BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15-1064

GREAT LAKES COMNET, INC. AND WESTPHALIA TELEPHONE COMPANY,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

AT&T SERVICES, INC., AT&T CORP., VERIZON, SPRINT COMMUNICATIONS COMPANY L.P AND CENTURYLINK COMMUNICATIONS, LLC,

INTERVENORS FOR RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners.

2. Rulings under review.

The ruling at issue is *AT&T Services, Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Telephone Company*, Memorandum Opinion and Order, 30 FCC Rcd 2586 (2015) ("*Order*") (JA __).

3. Related cases.

The ruling at issue has not previously been before this Court. Petitioners are parties to additional proceedings that involve substantially the same parties and similar issues: 1) *In the matter of the application and complaint of Westphalia Telephone Company and Great Lakes Comnet, Inc. against AT&T Corp*., Case No. U-17619, Order, 2015 WL 433496 (Mich. P.S.C. Jan. 27, 2015) and 2) *Great Lakes Comnet, Inc. and Westphalia Telephone Company v. AT&T Corp*., No. 1:15-cv-00216-RJJ (W.D. Mich. filed Feb. 27, 2015).

In addition, three carriers have filed an informal complaint before the FCC against Petitioners that involves substantially the same issues as in this case: *Verizon Business Services, CenturyLink QCC and Sprint*

Communications Company L.P. v. Local Exchange Carriers of Michigan, Inc., Great Lake Comnet, Inc. and Westphalia Telephone Company, EB-14-MDIC-0001 (Feb. 26, 2014). That proceeding has been stayed pending resolution of this appeal.

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GLOSSARY

CLEC	Competitive local exchange carrier
FCC	Federal Communications Commission
ILEC	Incumbent local exchange carrier
IXC	Interexchange carrier, commonly known as a long-distance carrier
LEC	Local exchange carrier, commonly known as a local telephone company

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JURISDICTION

The *Order* under review (JA __) was released on March 18, 2015. Petitioners—Great Lakes Comnet, Inc. and Westphalia Telephone Company—timely filed their petition for review on March 23, 2015, within the sixty-day filing period prescribed by 28 U.S.C. § 2344. This Court has jurisdiction pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

1. Whether the Commission reasonably determined that Great Lakes is a competitive local exchange carrier (CLEC) and therefore, under the benchmark rule, 47 C.F.R. § 61.26(b), was required to set its tariffed rates for interstate access charges no higher than the rate of the competing incumbent local exchange carrier (ILEC)?

2. Whether the Commission reasonably determined that Great Lakes did not qualify for the rural exemption to the benchmark rule when Great Lakes stipulated that its service area included large urban areas?

3. Whether the Commission reasonably determined that AT&T Michigan is the competing ILEC against whose rates Great Lakes' tariff rates should be measured?

4. Whether Great Lakes failed to show that the Order effects an unconstitutional taking of property?

5. Whether the Commission's retroactive application of the *Order* was appropriate and consistent with the presumption of retroactivity that attaches to adjudicatory decisions?

6. Whether Great Lakes had fair notice that it was subject to the benchmark rule when the Commission expressly stated over a decade ago that

it would apply the benchmark rule to intermediate carriers such as Great Lakes?

7. Whether Great Lakes will have the opportunity during the damages phase of the underlying proceeding to argue that AT&T's claims are confined to the 2-year statute of limitations period under 47 U.S.C. § 415?

STATUTES AND REGULATIONS

An addendum to this brief sets forth the relevant statutes and rules.

COUNTERSTATEMENT

This case arises from a formal complaint filed by AT&T against Petitioners Great Lakes Comnet, Inc. and Westphalia Telephone Company, alleging that Petitioners charged AT&T unlawfully high tariffed rates for interstate access services.

A. Interstate Access Charges

Long-distance telephone carriers (formally known as interexchange carriers or IXCs) generally do not directly connect to their telephone customers. Instead, when a telephone caller places a long-distance call, the call travels from the facilities of the caller's local telephone company (a local exchange carrier, or LEC) to those of a long-distance carrier. The long-distance carrier then transports the call to the facilities of another local telephone company, which delivers the call to the recipient. *See NARUC v. FCC*, 737 F.2d 1095, 1103-04 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227

(1985). For example, imagine a customer in Washington D.C., who subscribes to Verizon for local service and AT&T for long-distance service, makes a call to a friend in California, who subscribes to Pioneer for local service. The call will initially travel over Verizon's facilities. Verizon will hand off the call to AT&T, which will transport the call to California. AT&T will then hand the call to Pioneer, which will deliver the call to the friend. AT&T will charge its customer, the originating caller, for the telephone call, and will pay "originating" access charges to Verizon and "terminating" access charges to Pioneer. *See In the Matter of Access Charge Reform, Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 9923 ¶ 10 (2001) ("*Seventh Report & Order*"). The more minutes of traffic that a local telephone company originates or terminates, the more in access fees it will collect.

Historically, an incumbent local exchange carrier (or ILEC), whose access rates were closely regulated by the FCC, provided all local exchange and exchange access services in a particular region, pursuant to a monopoly franchise granted by the state. *Id.* ¶ 8. The Telecommunications Act of 1996 ended the system of state-sanctioned monopolies, *see* 47 U.S.C. § 253(a), and a new group of providers called competitive local exchange carriers (or CLECs) entered the local exchange market. *Id.* ¶ 21. Unlike the access

charges of incumbent carriers, the access charges of CLECs initially were largely unregulated, under the assumption that CLECs would not have the ability to charge excessive rates because of their small market share. *Id*. In 2001, the Commission reexamined this assumption and found it to be incorrect. In fact, CLECs' access rates were well above the rates of incumbent carriers for similar service. *Id*. ¶ 22.

CLECs could charge excessive access rates for two reasons. First, a long-distance carrier that pays access charges to a CLEC does not have the practical means to influence the caller's choice of CLEC. *Id*. ¶ 31. Second, the Commission required that long-distance carriers charge a uniform rate across different regions to spread the cost of access over all of their customers who pay to place telephone calls. *Id.* As a result, long-distance carriers could not shift the burden of high CLEC access rates to those customers who had chosen CLECs that charged excessive access rates. Although the Commission refused to conclude that CLEC access rates, "across the board," were "unreasonable," it found that market conditions and the Commission's rate-averaging rules created an "opportunity for CLECs to charge unreasonable access rates." *Id*. ¶ 34.

