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

NOS. 18-1007, 18-1257, 19-1013

AT&T CORP.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

IOWA NETWORK SERVICES, D/B/A AUREON NETWORK SERVICES,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

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.

Petitioners are AT&T Corp. (AT&T) and Iowa Network Services, Inc. d/b/a Aureon Network Services (Aureon). Respondents are the Federal Communications Commission (FCC) and the United States of America. Intervenors are South Dakota Network, LLC and Sprint Communications Company L.P.

2. Rulings under review.

The rulings under review are: *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, 32 FCC Rcd 9677 (2017); *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Order on Reconsideration, 33 FCC Rcd 7964 (2018); and *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Second Order on Reconsideration, 33 FCC Rcd 11855 (2018).

3. Related cases.

AT&T and Aureon have each petitioned for review of FCC decisions in a separate but related administrative proceeding regarding the lawfulness of a tariff filed by Aureon. *See Iowa Network Services, Inc. d/b/a Aureon Network Services v. FCC*, Case No. 19-1087 (D.C. Cir. filed Apr. 16, 2019); *AT&T Services, Inc. v. FCC*, No. 19-1014 (D.C. Cir. filed Jan. 18, 2019); *Iowa Network Services, Inc. d/b/a Aureon Network Services v. FCC*, Case No. 18-1258 (D.C. Cir. filed Sept.

19, 2018). This Court consolidated those three tariff investigation-related cases, and is holding them in abeyance. Order in Case Nos. 18-1007, *et al.* (July 15, 2019).

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GLOSSARY

Access Charges	Charges that local telephone companies impose on long-distance carriers for access to their local telephone networks to complete calls
Access Stimulation (or Traffic Pumping)	An arrangement between a local telephone company and a provider of high call volume operations to inflate the company's access minutes in return for some benefit to the provider
Bill-and-Keep Transition	Comprehensive plan adopted by the Federal Communications Commission in its 2011 *Transformation Order* to phase out the access charge system of intercarrier compensation
CEA Provider	Centralized Equal Access Provider. An intermediate carrier that connects long-distance carriers to local telephone companies serving rural areas.
IXC	Interexchange Carrier. A long-distance carrier that connects local telephone companies' end users to other local telephone networks.
LEC	Local Exchange Carrier. A local telephone company. LECs are divided between "incumbent" LECs that provided exchange service when the Telecommunications Act of 1996 was enacted, and new entrants into local telephone markets after 1996, known as "competitive" LECs.

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QUESTIONS PRESENTED

In 2011, the Commission reformed the "access charge" regime that governs intercarrier compensation for exchanging telephone calls. As part of the transition to a "bill-and-keep" system, the FCC capped most access rates of all local telephone companies ("local exchange carriers" or "LECs") at then-existing levels.

In the adjudicatory orders on review, the FCC determined that Aureon's 2013 rate exceeded the applicable rate cap at the time it was filed and thus was void *ab initio*. On reconsideration, the FCC found that Aureon's 2012 rate remained in effect during the relevant period. This case presents the following questions:

1. Did the Commission reasonably conclude that Aureon's 2013 rate was not "deemed lawful" under 47 U.S.C. § 204(a)(3) because it violated the prescribed rate cap at the time it was filed?

2. Did the FCC correctly determine that Aureon, like all other local exchange carriers, is subject to bill-and-keep transition requirements?

3. Did the FCC correctly determine that, because Aureon's 2013 rate was void *ab initio*, Aureon's 2012 rate remained in effect, and that AT&T forfeited the opportunity to challenge the 2012 rate's "deemed lawful" status by failing to allege or establish violation of a prescribed rate cap either in its original Complaint or in response to Aureon's petition for reconsideration?

4. Did the FCC correctly determine that Aureon did not violate the Commission's access-stimulation rule?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. Statutory Framework.

Section 201(b) of the Communications Act of 1934, as amended (the "Act"), mandates that rates for interstate communications services be "just and reasonable." 47 U.S.C. § 201(b). In service of this mandate, carriers must file "schedules of charges" – commonly referred to as tariffs – with the Commission listing interstate services and the applicable rates. *Id.* § 203. The FCC may suspend a tariff for a limited time period before the tariff becomes effective to evaluate its lawfulness. *Id.* § 204(a). The FCC may also prescribe just and reasonable rates to be charged in the future. *Id.* §§ 154(i), 201-205. "Any person" may file a complaint with the Commission that a carrier's effective tariff is unlawful, *id.* § 208(a), and request damages. *Id.* §§ 206, 207.

In 1996, Congress amended Section 204(a) of the Act by adding subsection (3). *See Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170 (1997). Section 204(a)(3) provides that a carrier "may file with the Commission a new or revised charge … on a streamlined basis" and that "[a]ny such charge … shall be deemed lawful" if the FCC does not suspend or investigate it within seven days if the rate decreases or within 15 days if the rate increases. 47 U.S.C. § 204(a)(3).

B. The Access Charge System and Its Reform.

This case involves tariffed charges that local exchange carriers impose on

long-distance carriers ("interexchange carriers" or "IXCs") for providing access to local telephone networks.[1] The Commission established the access charge system after the 1984 AT&T divestiture to enable local exchange carriers to recover costs that they previously recovered through AT&T's monopoly system. *Connect America Fund*, 26 FCC Rcd 4554, 4704-05 ¶¶ 497-98 (2011).

With the passage of the Telecommunications Act of 1996 ("1996 Act"), local exchange carriers were subdivided between incumbent LECs, which provided access service when the 1996 Act was enacted, and new entrants called competitive LECs ("CLECs"). *See*, *e.g.*, *Fones4All Corp. v. FCC*, 550 F.3d 811, 813 (9th Cir. 2008). Finding that incumbent LECs possessed market power in access service, the Commission regulated those carriers as "dominant carriers," 47 C.F.R. § 61.3(q); their access charges were initially based on their historical costs. *See Access Charge Reform*, 16 FCC Rcd 9923, 9939 ¶ 41 (2001). Because competitive LECs were considered "nondominant carriers," 47 C.F.R. § 61.3(z), their rates initially were largely unregulated. But in 2001, the FCC concluded that competitive LECs exercised market power over access service. *Access Charge*

[1] "The LEC owns the phone lines that connect directly to end users, and it is through the LEC's lines that users make local calls. The long-distance carrier connects end users' LEC networks to other LEC networks around the country, thus giving end users the ability to make long-distance calls." *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1000 (D.C. Cir. 2016).

Reform, 16 FCC Rcd at 9938 ¶ 39.[2] To constrain that power in the access service market, the FCC limited competitive LEC tariffed access charges to a benchmark at or below the access rate charged by the incumbent LEC serving the same area. *Id*. at 9938-40 ¶¶ 40-44; *see* 47 C.F.R. § 61.26(c).

Like the AT&T monopoly system that preceded it, the access charge system included implicit subsidies to ensure that local telephone service was affordable. *See, e.g., High-Cost Universal Service Support*, 24 FCC Rcd 6475, App. A, 6574-76 ¶¶ 173-77 (2008). Recognizing that such subsidies were inconsistent with the competitive environment envisioned by Congress, the FCC began reforming the system after the 1996 Act's passage. *See id*. But incremental reforms failed to resolve significant problems with access charges. *See Connect America Fund*, 26 FCC Rcd at 4702-10 ¶¶ 494-508. Among other things, some LECs sought to increase their access revenues through a practice called "traffic pumping," or more recently, "access stimulation."

Access stimulation occurs when a [LEC] with high switched access[3] rates

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[2] The FCC reached this conclusion because "once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user." *Access Charge Reform*, 16 FCC Rcd at 9935 ¶ 30.

[3] "Switched" access means access provided "using lines in common with other … customers." *Competitive Telecom. Assn. v. FCC*, 87 F.3d 522, 524 (D.C. Cir. 1996).

> enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls. The arrangement inflates or stimulates the access minutes terminated to the [LEC], and the [LEC] then shares a portion of the increased access revenues resulting from the increased demand with the 'free' service provider, or offers some other benefit to the 'free' service provider.

Connect America Fund, 26 FCC Rcd 17663, 17874 ¶ 656 (2011) ("*Transformation Order*"), *aff'd*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S.Ct. 2072 (2015).[4]

In 2011, the Commission adopted a comprehensive plan "to phase out regulated intercarrier compensation charges," including access charges. *Id.* ¶ 736. The Commission decided that "a uniform national bill-and-keep framework" – in which each carrier "bills" its own subscribers and "keeps" the revenue – will apply to "all telecommunications traffic exchanged with a LEC," *id.* ¶ 34, and observed that bill-and-keep "reduces arbitrage and competitive distortions" by "eliminating carriers' ability to shift network costs to competitors and their customers," *id.* ¶ 738.

The Commission found that a gradual transition to bill-and-keep was warranted to minimize disruption. As of December 29, 2011, "all interstate switched access … rates" were capped at then-existing levels. *Id.* ¶ 801; *see* 47 C.F.R. Part 51 Subpart J (Transitional Access Service Pricing). Terminating

[4] This Court is well-acquainted with access stimulation or traffic pumping schemes. *See, e.g., All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81 (D.C. Cir. 2017).

intrastate rates[5] also were capped and had to equal lower interstate rates by July 1, 2013. *Transformation Order* ¶ 801. The FCC required some access rates to transition to bill-and-keep (*i.e.*, to zero) over six to nine years, and sought comment on an appropriate schedule for other rates. *Id.* ¶¶ 800-08, 817-21.

The FCC also established rules to curb access stimulation. *Id.* ¶¶ 656-701. The FCC defined access stimulation as occurring when two conditions are met: the carrier (1) has an access revenue-sharing agreement with another party that would result in a net payment to the other party based on the billing or collection of access charges; and (2) has a three-to-one ratio of interstate terminating-to-originating traffic. 47 C.F.R. § 61.3(bbb). The FCC recently revised its access stimulation definition to add an alternative test. *See* § E *infra*.

C. Aureon and Centralized Equal Access Service.

Aureon is an intermediate carrier that connects interexchange carriers such as AT&T to local exchange carriers serving rural areas in Iowa and thus is subject to the Commission's access charge regime. Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, Proceeding Number 17-56 (filed July 20, 2017), Stipulated Facts 25-26 (JA__). Aureon is one of a handful of carriers that the Commission first authorized in the 1980s to provide centralized equal access

[5] "Terminating" rates are rates to complete calls. "Intrastate" rates are rates for calls between local exchanges in the same state.

