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

In the Matter of

COMMUNIQUE TELECOMMUNICATIONS, INC. dba LOGICALL

Petition for Declaratory Ruling and Interim Relief Against the National Exchange Carrier Association's Unauthorized Interference with the Continued Provision of Authorized Resale Carrier Operations

National Exchange Carrier Association

Petition for Declaratory Ruling Regarding the Effectiveness of Tariff Rates and Regulations Governing Lifeline Assistance and Universal Service Fund Charges During the Period April 1 through July 31, 1989

DECLARATORY RULING AND ORDER

Adopted: May 23, 1995; Released: May 25, 1995

By the Chief, Common Carrier Bureau:

1. On April 21, 1993, Communique Telecommunications, Inc., dba LOGICALL (Communique), filed a petition for declaratory ruling and interim relief against the National Exchange Carrier Association (NECA)[1] and the local exchange carriers (LECs) providing interstate access services to Communique. Communique is a reseller of interstate telecommunications services. Communique seeks a declaratory ruling that NECA does not have statutory or other authority to bill and collect from Communique the Universal Service Fund (USF) and Lifeline Assistance (LA) charges contained in NECA's Tariff F.C.C. No. 5.[2] Communique also asks the Commission to rule that NECA's member LECs may not disconnect or otherwise interfere with local access services being provided to Communique while the Commission determines the lawfulness of NECA's tariffing, billing and collecting of the USF and LA charges under Part 69 of the Commission's rules.

2. Communique's petition was placed on public notice on May 10, 1993. On June 21, 1993, comments were filed by NECA, the National Telephone Cooperative Association (NTCA), Southwestern Bell Telephone Company (Southwestern), the United Telephone Companies (United) and the United States Telephone Association (USTA). Replies were filed by NECA, the Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO) and Communique on July 12, 1993.

3. Previously, on December 5, 1990, NECA had filed a petition for declaratory ruling that the Commission's rules and NECA Tariff F.C.C. No. 5 require Allnet Communications Service, Inc. (Allnet) to pay USF and LA charges for the period April 1 through July 31, 1989. NECA further sought a ruling that the "self-help" provisions in Section 2.1.8 (f) of its tariff and similar provisions found in access tariffs of LECs that are not members of the NECA pools, which permit LECs to refuse to provide additional service or to discontinue existing service for nonpayment of bills, may be used to force Allnet to pay the delinquent USF and LA payments.[3] These are the provisions that Communique asks not apply to it while its petition is pending before the Commission.

4. We deny Communique's petition and conclude that NECA has authority to bill and collect USF and LA charges on behalf of the LECs, and that the administration of the USF and LA programs through the access charge plan has been affirmed through judicial review.[4] We deny Communique's request for interim relief because we find that it has failed to make the requisite showing for such relief. With respect to NECA's petition, we conclude that if Allnet had the requisite number of presubscribed lines during the period in question, it is liable for the USF and LA charges billed by NECA for the period between April 1 and July 31, 1989. We reach no conclusion on the issue of the lawfulness of NECA's and other LECs' self-help provisions raised in both Communique's and NECA's petitions. Instead we find that the issue is properly addressed in the complaint process rather than through requests for declaratory ruling.

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[1] NECA is an association of all local exchange carriers created by Section 61 Subpart G of the Commission's rules. 47 C.F.R. § 61.601 *et seq.* NECA prepares and files access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements. NECA also administers the Universal Service Fund and Lifeline Assistance programs.

[2] As discussed below, the USF and LA charges are per-line charges assessed on all interexchange carriers that use local exchange switching facilities to provide interstate or foreign telecommunications services and that have at least .05 percent of the total subscriber lines presubscribed to interexchange carriers.

[3] On December 10, 1990, Allnet filed a motion to dismiss NECA's petition or, in the alternative, to stay the proceeding pending the resolution of its court case. NECA filed its opposition to Allnet's motion on December 20, 1990. On January 4, 1991, Allnet filed its reply to NECA's opposition. NECA's petition was not placed on public notice. Allnet's opposition and the responsive pleadings did not address the issues for which NECA seeks declaratory ruling. Allnet argued that the timing of NECA's petition was improper because the matter was already before the courts, *citing Allnet Communications Services, Inc. v. NECA*, 741 F. Supp. 983 (1990); 965 F.2d 1118 (D.C. Cir. 1992). Subsequently, the Court of Appeals upheld the lower court's dismissal of Allnet's complaint and held that the Commission has primary jurisdiction over the substantive issues raised. Because the court proceedings have concluded, we need not address Allnet's opposition.

[4] *See NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1994), *cert. denied*, 469 U.S. 1227 (1985) (stating "[w]e therefore affirm the FCC's orders in all major respects.").

I. BACKGROUND

5. The Commission regulates the rates local exchange carriers (LECs) charge to recover the costs associated with providing interstate telecommunications services. The states regulate LEC rates that recover costs associated with intrastate services (local service and intrastate long distance services). The cost of telephone facilities that can be used to provide both interstate and intrastate services are allocated between the two jurisdictions. These jointly used facilities include local "loops" -- a term used to describe the telephone wires, poles, and other facilities that directly link each telephone customer's premises to a telephone central office in the public switched telephone network and can be used for making and receiving intrastate and interstate telephone calls.