B. The Benchmark Rule

In light of these developments, the Commission adopted specific rules limiting the access charges CLECs could impose by tariff. In particular, in 2001, the Commission adopted the "benchmark rule"—codified in 47 C.F.R. § 61.26(b)—which provides that a CLEC cannot tariff interstate access charges above those charged by the "competing ILEC."[1] *Seventh Report & Order* ¶ 45; 47 C.F.R. § 61.26(b). The "competing ILEC" is the incumbent carrier that provides interstate exchange access services in the same geographic area as that of the CLEC. 47 C.F.R. § 61.26(a)(2). At the time the Commission adopted the benchmark rule, it also established a rural exemption. This exemption permitted a small group of qualifying carriers that serve only rural customers to charge rates above the benchmark for their interstate services, to account for rural carriers generally having higher costs. *Seventh Report & Order* ¶ 73; 47 C.F.R. § 61.26(e).

In 2004, the Commission further clarified allowable CLEC access rates by adopting a new rule for CLECs that serve as "intermediate carriers." *See In the Matter of Access Charge Reform, et al., Eighth Report and Fifth Order*

[1] As an alternative to tariffing, a CLEC can negotiate a contract with a long-distance carrier to charge rates higher than what is permitted under the benchmark rule. *Order* ¶ 10 (JA __); *Seventh Report & Order* ¶ 10.

on Reconsideration, 19 FCC Rcd 9108, 9117 ¶ 17 (2004) ("*Eighth Report & Order*"); 47 C.F.R. § 61.26(f). Intermediate carriers typically do not have their own individual customers, or end users. Rather, these CLECs provide a link between the caller's long-distance carrier and the called party's local telephone company. Under the rule, "the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions." 47 C.F.R § 61.26(f); *Eighth Report & Order* ¶ 17. In other words, the Commission determined that intermediate carriers should also be subject to the benchmark rule.

The agency found it necessary to regulate the rates of intermediate carriers because of their "monopoly power" over long-distance carriers, who "may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier." *Eighth Report & Order* ¶ 17. This is because a customer placing a telephone call chooses the originating local telephone company, the customer receiving the call chooses the terminating local telephone company, and the called party's local telephone company chooses the intermediate carrier. The long-distance carrier, in contrast, has no choice in the matter. *Id.*

C. AT&T Complaint

AT&T Corp. ("AT&T") is a long-distance carrier that provides service to end users across the country. *AT&T Formal Complaint (AT&T Compl.)* ¶ 27 (Oct. 22, 2014) (JA __). As relevant here, AT&T provides 8YY toll-free service to end users, in which the business receiving the call—AT&T's customer—pays for the call.[2] *Id.* (JA __). The service is free for the person making the call. *Id.* (JA ___).

Petitioners are Great Lakes Comnet, Inc., an intermediate carrier that provides interstate switched access services to customers in Michigan, and Westphalia Telephone Company, a rural incumbent carrier owned by Great Lakes. *Id.* ¶ 28-29 (JA __, __). The 8YY traffic from various wireless carriers was aggregated and directed to a company called LEC-MI, before ultimately routed to Great Lakes. Great Lakes then directed that traffic to AT&T, the long distance carrier providing the service. *Order* ¶ 14 (JA__).

As the Commission later found, for much of the relevant period, Great Lakes—and Westphalia, which acted as Great Lakes' billing agent—billed AT&T for their role in completing 8YY calls under a tariff for various

[2] The service is denominated "8YY" service because it is provided through a series of toll-free three-digit area codes beginning with the number 8 (i.e.: 800, 866, 877, 888, etc.).

switched access services at rates totaling $0.008483 per minute exclusive of mileage.[3] *Order* ¶ 17 (JA___). This rate was far above the rate ($0.001239 per minute exclusive of mileage) that AT&T Michigan, the local incumbent carrier, would have charged for the same services. *Id*. (JA __).

After informally disputing the charges, in October 2014 AT&T filed a formal complaint with the Commission against Great Lakes and Westphalia, alleging, among other things, that Great Lakes' tariffed rates for interstate access services were unlawful under the Commission's rules. *Id.* ¶ 2 (JA __).

D. Order on Review

The FCC determined that Great Lakes violated the Commission's benchmark rule governing CLEC tariffs for interstate access services, *Order* ¶ 2 (JA __), by charging nearly seven times the rate of AT&T Michigan, the competing incumbent local exchange carrier. *Id*. ¶ 17 (JA __). In doing so, the Commission made three findings relevant to this appeal.

First, the Commission determined that Great Lakes was a CLEC and was therefore subject to the requirements of Section 61.26. *Id.* ¶ 19 (JA __). Great Lakes met the definition of a CLEC because it is a "local exchange

[3] The switched access services involved included "tandem transport, tandem switching, tandem switched termination, and an 8YY database query charge." *Order* ¶ 17 (JA___). The details of these services are irrelevant to the dispute before the Court.

carrier that provides some . . . interstate exchange access services used to send traffic to or from an end user" and was "[not an] incumbent local exchange carrier." *Id.* (JA __); 47 C.F.R. § 61.26(a)(1).

Second, the Commission found that Great Lakes did not qualify for the rural exemption, which allows rural CLECs to file tariffs containing rates above the benchmark rate. *Order* ¶ 27 (JA __). The exemption does not apply, the Commission explained, "if any portion of the competitive LEC's service area falls within a non-rural area." *Id*. (JA __); *Eighth Report & Order* ¶ 33. Because Great Lakes stipulated that it services large urban cities like Chicago, *Order* ¶ 27 (JA __), and the 8YY wireless traffic at issue originates from locations across the country including urban areas, *id*. n.100 (JA __), the Commission concluded Great Lakes could not be considered a rural CLEC. *Id.* ¶ 27 (JA __).

Third, the agency determined that Great Lakes' tariff exceeded the rate of "the competing ILEC" —AT&T Michigan[4]—for the same services, *Id*. ¶ 25 (JA __); 47 C.F.R. § 61.26(a)(2). The agency rejected Great Lakes' contention that Westphalia—which Great Lakes owns—was the competing ILEC against whose rates Great Lakes should be measured. *Id*. (JA __). The Commission explained that had Westphalia provided the services, it would have violated its tariff by billing for services outside of its geographic boundaries. *Id*. (JA __).