("CEA") service. *Id.* at 22 (JA__); *see Iowa Network Access Division*, 3 FCC Rcd 1468 ¶ 4 (1988). CEA service enables interexchange carriers to complete calls to the end users of numerous small, rural LECs without interconnecting directly with each individual LEC. Stipulated Facts 18-21 (JA__). Aureon operates a tandem switch[6] in Des Moines and a fiber "ring" that connects the switch to points of interconnection with "subtending" LECs that participate in Aureon's CEA network. *AT&T Corp. v. Alpine Commc'ns*, 27 FCC Rcd 11511, 11512-13 (2012) ("*Alpine*"); *see* Stipulated Fact 25 (JA__). To access the subtending LEC networks, interexchange carriers deliver calls to Aureon by interconnecting with Aureon's tandem switch. *Alpine*, 27 FCC Rcd at 11512-13; *see* Stipulated Fact 29 (JA__). Aureon then transports the calls to a point of interconnection for delivery to the subtending LECs.

The FCC regulated Aureon as a dominant carrier because interexchange carriers were required to use Aureon's CEA network for calls involving Aureon's subtending LECs, *Iowa Network Access Division*, 3 FCC Rcd at 1473 ¶ 33,[7] and

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[6] Tandem switches "operate much like railway switches, directing traffic" between LEC central offices rather than connecting to customers directly. *AT&T Corp. v. FCC*, 841 F.3d 1047, 1050 (D.C. Cir. 2016).

[7] The FCC recently eliminated the "mandatory use" requirement for calls to subtending LECs engaged in access stimulation. *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 34 FCC Rcd 9035, ¶¶ 106-13 (2019), *pets. for review pending*, *Great Lakes Commc'ns Corp. v. FCC*, No. 19-1233 (D.C. Cir. docketed Oct. 29, 2019); *see* § E *infra*.

Aureon's access rates historically were based on its costs and projected demand. *See* 47 C.F.R. § 61.38. Aureon charges a single "switched transport rate" for interstate CEA service. Stipulated Fact 37 (JA__). At the outset of the bill-and-keep transition on December 29, 2011, that rate was $0.00819 per minute. *Id.* at 59 (JA__). Aureon reduced the rate to $0.00623 in 2012, but then sought to increase it to $0.00896 in 2013. *Id.* at 60-61 (JA__).[8] Aureon's intrastate CEA rates have not changed since the early 1990s. *Id.* at 69 (JA__).

D. The Proceedings Below.

AT&T is an interexchange carrier that serves end users nationwide. AT&T purchases Aureon's CEA service to deliver calls to Aureon's subtending LECs in Iowa. Stipulated Facts 73-75 (JA__). Certain of those LECs allegedly engage in access stimulation, substantially increasing the AT&T call traffic that traverses Aureon's network and, therefore, Aureon's access charges to AT&T. *Id.* at 44-48 (JA__). In 2013, AT&T began withholding payment to Aureon for service related to alleged access stimulation. *Id.* at 75-77 (JA__).

Aureon filed a collection action against AT&T in the United States District Court for New Jersey. *Id.* at 12 (JA__). The District Court stayed the case and referred it to the Commission under the primary jurisdiction doctrine. *Id.* at 13-14

[8] Although the difference in rates appears to be *de minimis*, when applied to the billions of minutes billed by Aureon, it amounts to millions of dollars.

(JA__). To effectuate that referral, AT&T filed its Complaint with the FCC pursuant to 47 U.S.C. § 208. Formal Complaint of AT&T Corp., Proceeding Number 17-56, ¶ 1 (filed June 8, 2017) ("Complaint") (JA__).

AT&T asserted that Aureon violated Sections 201 and 203 of the Act. 47 U.S.C. §§ 201, 203. Among other things, AT&T argued that (1) Aureon violated the FCC's bill-and-keep transition regulations, (2) Aureon engaged in access stimulation under the FCC's rules, and (3) Aureon's federal tariff does not cover service related to access stimulation. Complaint ¶¶ 62-80, ¶¶ 86-117 (JA__). As permitted by 47 C.F.R. § 1.722 (2017), AT&T requested bifurcation of its liability and damage claims. *Id.* ¶ 20 (JA__).

1. The *Order*.

The Commission granted AT&T's Complaint in part, finding that Aureon violated the bill-and-keep transition regulations. *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 32 FCC Rcd 9677 ¶ 1 (2017) ("*Order*") (JA__). The FCC stated that it would determine the damages amount in a separate phase of the proceeding. *Id.* (JA__). It also ordered Aureon "to revise its tariff to file rates that comply with the Commission's rules." *Id.*[9]

[9] This Court is holding in abeyance the consolidated petitions for review of Commission decisions in the separate proceeding investigating the lawfulness of Aureon's revised tariff. Order in Case Nos. 18-1007, *et al.* (July 15, 2019).

a. The Commission found that Aureon was subject to and violated bill-and-keep transition requirements by seeking to raise its interstate switched transport rate in 2013 and by not lowering certain of its intrastate rates to parity with its interstate rate. *Id.* ¶¶ 23-29 (JA__). "[T]he Commission capped '*all* interstate switched access rates in effect as of [December 29, 2011] …'" *Id.* ¶ 23 (JA__) (quoting *Transformation Order* ¶ 800). Aureon violated the cap when it filed a revised 2013 tariff proposing to increase its interstate switched transport rate to $0.00896, above its rate of $0.00819 as of December 29, 2011. *Id.* ¶ 24 (JA__); Stipulated Facts 59, 61 (JA__).

The FCC also concluded that Aureon is a competitive LEC for bill-and-keep transition purposes. *Order* ¶¶ 23, 25 (JA__). Aureon had conceded that it "'provi[ded] … exchange access,'" *id.* ¶ 25 (JA__) (quoting 47 C.F.R. § 51.5), and thus qualified as a local exchange carrier. *See* 47 U.S.C. §§ 153(20), (32) (defining "exchange access" as "the offering of access to telephone exchange services" and "local exchange carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access"). Aureon did not qualify as an incumbent LEC because, *inter alia*, it did not provide "'telephone exchange service'" (that is, service within a local exchange, as opposed to exchange access). *Order* ¶ 25 (JA__) (quoting 47 C.F.R. § 51.5). "Aureon must therefore be a CLEC for purposes of the [bill-and-keep transition] rules … because a '[CLEC] is any

local exchange carrier, as defined in [Section] 51.5, that is not an incumbent [LEC].'" *Id.* (quoting 47 C.F.R. § 51.903(a)). Accordingly, Aureon was subject to 47 C.F.R. § 51.911(b), which required that certain competitive LEC intrastate rates be reduced to parity with lower interstate rates by July 2013. *Order* ¶ 23 (JA__); *see Transformation Order* ¶ 35.

The FCC rejected Aureon's argument that, as a dominant carrier subject to cost-based ratemaking requirements, it could not also be subject to rate caps. *Order* ¶¶ 26-27 (JA__). The two sets of regulations are complementary, the FCC explained: "Aureon must comply with [the cost-based ratemaking requirements] to support its rates at or below the cap." *Id*. ¶ 26 (JA__). The FCC also rejected Aureon's argument that it is not subject to bill-and-keep transition requirements because, as an intermediate carrier, it cannot offset decreased access revenues with increased end-user charges. *Id.* ¶ 28 (JA__). The Commission further explained that it did not exclude CEA providers from comprehensive reform of the access charge system, *id.*, and that CEA providers have other options for offsetting decreased access revenues, *id.* at n.153.

Finally, the Commission rejected Aureon's argument that its 2013 rate was "deemed lawful" under 47 U.S.C. § 204(a)(3) because the FCC neither suspended nor investigated Aureon's 2013 tariff filing within 15 days of its filing. *Order* ¶ 29 (JA__). "Where the Commission, as here, has prohibited the filing of a tariff with

rates above the [rate levels as of December 29, 2011]," the FCC explained, "such a tariff cannot benefit from 'deemed lawful' status." *Id.* On the contrary, the 2013 rate was facially invalid when filed and, therefore, void *ab initio*. *Id.* Aureon therefore was liable for damages; the FCC stated that it would determine the rate that Aureon should have charged in the damages phase. *Id.* ¶ 30 (JA__).[10]

b. The Commission disagreed with AT&T that Aureon engaged in access stimulation under FCC rules. *Id.* ¶¶ 31-34 (JA__). The rule's condition of a three-to-one ratio of originating-to-terminating traffic was satisfied based on the parties' stipulations. *Id.* ¶ 31; Stipulated Fact 71 (JA__). But the FCC found that there was no "'access revenue sharing agreement.'" *Order* ¶ 32 (JA__) (quoting 47 C.F.R. § 61.3(bbb)(1)(i)). AT&T contended that Aureon's traffic agreements with subtending LECs allegedly engaged in access stimulation constituted revenue-sharing agreements. *Id.* ¶ 33 (JA__). The FCC concluded that those agreements for participation in Aureon's CEA network had not changed since 1989 – before access stimulation existed – and that there was no evidence of any change in Aureon's practices to facilitate access stimulation. *Id.*

[10] The FCC deferred to the damages phase a decision whether Aureon violated 47 C.F.R. § 51.911(c), which required competitive LECs to reduce their interstate rates to the benchmark rates of competing incumbent LECs as of July 1, 2013. *Order* ¶ 24 (JA__). "[W]e do not have an adequate record to determine the pertinent benchmark rate." *Id.* The FCC later reconsidered that decision. *See* p. 17 *infra*. It also deferred consideration of whether Aureon engaged in furtive concealment of improper accounting practices. *Order* ¶ 30 (JA__).

c. AT&T further argued that Aureon could not impose access charges for transporting calls to access-stimulating LECs under Aureon's tariff. *See id.* ¶ 17 (JA__); Complaint ¶¶ 62-85, 64-70 ¶¶ 134-54 (JA__). The FCC disagreed, finding that the service Aureon provided AT&T was covered by the tariff.

The FCC's analysis began with the tariff language, which sets forth the "regulations, rates and charges applicable to the provision of Switched Access Services and other miscellaneous services … provided by [Aureon]." Iowa Network Access Division Tariff F.C.C. No. 1 ("Tariff"), § 1.1, 2nd Revised Page 16 (issued Oct. 27, 2000) (JA__); *Order* ¶ 18 (JA__). The FCC explained that there was no dispute that Aureon provided the switched access service described in the Tariff when it routed calls from AT&T to Aureon's subtending LECs. *Order* ¶ 18 (JA__). As Aureon "'provide[d] its services in exactly the way the carrier describe[d] them in th[e] [T]ariff,'" the FCC concluded that Aureon billed AT&T appropriately under the Tariff. *Id.* ¶ 17, n.96 (JA__) (internal citations omitted).