6. On a nationwide, average basis, telephone companies allocate approximately 27 percent of their loop costs to the interstate (federal) jurisdiction and 73 percent to the state jurisdiction.[5] Individual LECs' average cost per loop, however, varies significantly. The Commission's high cost assistance program, which is known as the Universal Service Fund (USF), permits LECs with costs per loop that are well above the nationwide average to allocate a higher percentage of those costs to the interstate jurisdiction and receive payments from the USF to recover those additional allocated costs from interstate revenues. In this manner, the high cost assistance program enables eligible LECs to maintain their local rates at reasonable levels and thereby furthers one of the more important goals of federal and state regulation -- the preservation of universal telephone service.

7. The Lifeline Assistance (LA) programs are designed to promote universal service by helping low income individuals afford telephone service. The LA programs reflect matching local rate reductions approved by state utility commissions, and may take the form of a reduction in monthly charges or a reduction in service connection and installation charges. These state reductions are matched by corresponding reductions in the federal subscriber line charges -- a fixed monthly amount charged to all subscribers that covers a portion of the loop costs assigned to the interstate jurisdiction. A third program, Link-Up America, allows low income households to connect to the telephone network.[6] Under these programs, beneficiaries must pass a "means" test, such as eligibility for food stamps or Medicaid, and each applicant's eligibility for benefits must be verified. The states submit their plans and proposed qualification standards to the Commission for certification.

8. The present USF and LA programs began on April 1, 1989, and are funded by charges assessed on qualifying interexchange carriers in proportion to their presubscribed lines for interstate service.[7] Specifically, interexchange carriers that use local exchange switching facilities to provide interstate or foreign telecommunications services are charged for USF and LA if they have .05 percent or more of the total nationwide subscriber lines[8] that are presubscribed to an interexchange carrier for "1+" service.[9] These USF and LA charges are monthly per-line charges, computed and assessed by NECA. The level of the per line charge depends upon data submitted by the LECs, in compliance with Sections 69.116 and 69.117 of the Commission's rules.[10] The USF and LA charges are specific rate elements in access charge tariffs. The access charge tariff prepared by NECA is used by LECs that participate in the NECA pools,[11] while LECs that do not participate in the NECA pools maintain their own tariffs. USF and LA assistance is available to all LECs.

9. The rules now in effect superseded rules adopted by the Commission on May 19, 1987 that provided that an interexchange carrier would have to contribute to the USF and LA if it had at least one percent of the total presubscribed lines in all study areas. Under the superseded rules an interexchange carrier with five percent of the presubscribed lines in any single study area and a minimum of 1,000 presubscribed lines in that study area, would also be charged for USF and LA assistance.[12] NECA reported that an analysis of presubscribed lines data indicated that under the one percent threshold some very small interexchange carriers would have to contribute to the USF and LA while some medium-sized carriers would not. This occurred because some very small interexchange carriers had a relatively large regional presence (greater than 5 percent of the presubscribed lines in a study area) while some medium size interexchange carriers (on a na-

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[5] *Monitoring Report*, CC Docket No. 87-339, May 1993, at 71.

[6] Under the Link-Up America plan, federal assistance pays one-half of the connection charges, up to a maximum of $30.00. If a LEC offers a deferred payment plan for service commencement charges and it does not assess the subscribers any interest charges, federal assistance will be available to that LEC to cover the interest on costs of up to $200.00.

[7] Concerning USF charges, *see* MTS and WATS Market Structure, 93 FCC 2d 241, 281-82 (1983), *recon.*, 97 FCC 2d 682, 689, *further recon.*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part, NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see also, Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1313-15 (D.C. Cir. 1988). Concerning LA charges, *see* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, *Order*, 2 FCC Rcd 2953 (1987), *aff'd on recon.*, 3 FCC Rcd 4543 (1988), *aff'd, Dist. of Columbia Publ. Serv. Comm'n v. FCC*, 897 F.2d 1168 (D.C. Cir. 1990); *see also* MTS and WATS Rate Structure, *Recommended Decision and Order*, 2 FCC Rcd 2324, 2332 (1987).

[8] A "subscriber line" or "common line" is the local loop or the facilities connecting the telephone company central office with the customer's premises.

[9] To be presubscribed to an interexchange carrier for 1+ service means that when a subscriber dials "1" as the first digit of an interLATA call, the call is automatically handed off to and carried to its destination by the interexchange carrier previously selected by that subscriber. The Modification of Final Judgment defines 1+ service as a service that "permits each subscriber automatically to route, without the use of access codes, all the subscriber's interexchange communications to the interexchange carrier of the customer's designation." Modification of Final Judgment, app. B ¶ A(2)(ii), 552 F. Supp. 225, 233.

[10] 47 C.F.R. §§ 69.116 and 69.117.

[11] LECs that charge rates in the tariffs prepared by NECA all charge the same rates, even though their costs to provide services vary from company to company. The revenues collected through the tariff rates are "pooled." Each company then receives an amount of the pooled revenues to cover its costs, plus its share of the return earned by the pool. This pooling process is administered by NECA.

[12] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953 (1987).

tionwide basis) did not. For this reason, in November 1988, the Commission proposed to change both the one-percent and five-percent qualification criteria to a .05 percent threshold only.[13] While the revisions were not adopted until July 21, 1989 (and became effective 30 days after their release),[14] NECA and the LECs participating in its tariff had previously sought and received a waiver of the original criteria to permit use of the proposed .05 percent criteria to determine USF and LA interexchange carrier liability.[15] This waiver also permitted them to use the revised criteria in the 1989 access tariff filing. Those tariffs became effective April 1, 1989, between four and five months prior to the Commission's adoption of the new rule.

