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

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

MEMORANDUM OPINION AND ORDER

Adopted: November 30, 2004 **Released: November 30, 2004**

By the Commission:

I. INTRODUCTION

1. In this order, we conclude the investigation of three issues pertaining to the National Exchange Carrier Association, Inc. (NECA), 2004 annual access tariff filing. First, we conclude that NECA has not sufficiently justified the rates filed in its annual access tariff to permit us to determine that the rates are just and reasonable and should be accorded lawful status. Rather, we conclude that, given the support NECA provided, the rates are not unjust or unreasonable so long as the rates remain legal rates that are subject to potential refund if NECA should overearn during the relevant monitoring period. This achieves the fairest result based on the record before us, ensuring that NECA does not overearn and that its access customers do not overpay. As merely legal rates, refunds may be due to NECA's customers if it is determined that NECA has overearned in a complaint proceeding brought pursuant to section 208.[1] We also clarify that NECA has a continuing obligation to revise its September Form 492 Report, to the extent it contains earnings estimates, by filing a report that reflects the adjustments made through the end of NECA's 24-month true-up process. Furthermore, we direct NECA to file a report with the Commission within 60 days of the release of this order that offers proposals for addressing the concerns raised in this record related to the timing conflicts between NECA's true-up process and the final September Form 492 Report. Second, we also conclude that the language in NECA's tariff that applies entrance facility charges in the collocation context is unreasonable. We direct NECA to file revised language to section 6.1.3 of its F.C.C. Tariff No. 5 within ten days. Finally, we terminate the section 204(a) investigation into whether NECA had correctly determined the demand supporting its entrance facility charge, finding that the record shows that GCI is not presently purchasing any cross-connects on which it is being assessed an entrance facility charge.[2]

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[1] 47 U.S.C. § 208.

[2] 47 U.S.C. § 204(a).

II. BACKGROUND

2. NECA files an annual access tariff as an agent for rate-of-return carriers that do not file separate tariffs or concur in a joint access tariff of another company.[3] Pursuant to section 61.38 of the Commission's rules, NECA files an annual access tariff that reflects averaged rates based on participating carriers' historical and projected costs of providing interstate access services and forecasted demand for these services.[4] Local exchange carriers (LECs) charge interexchange carriers (IXCs) for access services at NECA's tariff rates, and NECA settles with participating LECs based on their reported revenues and costs.[5] NECA reimburses the LECs for their costs and provides each participating LEC an equal return on its investment.[6]

3. On July 1, 2004, the Pricing Policy Division (Division) of the Wireline Competition Bureau released an order that suspended for one day and set for investigation several of the incumbent LECs' 2004 annual access tariff filings.[7] On July 30, 2004, the Division reconsidered, on its own motion, its decision to suspend and investigate those tariffs except for the tariff of NECA.[8]

4. On September 20, 2004, the Division released an order that designated for investigation three issues related to the 2004 annual access tariff filing of NECA[9] -- the first two pursuant to the Commission's authority under section 204 of the Communications Act of 1934, as amended (Act), and the third issue pursuant to the Commission's authority under section 205 of the Act.[10] First, the Division designated for investigation whether the revised rates in NECA's annual access tariff are unjust or unreasonable in violation of section 201 of the Act,[11] particularly whether NECA's rate development methodology has resulted in consistent overearnings, such that this methodology produces access rates that are unjust or unreasonable. Second, the Division designated for investigation whether NECA's entrance facility rates are calculated using demand projections for entrance facilities that are neither ordered nor

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[3] 47 C.F.R. §§ 69.3, 69.601.

[4] 47 C.F.R. § 61.38; 47 C.F.R. §§ 69.601-610. NECA members participate in revenue pooling as either "cost companies" or "average schedule" companies. 47 C.F.R. §§ 69.605-606. Cost companies receive pool revenues for interstate access services based on their actual interstate investment and expenses, calculated each year from cost studies. 47 C.F.R. § 69.605. The pool revenues of average schedule companies are determined on the basis of a series of formulas. 47 C.F.R. § 69.606. For qualifying small companies, the average schedule option avoids the expense of preparing cost studies.

[5] 47 C.F.R. §§ 69.603-69.610. About 1,150 LECs participate in NECA's access charge revenue pools. *See* NECA website, www.neca.org.

[6] 47 C.F.R. §§ 69.603-69.610.

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

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

[9] *July 1, 2004, Annual Access Charge Tariff Filings*, WC Docket No. 04-372, Order Designating Issues for Investigation, DA No. 04-3020 (WCB/Pricing, Sept. 20, 2004) (*Designation Order*).

[10] 47 U.S.C. §§ 204(a), 205.

[11] 47 U.S.C. § 201(b).

used, and whether the resulting rates are unjust or unreasonable under section 201 of the Act.[12] Finally, the Division designated for investigation whether the language in NECA's tariff relating to entrance facility charges is unjust or unreasonable.[13]

5. NECA filed its direct case on October 12, 2004.[14] AT&T Corp. (AT&T) and General Communication, Inc. (GCI) filed oppositions to NECA's direct case on October 22, 2004.[15] NECA filed a rebuttal to the oppositions on October 29, 2004.[16]

III. DISCUSSION

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

6. The first issue designated for investigation is whether the revised rates in NECA's 2004 access tariff are unjust or unreasonable in violation of section 201 of the Act.[17] Significant questions were raised by AT&T and GCI concerning whether NECA's rate development methodology has resulted in consistent overearnings over past years, indicating that the methodology NECA used in setting its 2004 rates may be flawed and produce access rates that are unjust or unreasonable.[18]

7. The Communications Act generally relies on a system of carrier-initiated tariff filings to establish applicable rates for services.[19] These rates are subject to review pursuant to section 204 and historically were subject to refund for overearnings upon a complaint. The Telecommunications Act of 1996, however, revised section 204 to provide that, under specified circumstances, rates filed by local exchange carriers would be "deemed lawful."[20] Rates that are "deemed lawful" are not subject to refund.[21]

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

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

[14] Direct Case of the National Exchange Carrier Association, Inc., CC Docket No. 04-372 (filed Oct. 12, 2004) (NECA Direct Case).

[15] Opposition of AT&T Corp. to the Direct Case of the National Exchange Carrier Association, Inc., CC Docket No. 04-372, (filed Oct. 22, 2004) (AT&T Opposition); Opposition of General Communication, Inc., to the Direct Case of the National Exchange Carrier Association, Inc., WC Docket No. 04-372 (filed Oct. 22, 2004) (GCI Opposition).

[16] Rebuttal of National Exchange Carrier Association, Inc., WC Docket No. 04-372 (filed Oct. 29, 2004)(NECA Rebuttal).

[17] 47 U.S.C. § 201(b).

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

[19] 47 U.S.C. § 203.

[20] 47 U.S.C. § 204(a)(3).

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

When tariffs, such as NECA's tariff, are filed pursuant to the "deemed lawful" provisions of the statute, therefore, it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates.

8. Under section 201(b) of the Act, a LEC may not charge unjust or unreasonable rates for its provision of access services.[22] To enforce this requirement, the Commission has prescribed an authorized rate of return of 11.25 percent for rate-of-return carriers.[23] To comply with this prescription, NECA must set its tariff rates at levels that are designed to produce no more than an 11.25 percent return on interstate net investment for NECA's tariff participants during the tariff period.[24] The Commission's rules provide that a carrier's interstate access earnings are measured over a two-year period (the monitoring period) to determine compliance with the maximum allowable rate of return.[25] A rate-of-return carrier may make access rate adjustments during the course of its two-year monitoring period to ensure that it does not exceed or fall short of its maximum allowable rate of return.[26] In addition, during the course of the monitoring period, the Commission may require a carrier to change its rates prospectively.[27]

9. The Commission's rate-of-return prescription and the ability to evaluate a carrier's earnings results in a timely manner are essential to ensuring that carriers do not charge unjust or unreasonable rates.[28] For this reason, the Commission requires LECs to file annual rate-of-return reports containing information that allows the Commission to review their earnings.[29] Rate-of-return LECs file earnings reports on Form

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[22] 47 U.S.C. § 201(b).