The FCC rejected AT&T's argument that the undefined Tariff term "Centralized Equal Access Service" should be read to narrow the Tariff's scope to exclude service related to access stimulation. AT&T argued that CEA service "'was approved for the limited purpose of facilitating the provision of equal access service to small, rural LECs carrying very low traffic volumes,' and that 'access stimulation traffic has virtually nothing in common with legitimate CEA traffic.'"

Id. ¶ 19 (JA__) (internal citations omitted). The FCC concluded that, even if the CEA service definition was adopted with low-volume traffic in mind, the Tariff's language controls, and "nothing in the language of the Tariff restricts its application to … what AT&T calls 'legitimate' CEA traffic (i.e., access traffic that is not bound for access stimulators)." *Id.* ¶ 18 (JA__).

2. The Reconsideration Order.

Aureon petitioned for reconsideration of the decision that it is liable for damages. Aureon Petition for Reconsideration, Proceeding No. 17-56 (filed Dec. 8, 2017) (JA__). Aureon argued that any relief must be prospective only because it lacked fair notice that it was subject to the bill-and-keep transition requirements, and because its 2013 rate was "deemed lawful" under 47 U.S.C. § 204(a)(3). The FCC rejected both arguments. *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 33 FCC Rcd 7964 ¶¶ 6-15 (2018) ("*Reconsideration Order*") (JA__).

The FCC concluded that the rules and orders in existence at the time of Aureon's 2013 tariff filing, including the unqualified statements in the *Transformation Order* that "'all interstate switched access … rates will be capped'" at the outset of the bill-and-keep transition, "provided Aureon ample notice of its regulatory status and obligations." *Id.* ¶¶ 6, 8 (JA__) (quoting *Transformation Order* ¶ 801). In addition, retroactivity is the "'norm in agency

adjudications no less than in judicial adjudications,'" so in the absence of a "'settled rule on which [Aureon] reasonably relied' and that the Commission changed," the *Order* "is properly presumed retroactive." *Id.* ¶ 9 (JA__) (quoting *AT&T Corp. v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

The FCC also reaffirmed that Aureon's 2013 rate was not "deemed lawful" because it violated the cap imposed by the *Transformation Order* at the time it was filed. *Id.* ¶¶ 12-13 (JA__). The Commission interpreted Section 204(a)(3) to limit FCC authority to impose retroactive liability for carrier-initiated rates, but not its authority to define unjust and unreasonable rates prospectively through notice-and-comment rulemaking. *Reconsideration Order* ¶¶ 13-15 (JA__). The rate cap was an exercise of such rulemaking authority. *Id*. ¶ 13 (JA__). Accordingly, Aureon's 2013 tariff filing increasing its interstate rate in violation of FCC regulations was invalid when filed and could not be "deemed lawful." *Id.* ¶ 15 (JA__).

The FCC reconsidered its intent to determine whether Aureon also violated 47 C.F.R. § 51.911(c) for purposes of calculating damages, *see* n.10 *supra*, concluding instead "that the rates in Aureon's 2012 tariff apply." *Id.* ¶ 16 (JA__). The 2012 tariff was "deemed lawful" because it was filed under Section 204(a)(3)'s streamlined procedures, did not exceed the cap when filed, and the FCC neither suspended nor investigated it. *Reconsideration Order* ¶ 17 (JA__).

"Because the 2013 tariff did not cancel or supersede Aureon's 2012 tariff," the FCC reasoned, the 2012 tariff retained "deemed lawful" status. *Id*.

3. The Further Reconsideration Order.

AT&T petitioned for further reconsideration of the decision to use Aureon's 2012 rate for purposes of calculating damages. AT&T Petition for Further Reconsideration, Proceeding No. 17-56 (filed Aug. 31, 2018) (JA__). The FCC ruled that several of AT&T's arguments did not warrant reconsideration because they were already considered and rejected. *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 33 FCC Rcd 11855 ¶ 5 (2018) (JA__) ("*Further Reconsideration Order*"). The Commission otherwise denied the petition, concluding that AT&T was required to allege that Aureon's 2012 rate violated the rate benchmark that went into effect in July 2013, *see* n.10 *supra*, and adduce evidence in support of that argument, in its Complaint or, at the latest, in response to Aureon's reconsideration petition requesting that the Commission determine the 2012 rate was applicable. *Further Reconsideration Order* ¶¶ 6-8 (JA__) (citing 47 C.F.R. §§ 1.720(a), 1.721(a)(4) (2017)). Having twice failed to raise the argument, AT&T could not raise it for the first time on further reconsideration, nor could the issue be deferred to the damages phase. *Id.*

E. Subsequent Developments.

The Commission recently revised its rules to further curb harmful access stimulation. In *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 34 FCC Rcd 9035, ¶¶ 4, 14-25, the FCC made access-stimulating LECs – rather than interexchange carriers – responsible for paying access charges associated with delivery of calls to an access-stimulating LEC.

SUMMARY OF ARGUMENT

There is no dispute that the FCC adopted an access rate cap in 2011, and Aureon's proposed 2013 access rate exceeded it. Aureon now contends that it did not understand that it was subject to the rate cap notwithstanding that *every other* local exchange carrier was so subject. The Commission correctly treated Aureon like other carriers in subjecting it to the cap and reasonably interpreted 47 U.S.C. § 204(a)(3) of the Act to preclude "deemed lawful" status for a rate that was facially not "legal" when filed.

Section 204(a)(3) establishes a conclusive presumption that legal, effective rates filed by carriers pursuant to a streamlined procedure are lawful and not subject to refunds if the Commission does not act within a specified period. But Congress adopted that subsection against the backdrop of the Supreme Court's *Arizona Grocery* decision, which held that carriers must conform to rate limits fixed in advance by an agency and that filings that exceed these limits do not meet

even the minimal requirements of legality—and thus are *per se* unlawful. Aureon's 2013 rate increase violated the FCC's prescribed rate cap when filed and, therefore, could not have been "deemed lawful."

The FCC's interpretation of Section 204(a)(3) is compelled by traditional tools of statutory construction. To the extent the Court determines otherwise because the statutory language does not resolve the precise question here, the Commission's interpretation warrants deference. Indeed, a contrary interpretation would eviscerate the FCC's rulemaking authority and contradict the Supreme Court's holding in *Arizona Grocery*. It would preclude the FCC from adopting effective *ex ante* rate limits because unless the FCC suspended and investigated every one of the thousands of tariffs filed, filers could effectively rewrite the FCC's rate prescriptions to their liking and claim immunity under "deemed lawful" status.

The FCC also correctly determined that Aureon, like all other local exchange carriers, is subject to bill-and-keep transition requirements. Aureon indisputably meets the definition of a competitive LEC under the transition rules, and there is nothing inconsistent about Aureon's status as a competitive LEC for purposes of the Commission's access charge regulations and as a dominant carrier. Aureon's different regulatory obligations are complementary, and the access rate reforms adopted in the *Transformation Order* apply equally to dominant and non-

dominant providers of access service. Aureon is neither exempt from the bill-and-keep transition as an intermediate carrier, nor unique in being subject to both cost-based ratemaking requirements and rate caps. To the contrary, exempting Aureon from rate caps would make it unique among local exchange carriers.

The fair notice doctrine does not apply because this case does not involve the imposition of civil or criminal penalties. In all events, Aureon had fair notice. The FCC also correctly determined that retroactive application of the *Order* would not produce a manifest injustice. Retroactivity is the norm in agency adjudications, and no settled rule exempted Aureon from the bill-and-keep transition. Aureon's 47 U.S.C. § 201(b) and Takings Clause challenges are not properly before the Court.

II. The FCC correctly determined that Aureon's 2012 rate remained in effect during the time period for measuring AT&T's damages. AT&T's contrary argument would absolve it of any payment for services it used for nearly five years and, in any event, comes too late. Having argued that Aureon's 2013 tariff filing was void *ab initio*, AT&T could and should have anticipated that Aureon's prior rate would remain effective. Moreover, as the complainant, AT&T had the burden of pleading its claim fully and demonstrating, if it so believed, that the 2012 rate became unlawful because it exceeded the interstate rate benchmark that took effect in July 2013. AT&T's failure to raise any challenge to the 2012 rate in its

Complaint or response to Aureon's reconsideration petition forfeited that claim. AT&T's argument that the FCC was obligated to determine the lawfulness of the 2012 rate outside of the agency's Section 208 complaint procedures is unfounded. The FCC can order damages only in complaint proceedings, and cannot do so when, as in this case, the record does not support a finding that a rate violates statutory or regulatory requirements.

AT&T's other challenges lack merit. *First*, the FCC correctly found that Aureon's traffic agreements with subtending LECs, which were made long before the advent of access stimulation, were not revenue-sharing agreements under the access stimulation rule because the consideration provided for by the traffic agreements does not relate to access stimulation.

Second, the FCC properly deferred to a parallel complaint proceeding the issue of whether AT&T is entitled to bypass Aureon's CEA network and directly interconnect with one of Aureon's subtending LECs allegedly engaged in access stimulation. AT&T raised the same issue in the other proceeding. The case that AT&T relies on to challenge the FCC's action is distinguishable.

Finally, the FCC correctly interpreted Aureon's Tariff to cover access service provided to AT&T. AT&T attacks a straw man by arguing that the FCC misinterpreted the Tariff to cover access stimulation-related traffic under a category other than "Centralized Equal Access Service."

STANDARD OF REVIEW

The Court's review of the Commission's interpretation of Section 204(a)(3) "is governed by the familiar *Chevron* framework" in which the Court utilizes "ordinary tools of the judicial craft" to determine "whether Congress has directly spoken to the precise question at issue" and, if not and the statute is ambiguous, the Court "defer[s] to an agency's construction of an ambiguous provision in a statute that it administers if that construction is reasonable." *Mozilla Corp. v. FCC*, 940 F.3d 1, 19, 20 (D.C. Cir. 2019); *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

"Under the APA, a reviewing court must uphold an FCC order unless it is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 257 (D.C. Cir. 2001) (quoting 5 U.S.C. § 706(2)(A)). "This is a deferential standard that presume[s] the validity of agency action." *Id.*

ARGUMENT

I. AUREON'S CHALLENGES TO THE ORDERS ON REVIEW LACK MERIT

A. The FCC Reasonably Determined that Aureon's 2013 Rate Increase Was Not "Deemed Lawful" Because It Violated a Prescribed Rate Cap.