10. Communique's petition states that in January of 1993, Communique received letters from NECA seeking to collect past due USF and LA charges in the amount of $265,030.76. According to Communique, NECA's letter of January 22, 1993 stated that under Section 8.1 of the NECA tariff, NECA may send written notification to companies that have not paid USF and LA charges and that the LECs may take action, including disconnection or refusal to provide new access services.[16] Communique states further that it informed NECA, by letter of February 25, 1993, that it was working to establish a payment program for the charges and that payment would be made under protest.[17] Subsequently, Communique filed its petition.

11. Allnet, which was not required to pay USF or LA charges initially because it did not meet the original presubscribed line thresholds, has refused to pay charges associated with the USF and LA programs for the period from April 1 to July 31, 1989, the period covered by the waiver described in the preceding paragraph. It has, however, paid those charges after that period. When NECA threatened to invoke its tariff provisions enabling members to discontinue service to carriers for nonpayment of charges, Allnet sought injunctive and declaratory relief from the United States District Court.[18] Allnet also sought a declaratory ruling that it owed no USF or LA amounts for the period from April 1 to July 31, 1989, and requested the court to enjoin NECA from exercising the tariff's self-help provision. On July 31, 1990, the court issued an order dismissing Allnet's petition, effectively denying its request for injunctive relief, on the grounds that NECA was not a common carrier and therefore not subject to the court's jurisdiction under Section 207 of the Communications Act.[19] On appeal of that district court opinion, the United States Court of Appeals for the District of Columbia rejected the District Court's reasoning but affirmed the dismissal of the case on the ground that the Commission had primary jurisdiction over the dispute.[20] After the District Court's decision, but before the Court of Appeals decision, NECA filed its petition for declaratory ruling with the Commission.

II. DISCUSSION

A. NECA's Authority to Bill and Collect USF and LA Charges

1. Positions of the Parties

12. Communique argues that NECA is not a common carrier under the Communications Act and, therefore, it does not have authority to file tariffs and bill and collect charges based on such tariffs under Title II of the Act. Communique asserts that until the Commission and the courts resolve the issue of NECA's authority under Title II, NECA should not be permitted to exercise prerogatives of a Title II carrier, including disconnecting service for nonpayment of bills.[21] Since NECA has no authority to tariff USF and LA charges, and since those charges are not tariffed elsewhere (*i.e.*, by the LECs themselves), Communique maintains, Sections 203[22] and 217[23] of the Communications Act preclude NECA from billing and collecting such charges or effecting disconnection of Communique's access services for nonpayment.[24] Communique asserts that nothing in the express language of the Act authorizes a non-carrier to make tariff filings and that the Act does not expressly permit non-carriers to take the place of, or to substitute for, a carrier in discharging its common carrier duties and obligations under the Act.

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[13] Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, *Notice of Proposed Rulemaking*, 4 FCC Rcd 2041 (1988). Under this threshold, only those interexchange carriers with .05 percent or more of the total presubscribed lines ("1+" access lines) allocated to interexchange carriers would be charged for USF and LA assistance.

[14] Amendment of Part 69 of the Commission's Rules Relating to the Assessment of Charges for the Universal Service Fund and Lifeline Assistance, *Memorandum Opinion and Order*, 4 FCC Rcd 6134, 6137 (1989), *review denied, ALC Communications Corp. v. FCC*, 925 F.2d 487 (D.C. Cir. 1991).D

[15] Annual 1989 Access Tariff Filings Petitions for Waiver and Petition for Reconsideration, *Memorandum Opinion and Order*, 4 FCC Rcd 413, 420 (Com. Car. Bur. 1988).

[16] Communique Petition at 4-5.

[17] *Id.* at 5.

[18] *Allnet Communications Services, Inc. v. National Exchange Carrier Association, Inc.*, CA 89-3345-SSH, Complaint for Declaratory Judgment and Injunctive Relief (D.D.C. filed Dec. 14, 1989). In exchange for an agreement from NECA not to use self-help while this matter was before the court, Allnet agreed not to raise a statute of limitations defense against NECA should NECA prevail. *See NECA v. Allnet Communications Services, Inc.*, No. 91-0600, Order (D.D.C. Oct 23, 1991).

[19] *Allnet Communications Services, Inc., v. NECA*, 741 F. Supp. 983 (D.D.C. 1990)..

[20] *Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc.*, 965 F.2d 1118 (D.C. Cir. 1992).

[21] *Id.* at 6-7, *citing Allnet Communications Services, Inc. v. NECA*, 741 F. Supp. 983 (D.D.C. 1990), 965 F.2d 118 (D.C. Cir. 1992); *American Sharecom, Inc. v. Southern Bell Tel. & Tel. Co.*, No 9-87-1334, slip. op. (D.D.C. August 18, 1989); *see also* Communique Reply at 3-4, *citing United States v. State of California*, 297 U.S. 175, 181, 56 S. Ct. 421, 423 (1936); *U.S. v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 304 (1919); *Terminal Taxicab Co. v. District of Columbia*, 241 U.S. 252, 254 (1916); *see also AT&T Communications v. FCC*, No 92-1053 (D.C. Cir. Nov. 13, 1992).

[22] Section 203 of the Communications Act contains provisions concerning, *inter alia*, the filing of rates by common carriers. 47 U.S.C. § 203.

[23] Section 217 of the Communications Act addresses the liability of a carrier for the acts and omissions of agents. 47 U.S.C. § 217.

[24] Communique Petition at 7-8.