The 8YY traffic at issue here was actually routed from wireless carriers to LEC-MI's end office switch in Southfield, Michigan—a suburb of Detroit, *Id*. ¶ 8 (JA __)—and then to Great Lakes, which in turn directed the traffic to AT&T. *Id*. ¶ 14 (JA __). Had Great Lakes not inserted itself into the traffic stream, LEC-MI ordinarily would have sent the traffic to AT&T Michigan, the incumbent carrier servicing Southfield, Michigan. *Id*. ¶ 17 (JA __).

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[4] Although AT&T Michigan and AT&T Corp. are corporate affiliates, *see Joint Statement of Stipulated Facts, Disputed Facts, Key Legal Issues, and Discovery and Scheduling*, File No. EB-14-MD-013 (filed Dec. 1, 2014) ¶ 4 (JA __), the two are distinct entities for purposes of this litigation, and serve entirely different roles in the case. AT&T Corp. is the long-distance carrier (or IXC) whose routed traffic was at issue in the complaint before the Commission. *Order* ¶ 25 (JA __). AT&T Michigan played no role in routing that traffic, but serves—the Commission found—as the benchmark against which Great Lakes' rates should be compared. *Id.* ¶ 25 (JA __).

Because Great Lakes' access charges well exceeded those of AT&T Michigan, the Commission determined that Great Lakes' tariff violated Section 61.26(f). *Id.* ¶ 26 (JA __).

Because AT&T had elected to bifurcate its claims for damages, the Commission did not address any affirmative defenses Great Lakes might have, leaving them for "the damages phase of [the] case." *Id.* ¶ 38 (JA__). The damages phase of the case is pending, at the parties' request. *See* Letter from Lisa B. Griffin, Deputy Chief, FCC Enforcement Bureau, to Great Lakes Comnet, et al., EB Docket No. 14-222, File No. EB-14-MD-012, at 1 (dated Apr. 6, 2015).

SUMMARY OF ARGUMENT

The Commission reasonably determined that Great Lakes' tariffed rates exceeded the incumbent benchmark imposed on CLECs under 47 C.F.R. § 61.26(f).

1. The FCC reasonably concluded that Great Lakes is a CLEC under Section 61.26, and is therefore subject to the benchmark rule. Great Lakes meets all parts of the definition of a CLEC, including that it provides "some . . . exchange access services used to send traffic to or from an end user." 47 C.F.R. § 61.26(a)(1). Great Lakes does not escape the Commission's rules because it is an intermediate carrier that does not *directly* serve end users.

The Commission addressed situations precisely like this one in Section 61.26(f), which the Commission adopted in 2004 in order to curtail the "monopoly power" of competitive LECs, such as Great Lakes, "when they act as intermediate carriers." *Eighth Report & Order* ¶ 17.

Great Lakes relies on snippets from the Commission's 2011 *Transformation Order* in arguing that it should not be deemed a CLEC. *USF/ICC Transformation Order*, 26 FCC Rcd 17663 (2011) ("*Transformation Order*"), *pets. for review denied sub nom. In re FCC* 11-161, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).[5] Its reliance is unfounded. That Order did not address the benchmark for CLEC access rates. And contrary to Great Lakes' assertions, the *Transformation Order* expressly held that "[a]ll intercarrier switched access rate elements . . . are capped." *Id.* ¶ 801, Fig. 9.

2. Great Lakes does not qualify for the rural exemption to the benchmark rule. That exemption is intended to "encourage competitive entry in truly rural markets." *Eighth Report & Order* ¶ 37. Because Great Lakes admits that its service area falls within large urban areas, *see Order* ¶ 27 (JA

[5] In the *Transformation Order*, the FCC comprehensively revised its intercarrier compensation and universal service rules. As discussed later, *see infra* at 23-25, that Order has little relevance to this case.

__), it is ineligible for the exemption. Great Lakes' position that it is a rural CLEC because it does not serve any end users *anywhere* is an absurd interpretation of the rule, as it would allow *all* intermediate carriers to obtain a rural exemption. This result is squarely at odds with the Commission's goal in keeping the exemption "as narrow as possible." *Eighth Report & Order* ¶ 35.

3. The Commission reasonably determined that AT&T Michigan is the "competing ILEC" against whose rates Great Lakes should be measured. The 8YY traffic at issue was handed off to LEC-MI, which operates an end office switch in Southfield, Michigan. *Order* ¶¶ 8, 14 (JA __, ___). Had Great Lakes not inserted itself into the traffic stream, LEC-MI ordinarily would have handed the traffic off to AT&T Michigan, the incumbent carrier that services Southfield. *Id.*¶ 17.

4. Great Lakes' other arguments are unavailing.

a. Great Lakes' unconstitutional takings claim has no merit because it pertains to alleged injuries that will not occur, if at all, until years in the future. Great Lakes does not argue that subjecting it to the benchmark rule at *present* will force it out of business. Therefore, it has no takings claim for the time period relevant to this case. And, significantly, Great Lakes in all events is free to negotiate a contract with AT&T to charge access rates higher than

what is permitted under the benchmark rule. Its claim is thus entirely speculative.

b. The Commission's retroactive application of the order does not result in manifest injustice. At the outset, there is a substantial question whether Great Lakes sufficiently raised this issue before the Commission. Failure to raise the issue would preclude this Court's review under 47 U.S.C. § 405(a).

Great Lakes' claim also fails on the merits. Retroactivity is the norm in agency adjudications, *see Am. Tel. & Telegraph Co. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006), and the exception to this general rule is only where applying a "new rule to past conduct or prior events would work a 'manifest injustice.'" *Clark-Cowitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987). The challenged Order did not apply a new rule, nor did it change settled law. Indeed, over a decade ago, the Commission adopted a rule making applicable the benchmark rate to intermediate carriers that do not directly serve end users—like Great Lakes.

c. Great Lakes had fair notice that it was subject to the benchmark rule under Section 61.26. Great Lakes cannot feign surprise that the Commission determined that it was a CLEC when its own tariff stated for twelve years that it was a CLEC. *Order* ¶ 24 (JA __). In addition, the Commission provided

fair notice over a decade ago when it expanded the benchmark rule to include "competitive LECs when they act as intermediate carriers." *Eighth Report & Order* ¶ 17. This is reflected in the language of Section 61.26(f), which applies the benchmark rule to CLECs that provide "some" of the "access services used to send traffic to or from an end user not served by that CLEC." Great Lakes also had fair notice of the Commission's interpretation of the rural exemption. The Commission repeatedly emphasized that the exemption was designed to "encourage competitive entry in truly rural markets." *Eighth Report & Order* ¶ 37. Great Lakes does not serve rural end users and its service areas falls within urban areas.