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

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

[25] 47 C.F.R. § 65.701. Monitoring periods reflect calendar years, while tariffs are filed for one- or two-year periods beginning July 1. *Compare* 47 C.F.R. § 69.3(a) *with* § 65.701.

[26] 47 C.F.R. § 69.3(b). *See, e.g.*, *MCI v. FCC*, 59 F.3d 1407, 1415 (D.C. Cir. 1995) (*MCI v. FCC*); *Virgin Islands v. FCC*, 989 F.2d 1231, 1238-39 (D.C. Cir. 1993); *Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements*, CC Docket No. 86-127, Report and Order, 1 FCC Rcd 952, 954, para. 10 (1986) (*Rate-of-Return Methodologies Order*) (subsequent history omitted).

[27] 47 U.S.C. §§ 205, 208. *See In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2170, 2175-78, 2181-84, 2197, at paras. 8, 11, 12, 19-21, 23, 24, 51 (1997) (*Streamlined Tariff Order*).

[28] *ACS of Anchorage v. FCC*, 290 F.3d at 412; *MCI v. FCC*, 59 F.3d at 1414 (citing 47 U.S.C. § 201(b)).

[29] *Amendment to Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies to Establish Reporting Requirements,* CC Docket No. 86-127, Report and Order, 1 FCC Rcd 952, 957, para. 51 (1986) ("We conclude that the filing of FCC Form 492 will be minimally burdensome, and that it is necessary to implement our decision . . . to enforce maximum rate of return prescriptions. . . . [R]eporting for an enforcement period will enable us to monitor carriers' actual performance at the level necessary to assist us in the tariff review process. This
(Footnote continued on the next page.)

492 annually and for two-year monitoring periods.[30] The monitoring period begins on January 1 in odd-numbered years and ends on December 31 in even-numbered years.[31] After the first year, a carrier files an "interim" monitoring report that reflects the rate of return realized during the first year.[32] When the monitoring period ends, a carrier must file a "final" monitoring report by September 30 of the following year, showing total access earnings.[33] NECA reports the aggregated, or overall, rate of return for the carriers that participate in its tariff and revenue pool.[34]

10. We instituted this investigation due to concerns over NECA's September Form 492 Reports filed with the Commission showing several instances where rates of return for monitoring periods going back to 1993 were higher than the authorized earnings level, particularly in the switched traffic sensitive category.[35] NECA claims that its actual returns for the past 10 years were, in fact, generally lower than those reflected in its September Form 492 Reports, which indicate that NECA repeatedly exceeded the Commission's prescribed earnings level.[36] NECA explains that the data in the September Form 492 Reports do not represent final earnings "because not all NECA companies complete cost studies by the time final [September] Form 492 reports are due."[37] NECA further explains that it gives member companies up to 24 months from any given month to perform cost studies and submit revisions of earnings data, known as adjustments or "true-ups."[38]

11. In notes filed with each September Form 492 Report, NECA states that results "include estimates and are subject to further adjustments, as Exchange Carriers revise data," and as companies report actual data, "it is expected that the rates of return reported on NECA's Form 492 report will decline."[39]

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reporting system will provide an early warning system if rate adjustments become necessary."). *See also Revision of Filing Requirements*, CC Docket No. 96-23, Report and Order, 11 FCC Rcd 16326, 16343, para. 38 (1996) (reducing the frequency of filing the FCC Form 492 Report from quarterly to annually "without diminishing our ability to monitor rates of return").

[30] 47 C.F.R. §§ 1.795, 65.600, 65.701.

[31] 47 C.F.R. § 65.701.

[32] 47 C.F.R. § 65.600(b) (requiring carriers to file rate-of-return reports by March 31).

[33] 47 C.F.R. § 65.600(b) (requiring that "final adjustments . . . be made by September 30 of the year following the [monitoring] period").

[34] 47 C.F.R. § 65.600.

[35] *Designation Order* at 4, para. 7; NECA Rate of Return Reports, Form FCC 492s (Sept. 29, 1995; Sept. 30, 1997; Sept. 29, 1999; Sept. 28, 2001; Sept. 30, 2003).

[36] NECA Direct Case at 12 ("Generally speaking, for each calendar year (1993 through 2002) and monitoring period, the NECA pools have experienced earnings erosion (i.e., final pool earnings falling below initial reported pool levels). This general pattern in reductions in earnings occurs when actual costs are reported to NECA for pool settlement true-ups after the end of a calendar year or monitoring period that exceed the initial estimated pool settlement costs reported by LECs."). *See also* NECA Direct Case at Exh. 2.

[37] NECA Direct Case at 4.

[38] NECA Direct Case at 4.

[39] *See, e.g.,* NECA Form FCC 492, Rate of Return Report, Additional Statements (filed Sept. 30, 1997) (covering January 1995 to December 1996 cumulative period).

NECA does not, however, subsequently file a revised Form 492 to disclose the final data. As a result, interested parties are not privy to NECA's earnings, and the Commission does not have all of the data upon which it normally relies to determine whether a carrier exceeds its authorized earnings level.

12. Consequently, an investigation was initiated to determine whether NECA's revised rates in its 2004 access filing are targeted to realize an 11.25 percent return and whether NECA's rate-of-return reports provide sufficient information to determine the reasonableness of NECA's rates. It was also necessary to examine how post-September adjustments affect the assignment of costs between the federal and state jurisdictions and the extent to which various categories of access rates are affected.

13. NECA was directed to provide information regarding its final rates of return and underlying data that would enable the Commission to validate the reliability of NECA's rate development methodology and earnings results.[40] Because NECA's internal practice allows its members to adjust cost data 15 months after the Commission's rules require that final adjustments be reported,[41] NECA was also directed to provide a better understanding of this process and the reliability of resulting data.[42] In particular, the *Designation Order* required NECA to submit certain information to validate the post-September Form 492 Report rates of return that NECA claims represent final earnings.[43] NECA was required to submit, for a sample of companies, disaggregated accounting information on post-September Form 492 adjustments to revenues, expenses, and average investment, thus enabling us to understand the reasons for overall revenue, expense, and investment increases, decreases, or reallocations and to evaluate NECA's earnings.[44]

14. Though not as rigorous as an audit, the opportunity for a careful review of this information is essential to determining the reliability of NECA's claimed rates of return.[45] It is necessary to examine company-specific, disaggregated earnings data because we must determine the validity of previous years' "final" returns that NECA has not previously provided to the Commission but upon which it now relies to counter concerns that the rates contained in its 2004 annual access filing would result in overearnings. In some cases, these claimed returns are substantially lower than what was reported on the September Form 492s.

15. As a threshold matter, NECA asserts that the information that it was directed to provide on earnings levels for prior periods relate to prior tariff rates, not the rates proposed in NECA's annual access filing, and are, therefore, not relevant here.[46] We disagree. Prior period earnings are relevant in

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[40] *Designation Order* at 5-9, paras. 10-23.

[41] 47 C.F.R. § 65.600(b).

[42] *Designation Order* at 7-9, paras. 14-23.

[43] *Designation Order* at 7-9, paras. 14-23.

[44] *Designation Order* at 8, paras. 20-21, App. A.