At the outset of the FCC's transition to a uniform nationwide bill-and-keep framework, the FCC capped "all interstate switched access rates in effect as of [December 29, 2011]." *Transformation Order* ¶ 800; *id.* ¶ 801. Aureon (Br. §§ I-II) argues that 47 U.S.C. § 204(a)(3) bars retroactive application of the FCC's finding that the rate increase in Aureon's 2013 tariff filing violated this rate cap. But the FCC correctly interpreted Section 204(a)(3) not to protect rates that are invalid when filed because they violate a prescribed rate cap and thus are not "legal" filings.

1. As this Court has observed, the terms of Section 204(a)(3) "come to us burdened with (or illuminated by) the Supreme Court's decision in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U.S. 370 (1932)." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002). That decision, interpreting the Interstate Commerce Act, made a distinction between "legal" and "lawful" tariffs—a framework that this Court has applied with equal force to the Communications Act. *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006); *see also MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 38 (D.C.

Cir. 1990) ("The Communications Act, of course, was based upon the [Interstate Commerce Act] and must be read in conjunction with it."). Under *Arizona Grocery*, the prerequisite for all rates is that they be "legal," meaning among other things that they were filed pursuant to a valid process and "contain[] the published rates the carrier is permitted to charge." *Virgin Islands Tel. Corp.*, 444 F.3d at 669; *see Arizona Grocery*, 284 U.S. at 384, 387.

A rate that is minimally legal may nevertheless violate the duty, existing at common law and "expressly affirmed" by statute, "to charge no more than a reasonable rate." *Arizona Grocery*, 284 U.S. at 384. In that circumstance, the rate is not "lawful" because – in the parlance of the current Act – it is not substantively "just and reasonable" within the meaning of Section 201(b). *Virgin Islands Tel. Corp.*, 444 F.3d at 669. According to the Supreme Court, rates could be "lawful" in one of two ways. In the first scenario, rates could be prescribed in advance via an agency's rulemaking or "quasi-legislative" authority, in which case, "there is … no difference between the legal or published tariff rate and the lawful rate." *Arizona Grocery*, 284 U.S. at 387. Alternatively, a carrier could submit a "legal" rate that could later be adjudged unreasonable – and thus not "lawful" – and subject to refunds. *ACS*, 290 F.3d at 411. In either scenario, legality is a necessary predicate to lawfulness.

Section 204(a)(3) altered an aspect of the second of *Arizona Grocery*'s two recognized practices, applicable to carrier-initiated rates. In certain specified circumstances, a legal and effective rate would be "deemed lawful" if left unchallenged for a prescribed amount of time. "In accordance with *Arizona Grocery*, these 'deemed lawful' tariffs are not subject to refunds." *ACS*, 290 F.3d at 411 (citing *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd at 2182-83 ¶¶ 20-21). But nothing in Section 204(a)(3) either eliminates the requirement that a rate must be minimally legal before it may be considered lawful or disturbs the FCC's authority under the Communications Act to "declare a specific rate to be the reasonable and lawful rate for the future." *Arizona Grocery*, 284 U.S. at 386. *See Am. Fed'n of Gov't Emp., Local 3295 v. Fed. Labor Relations Auth.*, 46 F.3d 73, 78 (D.C. Cir. 1995) (recognizing "the familiar principle that Congress legislates with a full understanding of existing law."); *see also Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). Section 204(a)(3) should be read as preserving these longstanding practices.

2. The 2011 *Transformation Order*, which established the interstate rate cap, contains "[s]pecific rates prescribed for the future," which the *Arizona Grocery* Court recognized "take the place of the legal tariff rates theretofore in force by the

voluntary action of the carriers, and themselves become the legal rate." 284 U.S. at 387. As that Court held, a "carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission." *Id. See Reconsideration Order* ¶¶ 12-14 (JA__).

Because Aureon's 2013 rate exceeded the rate cap the Commission prescribed in 2011, the 2013 tariff filing contained "rates that the carrier is not permitted to charge." *Id.* ¶ 15 (JA__). Accordingly, Aureon's tariff did "not even meet the preliminary standard for a legal tariff filing, and therefore cannot become a 'deemed lawful' tariff by operation of Section 204(a)(3)." *Id.*

The FCC's statutory interpretation is correct under traditional principles of statutory construction because it reads Section 204(a)(3) in light of the preexisting Court interpretations and common law set forth in *Arizona Grocery*. If, however, the Court concludes otherwise and determines that Section 204(a)(3) does not resolve the "precise question" of whether a legally-prohibited rate may benefit from "deemed lawful" status, the Court should defer to the Commission's interpretation, *Chevron,* 467 U.S. at 842-843, which is consistent with *Arizona Grocery*, this Court's precedents, and the structure of the Act as a whole.

3. The FCC's interpretation is also the only sensible one given the legislative purpose.[11] Congress adopted Section 204(a)(3) to "'speed up FCC action for phone companies.'" *Reconsideration Order* ¶ 14 & n. 46 (JA__) (quoting *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd at 2172 n.2). It did so by establishing streamlined procedures and enabling carriers to benefit from a conclusive presumption of lawfulness. *See ACS*, 290 F.3d at 411. But when, as in this case, the agency has prescribed a maximum reasonable rate through rulemaking, there is no need for speed where a rate facially violates those limits. *See Arizona Grocery*, 284 U.S. at 389 ("the carrier is entitled to rely upon the [agency's] declaration as to what will be a lawful, that is, a reasonable, rate."). Rate limits establish lawfulness in advance.

By undermining the Commission's authority to prescribe effective rate limits *ex ante*, a contrary interpretation of Section 204(a)(3) would slow rather than hasten FCC action. The FCC needlessly (and perhaps frequently) would be forced to suspend and investigate proposed rates to prevent unscrupulous carriers from exploiting the statute's streamlined procedures. *See Reconsideration Order* ¶ 14

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[11] Aureon (Br. 15) argues that the FCC's interpretation is inconsistent with its own prior interpretation. The agency addressed a different issue in implementing the statute: whether to establish a presumption that certain tariffs warrant suspension. *Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd at 2200 ¶ 60. The FCC did not address the instant situation where a carrier files a rate exceeding fixed limits.

(JA__) (acknowledging the agency's "practical inability to review and, if necessary, suspend within 15 days, each of the well over 6,000 tariff filings it receives annually"). A contrary interpretation would effectively enable tariff filers to violate FCC rate prescriptions with impunity by invoking "deemed lawful" status. Carriers could do what the FCC cannot: "ignore its own pronouncement promulgated in its quasi legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." *Arizona Grocery*, 284 U.S. at 389.

4. This Court's decisions regarding Section 204(a)(3) are not to the contrary. Those decisions limit the relief available in complaint cases where the carrier has set a rate that is minimally legal and "deemed lawful"—but the rate is later found to be unreasonable on the ground that it violates rate-of-return prescriptions. *See Virgin Islands Tel. Corp.*, 444 F.3d at 669; *ACS*, 290 F.3d at 413. Neither *ACS* nor *Virgin Islands* addressed the issue here of whether a rate that violates an FCC rate cap, and therefore is *not* legal as filed, may nonetheless become "deemed lawful."

5. Based on language in *ACS*, the FCC stated that AT&T may present evidence in the damages phase of the proceeding that Aureon "'furtively employ[ed] improper accounting techniques'" to hide "'potential rate of return violations.'" *Reconsideration Order* ¶ 18 (JA__) (quoting *ACS*, 290 F.3d at 413); *see Order* ¶ 30 (JA__). Aureon (Br. 22-23) argues that Section 204(a)(3) does not

contemplate a furtive concealment exception. That issue is not ripe because the FCC has not determined that Aureon engaged in furtive concealment. *See Great Lakes Comnet*, 823 F.3d at 1005 (declining to address whether statute of limitations barred claims where the FCC left that issue to separate damages phase of proceedings); *Verizon Tel. Co. v. FCC*, 269 F.3d 1098, 1112 (D.C. Cir. 2001) (issues to be addressed in damages phase were not ripe). Aureon urges the Court to address the issue "'to avoid re-litigation of identical issues in a subsequent petition.'" Aureon Br. 22 (quoting *AT&T Corp.*, 841 F.3d at 1054). But here "judicial economy suggests" that the Court should defer the issue because the FCC has not yet passed on whether Aureon's actions in this case may constitute "furtive concealment" as discussed in *ACS. AT&T Corp.*, 841 F.3d at 1054.

6. Aureon's remaining scattershot arguments lack merit. *First*, 47 U.S.C. § 203(d)[12] creates no inference regarding the "deemed lawful" provision because Section 203(d) does not limit FCC "authority to 'void' tariff filings." Aureon Br. 16. Rather, it provides that the *effect* of FCC rejection of a tariff without an effective date is that the tariff "shall be void."

[12] Section 203(d) provides that "[t]he Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful." 47 U.S.C. § 203(d).

Second, Aureon argues that the FCC's rate cap is not "just and reasonable" under 47 U.S.C. § 201 because "[t]he FCC prohibited Aureon from billing [the cap]." Aureon Br. 16-17 (citing *Order* ¶ 26 (JA__)). The FCC did no such thing. The passage of the *Order* that Aureon cites explains that Aureon must comply with the rate cap *and* cost-based rate regulation.

Third, Aureon (Br. 18) argues that the FCC lacks authority to prevent Aureon from filing tariffs, but the FCC asserted no such authority. It ruled that Aureon's 2013 tariff "was unlawful when filed and void *ab initio*." *Order* ¶ 29 (JA__). Nothing precluded Aureon from filing a tariff that complied with the rate cap.

Fourth, Aureon argues that 47 C.F.R. § 51.905 "does not contain any interstate rate ceiling applicable to CLECs – the alleged $0.00819 rate ceiling simply does not exist in the CLEC rules referenced by the FCC." Aureon Br. 7; *see id.* at 20-21. But the FCC established the rate cap in the *Transformation Order*, and applied it to "all interstate switched access rates." *Transformation Order* ¶ 801; *see Reconsideration Order* ¶¶ 8, 13 (JA__). "An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

Fifth, Aureon complains that the FCC imposed "a second rate ceiling of $0.005634 … by applying Rule 51.911(c)," Aureon Br. 21; *see id.* at 20, 25, 33, citing a Commission order in the separate tariff investigation proceeding. *See* n.9 *supra*. The orders in that proceeding are not before the Court now; they will be reviewed in separate cases that this Court is holding in abeyance.

Finally, Aureon (Br. 21) in one sentence challenges FCC authority over intrastate rates, relying on *Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017), a case addressing FCC authority over *payphone* rates under a different statute. As the Tenth Circuit has affirmed, Sections 201(b) and 251(b)(5) of the Act apply to all traffic between interexchange and local exchange carriers, including intrastate traffic. *In re: 11-161*, 753 F.3d at 1115-24. This Court should hold the same.