7. Finally, the Commission did not hold, as Great Lakes contends, that AT&T may recover for periods outside the two year statute of limitations in 47 U.S.C. § 415. That issue remains open. The FCC left the adjudication of any affirmative defenses Great Lakes may have to a subsequent damages phase of the proceeding, which has not yet taken place.

STANDARD OF REVIEW

The petitioners bear a heavy burden to establish that the FCC's *Order* is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the Order is entitled to a presumption of validity. *E.g.*, *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C.

Cir. 2004). The *Order* must be affirmed unless the agency failed to consider relevant factors or made a clear error in judgment. *E.g.*, *Consumer Elec. Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

In addition, an agency's interpretation of its own rules is also "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

ARGUMENT

The benchmark rule provides that a CLEC cannot tariff interstate access charges above the "competing ILEC" rate. 47 C.F.R. § 61.26(b). The Commission reasonably concluded that Great Lakes was subject to the benchmark rule and that its tariff was unlawful because its rates well exceeded those of the competing ILEC. On appeal, Great Lakes argues that it is not subject to the benchmark rule because (1) it is not a CLEC; (2) if it is a CLEC, it is a rural CLEC and therefore exempt from the benchmark rule; and (3) even if it is a CLEC and not exempt as a rural CLEC, AT&T Michigan is not the incumbent local exchange carrier against whom Great Lake's tariffed rates should be measured. Great Lakes also insists that the judgment: (4) amounts to an unconstitutional taking; (5) was impermissibly retroactive; (6) deprived Great Lakes of fair notice; and (7) was based on a misreading of the statute of limitations. All of these arguments fail.

I. THE COMMISSION REASONABLY CONCLUDED THAT GREAT LAKES IS A CLEC AS DEFINED BY SECTION 61.26(A)(1).

The Commission reasonably determined that Great Lakes is a CLEC subject to the benchmark rule. Section 61.26(a)(1) of the Commission's rules defines a CLEC as a "local exchange carrier"; "that provides some or all of the interstate exchange access services used to send traffic to or from an end user"; and that "does not fall within the definition of 'incumbent local exchange carrier." 47 C.F.R. § 61.26(a)(1).

It is undisputed that Great Lakes is a local exchange carrier. *See* 47 U.S.C. § 153(32) (a LEC is any entity "engaged in the provision of telephone exchange service or exchange access"); *Joint Stipulated Facts* ¶ 21 (JA __). In addition, Great Lakes stipulated that it is not an incumbent local exchange carrier. *Joint Stipulated Facts* ¶ 14 (JA _). According to its tariff, Great Lakes provides "some . . . exchange access services," such as tandem switched transport termination, tandem switched transport facility, and tandem switching. *Order* ¶ 10 (JA __); 47 C.F.R. § 61.26(a)(3)(i). These services are in turn used to send traffic to or from an end user—namely, AT&T's 8YY customers. *Order* ¶ 20 (JA __). Great Lakes therefore comfortably falls within the definition of a CLEC subject to the benchmark rule.

A. The Commission's Rules Do Not Require That A CLEC Have Its Own End Users.

Great Lakes nevertheless contends that it is not a CLEC because it does not directly serve end users. Corrected Joint Brief of Petitioners Great Lakes Comnet, Inc. and Westphalia Telephone Company (Sept. 2, 2015) at 26 (Great Lakes Br.). In so arguing, Great Lakes faces a steep uphill battle. The Commission's interpretation of its own regulations is entitled to a "high level of deference," and controls unless Great Lakes can show that the interpretation "[is] plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461. Great Lakes fails to meet its burden.

As the Commission found, *Order* ¶ 20 (JA___), the definition of CLEC is not limited to carriers that directly serve end users or only have their own end users. Instead, the definition states that a CLEC is a local exchange carrier that provides "some or all of the interstate exchange access services used to send traffic to or from *an* end user," 47 C.F.R. § 61.26(a)(1) (emphasis added), regardless of whether that end user is directly served by the local exchange carrier. Great Lakes seeks to artificially divide Section 61.26(a)(1) into "four elements," Great Lakes Br. at 26 , the second and third of which are that the LEC "[2] provides some or all of the interstate exchange access services" that are "[3] used to send traffic to or from an end user," *id.* (bracketed numbers added by Great Lakes, other emphasis omitted), claiming

the Commission's interpretation renders the so-called third element "surplusage". Great Lakes Br. at 26. But Great Lakes has invented this four-part division out of whole cloth. Because of the use of a definite article "the" preceding "interstate exchange access services," it is difficult to understand what that phrase refers to without the clarifying phrase "used to send traffic to or from an end user" that follows. In other words, what Great Lakes calls elements two and three are properly read as a single element. Accordingly, there is no surplusage.

Moreover, the definition does not state that the services have to be used to send traffic to or from the carrier's *own* end users. Rather, the phrase "used to send traffic to or from an end user" makes clear that all providers of interstate exchange access services in the chain connecting long-distance carriers to end users are defined as CLECs. Great Lakes readily satisfies this definition.

Indeed, had the Commission intended to narrow the scope in the manner Great Lakes claims, it could easily have opted to make that intent clear in the definition of CLEC in any number of different ways. For example (changes to the actual definition highlighted in bold):

> "CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from **its** end user and does not fall within the

> definition of 'incumbent local exchange carrier in 47 U.S.C. 251(h)."
>
> "CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic **directly** to or from an end user…"
>
> "CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user **that it directly serves**…"

Instead, the Commission adopted a broader definition that covers carriers that provide "some or all" interstate exchange access services, irrespective of whether they have their own end users. *Order* ¶ 20 (JA___); 47 C.F.R. § 61.26(a)(1).