13. Communique also asserts that because Section 216 of the Act[25] expresses a Congressional intent that only receivers and trustees of carriers may stand in place of the actual carrier for purposes of the Act's application, an agent, such as NECA, may not. According to Communique, Section 217's provision of liability by a carrier for the acts or omissions of its agent does not entitle the agent to exercise the carrier's rights or obligations, including the obligation to file tariffs. Hence, Communique asserts that when Congress addressed the application of the Act to non-carriers, it did so specifically, and in a very limited way. These sections, Communique argues, preclude the FCC or a court from expanding the application of Title II to include NECA.[26] Communique also argues that the USF and LA charges constitute an unlawful tax in violation of Article I, Section 7 of the U.S. Constitution.[27]

14. Communique states that in *American Sharecom*,[28] the court concluded that NECA was not subject to liability under Sections 206 and 207[29] of the Act because these sections imposed liability only on common carriers for any act that violates the Act. Communique maintains that the court dismissed the claims against NECA in that case because it found no statutory basis to treat NECA as a common carrier even if it is an agent of LECs.[30]

15. Finally, Communique argues that the Court in *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988),[31] "couched" its concerns about the inequities established by the USF program on the transitory nature of the USF plan and the Commission's need to establish an access charge plan at the time of divestiture.[32] Communique asserts that now, ten years later, this "transition" mechanism is still in place, but nothing has been done to address the inequities, which have only worsened. Communique does not describe these "inequities." Communique argues that the Commission has a duty to revisit its policies and to adapt them to new circumstances.[33]

16. USTA, NECA and Southwestern argue that the Commission's access charge rules require NECA to file tariffs on behalf of its member companies.[34] USTA argues that under Part 69 of the Commission's rules, interexchange carriers were required, effective April 1, 1989, to pay two new rate elements -- Lifeline Assistance and Universal Service Fund -- to help assure universal availability of telephone service funding programs established to reduce rates charged by high cost local exchange carriers.[35] NECA and USTA also assert that the rules require non-pooling LECs' tariffs to cross-reference NECA's USF and LA tariff provisions.[36] Southwestern and USTA further state that the Commission's rules give NECA authority to collect and distribute access charge revenues.[37] USTA argues that NECA's USF and LA charges have the same force and effect as a LEC's own access tariff charges and that the same authority to enforce collection applies.[38]

17. NECA argues that, contrary to Communique's claims, the court in *Rural Telephone Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988), directly addressed and rejected the petitioners' claim that USF assessments constitute an unlawful "tax" in violation of Article 1, Section 7 of the Constitution.[39]

18. NECA asserts that USF revenue requirements have grown pursuant to an eight-year "phase in" prescribed as part of the Commission's original USF plan, and currently are well within the amounts contemplated by the Commission when it established the plan.[40] NECA argues that the policies underlying the USF and LA programs are still valid and in the public interest.[41] But, even if it were true that the USF program requires further revisions, NECA continues, this would not absolve Communique of its obligation to pay the assessed USF and LA charges, which are calculated in accordance with current Commission rules, and which are set forth in NECA's filed and effective tariff. Similarly, according to NECA, the fact that the Commission has initiated an investigation of NECA's most recent USF filings, or the fact that it is examining NECA pooling safeguards in Docket 93-6, cannot possibly justify nonpayment of tariffed USF and LA charges.

19. Communique's position is that, because NECA is not a common carrier, NECA cannot file tariffs pursuant to Section 203 of the Act, and thus cannot collect charges for USF and LA from Communique. We disagree. The Commission in creating NECA implicitly recognized that NECA would act as a tariff filing agent for its member common carriers. The Commission found that, given the structure of the industry at the time of the enactment of

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[25] Section 216 of the Communications Act states that the provisions of the Act "apply to all receivers and operating trustees of carriers subject to [the] Act to the same extent that it applies to carriers." 47 U.S.C. § 216.

[26] Communique Petition at 10-11; *see also* Communique Reply at 4.

[27] Communique Petition at 21.

[28] *American Sharecom, Inc. v. Southern Bell Tel. & Tel. Co.*, No 87-1334, slip op. (D.D.C. August 18, 1989).

[29] Sections 206 and 207 of the Communications Act address the liability of carriers for damages and the recovery of damages, respectively. 47 U.S.C. §§ 206, 207.

[30] Communique Petition at 9.

[31] In *Rural Telephone Coalition* the court affirmed the Commission's allocation of local exchange costs between interstate and intrastate jurisdictions. The court held that: (1) allocation of 25 percent of non-traffic sensitive costs to the interstate jurisdiction did not constitute confiscation of an interexchange carrier's property; (2) the 25 percent allocation was not a tax; (3) the 25 percent allocation was a reasonable and carefully considered element of transition toward a national telephone rate structure based primarily on access charges; (4) the USF proposal was within the Commission's statutory authority; (5) the Commission's proposed creation of the fund was neither arbitrary nor capricious; and (6) the Commission's amendment to the separations manual was a substantive change mandating seven-day traffic studies.

[32] Communique Petition at 23-24, citing 838 F.2d at 1316; *see also* Communique Reply at 8.

[33] Communique Petition at 24.

[34] USTA Comments at 3-4; NECA Comments at 6-7; NECA Replies at 2-3; Southwestern Comments at 2.

[35] USTA Comments at 5-6; *accord* United Telephone Companies Comments.

[36] USTA Comments at 5-6; NECA Comments at 6-7; NECA Replies at 2-3.

[37] USTA Comments at 6-7, citing 47 C.F.R. § 69.603(a); Southwestern Comments at 5-6.