B. The FCC Correctly Determined that Aureon, Like All Other Local Exchange Carriers, Is Subject to Bill-and-Keep Transition Requirements.

The FCC required most intrastate access rates to be reduced to parity with interstate rates by July 2013 as part of the bill-and-keep transition. *Transformation Order* ¶ 801; 47 C.F.R. §§ 51.907-51.911. There is no dispute that Aureon did not comply with this requirement. *See Order* ¶ 24 (JA__); Stipulated Facts 59-60 (JA__). Aureon (Br. § III.A, C) argues that, as a CEA provider that is classified as dominant in the provision of access service and is subject to cost-based ratemaking

requirements, it cannot be treated as a competitive LEC or subjected to rate caps under the bill-and-keep transition requirements. Aureon (Br. § III.D) also argues that it lacked fair notice that it was subject to the transition. *See also* SDN Br. §§ I-III. These arguments lack merit.

1. The FCC Correctly Determined that Aureon Is a Competitive LEC For Bill-and-Keep Transition Purposes.

a. The bill-and-keep transition requirements adopted in 2011 are codified as Subpart J to Part 51 of the Commission's rules. *See* 47 C.F.R. §§ 51.901, *et seq.* Section 51.903(a) defines a competitive LEC as "*any* local exchange carrier, as defined in § 51.5, that is not an incumbent local exchange carrier." 47 C.F.R. § 51.903(a) (emphasis added). Section 51.5 defines a local exchange carrier as "any person that is engaged in the provision of telephone exchange service or *exchange access*." 47 C.F.R. § 51.5 (emphasis added); *see* 47 U.S.C. § 153(20) (defining "exchange access"). Aureon concededly provides exchange access. *Order* ¶ 25 (JA__); *see* Answer ¶¶ 92-94 (JA__). In addition, the FCC concluded – and Aureon did not dispute – that Aureon is not an incumbent LEC. *Order* ¶ 25 (JA__). Thus, the Commission correctly concluded that Aureon is a competitive LEC under the catch-all definition in Part 51(J). *Id.*

Because the FCC's conclusion was based on the Part 51 rules, Aureon (Br. 29) is mistaken in its contention that the Commission improperly relied on allegedly ambiguous statements in the *Transformation Order*. Aureon also argues

that the FCC could not have intended the Part 51 rules to apply to Aureon because neither the rules nor the *Transformation Order* mention CEA providers. But there was no need to do so, because CEA providers are local exchange carriers, and the bill-and-keep transition applies to *all* local exchange carriers. Aureon seeks to read an exception into the FCC's regulations that does not exist.

b. Aureon also argues that it cannot be a competitive LEC for bill-and-keep transition purposes because competitive LECs traditionally have been classified as non-dominant in access service, whereas CEA providers remain classified as dominant. But the applicability of the transition regulations is "not triggered by a dominance classification." *Technology Transitions*, 31 FCC Rcd 8283, 8286 ¶ 8 (2016). There is nothing inconsistent in Aureon's status as a competitive LEC under Part 51(J) and a dominant carrier under the Part 61 rules.

As the FCC has explained, "LECs are members of several overlapping regulatory categories. Different obligations flow from membership in each category." *Id.* at 8297 ¶ 41. Section 61.38 specifies the "supporting … material" that dominant carriers must submit with tariff filings. 47 C.F.R. § 61.38. If a carrier's underlying cost studies and other material support the rate set forth in a tariff filing, then the rate generally is permitted to take effect.

The Commission established another layer of rate regulation in the *Transformation Order*. Under the bill-and-keep transition requirements, regardless

of how a local exchange carrier calculates its rates for switched access service (*i.e.*, based on its own costs or benchmarking against another carrier's rates), those rates may not exceed the specified rate cap. *See Transformation Order* ¶¶ 798-801. As the FCC stated, Aureon's obligations under the transition requirements and the Part 61 rules "complement each other." *Order* ¶ 26 (JA__).[13]

Intervenor SDN (Br. § I.b) argues that Aureon cannot be treated as a competitive LEC based on the history of competitive LEC regulation, insisting that CEA providers are more like incumbent LECs and that their rates should be "treated as presumptively just and reasonable" because their rates are "the product of an extensive regulatory process." This argument is wrong for two reasons.

First, both incumbent and competitive LEC terminating rates were capped by the bill-and-keep transition regulations. *See Technology Transitions*, 31 FCC Rcd at 8292 ¶ 27. In other words, SDN is wrong to suggest that the FCC has never capped the access rates of incumbent LECs, which, like CEA providers, are subject

[13] Aureon (Br. 26-27) argues that requests for waiver of the benchmark rules to allow CLECs to set cost-based rates would be unnecessary "[i]f, as the FCC urges, these rules are complementary" with cost-based rate regulation. But most CLECs are not subject to cost-based rate regulation, which historically applied to incumbent LECs. *See* pg. 4 *supra*. Aureon (Br. 27-30) also argues that the FCC must have intended rate caps and cost-based rate regulation to be mutually exclusive because the rules do not expressly address its situation. But the FCC routinely applies its regulations to "highly fact-specific" situations in adjudications such as this one, *Conference Group, LLC v.* FCC, 720 F.3d 957, 965 (D.C. Cir. 2013) (internal quotations omitted), and the agency sensibly explained how the regulations work together.

to cost-based rate regulation. *Second*, SDN's historical argument lacks force in the wake of the reforms the FCC adopted in the *Transformation Order*. That "comprehensive overhaul" of the access charge system "fundamentally changed the regulatory character of interstate switched access." *Id.* at 8295 ¶ 33.

c. Aureon (Br. 35-37) contends that CEA providers are unique in being treated as dominant for some regulatory purposes and non-dominant for others. Not so. In 2016, for example, when the FCC declared incumbent LECs to be non-dominant in the provision of access service, it recognized that they, too, "may remain obligated to file cost support with their interstate switched access tariffs" under the Part 61 rules for reasons not tied to their former dominant classification. *Technology Transitions*, 31 FCC Rcd at 8299 ¶ 47. These same incumbent LECs were subject to the rate caps and schedule of rate reductions established in the *Transformation Order*, all of which depart from cost-based ratemaking requirements. Indeed, it is Aureon's position that would render CEA providers unique among local exchange carriers by allowing them to avoid rate caps altogether.

Aureon (Br. 35-37) also argues that the FCC did not explain in the orders on review its departure from prior norms that carriers were subject to rate caps or cost-based ratemaking, not both. *See also* SDN Br. § I.a. But those orders merely

applied the regulations established in the *Transformation Order*, which explained in depth the agency's break with past policy regulating access charges.

d. Aureon (Br. 26) further contends that it must be exempt from bill-and-keep transition requirements because, as an intermediate carrier, it cannot offset decreased access charge revenues with increased end-user charges or universal service subsidies. But the Commission intended the transition requirements to apply to "*any* local exchange carrier," 47 C.F.R. § 51.903(a) (emphasis added), including intermediate carriers. *Order* ¶ 28 (JA__); *see Transformation Order* ¶¶ 1311-13 (tandem switching and transport services of terminating carriers that own the tandem switch are subject to bill-and-keep). The broad purpose of the transition requirements, which necessarily encompassed CEA providers, was to "ensure[] that no rates increase during reform" and to "combat potential arbitrage and other efforts designed to increase or otherwise maximize sources of intercarrier revenues during the transition." *Id.* ¶¶ 798, 800, n.1494. The FCC also rejected "the notion that … reform should be revenue neutral." *Id.* ¶ 38; *see id.* ¶ 924. In all events, Aureon may offset decreased access charge revenues by recovering costs from its subtending LECs. *Order* ¶ 28, n.153 (JA__).

SDN (§ I.c) argues that the FCC arbitrarily failed to consider whether to adopt a mechanism for CEA providers to recover lost access revenues. The FCC's decision to provide universal service support for incumbent LECs reflected

regulatory limits on their recovery of reduced access revenues from increased end user charges. *See Transformation Order* ¶¶ 849-53. Like competitive LECs, CEA providers were subject to no such limits. *Id.*

2. The Fair Notice Doctrine Does Not Apply Here, Aureon Had Fair Notice In All Events, and Retroactivity Would Not Lead to a Manifest Injustice.

Aureon also argues that the transition requirements cannot apply to it retroactively because it lacked fair notice. But the fair notice doctrine does not apply to this agency adjudication. In all events, Aureon had fair notice. Insofar as Aureon is arguing that retroactivity would lead to a "manifest injustice," it cannot point to a "settled rule on which [it] reasonably relied" and which the Commission changed in the *Order*. *AT&T Co.*, 454 F.3d at 332 (internal citations omitted).

a. The fair notice doctrine applies in cases, unlike this one, in which an agency sanctions a party that has violated a rule. "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (internal quotations omitted). This Court has refrained from applying this doctrine to an agency's interpretation of its own rules "in a non-penal context." *Id*. For example, *AT&T*, 454 F.3d at 329, held that the FCC could retroactively require AT&T to pay universal service support based on its calling

card revenues, even though the rules governing this issue had theretofore been ambiguous. In *Qwest v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007), in which the FCC ruled that prepaid calling card providers must pay millions of dollars in access charges, this Court reaffirmed that an agency's adjudication of the rights and responsibilities of private parties generally applies retroactively, even if it clarifies ambiguous agency rules.

Like *AT&T* and *Qwest*, this case did not involve imposition of civil or criminal penalties. Rather, the Commission decided that Aureon is subject to the bill-and-keep transition in adjudicating AT&T's complaint seeking retroactive relief from Aureon. Accordingly, the fair notice doctrine does not apply.

b. Even if the Court were to apply the fair notice doctrine, the Court has "never applied [that] doctrine in a case where the agency's interpretation is the most natural one." *NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008).[14] The *Transformation Order* was clear that "at the outset of the transition, *all interstate switched access* and reciprocal compensation *rates will be capped* at rates in effect as of the effective date of the rules." *Id.* ¶ 801 (emphasis added). The scope of the Commission's codified rules is also broad and unambiguous. In particular, given Aureon's concession that it provides exchange access and,

[14] The Court in that case declined to resolve whether to apply the retroactivity or fair notice line of cases to the FCC's interpretation of its rules "because under either one, NET loses." *NetworkIP*, 548 F.3d at 123.

therefore, is a local exchange carrier as defined in 47 C.F.R. § 51.5, *see* Answer ¶¶ 92-93 (JA__), and its concession that it is not an incumbent LEC, *see Order* ¶ 25 (JA__), Aureon necessarily is a competitive LEC under the transition rules, which define a competitive LEC as "*any* local exchange carrier" that is not an incumbent. *Order* ¶ 25 (JA__) (emphasis added); 47 C.F.R. § 51.903(a).