The *Order*'s interpretation of Section 61.26 is consistent with its history. In the *Eighth Report and Order*, the Commission expanded the benchmark rule to apply to situations precisely such as this one:

> Because of the many disputes related to the rates *charged by competitive LECS when they act as intermediate carriers, we conclude that it is necessary to adopt a new rule to address these situations.* Specifically, we find that the rate that a competitive LEC charges for access components *when it is not serving the end-user* should be no higher than the rate charged by the competing incumbent LEC. We conclude that regulation of these rates is necessary for all the reasons that we identified in the CLEC Access Reform Order. Specifically . . . an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.

Eighth Report & Order ¶ 17 (emphasis added). This language makes clear that the Commission did not intend to limit the definition of a CLEC to only those entities that serve their own end users. The agency expressly stated that *intermediate carriers that do not serve end-users* would still be subject to the benchmark rule.

In light of the Commission's pronouncement in the *Eighth Report & Order* that the CLEC access rules apply to intermediate carriers, the Commission changed the definition of a CLEC under Section 61.26(a)(1). Previously, a CLEC had been defined as "a provider of interstate exchange access services that does not fall within the definition of 'incumbent local exchange carrier.'" *Seventh Report & Order*, Appendix B. In 2004, the Commission altered the definition to "a local exchange carrier that provides some or all of the interstate exchange access services . . . ." This modification makes clear that intermediate carriers such as Great Lakes—which provide only *some* exchange access services because they do not have their own end users—are also CLECs and thus are subject to the benchmark rule.

In addition, the Commission added subsection (f) to Section 61.26. *Eighth Report & Order* ¶ 17; 47 C.F.R. § 61.26(f). The rule provides that a CLEC cap on tariffed access charges applies "[i]f a CLEC provides some

portion of the switched exchange access services used to send traffic to or from an end user *not served by that CLEC*." 47 C.F.R. § 61.26(f) (emphasis added). Great Lakes is subject to Section 61.26(f) because it provides "some portion" of the switched exchange access services used to send traffic to or from end users that it does not serve.[6]

In short, the Commission reasonably concluded that applying Section 61.26 to intermediate carriers like Great Lakes was supported by the text, structure and history of Section 61.26.

B. Great Lakes' Reliance On The *Transformation Order* Is Misplaced.

Great Lakes insists that the Commission's finding that it is a CLEC subject to the benchmark rule is inconsistent with the Commission's statement in the *Transformation Order* that "[it] does not address the transition in situations where the tandem owner does not own the end office." Great Lakes Br. at 31 (quoting *Transformation Order* ¶ 1312). From this

[6] In determining that Great Lakes was a CLEC, the Commission also pointed out that for twelve years, Great Lakes' own tariff stated that it was a CLEC. *Order* ¶ 24 (JA __); *Great Lakes Tariff F.C.C. No. 20* (JA __) ("The Company is a rural CLEC under Section 61.26(a)(6) of the FCC's Rules."). A rural CLEC, by definition, is a type of CLEC. Then, a mere four days before filing an Answer in this case, Great Lakes filed a revision to its access tariff deleting the CLEC reference. *Order* ¶ 24 (JA __).

statement, Great Lakes contends that it is not subject to the benchmark rule (and thereby not a CLEC, since only CLECs are subject to the benchmark) because it does not own an end office. *Id*.

But it was the *Seventh Report and Order* that adopted the benchmark for CLEC access rates and explained its application in detail. *Seventh Report & Order* ¶ 45. And the *Eighth Report and Order* made clear the benchmark rule applied to intermediate carriers like Great Lakes. *Eighth Report & Order* ¶ 17. Nothing in the *Transformation Order* changed this.

In fact, in the *Transformation Order*, the Commission reaffirmed that "[w]e maintain the benchmarking approach to the regulation of rates of competitive LECs", *Transformation Order* ¶ 694, but did not otherwise address the benchmark for CLEC access rates. The statement in the *Transformation Order* upon which Great Lakes relies was regarding a new rule under which the access rates of certain carriers would be transitioned to a bill and keep system. *Order* ¶ 22 (JA __). Under bill and keep, carriers recover their costs from end-users, as opposed to other carriers. *Transformation Order* ¶ 34. That rule has no relevance here. The issue at hand is not what Great Lakes may charge once the transition to bill and keep is complete, but rather whether they were subject to the Commission's

benchmark rule during the period prior to October 2014, when AT&T filed its formal complaint.

Great Lakes asserts that the *Transformation Order* "preserved [the Commission's] policy of not imposing rate caps on carriers that do not serve end-users. . . ." Great Lakes Br. at 15-16. But the Commission has never had such a policy. *Order* ¶ 22 (JA __). The *Eighth Report and Order* expressly imposed such rate caps, and in the *Transformation Order* the Commission simply confirmed that "[a]ll intercarrier switched access rate elements, including interstate and . . . originating and terminating rates . . . are capped."[7] *Transformation Order* ¶ 801, Fig. 9. In short, nothing in the *Transformation Order* undermines the Commission's longstanding determination that intermediate carriers that do not directly serve end users, such as Great Lakes, are CLECs subject to the benchmark rule.

[7] The only exception to this general rule is an exemption for intrastate originating charges imposed by rate of return regulated carriers. *Transformation Order* ¶ 801, Fig. 9. That exception is inapplicable here because all of the charges at issue are *interstate*. *Order* ¶ 1 (JA __).

II. THE COMMISSION REASONABLY CONCLUDED THAT GREAT LAKES DID NOT QUALIFY FOR THE RURAL EXEMPTION TO THE BENCHMARK RULE.

Great Lakes also argues in the alternative that even if it is a CLEC, it is a *rural* CLEC exempt from the benchmark rule. Great Lakes Br. at 36-40; s*ee* 47 C.F.R. § 61.26(e). That assertion is unfounded.

A rural CLEC is a "CLEC that does not serve (*i.e.*, terminate traffic to or originate traffic from) any end users located within [two types of urban areas]." 47 C.F.R. § 61.26(a)(6). Great Lakes has an extensive fiber network that includes facilities in numerous urban areas, including Chicago and Detroit. *Order* n.100 (JA __). Indeed, Great Lakes stipulated that it serves urban areas. *Id.* ¶ 27 (JA __). In addition, the 8YY wireless traffic that Great Lakes directed to AT&T originated from locations across the country, including urban areas. *Id*. n.100 (JA __). Therefore, the Commission reasonably concluded that Great Lakes was ineligible for the rural exemption.