[45] The information would enable us to determine, for example, the extent to which the post-September 492 adjustments are attributable to overall increases or decreases in particular revenues, expenses, and investments, or to reallocations of these revenues, expenses, and investments between state and interstate jurisdictions, among interstate common line, traffic sensitive, and special access categories, or among particular accounts within interstate categories and the state jurisdiction.

[46] NECA Direct Case at 1. *See also* NECA Direct Case at 2, 5-7 (arguing that "NECA's proposed rates are always targeted to earn at the authorized 11.25% level during the tariff test period" and "NECA does not base its rate projections on data 'true-ups' for prior periods, but rather bases those projections on final data that fully incorporate the effects of pool true-ups").

determining whether there is a pattern of overearnings, and, if so, whether the rate development methodology that NECA uses is flawed and may produce rates in the 2004 annual access filing that are unjust or unreasonable.[47] We agree with AT&T and GCI that if there is sufficient evidence that a particular methodology for projecting revenue requirements and demand designed to achieve a targeted rate of return is consistently producing overearnings, that methodology may also produce overearnings in the future.[48] Accordingly, we examine NECA's past period earnings data and its true-up process, which are at issue, for the purpose of determining the accuracy and reliability of the methodology NECA employs to set rates for the current tariff period and whether NECA's rates are just and reasonable.

16. NECA did not provide, in either its direct case or its rebuttal, substantial data that we require to make these determinations. NECA failed to submit the company-specific Part 32 accounting information specified in the *Designation Order*, or other similar information that would enable us to evaluate NECA's claimed final rates of return, resulting from its 24-month true-up process. The *Designation Order* required NECA to submit for the 1999-2000 and 2001-2002 monitoring periods disaggregated accounting information for the two companies that submitted the greatest number of adjustments and the two companies with the largest aggregate amount of adjustments.[49] For each of these monitoring periods, NECA was required for this sample of four companies to itemize, using Part 32 accounts, the amounts of any adjustments to state and interstate common line, traffic sensitive, and special access revenues, expenses and taxes, operating income, and rate base, and to explain these adjustments.[50] The *Designation Order* also required NECA to provide the dates and causes of these Part 32 adjustments.[51] NECA, however, did not provide this Part 32 accounting information.

17. NECA asserts that it did not provide data as directed when the data were "not available to NECA,"[52] contending that it does not maintain certain data itself, that it only stores certain information in

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[47] *Designation Order* at 3-4, para. 5. To the extent that NECA argues that prior period data would not be relevant for the purpose of ordering refunds for prior tariff rates that were "deemed lawful," we agree. That is not the case, however, in this proceeding.

[48] AT&T Opposition at 3-4; GCI Opposition at 6. *See also 1997 Annual Access Tariff Filings*, CC Docket No. 97-149, Memorandum Opinion and Order, 13 FCC Rcd 3815 (1997) (employing past period data in the Commission's analysis of whether there was bias in the methodology used to set current rates). NECA complains that the *Designation Order* "requests no information on the processes and procedures actually used by NECA to forecast costs and demand and to calculate proposed rates for the test period." NECA Direct Case at 8. We note that some of this information was reviewed as part of NECA's 2004 annual access filing. To the extent that NECA desired that we consider any additional information, it was not precluded from submitting it. In theory, NECA is correct that a review of its forecasting methodology might also be probative, but such a review would require NECA to submit and explain in detail all of the data, assumptions, calculations, formulas, methodologies, work papers, a representative sample of any company budget forecasts, etc. that it uses to forecast cost and demand for every element for which it tariffs a rate. This information would be in addition to, not in lieu of, the information requested in the *Designation Order*, because the starting point for NECA's forecasts is its "final" results for prior years, which we still would have to validate. *See* NECA Direct Case at 6-7. Even if NECA could provide the information required for such a review in a timely fashion (which seems unlikely, given NECA's stated inability to respond to far less burdensome requests reflected in the *Designation Order*), that volume of material is not amenable to review in a 5-month tariff investigation.

[49] *Designation Order* at 8, para. 21, App. A.

[50] *Designation Order* at 8, para. 21, App. A.

[51] *Designation Order* at 8, para. 21, App. A.

[52] NECA Direct Case at 2. *See also* NECA Direct Case at 3, 8, 17.

its computer systems for a limited period of time, and that it "has used its best efforts to comply with the *Designation Order* requirements considering the short time allowed for response."[53] We find this explanation to be unsatisfactory and inadequate, especially in view of the substantial data that NECA did not provide. The Commission's rules provide that NECA serves as an agent in filing tariffs for telephone companies and require "[p]articipation in Commission or court proceedings relating to access charge tariffs."[54] NECA has not provided any evidence that the information we seek is not available from the carriers that participate in its tariffs. In fact, most, if not all, of the company-specific data that were requested are already compiled by NECA companies for other purposes, such as meeting financial reporting or accounting rules requirements.[55] We cannot conclude that NECA has fulfilled its duty to work with the carriers to produce the information specified in the *Designation Order*, and otherwise to comply with that order.

18. Furthermore, much of the data that NECA does provide are inadequate to provide the level of detailed information necessary to complete this investigation. In order to ensure that the Commission has a reliable data sample for reviewing the differences between NECA's September Form 492 and its "final" rates of return at the end of the 24-month true-up period, the *Designation Order* required NECA to submit for each year 1993 through 2002 the 120 largest post-September Form 492 adjustments made to the common line, traffic sensitive switched access, and special access pools after the companies submitted annual cost studies, and the date and reason for each adjustment.[56]

19. Although NECA provided some information in response to this requirement, NECA did not fully comply with the order for several reasons.[57] First, NECA in many cases reports revenue, expense, and income differences that reflect numerous adjustments made at different points in time for different reasons, but it did not separately provide the amounts of the individual adjustments. For example, NECA submitted data related to a telephone company[58] that show the differences in results between its September Form 492 Report and the end of the 24-month period for settlement revenues, expenses, rate base, and settlement

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[53] NECA Direct Case at 2 ("While NECA maintains within its pool settlements system the information necessary to calculate interstate earnings levels for all requested periods, NECA does not maintain account-level detail corresponding to monthly settlement data nor does NECA maintain intrastate earnings monitoring data, and therefore cannot respond to portions of the *Designation Order* requesting such information."). NECA also explains that "information is only available on-line for adjustments submitted within the last 24 months." NECA Direct Case at 3.

[54] 47 C.F.R. §§ 69.3, 69.601.

[55] *See, e.g.,* 47 C.F.R. § 32.2. The foundation for the cost of service filings developed by rate-of-return carriers to establish rates is the Part 32-Uniform System of Accounts. It provides, in part, that"[t]he financial data contained in the accounts, together with the detailed information contained in the underlying financial and other subsidiary records required by [the] Commission, will provide the information necessary to support separations, cost of service and management reporting requirements." 47 C.F.R. § 32.2(f).

[56] Alternatively, NECA was required to submit data representing 80% of the true-up totals, if the 120 largest adjustments represented more than 80% of the total true-ups.

[57] NECA submitted data for each year 1993 through 2002 for cost companies that accounted for at least 80 percent of the difference between September 492 and 24-month settlement revenues. Specifically, it submitted September 492 and 24-month settlement revenues, expenses, settlement income, and rate base; the differences between the settlement revenues, expenses, and settlement income; and a brief explanation.

