are set by cost carriers to recover expenses plus a reasonable rate of return, or based on average schedule settlements for average schedule carriers. If expenses do not increase at a proportionate rate to demand, the realized rates of return are likely to exceed the authorized rate of return and thus become unjust and unreasonable at some point.<sup>35</sup> AT&T, Qwest, Sprint Nextel, and Verizon assert that they have seen a pattern of access stimulation by section 61.39 carriers in recent years and that they expect that many of the carriers leaving the pool and filing tariffs pursuant to section 61.39 will engage in such access stimulation practices in the future.<sup>36</sup> They also note that some of the carriers leaving the traffic-sensitive pool, or an affiliate, have engaged in access stimulation in the past.<sup>37</sup> The petitioners contend that, if the carriers at issue engage in traffic stimulation, the carriers will earn returns that greatly exceed that permitted by the Commission's rules, with no remedy available because of the deemed lawful provision of section 204(a)(3).<sup>38</sup> The petitioners also contend that the access stimulation violates the intent of the *Small Carrier Tariff Order*, which requires that rates filed by small LECs based on historical data be just and reasonable.<sup>39</sup> The Wireline Competition Bureau, on its own motion, concluded that the tariffs of those carriers exiting the NECA traffic-sensitive pool and filing their own tariffs pursuant to section 61.38 of the Commission's rules also raise questions of whether rates would remain just and reasonable in the face of access stimulation. If these carriers enter into access stimulation activities, they, like section 61.39 carriers, can generate increased revenues that likely would result in rates that are unjust and unreasonable, but which would be protected by the deemed lawful provision of the Act.<sup>40</sup>

16. To determine if the tariffed rates subject to this investigation are, and will remain, just and reasonable, it is necessary to explore the relationship between the relative rates of growth of expenses and revenues as demand changes. Initially, we must establish the baseline data on which the discussion of many of the following issues will depend. Because section 61.39 carriers did not file tariff support materials with their tariffs, we direct them to file the supporting materials required by section 61.39(b) as part of their direct case.<sup>41</sup> Each section 61.39 carrier shall also provide its December 31, 2005, and December 31, 2006, balance sheets and its income statement accounts for 2006. The balance sheet and income statement data should be disaggregated to a similar level as that contained in the Class

---

<sup>35</sup> It is well established that there is a large fixed cost to purchasing a local switch and that the marginal or incremental cost of increasing the capacity of a local switch are low (some contend that they are zero) and certainly less than the average cost per minute of the local switch. Thus, if the average revenue per minute remains constant as demand grows, but the average cost per minute falls (which occurs if the marginal cost per minute is less than the average cost per minute), then profits (or return) will rise. *See supra*. N. 30.

<sup>36</sup> *See* AT&T Petition at 10; Verizon Petition at 10; Qwest Petition at 9. The Qwest petition was conditional, requesting suspension and investigation only if the carriers refuse to certify that they have no reason to believe that their rates would increase by 300 percent during the tariff period, and that, if they do, the carrier will file revised tariff rates. *Id.*

<sup>37</sup> *See, e.g.*, AT&T Petition at 14; Verizon Petition at 13.

<sup>38</sup> *See* Sprint Nextel Petition at 2-3.

<sup>39</sup> *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, para. 7.

<sup>40</sup> *See* 47 U.S.C. § 204(a)(3).

<sup>41</sup> 47 C.F.R. § 61.39(b).

B accounts in Part 32 of the Commission's rules. We incorporate the section 61.38 carriers' tariff support materials from their 2007 annual interstate access tariff filings into the record of this investigation.<sup>42</sup> These carriers shall also file local switching demand data for each month of 2006.