The Commission's reading of the rural exemption—to which this Court owes substantial deference under *Auer*—is consistent with the FCC's express statements about the scope of the exemption when it was first created. The exemption was designed to account for rural carriers having higher costs, specifically the costs of building and operating a network in rural markets and

fewer customers to whom these costs could be spread. *Seventh Report & Order* ¶¶ 65-66. When the FCC adopted the exemption in 2001, the agency emphasized that it would only be available to "a small number of carriers serving a tiny portion of the nation's access lines." *Seventh Report & Order* ¶ 68. Three years later, the Commission reiterated that the exemption was "designed as a narrow exception to the otherwise market-based rule that ties competitive LEC rates to those of their incumbent competitors in the access market." *Eighth Report & Order* ¶ 37. Accordingly, the exemption does not apply "if any portion of the competitive LEC's service area falls within a non-rural area." *Id*. ¶ 33. Indeed, the Commission stated that having even "a single end-user in a non-rural area" disqualified a CLEC from the rural exemption. *Id*. ¶ 36; *Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c) or in the Alternative, Section 61.26(a)(6) of the Commission's Rules*, 23 FCC Rcd 2556 (2008) ¶ 5 ("*PrairieWave Order*").

Great Lakes contends that it is a rural CLEC because it does not serve any end users *anywhere* (whether in rural or urban areas). Great Lakes Br. at 40. In support of this point, Great Lakes points to language in the *Order* that the exemption applies only to carriers that "serve rural end users, and only rural end users." *Id*. at 38 (quoting *Order* n.96 (JA __)). This language

simply emphasizes that the rural exemption is available only for those CLECs that serve only rural areas, which Great Lakes indisputably does not.[8]

Under Great Lakes' flawed logic, all intermediate CLECs that serve no end users would automatically qualify for the rural exemption, irrespective of where they operated. Therefore, a carrier whose service area fell entirely within midtown Manhattan would be deemed a "rural CLEC" so long as it did not directly serve any end users there. In short, a carrier devoid of any connection to a rural area could nevertheless claim the rural exemption under Great Lakes' distorted reading of the Commission's rules. Even Great Lakes' supporting *amici* find that reading "peculiar at best." *See NTCA Amicus Br.* at 9. While Great Lakes creatively seeks to parse the language of the rule to support its argument, the Commission reasonably interpreted the exemption so as not to produce this bizarre result. *See Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1068 (D.C. Cir. 1998) ("If a literal construction of the words

[8] Great Lakes' reliance on the *PrairieWave Order* is similarly misplaced. In that Order, the Commission denied PrairieWave's request for a waiver to allow it to operate under a rural exemption while serving customers in Sioux Falls, South Dakota, an urban area. *Id.* ¶ 1. In so doing, the Commission reaffirmed that even a "single end user in a non-rural area" disqualifies a carrier from the rural exemption. *Id.* ¶ 5 (quoting *Eighth Report & Order* ¶ 36). Far from being helpful for Great Lakes, the *PrairieWave Order* confirmed that the rural exemption applies only to carriers "serving exclusively rural areas." *Id.*

of a statute be absurd, the act must be so construed as to avoid the absurdity."). Great Lakes' interpretation of the rural exemption defies common sense.

In addition, the interpretation is squarely at odds with the Commission's intent in crafting the exemption. *See Darrell Andrews Trucking, Inc. v. Fed. Motor Carriers Safety Admin.*, 296 F.3d 1120, 1128 (D.C. Cir. 2002) ("it is hardly arbitrary to construe the regulation in light of its purpose."). The rural exemption was designed to be kept "as narrow as possible to minimize the strain it placed on the interexchange market." *Eighth Report & Order* ¶ 35. Accepting Great Lakes' overbroad interpretation would result in the opposite effect. Allowing all CLECs that do not serve end users—that is to say, all intermediate carriers—to qualify for the rural exemption would provide an enormous loophole to those claiming rural CLEC status (and the accompanying higher tariff rate afforded to rural CLECs). The Commission properly rejected it. *See PrairieWave Order* ¶ 16 (denying carrier's request for a waiver that would allow it to qualify for the rural exemption, as doing so "would greatly increase the number of lines eligible to be served under the rural exemption, thereby undermining the objective of a narrow rural exemption . . . . ").

III. THE COMMISSION REASONABLY CONCLUDED THAT AT&T MICHIGAN IS THE COMPETING ILEC.

Under Section 61.26(f) of the Commission's rules, Great Lakes was permitted to "assess a rate equal to" the rate charged by "the competing ILEC" for "all exchange access services required to deliver interstate traffic to the called number." 47 C.F.R. § 61.26(f). The "competing ILEC" is the incumbent local exchange carrier "that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC." 47 C.F.R. § 61.26(a)(2).

The Commission concluded that, for purposes of applying the benchmark rule to Great Lakes, AT&T Michigan is the competing ILEC. *Order* ¶ 25 (JA ___). The 8YY wireless aggregated traffic at issue was handed off to LEC-MI, which operates an end office switch in Southfield, Michigan. *Id.* ¶¶ 8, 14 (JA __, __). AT&T Michigan is the incumbent carrier that serves Southfield. *Id.* ¶ 17 (JA __). Therefore, the Commission

reasonably determined that AT&T Michigan was the relevant competing ILEC.[9]

Great Lakes asserts that the Commission erred in finding AT&T Michigan to be the competing ILEC, Great Lakes Br. at 43, but does not offer a reasonable alternative. Instead, Great Lakes quotes language from the *Eighth Report & Order* that "there is only one 'competing ILEC' and one 'competing ILEC rate' for each end user," *Eighth Report & Order* ¶ 47, to argue that the Commission should have looked to "the location of the end user for each call" to determine the competing ILEC. Great Lakes Br. at 43. But the statement in the *Eighth Report & Order* upon which Great Lakes relies explained how CLECs should benchmark their rates in situations when there are *multiple* incumbent carriers in a service area. That is not the case here. AT&T Michigan is the sole ILEC that services Southfield, Michigan. *Order* ¶ 17 (JA __). The question here instead is how the benchmark rate should be calculated given that the end users of the 8YY calls are located

[9] In their pleadings before the Commission, Great Lakes all but acknowledged that AT&T Michigan competes in the same service area as Great Lakes. *See Legal Analysis in Opposition to Formal Complaint* (Nov. 12, 2014*)* at 2-3 (JA__) (Great Lakes was formed so that small, rural incumbent local telephone companies in Michigan could "reduce their dependency on the services provided only by the large monopolist ILECs such as AT&T's Michigan ILEC affiliate, and avoid being at the mercy of these large carriers.").

nationwide. *See Order* ¶ 5 (JA __). Under Great Lakes' reading, the parties would need to look to the rates of potentially hundreds of competing ILECs to determine intercarrier compensation. That is inconsistent with the Eighth Report & Order's directive to "minimize the burdens" in determining the competing ILEC. *Eighth Report & Order* ¶ 77.