[38] USTA Comments at 5-6; *accord* Comments of the United Telephone Companies.

[39] NECA Comments at 12-13.

[40] *Id.* at 13. *See* National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 518, *Reply* (*errata* filed December 15, 1992); *see also* National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, Transmittal No. 475, *Reply*, (filed December 12, 1991).

[41] NECA Comments at 13-14, citing Communique at 23, *citing Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

the Communications Act of 1934, Congress effectively made American Telephone and Telegraph (AT&T) the tariff filing agent for the industry.[42] Thus, AT&T's tariff filing agent role was codified in Section 203(a).[43] The Commission, in its creation of NECA, required NECA to "compute the charges and prepare and justify the tariffs on behalf of all the participating carriers."[44] Thus, the Commission essentially replaced AT&T with NECA in this tariff filing agent role.[45]

20. Moreover, in *Allnet Communications,* the Court of Appeals for the District of Columbia Circuit concluded that "the Commission appears to have assumed that NECA was subject to its tariff regulations. Unless that view violated the clear intent of Congress or was otherwise an unreasonable construction of Section 203, we would defer to it."[46] As explained above, we believe that Section 203 contemplated the use of a tariff filing agent. That the agent itself is not a carrier, we do not believe is a fatal flaw. As the Court recently stated, "[t]he tariff filing requirement . . . was Congress' chosen means of preventing unreasonableness and discrimination charges."[47] Because the rates charged by NECA members, which are common carriers, are publicly available and thus subject to review for reasonableness and discrimination, the intent of Section 203 is not frustrated. Indeed, NECA's tariffs fulfill the same role as a tariff filed by the common carrier, therefore furthering the purposes of Section 203. Moreover, we note that the Interstate Commerce Commission's tariff filing rules explicitly permit a carrier's agent to file tariffs for the carrier in the agent's name.[48] The Communications Act of 1934, including Section 203, was largely derived from the Interstate Commerce Act. Therefore, we reject Communique's argument that NECA is precluded from filing tariffs.

21. Moreover, the Commission is authorized by Section 4(i) to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[49] An important function of the Commission is ensuring universal service. The establishment and empowerment of NECA is critical to ensuring this goal. NECA oversees the USF, LA and Link-Up America programs, all of which are designed to promote and preserve universal telephone service. The Commission's rules appropriately require NECA to administer, compute, bill and collect charges for those programs.[50]

22. The Court of Appeals has previously recognized the Commission's authority under Section 4(i) to direct a party to file a tariff, even if Section 203 is inapplicable.[51] In *Lincoln Telephone,* for example, the court affirmed a Commission order requiring Lincoln Telephone and Telegraph Co. to offer local interconnections on a tariffed basis to an interexchange carrier. Lincoln asserted that the Commission could not require Lincoln to offer local interconnections on a tariffed basis to MCI because Lincoln, as a connecting carrier, was not subject to the requirements of Section 203. In rejecting Lincoln's argument, the court declared that Section 203(a)'s terms "do not. . . . in any way" provide the exclusive authority under which the Commission can require a tariff to be filed." According to the court, while Section 203(a) did not grant the Commission the requisite authority for its action, the Commission properly exercised its authority under Section 4(i) to require Lincoln to file an interstate tariff.[52]

23. We also believe that NECA's ability to file tariffs on the behalf of its member LECs is not precluded by Section 217 of the Act. Communique argues that NECA does not have authority to tariff USF and LA charges and that Sections 203 and 217 preclude NECA from billing charges not tariffed elsewhere or from effecting disconnection of service to Communique.[53] As discussed above, we conclude that Sections 203 and 4(i) authorize Commission rules directing NECA to tariff USF and LA charges. Section 217 merely states that carriers are responsible for the acts, omissions, or failures of its agents, officers and employees. We find no basis for Communique's assertion that Section 217 reflects a congressional intent to restrict the activities of carriers' agents and that Section 203 and Section 217 preclude NECA from acting as agent for its member companies by developing tariffs and billing and collecting funds pursuant to those tariffs. We also find that Communique's argument based on Section 216, which addresses the application of the Act to receivers and trustees, is irrelevant to the issue before us. We therefore conclude that NECA is authorized under the Commission's rules to file tariffs, and to bill and collect the USF and LA charges, as agent for its member local exchange carriers and that the Commission rules empowering NECA to take these actions are a valid exercise of the Commission's statutory authority.

24. We also disagree with Communique that the USF charges are an unconstitutional tax. In *Rural Telephone Coalition,* the court explained that a regulation is a tax only when its primary purpose is raising federal revenue.[54] As we stated in paragraph 6, *infra,* the primary purpose of the USF is to further the goal of preserving universal telephone service, not to raise federal revenue. Moreover, the USF and LA programs are components of a system designed to recover non-traffic sensitive costs of the telephone network. As the court in *Rural Telephone Coalition* explained, there is "no reasonable way to construe the [non-

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[42] MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d at 333.

[43] *Id.*

[44] *Id.*

[45] *Id.* at para. 341 (describing the request for comment on the Commission's "proposal to create a new intra-industry entity to perform the tariff filing and pool distribution functions because such an AT&T role in the post-divestiture environment would appear to conflict with the spirit, and possibly the letter, of the the then-proposed consent decree.")

[46] *Allnet Communications Services, Inc. v. NECA,* 965 F.2d at 1120.

[47] *MCI Telecommunications Corp. v. AT&T,* 114 SCt. 2223 (1994).