17. In order to assess whether tariff rates will remain reasonable as demand grows, we need to understand the degree to which demand increases cause average costs to decline. We direct the carriers whose tariffs were suspended to quantify to the extent possible any additional investment and expenses, including both plant-related and non-plant related, beyond that supporting their tariff filing that would be incurred as a result of increased demand.<sup>43</sup> The investment and costs the carriers include should only be those costs necessary to accommodate the increased demand and should not include costs incurred to meet other needs. Each carrier should provide a projection of switched access investment and cost data for increases in local switching demand of 30, 100, and 1000 percent over that used in establishing the rates in the carrier's suspended tariff. Investment and expense data should be disaggregated to a similar level as that contained in the Class B accounts in Part 32 of the Commission's rules. To ensure that we have a complete picture of the investment and expense effects of the traffic growth, each carrier shall identify each asset account in which the projected new investment for the year is greater than 10 percent of the account balance at the beginning of the year. The carriers should generally describe the nature of the projected increased investments in the account and specifically identify any of the projected investments that would be more than 25 percent of the total investment for the year in that account. These carriers shall also identify each expense account in which expenses for the year would be projected to increase by more than 10 percent of the total expense for that account during the year. The carriers should generally describe the nature of the projected increased expenses in the account and specifically identify any projected increased expense that would be more than 25 percent of the total expense in that account for the year. Each carrier should indicate the effect that the projected increases in demand would have on the carrier's average per minute switched access cost and its switched access rate of return. In calculating its rate of return, each carrier shall exclude from expenses any amounts reflecting direct payments, revenue sharing, or other compensation provided to the entity providing the stimulating activity. Finally, section 61.39 carriers shall, for each of the three specified levels of increased demand (*i.e.*, 30, 100, and 1000 percent), provide the results of running the increased demand through the average schedule formulas used to derive the baseline expense amount.

18. Notwithstanding the above data requirements, carriers subject to this investigation may submit other investment and expense data or other considerations that they believe are relevant in determining the range over which their rates will remain just and reasonable. To be most useful, any data should be provided at similar disaggregation levels to that specified above for the required submissions.

#### **D. Tariffing Requirements if Demand Increases Above a Commission-Specified Range**

19. The fourth issue designated for investigation is how the Commission should ensure it has an opportunity to review the rates when a specified increase in local switching demand is reached. As discussed above, it appears that, at some point, an increase in local switching demand will result in switched access rates that are no longer just and reasonable. The Commission relies on pre-review of

---

<sup>42</sup> Those materials may be found on the Commission's Electronic Tariff Filing System at <http://www.fcc.gov/wcb/iatd/neca.html> (reflecting sizeable traffic growth for a significant number of carriers)..

<sup>43</sup> We recognize that average schedule carriers will only be able to produce total company data reflecting increased investment and expenses beyond those investments and expenses associated with its operations as of the beginning of the tariff period. This should not significantly alter the conclusions because most cost increases are likely to be associated with interstate usage. Cost company data may also be used to confirm the reliability of the average schedule results.

tariffs as its primary means to ensure filed rates are just and reasonable.<sup>44</sup> Because the increased demand occurs after the tariffs are in effect, the Commission will be unable to identify in advance of the tariffs becoming effective those cases in which the local switching demand will increase to the point at which it exceeds the upper limit of the range for just and reasonable rates. In these circumstances, the deemed lawful provisions would be protecting rates that are likely unjust and unreasonable rather than protecting customers from unjust and unreasonable rates.

20. One potential solution would be to require these section 61.38 and 61.39 carriers to include language in their traffic-sensitive tariffs similar to the following:

If the monthly interstate local switching minutes of the issuing carrier exceeds [ ] percent of the interstate local switching demand in the same month of the previous year (refile trigger), the issuing carrier will file revised local switching and transport tariff rates within [ ] days of the end of the month in which the issuing carrier met the refile trigger.

21. Because it is normal for demand to fluctuate over time, carriers shall also address how the measurement period, e.g., monthly, bimonthly, or quarterly, should affect the determination of the growth trigger that will require a tariff filing. As the measurement period gets longer, we believe that the growth factor should decrease because the longer measurement period neutralizes possible spikes in demand that otherwise would need to be compensated for if a shorter time period were used. We invite each carrier whose tariff filing was suspended to comment on whether we should establish different trigger levels depending on the size of carriers, and at what levels any such triggers should be set. In addition, respondents should comment on whether we should establish different trigger points depending on whether the increase in traffic is endogenous or exogenous. We note that the increased levels of demand that were used to specify what detail should be provided by carriers subject to this investigation in paragraph 17 above are not to be taken as proposals of what the trigger level should be, but were intended to be data points to provide comparability among the data filed and to show the effects that increased demand has on the carriers' revenue requirement and return.

22. As part of their direct case, carriers subject to this investigation shall comment on whether this conceptual approach and language is adequate to address the problems identified. If a carrier exceeds the demand trigger, as discussed in paragraph 21, it will be required to file a revised tariff. In this connection, a carrier will need to obtain the traffic data and determine whether it has exceeded the limit, and, if so, prepare and file a revised tariff. As part of their direct cases, we direct carriers to provide data on how long it takes to get traffic data and on how much time would be needed to prepare and file the revised tariff. Notwithstanding the above specific requirements, each carrier whose tariff was suspended may submit other materials or data that they believe are relevant to the Commission's consideration of this issue.