Aureon improperly relies on the 2008 "*PrairieWave Order*." Aureon Br. 38 (citing *Access Charge Reform*, 23 FCC Rcd 2556, 2560-61 ¶ 13 (2008)). That decision predated the *Transformation Order* by three years. The fact that Aureon was not a competitive LEC under the Part 61 definition adopted in 2001 has no bearing on whether Aureon meets the Part 51(J) definition that the FCC adopted in 2011 for purposes of the bill-and-keep transition. *See* § II.A.4 *supra*.[15]

c. Aureon does not appear to argue that retroactive application of the FCC's adjudicatory orders would lead to a manifest injustice. But even if Aureon were so contending, the argument would fail. This Court has explained that "[r]etroactivity is the norm in agency adjudications" and where agency decisions "are merely 'new

[15] Aureon (Br. 38) and SDN (Br. 14-15) also improperly invoke language in paragraphs 687 and 694 of the *Transformation Order* declining to permit competitive LECs to file cost-based rates or to permit incumbent LECs to benchmark rates to Bell Operating Company rates. That language appears in a section of that order establishing measures to reduce access stimulation, not the relevant section regarding the bill-and-keep transition, and in all events did not address the issue here of whether a carrier subject to cost-based rate regulation under Part 61 may also be a competitive LEC under Part 51(J).

applications of existing law, clarifications, and additions,'" they "carry a presumption of retroactivity that [courts] depart from only when to do otherwise would lead to 'manifest injustice.'" *Qwest v. FCC*, 509 F.3d at 539 (quoting *AT&T*, 454 F.3d at 332) (internal citations omitted).

The *Order* was an agency adjudication, arising from a complaint that seeks retroactive relief. *Order* ¶ 15 (JA__). Aureon cannot point to any settled rule exempting CEA providers from the bill-and-keep transition. As discussed above, the FCC broadly applied the 2011 rate cap to "*all* interstate switched access rates," *Transformation Order* ¶ 800 (emphasis added); *id.* ¶ 801, consistent with its broad purpose to "ensure[] that no rates increase during reform." *Id.* ¶ 798; *id.* ¶ 800, n.1494. Under the circumstances, it was unreasonable for Aureon to assume that it was exempt from the bill-and-keep transition rules.

3. Aureon's 47 U.S.C. § 201(b) and Takings Clause Challenges Are Not Properly Before the Court.

Aureon (Br. § III.B) briefly argues that rate caps violate 47 U.S.C. § 201(b)'s "just and reasonable" provision and the Takings Clause of the United States Constitution because they arbitrarily limit Aureon's ability to set cost-based rates. Aureon forfeited these arguments by not raising them below. 47 U.S.C. § 405(a); *see, e.g., GLH Commc'ns, Inc. v. FCC*, 930 F.3d 449, 455 (D.C. Cir. 2019)

("We are unable to consider that argument because GLH did not appropriately raise it before the Commission.").[16]

Aureon did raise similar arguments in a separate Commission proceeding, *Iowa Network Access Division Tariff FCC No. 1*, 33 FCC Rcd 7517 ¶¶ 115 n.349 & accompanying text, 120-21 (2018), but the FCC is not "'required to sift through pleadings in other proceedings in search of issues that a petitioner raised elsewhere and might have raised here had it thought to do so.'" *Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 39 (D.C. Cir. 2006) (quoting *Beehive Tel. Co., Inc. v. FCC*, 179 F.3d 941, 945 (D.C. Cir. 1999)). In all events, as this Court held in disposing of a Takings challenge in *Great Lakes Comnet*, 823 F.3d at 1005, "the Transformation Order, not the order under review, implements the bill-and-keep framework, so any challenges to the validity of that framework are not presently before us."

II. AT&T'S SEPARATE CHALLENGES LACK MERIT.

A. The FCC Correctly Determined that Aureon's 2012 Rate Remained in Effect and that AT&T Forfeited the Opportunity to Challenge that Rate's "Deemed Lawful" Status.

In its petition for further reconsideration, AT&T argued for the first time that Aureon's 2012 interstate switched transport rate was unlawful as of July 1, 2013, because it exceeded the new rate cap that went into effect on that date – the rate "benchmark" the competing incumbent LEC in the area would have charged for

[16] Aureon (Br. 16) also did not argue below that rate caps violate 47 U.S.C. § 205's "just and reasonable" requirement.

the same service. 47 C.F.R. §§ 51.911(c), 61.26. Because the 2012 rate exceeded the new July 2013 rate cap and was subject to mandatory detariffing,[17] according to AT&T, *it owed Aureon nothing* for access service provided to it by Aureon for a period of nearly five years. *Further Reconsideration Order* ¶ 9 (JA__). The Commission rejected this claim, however, ruling that the 2012 rate remained in effect during that period, and that AT&T forfeited the opportunity to challenge the rate's lawfulness on that ground. AT&T (Br. § I) challenges that ruling, arguing that the FCC must determine whether the 2012 rate complied with the rate benchmark, and arbitrarily ruled that AT&T defaulted procedurally. *See also* Sprint Br. § I. Neither argument has merit.

1. There is no dispute that Aureon's 2012 rate was filed under Section 204(a)(3)'s streamlined procedures, that the FCC did not suspend it, and (unlike the 2013 rate) that it complied with FCC rate limits when filed. *Reconsideration Order* ¶ 17 (JA__). "[A]ccordingly, it was 'deemed lawful.'" *Id.* There is also no dispute that the rate "did not expire by its own terms." *Id.* ¶ 18 (JA__); *see* Complaint, Exh. 19 (JA__). The rate remained in effect, therefore, unless and until it was amended or cancelled. *Reconsideration Order* ¶¶ 17-18 (JA__). Aureon sought to increase the rate in 2013, but the FCC ruled the 2013 tariff filing void *ab*

[17] "Mandatory detariffing" means that a tariff is not permitted to be filed. *See generally MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

initio because it violated bill-and-keep transition requirements on its face. *See* § I *supra*. That ruling restored the status *quo ante*. *See Virgin Islands*, 444 F.3d at 671-72 (order vacating suspension of a streamlined tariff filing restored tariff's status *quo ante* as "deemed lawful"). Thus, Aureon's 2012 rate remained effective.

The FCC also correctly determined that AT&T forfeited the chance to show that the 2012 rate was no longer "deemed lawful" as of July 1, 2013, because it exceeded the rate benchmark that took effect on that date. *Further Reconsideration Order* ¶¶ 6-9 (JA__). "A complainant in a section 208 proceeding has the burden of demonstrating that the challenged rate is unlawful," *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128, 5133 ¶ 12 (2000); *Further Reconsideration Order* ¶ 7 & n.21 (JA__) (citing *Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000)), and must "plead all matters concerning its claims fully and with specificity" in its complaint. *Id.* at n.20 (JA__) (citing 47 C.F.R. §§ 1.720(a), 1.721(a)(4) (2017)); *see Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd 22497 ¶ 243 (1997) (generally prohibiting amendments to Section 208 complaints, reasoning that compliance with the statute's strict deadlines requires that complaints be fully developed before filing). Thus, in the absence of a rate that facially violated a specific rate cap, AT&T had the burden of challenging the lawfulness of Aureon's 2012 rate in the Complaint and proffering evidence that the rate exceeded the rate benchmark. AT&T failed to meet that burden. *Id.* ¶¶ 6-7

(JA__). As there was no basis to determine that the 2012 rate exceeded the benchmark as of July 2013, the rate was "deemed lawful" during the time period for which AT&T sought damages and "not subject to refunds." *ACS*, 290 F.3d at 411.[18]

2. AT&T contends that the Commission was obligated to determine whether the 2012 rate violated the benchmark, regardless of whether AT&T raised the issue. AT&T's unfounded premise is that the FCC not only may, but *must*, determine compliance with prescribed rate limits outside the statutory framework of Title II and the FCC's implementing rules and procedures, and regardless of whether any party ever properly challenges it. But the FCC can order damages only in Section 208 complaint proceedings. 47 U.S.C. § 208; *see Further Reconsideration Order* ¶ 9 n.33 (JA__). It cannot do so when, as in this case, the record does not support a finding that a rate violates statutory or regulatory requirements. *Id.* ¶ 7 (JA__).[19]

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[18] AT&T (Br. 25) insists that the FCC determined, in the separate tariff investigation, that the benchmark rate was $0.005634 per minute, lower than Aureon's 2012 rate of $0.00623. But that determination – which is not before the Court in this case – related to the tariff that Aureon filed on February 22, 2018, and "is prospective only;" it has no bearing on the benchmark as of July 2013. *Further Reconsideration Order* ¶ 7 (JA__).

[19] Thus, AT&T (Br. 22) is wrong that "the FCC's rationale for refusing to enforce Aureon's 2013 rate … is fully applicable to the 2012 rate." Likewise, there is nothing "irrational" about the distinction the FCC drew between Aureon's 2012 and 2013 rates. AT&T Br. 30.

AT&T (Br. 20-21, 25) also argues that Section 206's provision for the "full amount of damages," 47 U.S.C. § 206, entitles it to damages based on the "just and reasonable" rate that Aureon should have charged. But "the Commission may not … impose refund liability for" rates that are "deemed lawful" – "even ones it concludes were unreasonable." *ACS*, 290 F.3d at 411. As Aureon's 2012 rate was "deemed lawful," the FCC may not impose refund liability for it. "Section 206 does not overcome the deemed lawful protection against refunds." *Further Reconsideration Order* ¶ 5 n.12 (JA__).

AT&T (Br. 25) further argues that the 2012 rate could not continue in effect past July 3, 2014, because Commission rules require Aureon to file tariff rates with updated cost support every two years. *See* 47 C.F.R. § 69.3(a), (f)(1). Aureon complied with this requirement, however, filing updated cost support in 2014 and 2016. *See* Complaint, Exh. 21-22 (JA__).[20] In all events, as the FCC stated, "AT&T offers no support for its contention that a failure to comply with Rule 69.3 vitiates an operative tariff." *Reconsideration Order* ¶ 18 (JA__).[21]

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[20] Aureon's 2014 and 2016 tariff filings contained the same interstate switched transport rate as its 2013 filing.

[21] AT&T's (Br. 23-24) suggestion that the FCC should have voided the 2013 rate but not "the [Tariff] provision … that canceled the 2012 rate" is mistaken. The sole purpose of the 2013 tariff filing was to revise Aureon's interstate switched transport rate. *See* Complaint Ex. 20 (JA__).