[48] *See* Sections 1312.10, 1312.4(d) and1312.1(a)(2) of the ICC Rules, 49 C.F.R. §§ 1312.10, 1312.4(d) and1312.1(a)(2).

[49] *See* Section 4(i) of the Commission's Rules, 47 U.S.C. § 154(i).

[50] *See* Sections 69.101, 69.116 and 69.117 of the Commission's Rules, 47 CFR §§ 69.101, 69.116 and 69.117.

[51] *Lincoln Telephone and Telegraph Co. v. F.C.C.,* 659 F.2d 1092 (D.C. Cir. 1981) (*Lincoln Telephone*).

[52] *Lincoln Telephone,* 659 F.2d at 1108-09.

[53] *See* Communique Petition at 7-8.

[54] *Rural Telephone Coalition v F.C.C.,* 838 F.2d 1307, 1314 (D.C. Cir. 1988), *citing Brock v. Washington Metropolitan Area Transit Auth.,* 796 F.2d 481, 488-89 (D.C. Cir. 1986).

traffic sensitive] cost allocation as having the primary purpose of raising federal revenue."[55] The court found the Commission's non-traffic sensitive cost recovery system to be a reasonable method of regulation. Under the reasoning of the court in *Rural Telephone Coalition,* neither the USF nor the LA program can be construed as an unconstitutional tax, as Communique argues.

25. Communique neither states how the USF fund is inequitable nor seeks any specific relief for the alleged inequity other than Commission review. The court found the fund to be "lawful, supported by substantial evidence . . . and rationally connected to the facts."[56] *Rural Telephone Coalition* contains no finding that any imperfections of the fund require any further Commission action. We therefore find Communique's criticism of "inequities" in the USF should have no bearing on the outcome of this proceeding."[57]

B. NECA's Self-Help Tariff Provisions

26. We next turn to the "self-help" provisions of NECA's tariff that are at issue in both the Communique and NECA petitions. Communique asks that we issue a declaratory ruling finding these provisions to be unlawful. Section 2.1.8 of *NECA's Tariff F.C.C. No. 5* states:

> If the National Exchange Carrier Association, Inc. notifies the Telephone Company that the Customer has failed to comply with Section 8 of the National Exchange Carriers Association, Inc., Tariff F.C.C. No. 4 (Lifeline Assistance and Universal Service Fund charges) including any Customer's failure to make payments on the date and times specified therein, the Telephone Company, may, on thirty days' written notice to the Customer by Certified U.S. Mail, take any of the following actions: (1) refuse additional applications for service and/or (2) refuse to complete any pending orders for service, (3) discontinue the provision of service to the Customer. In the case of discontinuance, all applicable charges including termination charges shall become due.

As discussed above, NECA files tariffs on behalf of its member LECs. This self-help provision has been in the NECA tariff and the tariffs of all concurring LECs since 1989.[58] These tariffs have been reviewed by the Commission and allowed to become effective pursuant to the Commission's rules and the Communications Act.

1. Positions of the Parties

27. Communique argues that, because NECA has not sought disconnection of Allnet's access services despite its refusal to pay the USF and LA charges, the principles of equitable estoppel prevent NECA from now taking such action against Communique. In addition, Communique asserts, each NECA member serving Communique would also be subject to the doctrine of equitable estoppel because discontinuance would constitute a violation of Sections 201-203 of the Act.[59] Moreover, Communique contends that disconnection for non-payment of charges whose reasonableness has been challenged is forbidden by *Reiter v. Cooper* and that it has the right to litigate the reasonableness of those rates prior to making payment.[60]

28. USTA claims that *Reiter,* resolving only the narrow procedural question of whether a court must delay judgment until the regulatory agency having primary jurisdiction over the subject matter has an opportunity to rule on the matter, holds that courts cannot decide claims before a party exhausts its administrative remedies.[61]

29. Communique asserts that if "NECA were allowed to invoke Title II to secure rights for its members, while those against which it uses those rights are denied the protection" of Sections 206-209 of the Communications Act because NECA, as a non-common carrier, is not subject to liability under Sections 206-209, then "those against which NECA acted would be denied equal protection of the law."[62]

2. Discussion

30. First we address Communique's assertion that the doctrine of equitable estoppel prevents NECA and its member LECs from using the self-help provision. With respect to NECA, Communique argues that estoppel applies because NECA has not sought disconnection of Allnet's access services and because that discontinuance by NECA's member LECs would violate Sections 201-203 of the Act. We reject these arguments. NECA cannot be estopped from discontinuing service to Communique because NECA does not provide service. Only the member LECs can take action pursuant to the self-help provisions. With respect to the member LECs, even if Communique were correct that discontinuing access services to it would violate Sections 201-203 of the Act, the doctrine of equitable estoppel would not apply. Equitable estoppel precludes a party from asserting a right he otherwise would possess but that he forfeits because of his conduct. The aggrieved party must have justifiably relied upon such conduct and changed his position so that he will suffer injury if the other is allowed to repudiate his conduct. For the doctrine of equitable estoppel to apply to the instant circumstances, the LECs must have a right to disconnect Communique for failure to pay, Communique must show that it has relied upon the LEC's failure to disconnect, and Communique must show that it has been harmed by its reliance. However, Communique has neither taken action that can be construed as a change of position, nor can it demonstrate

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[55] *Id.* at 1314, *citing South Carolina ex rel. Tindal v. Block,* 717 F.2d 874, 887 (4th Cir. 1983) (it is not an exercise of taxing power, but of the power to regulate commerce, to exact deductions from sales of all commercially marketed milk to offset cost of milk price support program), *cert. denied,* 465 U.S. 1080 (1984).