[58] Carrier specific information is treated confidentially pursuant to a protective order. *See* July 1, 2004 Annual Access Charge Tariff Filings, WC Docket No. 04-372, Protective Order, DA 04-3261 (WCB/Pricing, Oct. 14, 2004).

income in calendar year 2002.[59] These data show the differences for common line, traffic sensitive switched access, and special access services. NECA also provided brief explanations for 55 data adjustments that account for the related revenue, expense, rate base, and income differences, and the month and year to which these adjustments applied, and the day, month, and year that they were reported.[60] NECA did not, however, report the dollar amounts of any of these 55 adjustments, nor did it identify whether the adjustments affected the common line, traffic sensitive switched access, or special access categories. NECA also did not adequately identify whether the adjustments affected settlement revenues, expenses, rate base, or settlement income. We are thus unable to map the explanations for these adjustments to the dollar differences between the company's September Form 492 Report and the end of the 24-month period for settlement revenues, expenses, rate base, and income. Without the ability to determine the amounts of any of these company-specific adjustments, or the extent to which they account for the overall differences in NECA earnings reports, we cannot determine the accuracy of what NECA alleges to be its final rates of return.

20. Second, NECA's explanations are inadequate. NECA provided no reasons for adjustments made from 1993 to September 2002 and supplied explanations relating to only certain adjustments made from October 2002 forward. Moreover, NECA's explanations are too general to provide an understanding of why these adjustments were made. For example, NECA offers such explanations as "completed 2001 cost study," "cost study adjustment," and "cost study true-up."[61] Significantly, the lack of detail leaves unanswered the question of why the net effect of these adjustments in virtually every case is a *downward* revision to the September Form 492 rates of return. Pursuant to the true-up process, cost and revenue estimates are later finalized based on actual costs and revenues, thus, we would have expected both downward and upward revisions of roughly the same magnitude and frequency, unless there is a consistent bias in the estimates.

21. Third, NECA submitted settlement revenues for its sample of carriers that reflects the amounts added or subtracted to revenues derived from customer bills, so that each carrier would earn the pool average rate of return. The revenues were not derived solely from customer bills.[62] As a result, it is

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[59] *See* NECA Direct Case, Exhibit 3A, "Companies Accounting for 80% of True-Up," for Calendar Year 2002, part 10, row 4; part 20, row, 6; and part 30, row 13.

[60] NECA lists a date for carrier adjustments that we believe reflects the date on which the carrier reports adjustments to NECA. *See* NECA Direct Case, Exhibit 3B, "Explanations for Calendar Year 2001 Adjustments" and "Explanations for Calendar Year 2002 Adjustments," in the column labeled "Date." A sample of some adjustments for this carrier reads as follows: "True-up of end user revenue 02/2002," applied to February 2002 and reported on September 12, 2003; "True-up for MCI bankruptcy for 07/2002," applied to July 2002 and reported on September 24, 2003; "True-up of DSL Revenue for 10/2002," applied to October 2002 and reported on December 8, 2003; "4Q2002 Cost Study True-up," applied to November 2002 and reported on November 21, 2003; and "4Q02 Adjustment for FIT review," applied to December 2002 and reported on March 26, 2004. *See* NECA Direct Case, Exhibit 3B, "Explanations for Calendar Year 2002 Adjustments," at 11 (rows 22, 49, 60, 63), 12 (row 7).

[61] *See* NECA Direct Case, Exh. 3B, "Explanations for Calendar Year 2001 Adjustments," at 1 (rows 1, 14, 57).

[62] NECA calculates on a monthly basis a settlement result for each carrier based on data submitted by all of the carriers. The total pool settlement result is determined by applying the pool average rate of return to each carrier's reported average net investment, or rate base. If a carrier's reported revenues are greater than its calculated settlement amount, the carrier remits monies to NECA in the amount of this difference. If a carrier's reported revenues are less than its calculated settlement amount, NECA remits monies to the carrier in the amount of this difference. *See* NECA Direct Case at 19-20.

impossible to distinguish the difference in revenues between the September Form 492 and the end of the 24-month period that relate to carrier-initiated revenue adjustments from adjustments relating to monies remitted to or from NECA. It is particularly important to ascertain the magnitude of the revenue differences that are attributable only to carrier-initiated accounting adjustments because these adjustments determine the outcome of the settlement process and the final amount of the carrier's earnings. Carrier-initiated revenue adjustments, for example, occur when a new cost study is completed, a cost study is revised, or erroneous billing of customers is corrected.

22. Fourth, the financial data that NECA submitted do not include amounts assigned by NECA companies to the state jurisdictions. The separations process produces separate state and interstate revenue, expense, and investment amounts. The interstate amounts are then used to calculate the interstate rate of return that NECA reports on its September Form 492 Reports and a final rate of return after the 24-month true-up period. Absent state financial data, it is not possible to ascertain the extent to which the differences in NECA's reported interstate returns reflect overall company revenue, expense, or investment increases or decreases, on the one hand, or revenue, expense, or investment reallocations between state and interstate jurisdictions, on the other. In sum, this incomplete accounting that NECA provides of company-wide revenues, expenses, income, and rate base renders us unable to determine the validity of NECA's final interstate returns resulting from its 24-month true-up process.

23. The *Designation Order* also directed NECA to identify and explain, for various years and monitoring periods, any differences in the total interstate amounts that NECA reported on its September Form 492s and the 24-month amounts for the common line, traffic-sensitive, and special access categories respectively.[63] The *Designation Order* also directed NECA to identify and explain any differences between the total amounts assigned by NECA companies to the state jurisdictions in order to develop its September Form 492s and its 24-month amounts in these categories: total revenues, total expenses and taxes, operating income, rate base, and rate of return.[64] In response, NECA provided differences in the total interstate amounts that it reported on its September Form 492 Reports and the 24-month amounts for the common line, traffic-sensitive, and special access categories. It did not, however, provide information regarding differences between the total amounts assigned by NECA companies to the state jurisdictions in order to develop its September Form 492 Reports and its 24-month amounts in the required categories. Absent the required state earnings information, as mentioned above, it is not possible to ascertain whether the adjustments reflect overall company revenue, expense, or investment increases or decreases, or revenue, expense, or investment re-allocations between state and interstate jurisdictions. Again, this incomplete accounting does not allow us to determine the validity of NECA's 24-month rate of returns.

24. Reliable data are essential to the Commission's ability to conduct tariff reviews and investigations, ensure just and reasonable rates, and, if necessary, to prescribe rates. NECA's failure to comply fully with the *Designation Order* leaves us with insufficient and unreliable data, such that we are unable to develop the necessary certainty to permit us to conclude that the rates should be deemed lawful, or to prescribe alternative rates that would be deemed lawful. We find that NECA has failed to meet its burden of proof in this proceeding under section 204 of the Act to warrant a finding that its proposed rates are just and reasonable and should be deemed lawful rates not subject to potential refund for overearnings. Rather, we conclude that, given the state of the present record, the rates filed by NECA are not unjust or unreasonable so long as they remain legal rates that are subject to potential refund if NECA should overearn during the relevant monitoring period. In concluding that NECA has met its burden of establishing legal, but not lawful, rates, we recognize and rely upon the well-established distinctions between legal and lawful

[63] *Designation Order* at 7, paras. 14-17.

[64] *Designation Order* at 7, paras. 14-17.

tariff rates.[65] This result is also consistent with section 204(a)(3) of the Act, which accords deemed lawful status to rates filed pursuant to that section that are not suspended, but does not limit the substantive remedies available to the Commission once it undertakes a tariff investigation.[66] This result also addresses NECA's concerns that its member companies have the opportunity to earn at least an 11.25 percent rate of return, while the potential for refund liability in the event of excess earnings also ensures that customers will pay no more than just and reasonable rates.[67] Furthermore, in a complaint proceeding alleging actual overearnings, issues of prior patterns of earnings and projected costs and demand will not be present; the question will simply be whether NECA overearned during the relevant monitoring period.[68]

25. AT&T and GCI request that we find NECA's rates unlawful and prescribe just and reasonable rates based on the overearnings data on the record.[69] Both carriers propose that we require NECA to make adjustments to its switched access rates, in particular.[70] As discussed above, the data that NECA provides, however, are insufficient for us to determine what adjustments we should prescribe. Without sufficient and reliable data to measure precisely any demonstrated bias in NECA's rate-making methodology, we are unable to ensure that our prescription would result in just and reasonable rates.