#### **E. Support Materials for the Revised Tariffs**

23. The fifth issue designated for investigation is whether the existing cost support requirements contained in section 61.38 and 61.39 of the Commission's rules will be adequate to permit the Commission to determine if revised rates filed as a result of significant increases in access traffic as described above are just and reasonable, or whether additional data will be necessary. As part of their direct cases, we direct the section 61.38 carriers subject to this investigation to explain how the cost relationships underlying their initial tariff could be revised so that they could be relied upon to produce just and reasonable rates at the higher demand levels. They shall specify any additional data that would

---

<sup>44</sup> *Streamlined Tariff Order*, 12 FCC Rcd at 2197, para. 52.

be necessary to permit historic costs to be extrapolated forward to produce just and reasonable rates. Carriers subject to this investigation shall also address how the Commission should determine the proper demand to use in setting the revised rates.

24. As part of their direct cases, we direct average schedule 61.39 carriers to explain how they would establish revised traffic-sensitive rates that are just and reasonable based on “an amount calculated to reflect the traffic sensitive average schedule pool settlement the carrier would have received if the carrier had continued to participate, based upon the most recent average schedule formulas approved by the Commission.”<sup>45</sup> As discussed above, the average schedule formulas may not produce reasonable estimates of average schedule costs if the new demand is significantly outside the range of traffic used in establishing the formulas. The expectation in the *Small Carrier Tariff Order*, that rate neutrality could be achieved by reliance on the average schedule formula to establish tariff rates, may be valid only if a relatively stable demand level is maintained. If we should determine that the validity of using the average schedule formulas in subsequent tariff filings is generally limited to carriers whose access demand falls within the range of demand observations used to establish the average schedule formulas initially, we direct section 61.39 carriers subject to this investigation to propose alternatives for establishing just and reasonable rates. We direct carriers to comment on the possible use of the settlement amount associated with the highest demand point of the observed demand range, which would be divided by recent demand levels to set switched access rates. To assist the Commission in evaluating this proposal, we direct each section 61.39 carrier to determine the appropriate ranges for its switched access service and calculate the resulting settlement amount using the highest observed demand in the data from which the average schedules were derived. These carriers shall also address what the appropriate demand would be for calculating revised rates.

25. As discussed above, the extraordinary increases in local switching demand raises issues about the existing costing and average schedule procedures. Without reasonable and reliable methods of establishing new cost and demand levels, the Commission would be unable to determine if revised switched access rates filed based on this higher demand will be just and reasonable. The potential exists for demand volatility to lead to repeated tariff filings in which the carriers and the Commission would be attempting to estimate a moving target. Carriers subject to this investigation should address whether it would be appropriate for the Commission to forbear from enforcing the deemed lawful provision of section 204(a)(3) for a mid-course tariff filing that is triggered by a sufficient increase in demand, as discussed in conjunction with issue four.<sup>46</sup> This would exclude such switched access tariffs from the streamlined filing process and could reduce the costs to carriers of tariff preparation and possible investigation and the costs to the Commission of reviewing, and possibly conducting an investigation of, such tariffs. Forbearing from section 204(a)(3) may help ensure that rates charged by these carriers were just and reasonable because they would be subject to refunds in the event of overearnings. Carriers subject to this investigation shall address these concerns and the merits of the forbearance approach. Parties should address whether the Commission should require carriers to include language in their tariffs to implement the forbearance from deemed lawful, if so, what the tariff language should be, or whether some other approach would be better.

---

<sup>45</sup> 47 C.F.R. §61.39(b)(2)(II).

<sup>46</sup> The repeated filings could result because the lower switched access rate could mean that the compensation that is integral to these operations could not be paid, and the LECs would have to terminate them. This could lead to the LECs filing revised rates to reflect the anticipated lower demand.

**F. Reasonableness of Rates During the Investigation**

26. The sixth issue designated for investigation is whether the switched access rates of the suspended tariffs remain just and reasonable during the investigation. It is possible that, during the period of the investigation, some carriers' demand could increase sufficiently such that the carriers' rates might become unjust and unreasonable during the investigation. Therefore, for the duration of this investigation, the carriers subject to this investigation shall file within 35 days of the end of each month the local switching demand for the month and the average monthly demand used to establish the rates in its 2007 annual access tariff filing. If a carrier's demand increases by more than the trigger we adopt, the carrier may be required to file revised rates and propose a plan to refund any excess revenues collected during the period the tariffs were under investigation.