[56] *Rural Telephone Coalition,* 838 F.2d at 1316.

[57] We note that the Commission and a Federal/State Joint Board is currently reviewing the USF mechanisms. Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, *Notice of Proposed Rulemaking,* CC Docket No. 80-286, 8 FCC Rcd 7114 (1993)."

[58] *See* Local Exchange Carrier Tariff Revisions for the Application of Universal Service Fund and Lifeline Assistance Program Charges, DA 89-916, released July 31, 1989 (Com. Car. Bur.) (denying petitions of Allnet and MCI Communications Corporation specifically opposing the self-help provisions in the NECA tariff).

[59] Communique Petition at 7.

[60] *Reiter v. Cooper,* 61 LW 4232 (Mar. 9, 1993); *accord AT&T v. The People's Network, Inc.,* Civ. action No. 92-3100 (AJL), (D.C.N.J., Mar. 31, 1993).

[61] USTA Comments at 3-4; *see also* NECA Comments at 9-10.

[62] Communique Petition at 9.

harm from reliance on the LEC's failure to disconnect. Therefore, the doctrine of equitable estoppel does not apply.

31. We also do not believe that Communique is denied equal protection of the law if it is barred from filing a complaint against NECA under Title II.[63] It is not clear, however, that Communique would be barred from filing a Section 208 complaint against NECA. While the Commission has not ruled definitively on the issue, *dictum* suggests that access customers may file complaints against NECA.[64] Moreover, regardless of whether a complaint would lie against NECA, there is no question that Communique can pursue Section 208 complaints directly against all LECs that elect to discontinue service to Communique. If carriers employ the self-help provisions of NECA's tariff, Communique would have direct recourse against these carriers through the complaint process. No provision of the Act or of Commission rules limits Communique's procedural rights to raise grievances or seek reparations against such carriers. Thus, Communique's equal protection claim remains unsubstantiated. We therefore deny CTI's request for declaratory ruling and do not rule on the lawfulness of NECA's self-help provisions in this order.

32. Regarding Communique's request for a declaratory ruling, we note that the Bureau's initial review of tariffs and our orders denying petitions against the filings are interlocutory rulings and do not constitute a final determination of the lawfulness of the tariffs. The orders terminating such review simply assert that the contested portion of the tariff is not so patently unlawful that the tariff should be rejected and that no substantial issue has been raised that would require investigation of the tariff. Absent an investigation, the review of proposed tariffs is a limited review. More thorough adjudications occur in response to fact-specific complaints. The resolution of any application of self-help provisions at issue in this proceeding would depend on the facts of the specific case.

33. The determination of whether to issue a declaratory ruling under 47 C.F.R. § 1.2 in a particular proceeding is a matter within the Commission's discretion.[65] Issues that are heavily dependent on factual situations are not appropriately addressed through a declaratory ruling. For example, in *Competitive Telecommunications Association*,[66] the Common Carrier Bureau denied petitioner's request for declaratory ruling that "blocking" the use of competitive 800 access services[67] for the completion of interexchange telephone calls is an unlawful practice. In support of its decision to grant no declaratory ruling, the Bureau explained that the petitioner provided no "specific evidence" of blocking or violation of any provision of the Communications Act, Commission rules or orders. Accordingly, the Bureau stated that issuance of a declaratory ruling or a cease and desist order would be inappropriate. The Bureau concluded that, to the extent a carrier blocks calls, a complaint could be filed against that carrier under Section 208 of the Act.[68]

34. In this case, Communique offers no specific evidence that any carrier discontinued service because Communique had not paid USF and LA charges. Moreover, we do not find that on their face the NECA tariff provisions allowing for self-help violate any provision of the Communications Act, Commission rules or orders. The appropriate forum for resolving Communique's assertions challenging NECA and LEC self-help provisions is either a tariff investigation under Section 204 or 205 or the complaint process. As discussed above, no tariff investigation has been initiated; and to our knowledge, no carrier has attempted to enforce these self-help provisions. If a carrier elects to enforce the NECA tariff's self-help provisions, Communique may file a complaint under Section 208 and present the arguments it has made here, within the context of actual application of NECA's tariff by a participating carrier.

C. Interim Relief

35. We next turn to Communique's request for interim relief pending resolution of its petition to prevent NECA and its member companies from enforcing the self-help provisions against Communique for its failure to pay the USF and LA charges. Communique asserts that *Reiter*[69] requires that its challenge to the lawfulness of NECA's rates must be decided before it has to pay the USF and LA charges.

36. We agree with USTA and others that Communique has incorrectly interpreted the *Reiter* case. We find that *Reiter* did not hold that traditional self-help remedies for non-payment of disputed charges become unavailable to carriers whenever a customer asserts that the charges are unreasonable under the Communications Act. In fact, as NECA asserts,[70] the Court expressly affirmed the traditional rule that "tariff rates not disapproved by the [regulatory agency] are legal rates, binding on both the customer and the carrier."[71] Furthermore, the Commission has recognized that "the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties. . . ."[72] Customers who claim that tariff rates are unreasonable may file complaints with the Commission under Section 208 of the Communications Act, but may not automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable.[73]

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[63] *See Id.* n.6.

[64] *See* Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, *recon.*, 4 FCC Rcd 3965, 3966 (1989), stating that NECA's access customers could "file Section 208 complaints against NECA to recover reparations for excessive rates."