3. AT&T contends that it was under no obligation to challenge the 2012 rate "until the damages phase," when "AT&T had the right to file a supplemental complaint for damages." AT&T Br. 26 (citing 47 C.F.R. § 1.722(d) (2017)). As discussed above, *see* § I.A *supra*, "deemed lawful" means that a rate is conclusively presumed to be "just and reasonable" and that a carrier is not subject to retroactive liability for damages while the rate is in effect. *See ACS*, 290 F.3d at 411. For Aureon to be subject to damages claims in a supplemental complaint – *i.e.*, for the FCC to determine that the "just and reasonable" rate was other than the 2012 rate – the FCC would have had to determine that the 2012 rate was not "deemed lawful" because it exceeded the rate benchmark that went into effect on July 1, 2013. That determination could be made only in the liability phase of the proceeding.

> Section 208 of the Act [] requires proof that the defendant carrier has violated the Act or a Commission rule or order for a complainant to prevail… In those cases in which the complainant fails to sustain its burden of proving a violation of the Act, there would obviously be no basis for a supplemental complaint for damages.

Implementation of the Telecommunications Act of 1996, 12 FCC Rcd at 22577 ¶ 186. Here, AT&T failed to sustain its burden of alleging, and proffering evidence,

that the 2012 rate violated the rate benchmark that took effect in July 2013, so there was "no basis for a supplemental complaint for damages." *Id.*[22]

AT&T complains that the FCC's ruling required it to allege the unlawfulness of Aureon's rates "all the way down." AT&T Br. 28 (internal quotations omitted). But AT&T sought damages only for the period beginning July 1, 2013. *See Order* ¶ 23, n.125 & accompanying text (JA__). As stated above, the 2012 rate was in effect and "deemed lawful" prior to that date.[23]

AT&T (Br. 23-24, 27-28) also complains that it had "no reason … to expect" to have to allege that the 2012 rate exceeded the rate benchmark in its Complaint, and that the FCC's void *ab initio* finding as to the 2013 rate operated to "shield" the 2012 rate from scrutiny. But the finding that the 2012 rate remained in effect followed directly from AT&T's argument that the 2013 rate was void *ab initio*. *See Further Reconsideration Order* ¶ 7 (JA__). AT&T's failure to challenge

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[22] AT&T's (Br. 29) argument regarding its failure to challenge the 2012 rate in response to Aureon's reconsideration petition fails for the same reason. The FCC's point regarding that failure was that AT&T missed more than one opportunity to challenge the 2012 rate's lawfulness in the liability phase, as Aureon argued on reconsideration that the 2012 rate remained in effect and "deemed lawful" due to the 2013 rate being void *ab initio*. *Further Reconsideration Order* ¶ 8 (JA__).

[23] AT&T (Br. 28-29 n.9) also invokes mitigation of damages to argue that Aureon should have pled the 2012 rate's lawfulness as an affirmative defense. That doctrine has no bearing on the rate's lawfulness. "[T]he doctrine of mitigation of damages … looks solely to the conduct of the party requesting damages." *Drexel Burnham Lambert Inc. v. CFTC*, 850 F.2d 742, 752 (D.C. Cir. 1988).

the 2012 rate in its complaint precluded scrutiny of that previously "deemed lawful" rate.

B. The FCC Correctly Found that Aureon Did Not Engage in Access Stimulation under FCC Rules.

AT&T (Br. § II) argues that the Commission erred by concluding that Aureon's actions did not satisfy the agency's definition of access stimulation. *Order* ¶¶ 31-33 (JA__). According to AT&T, Aureon's traffic agreements with subtending LECs allegedly engaged in access stimulation constitute revenue-sharing agreements within the meaning of the FCC's rule.[24] AT&T is wrong.

Under the rule in effect at the time of this case, a carrier engages in access stimulation if the carrier, *inter alia*,

> [h]as an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the [carrier] is based on the billing or collection of access charges from interexchange carriers.

47 C.F.R. § 61.3(bbb)(1)(i).

The FCC correctly concluded that Aureon's traffic agreements with subtending LECs are not revenue-sharing agreements under the rule. *Order* ¶ 33 (JA__). "When the parties have adopted a writing as a final expression of their

[24] There was no dispute that the other condition for finding that a carrier is engaged in access stimulation, a three-to-one ratio of originating-to-terminating traffic, was satisfied. *Order* ¶ 32 (JA__).

agreement, interpretation is directed to the meaning of that writing in the light of the circumstances." Restatement (Second) of Contracts § 202 cmt. b (1981); *id.* at § 202(1) & cmt. c (contractual language is interpreted in light of, *inter alia*, the principal purpose of the contract) (cited in *Segar v. Mukasey*, 508 F.3d 16, 24 (D.C. Cir. 2007)). Here, the language of the traffic agreements, the circumstances in which they were made, and their purpose all support the FCC's conclusion.

In the traffic agreements, Aureon agreed [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]. The traffic agreements are largely identical – they do not differ according to whether a subtending LEC allegedly engages in access stimulation. *See id.* at Exh. 31-37 (JA__); Answer 28 ¶ 51 (JA__), Hilton Decl. at 12 ¶ 21 (JA__). This is not surprising, as the agreements were made in the 1980s, long before the emergence of access stimulation schemes in the past 10-15 years. *Order* ¶ 33 (JA__). The purpose of the traffic agreements,

which the state regulatory authority mandated, was to implement Aureon's CEA service. *Id*.

AT&T argues that subtending LECs receive a "net payment" under the traffic agreements that is "based upon the billing or collection of access charges" within the meaning of the access stimulation rule because it is "part of an 'arrangement … that results in the generation of switched access traffic to [Aureon].'" AT&T Br. 31 (quoting *Connect America Fund*, 27 FCC Rcd 605, 613 ¶ 27 (Comm. Carr. Bur. 2012)). But the rule requires that access stimulation be the *inducement* for payment. "[T]o be 'based upon the billing or collection of access charges,'" a revenue-sharing agreement must "provide[] for the net payment of consideration" for "the generation of switched access traffic to the LEC." *Connect America Fund*, 27 FCC Rcd at 613 ¶ 27; *see Transformation Order* ¶ 670 (FCC "intend[ed] the net payment language to limit the revenue sharing definition in a manner that … best identifies the [agreements] likely to be associated with access stimulation.").

There is no evidence here of any such relationship between access stimulation and the alleged net payments. Aureon handles call traffic the same regardless of whether the subtending LEC for which the traffic is bound is allegedly an access stimulator. *Order* ¶ 33 (JA__). As set forth above, the consideration the traffic agreements provide for relates to implementation of

Aureon's CEA service, not to access stimulation. In light of the foregoing, the FCC's conclusion that Aureon's traffic agreements are not revenue-sharing agreements within the meaning of the access stimulation rule is correct.

C. The Commission Properly Declined to Rule on AT&T's Unreasonable Practice Claim in This Proceeding.

The FCC deferred resolution of one of AT&T's unreasonable practice claims against Aureon under 47 U.S.C. § 201(b) to a parallel complaint proceeding in which AT&T raised the same issue. *Order* ¶ 34 (JA__). AT&T (Br. § III) argues that the FCC acted impermissibly, relying on *AT&T Corp. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992). AT&T's reliance on that decision is misplaced.

Shortly after filing its Complaint, AT&T filed a complaint against Great Lakes Communication Corporation (GLCC), one of Aureon's subtending LECs allegedly engaged in access stimulation. *Order* ¶ 21 (JA__); *see id.* ¶ 13, n.71 & accompanying text (JA__). In the *Order*, the Commission explained that AT&T's claim that Aureon engaged in an unreasonable practice by facilitating the actions of access-stimulating LECs shared the same premise as AT&T's GLCC complaint: that GLCC was required to "price [] switched access services, including transport, at rates that do not exceed the rates for functionally equivalent service offered by the lowest-priced price cap LEC in the state, which is CenturyLink[,] and to offer a direct transport service like CenturyLink." *Id.* ¶ 34 (JA__) (internal quotations omitted). The FCC stated that it would address this issue in the GLCC proceeding,

reasoning that "AT&T's real dispute is that it wants to bypass Aureon completely and directly interconnect with the subtending LECs engaged in access stimulation." *Id.* ¶ 21 (JA__). That decision was well within the Commission's broad discretion. *Cf. MCI Worldcom Network Services, Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001) (affirming FCC refusal to enforce a carrier's compliance with a merger condition "in a parallel and duplicative section 208 proceeding.").[25]

AT&T's reliance on the 1992 *AT&T* case is misplaced. Unlike that case, "this case involves neither an 'administrative law shell game' nor a 'promise to address the legal issue … in a future rulemaking.'" *AT&T Corp. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000) (quoting *AT&T*, 978 F.2d at 731, 732-33). The FCC fully considered AT&T's challenges to Aureon's actions, and although it deferred one claim to a parallel complaint proceeding where AT&T raised the same issue, "there is no evidence that its reason for doing so was," as the Court observed in *AT&T*, "a desire to 'avoid judicial review.'" *Id.* (quoting *AT&T*, 978 F.2d at 731).

D. The FCC Correctly Interpreted the Tariff to Cover the Service that Aureon Provided to AT&T.

Finally, AT&T (Br. § IV) argues that the FCC misinterpreted Aureon's Tariff to cover service related to access stimulation traffic (*i.e.*, call traffic that

[25] AT&T's later settlement of its dispute with GLCC, *see* AT&T Br. 34 n.10, does not undercut the reasonableness of the FCC's exercise of discretion based on the circumstances at the time.

Aureon delivered to subtending LECs allegedly engaged in access stimulation). In the proceedings below, AT&T argued that "Centralized Equal Access Service" within the meaning of the Tariff must be interpreted to exclude service related to access stimulation traffic. *See Order* ¶¶ 17-19 (JA__). The FCC squarely rejected that argument. *Id.* AT&T tries another tack on appeal, suggesting that the agency actually agreed with AT&T, but misinterpreted the Tariff to cover service related to access stimulation traffic under a different category of switched access service, and thereby "fail[ed] to harmonize" the Tariff's provisions. AT&T Br. 38. This straw man argument mischaracterizes the FCC's decision.

The FCC correctly concluded that Aureon provided AT&T with CEA service covered by the Tariff. *Order* ¶ 18 (JA__). The Tariff is titled "Centralized Equal Access Service." Stipulated Facts 34-35 (JA__). It contains "regulations, rates and charges applicable" to Aureon's provision of "Switched Access Service." Tariff § 1.1, 2nd Revised Page 16 (JA__). The terms "Centralized Equal Access Service" and "Switched Access Service" are not defined in the Tariff's "Definitions" section. *See id.* § 2.6, Pages 50-66 (JA__). But section 6 of the Tariff, titled "Switched Access Service," describes both services.