Moreover, the issue at hand involves access charges related to how the calls were transported, not how they were originated. *Order* ¶ 14 (JA __). Had Great Lakes not inserted itself into the traffic path, LEC-MI ordinarily would have carried the traffic from its end office switch in Southfield, Michigan to AT&T Michigan—whose tandem office switch is located only seven miles from LEC-MI's end office switch. *Joint Stipulated Facts* ¶ 109 (JA __). AT&T Michigan—the incumbent carrier in Southfield, Michigan—would have then transported the traffic to AT&T to complete the call. *Order* ¶ 17 (JA __). Under these facts, the Commission reasonably determined that AT&T Michigan is the competing ILEC.

IV. GREAT LAKES' REMAINING CLAIMS ARE MERITLESS.

A. Great Lakes Has No Viable Takings Claim For The Time Period Relevant To This Case

Great Lakes asserts that the Commission's determination that it is subject to the benchmark rule amounts to an unconstitutional regulatory

taking because the Commission's rules will force Great Lakes' rates to zero by July 1, 2018. Great Lakes Br. at 45-47. Great Lakes reasons that under the Commission's interpretation of the benchmark rule, it is required to match the rates of AT&T Michigan, and under the *Transformation Order*, AT&T Michigan will be required to transition to a bill and keep regime by that date and no longer will be able to charge other carriers for access. *Id*. at 46-47. As such, Great Lakes argues it will be unable to recover any of its access costs. *Id.*

Great Lakes' taking claim is meritless. Great Lakes does not contend that AT&T Michigan's current access rates are insufficient for Great Lakes to stay in business. Even if the benchmark rate for the specific services at issue in this case *is* reduced to zero in 2018, there can be no takings claim with respect to the benchmark rates Great Lakes was permitted to charge for the period prior to the filing of AT&T's formal complaint at issue here.

In addition, even with respect to services after 2018, nothing in the *Transformation Order* would prevent Great Lakes from negotiating a contract with AT&T to charge access rates higher than what is permitted under the benchmark rule. *See Order* ¶ 10 (JA __); *Seventh Report & Order* ¶ 4, 40; *Eighth Report & Order* ¶ 55. To the extent that Great Lakes provides "benefits" to interexchange carriers like AT&T—as it claims, *see* Great

Lakes Br. at 9-10,—AT&T should be willing to pay for them. *See Seventh Report and Order* ¶ 43 (interexchange carriers may be willing to pay rates about the benchmark "[i]f a particular CLEC provides a superior quality of access service, or if it has a particularly desirable subscriber base."). Thus, any unconstitutional takings claim with respect to this future period is entirely hypothetical.

B. Retroactive Application Of The Order Does Not Result In Manifest Injustice.

Great Lakes argues that even if the *Order* were lawful, the Commission would be barred from applying it retroactively—despite retroactivity being "the norm in agency adjudications," *Am. Tel. & Telegraph Co.*, 454 F.3d at 332—because retroactive application would result in "manifest injustice." Great Lakes Br. at 48.

At the outset, there is a substantial question as to whether Great Lakes sufficiently raised this issue before the Commission. *See* 47 U.S.C. § 405(a). Great Lakes makes a passing reference to retroactivity in its pleading, asserting that the Commission should reject "AT&T's attempt to retroactively expand the scope of Section 61.26 to cover carriers that such rules were never meant to apply." *See Legal Analysis in Opposition to Formal Complaint* at 23 (JA__). (Great Lakes' other reference to retroactivity is a footnote in response to AT&T's access stimulation claim, which the Commission

dismissed). But to preserve an argument on appeal under 47 U.S.C. § 405(a), the issue must be brought to the Commission's attention distinctly; the Commission "'need not sift pleadings and documents to identify arguments that are not 'stated with clarity' by a petitioner." *Bartholdi Cable v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) (citation omitted). The petitioner is required to "assume[] at least a modicum of responsibility for flagging the relevant issues which its documentary submissions presented." *Id*. at 280. And nowhere in its pleadings before the Commission did Great Lakes argue that retroactive application of the decision would result in manifest injustice. Under the circumstances, the Commission was not fairly "afforded the opportunity to pass on the issue." *Id*. at 279.

In any event, Great Lakes' argument fails. Retroactivity works a manifest injustice only when an agency ruling "upset[s] settled expectations—expectations on which a party might reasonably place reliance." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007). That is not the case here. The challenged Order did not apply a new rule; nor did it change settled law. Eleven years ago, the Commission adopted a rule explicitly applying the benchmark rule to CLEC intermediate carriers, such as Great Lakes, that do not directly serve end users. 47 C.F.R. § 61.26(f); *see also Eighth Report & Order* ¶ 17. Specifically, the Commission explained,

"the rate that a competitive LEC charges for access components *when it is not serving the end-user* should be no higher than the rate charged by the competing incumbent LEC for the same functions." *Eighth Report & Order* ¶ 17 (emphasis added). The Commission repeated this proposition an additional five times in the *Eighth Report and Order*. *Eighth Report & Order* ¶¶ 9, 72, 75, 113, 119. And the Commission codified this new rule as 47 C.F.R. § 61.26(f). That now eleven-year-old provision expressly limits a CLEC's access rates to the benchmark rate when the CLEC operates as an intermediate carrier to provide "some portion of the . . . access services used to send traffic to . . . an end-user *not served by that CLEC*." 47 C.F.R. § 61.26(f) (emphasis added).