[65] *See Competitive Telecommunications Association*, 4 FCC Rcd at 5365; *see also, Yale Broadcasting Corp. v. FCC*, 478 F.2d 594 (D.C. Cir. 1973), *cert. denied* 414 U.S. 914 (1973).

[66] 4 FCC Rcd. 5364 (Com. Car. Bur. 1989).

[67] 800 service gives businesses and other organizations a means of providing potential customers, or other persons with whom they wish to communicate, a convenient and free method of contacting them.

[68] *Competitive Telecommunications Association*, 4 FCC Rcd at 5365.

[69] *Reiter v. Cooper*, 113 S. Ct. 1213 (1993).

[70] *See* NECA Comments at 12.

[71] 113 S. Ct. at 1221, *citing Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163; *Arizona Grocery Co. v. Atchinson, T. & S.F.R. Co.*, 284 U.S. 370, 384 (1932).

[72] Tel-Central of Jefferson City Missouri, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd 8338, 8339 (1989); *see also City of Girard v. FERC*, 790 F.2d 919, 922-23 (D.C. Cir. 1986); *AT&T Co. v. Florida-Texas Freight, Inc.*, 357 F. Supp. 977, 979 (S.D. Fla. 1973), *aff'd per curiam*, F.2d 1390 (5th Cir. 1973); Mocatta Metals Corp. v. ITT World Communications Corp., 544 FCC 2d 104, 105 (1975).

[73] *See also* Business WATS, Inc. v. AT&T, 7 FCC Rcd 7942

37. The standards for granting a stay are well established. If Communique wishes a stay of enforcement of NECA's tariff while its disputes are being resolved, it must make the factual showing set forth in *Virginia Jobbers:* "(1) whether the petition is likely to prevail on the merits of his appeal; (2) whether, without a stay, the petitioner will be irreparably injured; (3) whether issuance of a stay will substantially harm other parties interested in the proceeding; and (4) wherein lies the public interest."[74]

38. We agree with NECA that Communique's request for injunctive relief must be denied. Not only has Communique failed to show any likelihood of success on the merits, but it has failed to address any of the remaining parts of the four-pronged test.

D. Allnet's Liability for USF and LA Payments

39. On December 2, 1988, the Chief, Common Carrier Bureau issued an order waiving Section 69.5 of the Commission's rules to permit NECA to file tariff revisions that imposed USF and LA obligations only on those interexchange carriers having .05 percent or more of the total number of access lines nationwide presubscribed to it.[75] In the order allowing NECA's rate filing to become effective, the Bureau extended the waiver of Section 69.5 pending adoption of a report and order in the Commission's proceeding proposing to amend Section 69.5 to impose USF and LA charges on interexchange carriers meeting the .05 percent criterion.[76] No party objected to the Bureau's grant of the waiver or to NECA's use of the .05 percent criterion in these tariff filings at the time they became effective.

40. We therefore conclude that, because a proper grant of the waiver permitted NECA to use the .05 percent criterion, that provision was effective in NECA's tariff during the April 1, 1989 through July 31, 1989 time frame. If Allnet met that criterion during the three-month time period, then it is liable for USF and LA charges assessed for the period between April 1 and July 31, 1989.

III. CONCLUSION

41. We therefore conclude that NECA is authorized under the Commission's rules to file tariffs, and bill and collect the USF and LA charges, as agent for its member local exchange carriers. NECA's USF and LA tariff, which include terms and conditions governing discontinuance of service for non-payment, are currently effective. Under Sections 203 and 4(i) of the Communications Act, Part 69 of the Commission's rules, and NECA's currently-effective tariff, Communique is properly subject to the USF and LA charges appearing in NECA's tariff.

42. We decline to determine the lawfulness of NECA's self-help provisions in the context of this order responding to petitions for declaratory ruling. We find that, pursuant to Commission rules and procedures, NECA's self-help provisions are effective tariff provisions. The lawfulness of legally effective tariff provisions, when applied in specific instances, may be challenged by the filing of a Section 208 complaint. We conclude that Communique has failed to make an adequate showing to justify the interim relief it requests.

43. We also find that NECA's tariff provisions, including the .05 percent criterion, were effective during the period from April 1, 1989 through July 31, 1989 and that if the USF and LA charges to Allnet are correct, then it is liable for those charges covering that period of time.

IV. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554, and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.4, that the petition for declaratory ruling filed by the National Exchange Carrier Association IS GRANTED to the extent discussed herein.

45. IT IS FURTHER ORDERED, pursuant to Section 5(d) of the Administrative Procedures Act, 5 U.S.C. § 554, and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.4, that the petition for declaratory ruling and interim relief filed by Communique Telecommunications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

(1992) ("a customer . . . is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper . . . ."); MCI Telecommunications Corp., 62 FCC 2d 703, 706-06 (1976) (customers may not withhold payment of properly billed tariffed charges for voluntarily ordered services).

[74] *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-44 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[75] Annual 1989 Access Tariff Filings: Petitions for Waiver and Petition for Reconsideration, *Memorandum Opinion and Order*, 4 FCC Rcd 413, 420 (Com. Car. Bur. 1988). Tariff regulations incorporating the .05 percent criterion became effective on December 15, 1988. Initial USF and LA rates were filed on December 30, 1988 with a scheduled effective date of April 1, 1989.

[76] Annual 1989 Access Tariff Filings, *Memorandum Opinion and Order*, 4 FCC Rcd 3638, 3709 (Com. Car. Bur. 1989).