26. GCI argues that we should base any rate adjustments on data in NECA's previously filed September Form 492 Reports.[71] Meanwhile, AT&T anticipates that NECA companies will overearn going forward based on the financial results in both the September Form 492 Reports and NECA's unfiled final reports.[72] They both ask the Commission to eliminate the anticipated overearnings by reducing rates. At this point, however, absent sufficient and reliable underlying data from NECA, we do not know whether the data in NECA's unfiled final reports are reliable, and NECA itself casts doubt on the reliability of the September Form 492 Reports as a basis for setting rates because NECA makes clear this report is based only on estimates subject to subsequent true-ups. Furthermore, should we order adjustments, the resulting

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[65] *See generally ACS of Anchorage v. FCC*, 290 F.3d 403. If rates are declared "lawful," also known as "deemed lawful," refunds are thereafter impermissible as a form of retroactive ratemaking. *ACS of Anchorage v. FCC*, 290 F.3d at 411.

[66] *Cf. Streamlined Tariff Order*, 12 FCC Rcd at 2181-82, para. 19 (explaining that suspended tariffs under section 204(a)(3) do not receive deemed lawful status until the Commission issues an order finding them to be just and reasonable at the conclusion of the proceeding).

[67] *ACS of Anchorage v. FCC*, 290 F.3d at 411.

[68] *See Annual 1988 Access Tariff Filings*, 4 FCC Rcd 3965, 3966, para. 10 (1989) ("NECA's access customers can, of course, file Section 208 complaints against NECA to recover reparations for excessive rates."). Any complaint against NECA alleging overearnings can only be filed at the conclusion of the monitoring period.

[69] AT&T Opposition at 6; GCI Opposition at 10-11.

[70] AT&T Opposition at Attach. A; GCI Opposition at 6-11, Declaration of Alan Mitchell, Exh. 2. Because NECA has never filed revised September 492 Reports, NECA informs us for the first time in this proceeding of its "final" rates of return for traffic sensitive switched access services. NECA Direct Case at Exh. 2. According to NECA, these returns were 12.93% for the 1993-94 monitoring period, 12.11% for 1995-96, 13.46% for 1997-98, 12.17% for 1999-2000, and 13.14% for 2001-02 (as of Aug. 2004). NECA projects final traffic sensitive switched access rates of return for 2003 of 13.86%. *Id.* Because of NECA's 24-month true-up process, its final rate-of-return report for the 2003-04 monitoring period would not be available until January 2007.

[71] GCI Opposition at 6-11, Declaration of Alan Mitchell, Exh. 2.

[72] AT&T Opposition at Attach. A.

rates would then be "deemed lawful," and NECA would not be liable to its customers in the event of continued overearnings. It would not be reasonable to give the "deemed lawful" imprimatur to NECA's rates, especially in view of the fact that we have no assurance that the prescriptions AT&T and GCI suggest would solve problems with NECA's rate-making methodology going forward.

27. In addition, we seek to eliminate future controversies resulting from the failure of NECA or any carrier to disclose its final rate-of-return data to the Commission. Our rules require that "final adjustments" be made to rate-of-return reports by September 30 of the year following the close of a monitoring period.[73] As explained above, NECA notes on its September Form 492 Reports that its results "include estimates and are subject to further adjustments, as Exchange Carriers revise data."[74] NECA also notes that it expects the rate of returns that it has reported to decline.[75] Nothing in the record suggests that NECA's responsibility to report final earnings ends when it files an estimated report. To the contrary, NECA's notations suggest that NECA will file a revised "final" report at some future date. In any event, we find that NECA has a continuing obligation to revise its September Form 492 Report by filing a report that reflects NECA's "final adjustments."[76]

28. We also direct NECA to file a report with the Commission within 60 days of the release of this order that offers proposals for addressing the concerns raised in this record related to the timing conflicts between NECA's true-up process and the final September Form 492 Report. In addition to any suggestions NECA may offer, we direct NECA to address the issues and questions posed below. Based on NECA's response and recommendations, we will be in a better position to determine whether it is necessary or appropriate to initiate a rulemaking proceeding to resolve these issues.

29. As noted above, NECA permits its member carriers to submit cost adjustments or "true-ups" over a 24-month period that, in effect, gives the carriers 15 months after the date set forth by the Commission's rules to report final earnings adjustments.[77] NECA has never clarified the legal authority or other basis for establishing such an internal practice. We direct NECA to do so in this report. We direct NECA to explain how and why it selected a 24-month true-up period, and whether the use of current technology could reduce the 24-month time period.

30. Rate-of-return reports must be filed in a timely manner and provide the most current data possible if they are to assist the Commission and other interested parties that rely on them. NECA explains that most carriers complete their cost studies within 7-12 months from the end of the year.[78] NECA files its September Form 492 Report, however, just before most of these studies are done, and therefore, significant earnings data are not captured until one year later in the next report. Thus, NECA's September Form 492

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[73] 47 C.F.R. § 65.600(b).

[74] *See, e.g.,* NECA Form FCC 492, Rate of Return Report, Additional Statements (filed Sept. 30, 1997) (covering January 1995 to December 1996 cumulative period).

[75] *See, e.g.,* NECA Form FCC 492, Rate of Return Report, Additional Statements (filed Sept. 30, 1997) (covering January 1995 to December 1996 cumulative period).

[76] 47 C.F.R. § 65.600(b). When NECA realized that it could not submit final data in September in accordance with our rules, the better course would have been to seek a waiver of these rules. Given its failure to seek a waiver, however, it clearly had an ongoing obligation to supplement its filing.

[77] 47 C.F.R. § 65.600(b).

[78] NECA Direct Case at 18, 22.

Report may largely reflect imprecise and outdated cost estimates, thereby calling into question the value of this report.

31. We direct NECA to address the possibility of establishing a time-frame for true-ups that is consistent with the filing of the September Form 492 Report. If most carriers complete their cost studies within 7 to 12 months from the end of the year, and subsequent adjustments typically represent only about 10 percent of total adjustments,[79] NECA might be able to complete its true-up process in less than this 24 months. Furthermore, if some carriers are able to submit cost studies by the August cut-off date for the September Form 492 Report, it may be possible for all carriers to do so. If not, we direct NECA to explain why some carriers are unable to complete their cost studies by August, or why they cannot be directed to do so. We direct that NECA provide options in its report for shortening its true-up settlement process. In particular, we direct NECA to explore how true-ups could be conducted in a manner that enables NECA to file its final rate of return by September 30 after the close of a monitoring period.

32. NECA's response to the *Designation Order* leaves open the question of why NECA may not be able to file final adjustments to its rate-of-return report following the close of the 12-month Interstate Common Line Support (ICLS) true-up period.[80] We agree with AT&T that NECA did not fully address concerns about the inconsistency between the 12-month true-up period for ICLS and the 24-month true-up period for NECA's pools, since "both are presumably based on the same separations and cost studies."[81] NECA concludes that the "[c]ost studies are completed within 7 to 12 months from the end of the year, consistent with timeframes for ICLS true-ups."[82] This being the case, we direct NECA to explain why the 12-month ICLS true-up period could not also apply to the NECA pool true-ups, and, if it did, why NECA would not be able to file its final rate-of-return report following the close of the calendar year.