Great Lakes insists that it reasonably relied on a Commission statement in the *Transformation Order* that "the [*Transformation Order*] does not address the transition in situations where the tandem owner does not own the end office." Great Lakes Br. at 49 ; *Transformation Order* ¶ 1312. But the relevant order here is the *Eighth Report and Order*. Furthermore, as we have explained, *see* pp. 23- 25 *supra* [Section 1.B.], the *Transformation Order* in any event reaffirmed that the Commission was "retain[ing] the [CLEC] benchmark[] rule," *Transformation Order* ¶ 694, and did not otherwise address the benchmark for CLEC access rates. The statement in the

Transformation Order upon which Great Lakes relies pertains to a new rule under which the access rates of certain carriers would in the future be transitioned to bill-and-keep, a system in which carriers recover costs from their end users as opposed to other carriers. *Transformation Order* ¶ 34. That rule has no relevance to an application of the benchmark rule prior to the transition, as in this case.

C. Great Lakes Had Fair Notice That It Was Subject To The Benchmark Rule And Did Not Qualify For The Rural Exemption.

Great Lakes contends that it cannot be subject to the benchmark rule because it did not have "fair notice" that the rule "applied to tandem [switch] owners that do not own the end office." Great Lakes Br. at 52. But Great Lakes had fair notice "of the agency's interpretation in the most obvious way of all: by reading the regulations." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995). "If, [after] reviewing the regulations and other public statements issued by the agency, a . . . party acting in good faith would be able to identify with 'ascertainable certainty' the standards with which . . . to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *Id.*

Here, the Commission provided fair notice over a decade ago when it modified the benchmark rule to include "competitive LECs when they act as

intermediate carriers." *Eighth Report & Order* ¶ 17. The Commission also expressly stated that "[t]his new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis." *Id.* Taken together with the language of Section 61.26(f), which applies the benchmark rule to CLECs that provide "some" of the "access services used to send traffic to or from an end user not served by that CLEC", 47 C.F.R. § 61.26(f), Great Lakes had fair notice that it would be subject to Section 61.26.

Similarly, Great Lakes had fair notice that it could not qualify for the rural exemption. As Great Lakes stipulated, its service area falls within urban areas. *Order* ¶ 27 (JA __). Great Lakes' position that an access provider operating entirely in an urban area can claim the rural exemption, so long as it has no direct end users in any locale, is not a reasonable interpretation of the regulation and should be afforded no weight. *See Clark Cowitz Joint Operating Agency*, 826 F.2d at 1081 (party's reliance on its interpretation of an agency regulation must be reasonable).[10]

[10] Great Lakes does not contend that it lacked fair notice that the Commission would determine AT&T Michigan to be the competing incumbent carrier for purposes of the benchmark rule.

D. The Commission Has Not Yet Determined Whether AT&T's Claims Are Subject To The 2-Year Statute of Limitations Period.

Finally, Great Lakes asserts that to the extent the Order determined that AT&T's claims were not barred for periods outside of the two-year statute of limitations set forth in 47 U.S.C. § 415, this finding was in error.[11] Great Lakes Br. at 53. The *Order* made no such finding, however.

In accordance with the Commission's rules, AT&T elected to bifurcate the liability and damages claims in its complaint. *Order* ¶ 3 (JA __); *see* 47 C.F.R. § 1.722(d). While the Commission found that AT&T "filed its complaint within the applicable statute of limitations," *Order* ¶ 36 (JA __), the Commission did "not address" in the *Order* any of Great Lakes' "affirmative defenses relating to the extent of any damages AT&T allegedly incurred." *Order* ¶ 38 (JA__).

Great Lakes complains (Great Lakes Br. at 54) that the Commission stated that "[a]ny delay by AT&T in challenging [Great Lakes'] rates was the result of [Great Lakes'] conduct and therefore, is excusable." *Order* ¶ 36 (JA__). But that statement was not directed to the applicable period for

[11] 47 U.S.C. § 415(c) generally provides that actions at law for recovery of carrier overcharges shall be commenced within two years after the cause of action accrues.

recovery of damages. Instead, it was made to support the Commission's determination that AT&T had "not waived any of its claims for relief." *Id*.

The damages proceeding is the appropriate time for the Commission to evaluate whether and how AT&T's claims are limited by the two-year statute of limitations. *See Verizon Tel. Co. v. FCC*, 269 F.3d 1098, 1112 (D.C. Cir. 2001) (issues related to the amount that carriers would pay and the time period covered by the payments would be addressed at the damages proceeding, and were therefore not ripe for the Court's review). Great Lakes will have ample opportunity to raise its statute of limitations arguments during the damages proceeding, which has yet to occur.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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October 5, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GREAT LAKES COMNET, INC. AND WESTPHALIA TELEPHONE COMPANY, PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS. AT&T SERVICES, INC., AT&T CORP., VERIZON, SPRINT COMMUNICATIONS COMPANY L.P AND CENTURYLINK COMMUNICATIONS, LLC, INTERVENORS FOR RESPONDENTS.	NO. 15-1064

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the captioned case contains 8,658 words.

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ADDENDUM

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise

47 U.S.C. § 405 (cont'd)

statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 61.26

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 61. TARIFFS
SUBPART C. GENERAL RULES FOR NONDOMINANT CARRIERS

§ 61.26 Tariffing of competitive interstate switched exchange access services.

(a) Definitions. For purposes of this section, the following definitions shall apply:

(1) CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).

(2) Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

(3) Switched exchange access services shall include:

(i) The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;

47 C.F.R. § 61.26 (cont'd)

(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.

(4) Non-rural ILEC shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(44).

(5) The rate for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) Rural CLEC shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.

47 C.F.R. § 61.26 (cont'd)

(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.

(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption. Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Beginning July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.

(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

47 C.F.R. § 61.26 (cont'd)

(g) Notwithstanding paragraphs (b) through (e) of this section:

(1) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.

(2) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in § 61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in § 61.3(bbb).

15-1064

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Great Lakes Comnet, et al., Petitioners

v.

Federal Communications Commission
and the United States of America, Respondents

CERTIFICATE OF SERVICE

I, Thaila K. Sundaresan, hereby certify that on October 5, 2015, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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