**G. Safe Harbor Procedure**

27. Finally, we note that the primary focus of this investigation is directed to allegations of substantial growth in terminating access traffic from access stimulation activities that may be increasing carriers' rates of return to levels that result in the tariffed rates becoming unjust and unreasonable.<sup>47</sup> Because the increased demand from an access stimulation activity occurs after the tariffs are in effect, the Commission is unable to identify, prior to the tariffs going into effect, those cases in which access stimulation will occur. We are also aware that some exogenous variations in demand levels and patterns are likely, and we do not intend to penalize carriers for that normal variation.

28. We have previously indicated that the Commission is preparing a notice of proposed rulemaking in which it will address access stimulation in a comprehensive manner.<sup>48</sup> For purposes of managing this investigation and reducing the burdens on carriers, and without prejudice to that broader proceeding, we establish safe harbor mechanisms for carriers subject to this investigation. First, for carriers other than Reasnor, we will not require any carrier to respond to issues two through six above if that carrier files language similar to that described in paragraph 20 in its switched access tariff. That language must commit such carrier to filing a revised switched access tariff within 60 days of the end of the month in which its interstate local switching demand increases to a level that is more than 100 percent over the interstate local switching demand in the same month in the previous year.<sup>49</sup> Second, we will not require any carrier to respond to any issue raised in this order if that carrier files a petition for a waiver to join the NECA traffic-sensitive tariff. These filings shall be made on or before the date on which carriers' direct cases are due.<sup>50</sup> At the end of this investigation, we may, based on the record developed, establish different conditions than that reflected by the above tariff language for those carriers that proceed with the investigation.

---

<sup>47</sup> *Suspension Order* at 2-3, paras. 4-6.

<sup>48</sup> *See Call Blocking Order* at 3, para. 4.

<sup>49</sup> We believe that the selection of 60 days and 100 percent will achieve the limited purpose for which they are intended pending the resolution of the rulemaking proceeding. We will address the lawfulness of the tariffs of the carriers filing the tariff language in the order concluding this investigation. We encourage carriers to discuss possible tariff language with Commission staff before making the tariff filing. A carrier is not precluded from seeking permission to be excused from the obligation to make the tariff filing if it believes that the circumstances are such that the existing rates will not be unjust or unreasonable.

<sup>50</sup> This does not limit a carrier's ability to make carrier-initiated tariff filings. *See supra* para. 2 n.5.

#### IV. PROCEDURAL MATTERS

##### A. Filing Schedules

29. This investigation is designated WC Docket No. 07-184. The carriers listed in the Appendix are designated as parties to this investigation of the listed tariff filings.

30. The carriers listed in the Appendix shall file their direct cases no later than **September 21, 2007**. The direct cases must present the parties' positions with respect to the issues described in this Order. Pleadings responding to the direct cases may be filed no later than **October 5, 2007**, and must be captioned "Oppositions to Direct Case" or "Comments on Direct Case." The carriers listed in the Appendix may each file a "Rebuttal" to oppositions or comments no later than **October 12, 2007**.

31. An original and four copies of all pleadings shall be filed with the Secretary of the Commission. In addition, parties shall serve with three copies: Pricing Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Room 5-A233, Washington, D.C. 20554, Attn: Douglas Slotten. Parties shall also serve with one copy: Best Copy and Printing, Inc., 445 12th Street, S.W., Room CY-B402, Washington, DC 20554 (202) 863-2893. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. Such comments should specify the docket number of this investigation, WC Docket No. 07-184. Parties are also strongly encouraged to submit their pleadings via the Internet through the Electronic Comment Filing System at <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, which in this instance is WC Docket No. 07-184. Parties may also submit an electronic comment via Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

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

- The Commission's contractor 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 8:00 a.m. to 7:00 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, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, S.W., Washington, DC 20554.

32. The direct cases, oppositions, and replies and any other filed documents in this investigation may be obtained from Best Copy and Printing, Inc., in person at 445 12th Street, S.W., Room CY-B402, Washington, DC 20554, via telephone at (202) 488-5300, via facsimile at (202) 488-5563, or via e-mail at [FCC@BCPIWEB.COM](mailto:FCC@BCPIWEB.COM). The pleadings will also be available for public inspection

and copying during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554, and through the Commission's Electronic Filing System (ECFS) accessible on the Commission's Web site, <http://www.fcc.gov/cgb/ecfs>.

33. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

34. Commenters who file information that they believe should be withheld from public inspection may request confidential treatment pursuant to Section 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816 (1998), *Order on Reconsideration*, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. See 47 C.F.R. § 0.461; 5 U.S.C. § 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that does fall within the scope of a FOIA exemption.

#### **B. Ex Parte Requirements**

35. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>51</sup> Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>52</sup> Other rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules as well.

#### **C. Paperwork Reduction Act**

36. This order designating issues for investigation contains no new or modified information collections subject to the Paperwork Reduction Act of 1995, Pub. Law 104-13.

### **V. ORDERING CLAUSES**

37. IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201(b), 203(c), 204(a), and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), and 403, and 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.

38. IT IS FURTHER ORDERED that the carriers listed in the Appendix SHALL BE parties to this proceeding.

---

<sup>51</sup> 47 C.F.R. §§ 1.1200, 1.1206; Amendment of 47 C.F.R. § 1.1200 *et seq.* Concerning Ex Parte Presentations in Commission Proceedings, GC Docket No. 95-21, *Report and Order*, 12 FCC Rcd 7348 (1997).

<sup>52</sup> 47 C.F.R. § 1.1206(b)(2).

39. IT IS FURTHER ORDERED that each carrier listed in the Appendix SHALL INCLUDE, in its direct case, a response to each request for information that it is required to answer by this order.

FEDERAL COMMUNICATIONS COMMISSION

Albert M. Lewis  
Chief, Pricing Policy Division

**APPENDIX -PARTIES SUBJECT TO THIS INVESTIGATION AND ASSOCIATED  
TRANSMITTALS AFFECTED BY SUSPENSION**

<u>Alliance Communications Cooperative</u>	Transmittal Nos. 7 & 9	Tariff F.C.C. No. 2
<u>Broadband Network Group, LLC</u> Arthur Mutual Telephone Company Bascom Mutual Telephone Company Benton Ridge Telephone Company Buckland Telephone Company Fort Jennings Telephone Company Glandorf Telephone Company, Inc. Kalida Telephone Company, Inc. Middle Point Home Telephone Company Ottoville Mutual Telephone Company Ridgeville Telephone Company Sherwood Mutual Telephone Association, Inc. Vaughnsville Telephone Company	Transmittal No. 1	Tariff F.C.C. No. 1
<u>CenturyTel Operating Companies</u> CenturyTel of Central Wisconsin, LLC CenturyTel of Wisconsin Spectra Communications Group, LLC Telephone USA of Wisconsin, LLC	Transmittal No. 55	Tariff F.C.C. No. 1
<u>Consortia Consulting</u> Beresford Municipal Telephone Company McCook Cooperative Telephone Company Roberts County Telephone Cooperative Assn/ RC Communications, Inc. Western Telephone Company	Transmittal No. 1	Tariff F.C.C. No. 1
<u>Elsie Communications, Inc.</u>	Transmittal No. 1	Tariff F.C.C. No. 1
<u>Farmers Mutual Telephone Company (ID)</u>	Transmittal No. 1	Tariff F.C.C. No. 1
<u>ICORE</u> Jordan-Soldier Valley Telephone Company Killduff Telephone Company Lynnville Telephone Company Northeast Iowa Telephone Company, Inc. Sully Telephone Association	Transmittal No. 80	Tariff F.C.C. No. 2

**APPENDIX -PARTIES SUBJECT TO THIS INVESTIGATION AND ASSOCIATED  
TRANSMITTALS AFFECTED BY SUSPENSION (CONT'D)**

<u>John Staurulakis, Inc.</u> Camden Telephone & Telegraph Company, Inc. Chesnee Telephone Company Gearheart Communications Company, Inc. d/b/a Coalfields Telephone Company Mt. Vernon Telephone Company Oklahoma Communication Systems, Inc. Skyline Telephone Membership Corporation Tennessee Telephone Company Yadkin Valley Telephone Membership Corp	Transmittal No. 130	Tariff F.C.C. No. 1
<u>Royal Telephone Company</u>	Transmittal No. 1	Tariff F.C.C. No. 1
<u>Windstream Telephone System</u> Windstream Communications Kerrville, L.P Windstream Standard, Inc.	Transmittal No. 6	Tariff F.C.C. No. 1
<u>ICORE</u> Reasnor Telephone Company	Transmittal Nos. 80 & 81	Tariff F.C.C. No. 2