B. Entrance facilities

33. In the *Designation Order*, the Division designated two issues relating to entrance facility charges. The first, designated Issue 2 in the *Designation Order*,[83] relates to the appropriateness of NECA's determination of demand in calculating its entrance facility charge and was designated pursuant to section 204(a) of the Act. The second, designated Issue 3 in the *Designation Order*, concerns whether the language relating to entrance facility charges in section 6.1.3(A)(1) of NECA F.C.C. Tariff No. 5 is unjust or unreasonable.[84] This issue was designated pursuant to section 205 of the Act. After reviewing the record, we believe that addressing Issue 3 first provides a more cogent discussion of the issues.

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79 NECA Direct Case at 18, 22.

80 NECA Direct Case at 22 (responding to *Designation Order* at 9, para. 23); 47 C.F.R. § 54.903(a)(4) (requiring rate-of-return carriers to submit to the Universal Service Administrative Company on December 31 of each year the data necessary to calculate a carrier's Interstate Common Line Support for the prior calendar year).

81 AT&T Opposition at 8 (quoting the *Designation Order* at 9, para. 23).

82 NECA Direct Case at 22.

83 For purposes of tracking the issues, we retain the designation from the *Designation Order*.

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

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

34. The third issue designated for investigation is whether the language relating to entrance facility charges in section 6.1.3(A)(1) of NECA F.C.C. Tariff No. 5 is unjust or unreasonable. This issue was designated pursuant to section 205 of the Act.[85] The tariff states:

> The Entrance Facility recovers a portion of the costs associated with a communications path between a customer designated premises and the serving wire center of that premises. . . . [The entrance facility charge] will apply even if the customer designated premises and the serving wire center are collocated in a Telephone Company building.[86]

35. The *Designation Order* permitted NECA to defend the existing tariff language as it deems appropriate. In addition, NECA was directed to file as part of its direct case draft language that could be used to revise section 6.1.3 of NECA's tariff to reflect the assessment of entrance facility charges if the Commission reaches a decision adverse to NECA on Issue 2.[87] NECA was directed to submit language to address cases in which carriers that participate in the NECA traffic-sensitive pool provide collocation pursuant to section 251(c)(6) of the Act.[88]

36. As an initial matter, NECA asserts that, because it did not propose any changes to these terms and conditions in its annual access filing, questions regarding them are outside the scope of this tariff investigation.[89] NECA is incorrect. As AT&T notes,[90] this portion of the tariff investigation is being conducted pursuant to section 205 of the Act.[91] That section permits the Commission to initiate an investigation at any time on its own motion. Furthermore, NECA is incorrect when it asserts that the Commission should conduct a rulemaking proceeding rather than grant relief to GCI in a tariff investigation.[92] We are interpreting the existing rules, not amending them, and thus no rulemaking proceeding is necessary.

37. Our substantive consideration begins with some background on the tariff language. As NECA indicates, the language in section 6.1.3 was introduced in 1993 in response to the transport restructure proceeding.[93] That proceeding was conducted pursuant to section 201 of the Act. The tariff provision ensured that AT&T would not receive an unfair advantage over other IXCs when the AT&T point

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85 47 U.S.C. § 205 (authorizing the Commission to establish just and reasonable charges and practices).

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

87 *Designation Order* at 11, para. 31.

88 *Id*.

89 NECA Direct Case at 23, 28.

90 *See* AT&T Opposition at 1.

91 *See Designation Order* at 1, 11, 13, paras. 1, 30, 42; 47 U.S.C. § 205.

92 NECA Rebuttal at 12 n.17.

93 NECA Direct Case at 23.

of presence (POP) was located at the LEC serving wire center.[94] In the same general timeframe, the Commission adopted its expanded interconnection policies for interstate special access and switched transport services. The expanded interconnection rules required every LEC that is classified as a Class A company and that is not a NECA interstate tariff participant to provide special access and switched transport expanded interconnection.[95] NECA members today continue to be exempt from the Commission's expanded interconnection requirements contained in Part 64.[96]

38. In 1996, the Communications Act of 1934 was amended by the Telecommunications Act of 1996 (1996 Act).[97] Several provisions of that Act bear on this investigation. Section 251(c)(6) requires incumbent LECs to provide physical collocation to requesting carriers on rates, terms, and conditions that are just, reasonable and nondiscriminatory.[98] Section 251(c)(2) requires incumbent LECs to provide interconnection to requesting carriers on rates, terms, and conditions that are just, reasonable and nondiscriminatory.[99] Finally, the 1996 Act provides that the requirements of section 251 apply to all incumbent LECs, except those qualifying for a rural exemption pursuant to section 251(f).[100] As a result, some of NECA's members are subject to the provisions of section 251 -- notably ACS of Fairbanks and ACS of Alaska for present purposes.

39. The Commission initially implemented these provisions in the *Local Competition Order* and accompanying rules.[101] The Commission recognized that the rates requesting carriers would pay for collocation pursuant to section 251(c)(6) would be governed by the standards set forth in the 1996 Act rather than the expanded interconnection tariffing requirements.[102] It concluded that such collocators were entitled to interconnect with the incumbent LEC at any technically feasible point within the incumbent LEC's network.[103] The Commission further found that an incumbent LEC must provide requesting carriers collocating pursuant to section 251(c)(6) with cross-connects between, for example, unbundled loops the and the carrier's collocated equipment.[104] In addition, the Commission adopted section 51.515(a), which provides that access charges shall not "be assessed by an incumbent LEC on purchasers of elements that

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[94] *See id*. and n.34; *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006 (1992) (*Transport Order*).

[95] 47 C.F.R. § 64.1401(a) and (b).

[96] *Id.*

[97] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §§ 151 *et seq*.) (1996 Act).

[98] 47 U.S.C. § 251(c)(6).

[99] 47 U.S.C. §§ 251(c)(2); *see also* 47 U.S.C. § 252(d)(2) (establishing pricing standards for the provision of interconnection pursuant to section 251(c)(2)).

[100] 47 U.S.C. § 251(c); 47 C.F.R. § 251(f).

[101] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499 (1996) (*Local Competition Order*) (subsequent history omitted).

[102] *Local Competition Order*, 11 FCC Rcd at 15788, para. 567.

[103] *See* 47 C.F.R. § 51.305(a).

[104] *See Local Competition Order*, 11 FCC Rcd at 15693, para. 386.

offer telephone exchange or exchange access services."[105] The Commission defined elements to include "network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements."[106]

40. The question is whether entrance facility charges set forth in a federal access tariff may be assessed when a carrier collocates in a LEC central office pursuant to section 251(c)(6) and purchases a cross-connect under that statutory provision. NECA argues that, to the extent that a customer uses collocated arrangements "for the origination and termination of interstate interexchange traffic," the access charges specified in NECA's tariff, including entrance facility charges, apply.[107] It asserts that this result is required by section 69.110(a) of the rules, which provides that "[a] flat-rated entrance facilities charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use telephone company facilities between the interexchange carrier or other person's point of demarcation and the serving wire center."[108] NECA therefore asserts that when origination and termination of interexchange traffic is involved, application of access charges does not violate section 51.515.[109] We disagree.

41. The critical language in section 69.110(a) refers to "use [of] telephone company facilities between the interexchange carrier or other person's point of demarcation and the serving wire center."[110] Thus, for a LEC to assess an entrance facility charge, it must provide the appropriate facilities between the POP and the serving wire center. A competitive LEC collocating in a LEC central office, however, purchases cross-connect arrangements from the incumbent LEC to interconnect its facilities with those of the incumbent LEC or to access other unbundled network elements. These cross-connects are mandatory elements of collocation provided pursuant to section 251(c)(6) of the Act.[111] Thus, as GCI argues, the collocated competitive LEC is not using the incumbent LEC's access facility.[112] Section 51.515 of the Commission's rules is consistent with, and actually compels, this interpretation: the assessment of an entrance facility charge when a competitive LEC purchases a cross-connect cannot be reconciled with the section 51.515 prohibition on the assessment of access charges on purchasers of interconnection. Furthermore, assessment of an entrance facility charge would result in GCI (or other collocated competitors) paying twice for the same functionality – once when it provided its own facilities and again when it paid the entrance facility charge assessed by the LEC.[113] As GCI notes, in this scenario, there is no

[105] 47 C.F.R. § 51.515(a).

[106] 47 C.F.R. § 51.501(b). Section 51.509(g) lists collocation as one of the specific elements for which rate structure rules are established. 47 C.F.R. § 509(g).

[107] NECA Direct Case at 24.

[108] 47 C.F.R. § 69.110(a); NECA Direct Case at 24-25.

[109] NECA Direct Case at 25.

[110] 47 C.F.R. § 69.110(a).

[111] *See* 47 C.F.R. § 51.509(g).

[112] GCI Opposition at 18.

[113] See GCI Opposition at 14. GCI also notes that cross-connects (and any associated multiplexing) "would be required to be priced, in any state arbitration conducted pursuant to Section 252, based on forward looking economic costs and according to the Commission's specific rate structure rules for Section 251(c)(2) interconnection facilities and Section 251(c)(3) UNEs." *Id.* GCI further asserts that the "application of an embedded cost, rate-of-return regulation-derived entrance facility charge to this cross-connect cannot meet these requirements." *Id*.

way that a competitor could compete with the incumbent LEC for the provision of these services,[114] thereby defeating the intent of the 1996 Act to facilitate the development of competition.

42. NECA concedes that section 51.515 prohibits the assessment of access charges on purchasers of elements that offer telephone exchange or exchange access services.[115] NECA, however, asserts that the Commission has explained that "the provision of interexchange service to the incumbent LEC's customers is not telephone exchange or exchange access."[116] While NECA does not cite to a specific page or paragraph for this proposition, the language appears to be related to the finding that an IXC cannot interconnect pursuant to section 251(c) unless it provides exchange service, exchange access service, or both.[117] GCI, while admittedly offering interstate interexchange service, clearly is not interconnecting solely for the purpose of originating or terminating interexchange traffic; it is also engaged in the provision of telephone exchange service, at a minimum.[118] As GCI observes, the Commission made clear in the *Local Competition Order* that:

> [T]raditional IXCs that offer access services in competition with an incumbent LEC (*i.e.*, IXCs that offer access services to other carriers as well as to themselves) are also eligible to obtain interconnection pursuant to section 251(c)(2). For example, when an IXC interconnects at a local switch, bypassing the incumbent LEC's transport network, that IXC may offer access to the local switch in competition with the incumbent. In such a situation, the interconnection point may be considered a section 251(c)(2) interconnection point.[119]

43. NECA argues that, under GCI's rationale, GCI presumably would be allowed to use other UNEs (*e.g.*, unbundled local switching) in lieu of access services to bypass NECA's switched access tariff and provide exchange access to IXCs for end users that do not receive local exchange service from GCI. It states that the Commission rejected this assertion when it held that a carrier that purchases an unbundled switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service.[120] We reject

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[114] *See* GCI Opposition at 14.

[115] NECA Direct Case at 24. NECA's argument that section 51.515(d) clarifies that the prohibition on interstate access charges applies to situations in which a carrier provides both telephone exchange service and exchange access is without merit. *Id*. At n.39 This section is an additional prohibition against assessing access charges when a carrier provides both telephone exchange service and exchange access to an end user customer, but in no way limits 51.515(a).

[116] NECA Direct Case at 24 n.37 (citing *Local Competition Order,* 11 FCC Rcd 15,499).

[117] 47 C.F.R. § 51.305(b), which provides that "a carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act."

[118] *See* GCI Opposition at 17.

[119] *Local Competition Order,* 11 FCC Rcd at 15599, para. 191.

[120] NECA Rebuttal at 13-14 (citing *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*, CC Docket No. 00-218, *Petition of Cox Virginia Telecom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration*, CC Docket No. 00-249, *Petition of AT&T Communications of Virginia*
(Footnote continued on the next page.)

NECA's argument, which improperly conflates precedent about the availability of a facility for the purpose of unbundling with the availability of a facility for the purpose of interconnection. Statements by the Commission and Bureau regarding limitations on UNE switching made available to competitors under section 251(c)(3) simply have no relevance to competitors' rights to a facility for interconnection pursuant to section 251(c)(2).

44. NECA further asserts that its tariff permits customers providing both interexchange and local exchange services to commingle traffic on the same facility as required by the Commission's rules.[121] NECA argues that the Commission's commingling ruling clearly envisions that requesting carriers will continue to purchase tariffed services as well as unbundled network elements to the extent the requesting carrier's operations require exchange access to end users not served by its competitive LEC operation. NECA further argues that LECs are not required to ratchet or prorate facility charges.[122] GCI responds by stating that it is not requesting ratcheting and that this investigation is not about mixed use facilities.[123] We conclude that NECA's arguments regarding commingling and ratcheting are misplaced. The question is whether entrance facility charges from NECA's interstate access tariff may be assessed when a carrier collocates in a LEC central office and purchases a cross-connect element. Our decision in this order does not affect the rules regarding the commingling of services or the ratcheting of rates.

45. NECA also argues that pursuant to the *Second MAG Order* rate-of-return LECs are not required to tariff an access cross-connect element in the absence of geographically deaveraged rates for transport services.[124] The Commission's decision to require rate-of-return LECs to offer a cross-connect rate element before they can deaverage their special access and switched transport rates is inapplicable to the present issues. That decision was made pursuant to section 201 of the Act. The present inquiry relates to the provision of interconnection cross-connects pursuant to section 251 of the Act and the ability of an incumbent LEC to assess an entrance facility charge when a competitive LEC obtains a cross-connect under section 251(c). The *Second MAG Order* has no bearing on the requirements of providing interconnection pursuant to section 251.

46. In light of the foregoing, we conclude that the language in section 6.1.3 of NECA's tariff No. 5 is inconsistent with the Commission's rules and is therefore unreasonable. Accordingly, we direct NECA to file revised tariff language implementing the conclusions of this order. Such revisions shall be filed within ten days of the release of this order and shall be filed on fifteen days' notice.

47. We now consider alternative tariff language proposed by NECA and GCI. NECA indicates that it has considered an alternative approach to the provision of entrance facilities for those carriers that

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Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission regarding Interconnection Disputes with Verizon Virginia Inc. and for Expedited Arbitration, CC Docket No. 00-251, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27141-42, para. 208 (2002), *recon. denied*, 18 FCC Rcd 8467 (WCB, 2004)).

[121] NECA Direct Case at 25; NECA Rebuttal at 14-15 (noting section 51.309(e)-(g), 47 C.F.R. § 51.309(e)-(g)).

[122] NECA Direct Case at 25 (citing *Multi-Association Group (MAG) Plan for Regulation of Interstate Service of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service*, *Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket Nos. 00-256, 96-45, 19 FCC Rcd 4122, 4137, para. 31 (2004) (*Second MAG Order*).

[123] GCI Opposition at 18-19.

[124] NECA Direct Case at 25.

have obtained section 251(c)(6) collocation pursuant to Part 51 of the Commission's rules. Specifically, NECA would propose to establish a new category of entrance facility that would apply in lieu of the traditional entrance facility charge. The new rate element would be priced below the existing charge and designed to recover the costs associated with the new element.[125] NECA indicates that this could be accomplished by inserting the following language after the fourth paragraph of section 6.1.3(A)(1):

> If the customer designated premises and the serving wire center are collocated in the same Telephone Company building pursuant to an interconnection agreement with the Telephone Company that provides for collocation as specified in section 251(c)(6) of the Communications Act of 1934 As Amended By The Telecommunications Act Of 1996, then the rate specified in Section 17.2.2 for an Interconnected Entrance Facility will apply.

48. We find that NECA's proposed language is inconsistent with the Commission's rules. The proposed language would impose a new interstate access tariffed charge when a carrier is collocated pursuant to section 251(c)(6). As discussed above, an incumbent LEC is not permitted to force such a carrier to purchase cross-connects pursuant to the incumbent LEC's access tariff. Moreover, charges for the collocation and the associated cross-connect arrangements, which are the particular subject of the present investigation, are not tariffed in the interstate access tariff, but are established pursuant to the applicable interconnection agreement between the parties.[126] Thus, it is inappropriate for NECA to propose any new access tariff rates. If the proper application of the Commission's rules changes the cost of, or demand for, interstate access service, NECA, of course, may make appropriate tariff filings proposing revised access rates.

49. GCI submits that section 6.1.3(A)(1) must be amended to strike the following text: "This charge specified in 17.2.2 following will apply even if the customer designated premises and the serving wire center are collocated in a Telephone Company building."[127] GCI further contends that the following text should be inserted in lieu thereof: "When a customer has virtually or physically collocated in a Telephone Company premise no entrance facility charge shall apply."[128] We also conclude that this language does not adequately address the requirements of the Commission's rules. GCI's language is overbroad and fails to recognize the effects of the limitation in section 51.305(b). Section 51.305(b) provides that "[a] carrier that requests interconnection solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC's network and not for the purpose of providing to others telephone exchange service, exchange access service, or both, is not entitled to receive interconnection pursuant to section 251(c)(2) of the Act."[129] Collocation is a means of interconnecting. Thus, an incumbent LEC is not required to provide collocation under section 251(c)(6) to an IXC for the sole purpose of originating or terminating that IXC's own interexchange traffic. If an incumbent LEC does provide collocation pursuant to section 251(c)(6), an incumbent LEC may assess an entrance facility charge on an IXC that wishes only to originate or terminate its own interexchange traffic. The required revisions will

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[125] *Id*. at 28.

[126] While some interconnection agreements reference tariffed rates for some elements, such as cross-connects, the tariffed rates offer access services. In the case of cross-connect arrangements, the tariffed rates, terms, and conditions would commit the LEC to provide expanded interconnection pursuant to Part 64 of the Commission's rules. This would be a voluntary election on the part of the incumbent LEC.

[127] GCI Opposition at 21.

[128] GCI Opposition at 20-21.

[129] 47 C.F.R. § 51.305(b); *see also Local Competition Order*, 11 FCC Rcd at 15,598 paras. 190-91.

thus need to address the breadth of possibilities provided for under the rules adopted to implement section 251.

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

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

51. The *Designation Order* directed NECA to justify imposing entrance facility charges on customers who have interconnected pursuant to section 251(c)(6) of the Act.[130] NECA was also directed to explain in detail the manner in which the two ACS companies provide collocation and entrance facility arrangements to GCI, as well as other interexchange carriers, in the identified offices in Fairbanks and Juneau.[131] To supplement the description, NECA was further directed to provide a diagram showing the provisioning of collocation and entrance facilities in the central offices. NECA was to specify the charges assessed for collocation arrangements and entrance facilities and to associate the appropriate charges with the facilities on the diagram. NECA also was directed to indicate any divergent treatment in provisioning or charging that occurs, depending on whether GCI or other carriers purchase UNEs or interconnection pursuant to section 251, resell ACS services, or provide their own transmission facilities. NECA was directed to file the interconnection agreement between ACS and GCI.[132] Finally, NECA was directed to identify any facility or function for which charges for both collocation and entrance facilities are assessed upon GCI and to explain why requiring GCI to pay both collocation and entrance facility rates is lawful and does not over-recover costs for these assets or activities.[133]

52. As a preliminary matter, NECA argues that the real issue is not whether its entrance facility rates were calculated correctly, but whether the terms and conditions governing the application of those rates are reasonable.[134] In support, NECA states that section 6.1.3 has been unchanged since its introduction in 1993 as part of the implementation of the *Transport Order*.[135] Furthermore, NECA states that it is precluded from making changes to the terms and conditions of its access tariff in the annual access tariff filing.[136] Despite these considerations, the suspension of the NECA tariff was supported by assertions that NECA did not calculate the demand for entrance facilities pursuant to the applicable requirements of the Commission's rules.[137] NECA contends that, even if the Commission were to find that it had incorrectly calculated the demand, the Commission could not in a section 204 investigation order NECA to

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130 *Designation Order* at 10, para. 27.

131 *Id*. at 10, para. 28.

132 *Id*.

133 *Id*. at 10, para. 29.

134 NECA Direct Case at 23-24.

135 NECA Direct Case at 24; NECA Rebuttal at 11; *see Transport Order*, 7 FCC Rcd 7006.

136 NECA Direct Case at 24 n.35; NECA Rebuttal at 11; *see* 47 C.F.R. § 69.3(a).

137 *See Suspension Order* at 2, para. 5.

submit a carrier-initiated tariff filing to correct the ambiguity or unreasonable tariff term or condition uncovered by the erroneous demand calculation. We do not, however, have to resolve the issue because the Division designated the reasonableness of section 6.1.3 for investigation as Issue 3 pursuant to section 205 of the Act.

53. A review of the record reveals two distinct points. First, as discussed in the preceding section, NECA does not understand the correct application of entrance facility charges in the collocation environment. We have clarified this point in our discussion of Issue 3, *supra*., and it will be corrected in NECA's upcoming tariff filing.

54. The second point is that it has become apparent that GCI is not currently purchasing any cross-connects on which entrance facility charges are being assessed.[138] There is therefore no basis on which to require any rate adjustments or refunds at this time. Once a revised section 6.1.3 is effective, it is likely that the demand figure for entrance facilities will decline. As NECA notes, that would, other things being equal, result in NECA needing to increase some switched access rates.[139] Accordingly, we need take no further action with respect to Issue 2.

IV. ORDERING CLAUSES

55. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201-205, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, the National Exchange Carrier Association, Inc., SHALL FILE REVISED terms and conditions for Section 6.1.3 of its F.C.C. Tariff No. 5, as described in paragraph 46 above, no later than ten (10) calendar days from the release date of this order. These rates SHALL BE filed on fifteen (15) days' notice. For this purpose, we waive section 61.58 of the Commission's rules, 47 C.F.R. § 61.58.

56. IT IS FURTHER ORDERED that the investigation initiated in WC Docket No. 04-372 IS TERMINATED and that the rates under investigation in this proceeding are not unjust and unreasonable, but shall remain legal and subject to potential refunds for overearnings.

57. IT IS FURTHER ORDERED that the accounting order applicable to the National Exchange Carrier Association, Inc., IS TERMINATED.

58. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., SHALL FILE within sixty (60) days of the release of this Order the report described in paragraphs 28-32.

59. IT IS FURTHER ORDERED that the National Exchange Carrier Association, Inc., SHALL FILE revised September Form 492 Reports in accordance with the requirements of paragraph 27.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[138] *See* GCI Opposition at 13-14.

[139] *See* NECA Direct Case at 23 n.33.