> Switched Access Service, when combined with the services offered by [subtending LECs], is available to [IXCs]. [Aureon] provides a two-point electrical communications path between a point of interconnection with the transmission facilities of [a subtending LEC] at a location listed in Section 8 following and [Aureon]'s central access tandem where the [IXC]'s traffic is switched to originate or terminate its communications. It also provides for

> the switching facilities at [Aureon's] central access tandem… Rates and charges for Switched Access Service are set forth in 6.8 following.

Id. § 6.1, 4th Revised Page 88 (JA__).

Section 6 goes on to identify rate categories, one of which is relevant here, that "apply to the provision of Switched Access Service in conjunction with Centralized Equal Access Service: Switched Transport." *Id.* § 6.1.3, 2nd Revised Page 93 (JA__). And the Tariff describes "Switched Transport" as a

> two-way frequency transmission path [that] permits the transport of calls from [Aureon's] central access tandem to an [Aureon] premises listed in Section 8 following and from such [Aureon] Premises to [Aureon's] central access tandem… Switched Transport is assessed on a per access minute basis at the rate set forth in 6.8.1 following.

Id. § 6.1.3(A), 1st Revised Page 95-101 (issued Feb. 13, 1989) (JA__); *see id.* § 6.8.1, 12th Revised Page (specifying a "Switched Transport" rate of $0.00896 per minute) (JA__).

In sum, Aureon's "Switched Transport" rate is for Aureon's portion of a "complete Switched Access Service" between an interexchange carrier's point of interconnection with Aureon and one of Aureon's points of interconnection with a subtending LEC. *Id.* § 6.1.3, 1st Revised Page 94 (JA__). The Tariff describes that portion of "Switched Access Service" as "Centralized Equal Access Service." Based on the foregoing Tariff language, the FCC found that "Aureon indisputably provided Switched Access Service in the manner delineated in the Tariff when it routed the calls AT&T sent to the LECs that subtend Aureon's network." *Order* ¶

18 (JA__). The FCC's interpretation is correct. Accordingly, AT&T's argument that the FCC misinterpreted the Tariff should be rejected.

CONCLUSION

The petition for review should be denied.

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I, William J. Scher, hereby certify that on January 17, 2020, I filed the foregoing Public Copy—Sealed Material Deleted Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic 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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Statutory Addendum

47 U.S.C. § 153

§ 153. Definitions

* * *

(20) Exchange access

The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

* * *

(32) Local exchange carrier

The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.S.C. § 154

§ 154. Federal Communications Commission

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission,

in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

§ 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to

subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 203

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 204

§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 5 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(3) A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a).

47 U.S.C. § 205

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed,

and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C. § 206

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C. § 207

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in

any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 208

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

(2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

(3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 51.5

§ 51.5 Terms and definitions.

Terms used in this part have the following meanings:

* * *

Incumbent Local Exchange Carrier (Incumbent LEC). With respect to an area, the local exchange carrier that:

(1) On February 8, 1996, provided telephone exchange service in such area; and

(2)(i) On February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to § 69.601(b) of this chapter; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (2)(i) of this section.

* * *

Local Exchange Carrier (LEC). A LEC is any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of the Act, except to the extent that the Commission finds that such service should be included in the definition of the such term.

* * *

Telephone exchange service. A telephone exchange service is:

(1) A service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or

(2) A comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 C.F.R. § 51.903

§ 51.903 Definitions.

For the purposes of this subpart:

(a) Competitive Local Exchange Carrier. A Competitive Local Exchange Carrier is any local exchange carrier, as defined in § 51.5, that is not an incumbent local exchange carrier .

*** * ***

47 C.F.R. § 51.911

§ 51.911 Access reciprocal compensation rates for competitive LECs.

(a) Caps on Access Reciprocal Compensation and switched access rates. Notwithstanding any other provision of the Commission's rules:

(1) In the case of Competitive LECs operating in an area served by a Price Cap Carrier, no such Competitive LEC may increase the rate for any originating or terminating intrastate switched access service above the rate for such service in effect on December 29, 2011.

(2) In the case of Competitive LEC operating in an area served by an incumbent local exchange carrier that is a Rate-of–Return Carrier or Competitive LECs that are subject to the rural exemption in § 61.26(e) of this chapter, no such Competitive LEC may increase the rate for any originating or terminating intrastate switched access service above the rate for such service in effect on December 29, 2011, with the exception of intrastate originating access service. For such Competitive LECs, intrastate originating access service subject to this subpart shall remain subject to the same state rate regulation in effect December 31, 2011, as may be modified by the state thereafter.

(b) Except as provided in paragraph (b)(7) of this section, beginning July 3, 2012, notwithstanding any other provision of the Commission's rules, each Competitive LEC that has tariffs on file with state regulatory authorities shall file intrastate access tariff provisions, in accordance with § 51.505(b)(2), that set forth the rates applicable to Transitional Intrastate Access Service in each state in which it provides Transitional Intrastate Access Service. Each Competitive Local Exchange

Carrier shall establish the rates for Transitional Intrastate Access Service using the following methodology.

(1) Calculate total revenue from Transitional Intrastate Access Service at the carrier's interstate access rates in effect on December 29, 2011, using Fiscal Year 2011 intrastate switched access demand for each rate element.

(2) Calculate total revenue from Transitional Intrastate Access Service at the carrier's intrastate access rates in effect on December 29, 2011, using Fiscal Year 2011 intrastate switched access demand for each rate element.

(3) Calculate the Step 1 Access Revenue Reduction. The Step 1 Access Revenue Reduction is equal to one-half of the difference between the amount calculated in (b)(1) of this section and the amount calculated in (b)(2) of this section.

(4) A Competitive Local Exchange Carrier may elect to establish rates for Transitional Intrastate Access Service using its intrastate access rate structure. Carriers using this option shall establish rates for Transitional Intrastate Access Service such that Transitional Intrastate Access Service revenue at the proposed rates is no greater than Transitional Intrastate Access Service revenue at the intrastate rates in effect as of December 29, 2011 less the Step 1 Access Revenue Reduction, using Fiscal year 2011 intrastate switched access demand.

(5) In the alternative, a Competitive Local Exchange Carrier may elect to apply its interstate access rate structure and interstate rates to Transitional Intrastate Access Service. In addition to applicable interstate access rates, the carrier may assess a transitional per-minute charge on Transitional Intrastate Access Service end office switching minutes (previously billed as intrastate access). The transitional charge shall be no greater than the Step 1 Access Revenue Reduction divided by Fiscal year 2011 intrastate switched access demand

(6) Except as provided in paragraph (b)(7) of this section, nothing in this section obligates or allows a Competitive LEC that has intrastate rates lower than its functionally equivalent interstate rates to make any intrastate tariff filing or intrastate tariff revisions raising such rates.

(7) If a Competitive LEC must make an intrastate switched access rate reduction pursuant to paragraph (b) of this section, and that Competitive LEC has an intrastate rate for a rate element that is below the comparable interstate rate for that element, the Competitive LEC may increase the rate for any intrastate rate element

that is below the comparable interstate rate for that element to the interstate rate no later than July 1, 2013;

(c) Beginning July 1, 2013, notwithstanding any other provision of the Commission's rules, all Competitive Local Exchange Carrier Access Reciprocal Compensation rates for switched exchange access services subject to this subpart shall be no higher than the Access Reciprocal Compensation rates charged by the competing incumbent local exchange carrier, in accordance with the same procedures specified in § 61.26 of this chapter.

47 C.F.R. § 61.3

§ 61.3 Definitions.

* * *

(q) Dominant carrier. A carrier found by the Commission to have market power (i.e., power to control prices).

* * *

(z) Non-dominant carrier. A carrier not found to be dominant. The nondominant status of providers of international interexchange services for purposes of this subpart is not affected by a carrier's classification as dominant under § 63.10 of this chapter.

* * *

(bbb) Access Stimulation.

(1) A Competitive Local Exchange Carrier serving end user(s) engages in Access Stimulation when it satisfies either paragraph (bbb)(1)(i) or (ii) of this section; and a rate-of-return local exchange carrier serving end user(s) engages in Access Stimulation when it satisfies either paragraph (bbb)(1)(i) or (iii) of this section.

(i) The rate-of-return local exchange carrier or a Competitive Local Exchange Carrier:

(A) Has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return local exchange carrier or Competitive Local

Exchange Carrier is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this part, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier to the other party to the agreement shall be taken into account; and

(B) Has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year.

(ii) A Competitive Local Exchange Carrier has an interstate terminating-to-originating traffic ratio of at least 6:1 in an end office in a calendar month.

(iii) A rate-of-return local exchange carrier has an interstate terminating-to-originating traffic ratio of at least 10:1 in an end office in a three calendar month period and has 500,000 minutes or more of interstate terminating minutes-of-use per month in the same end office in the same three calendar month period. These factors will be measured as an average over the three calendar month period.

(2) A Competitive Local Exchange Carrier will continue to be engaging in Access Stimulation until: For a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section, it terminates all revenue sharing agreements covered in paragraph (bbb)(1)(i) of this section and does not engage in Access Stimulation as defined in paragraph (bbb)(1)(ii) of this section; and for a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(ii) of this section, its interstate terminating-to-originating traffic ratio falls below 6:1 for six consecutive months, and it does not engage in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section.

(3) A rate-of-return local exchange carrier will continue to be engaging in Access Stimulation until: For a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section, it terminates all revenue sharing agreements covered in paragraph (bbb)(1)(i) of this section and does not engage in Access Stimulation as defined in paragraph (bbb)(1)(iii) of this section; and for a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(iii) of this section, its interstate terminating-to-originating traffic ratio falls below 10:1 for six consecutive months and its monthly interstate terminating minutes-of-use in an end

office falls below 500,000 for six consecutive months, and it does not engage in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section.

(4) A local exchange carrier engaging in Access Stimulation is subject to revised interstate switched access charge rules under § 61.26(g) (for Competitive Local Exchange Carriers) or § 61.38 and § 69.3(e)(12) of this chapter (for rate-of-return local exchange carriers).

47 C.F.R. § 61.26

§ 61.26 Tariffing of competitive interstate switched exchange access services.

*** * ***

(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.

47 C.F.R. § 61.38

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) Scope. This section applies to dominant carriers whose gross annual revenues exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. Incumbent Local Exchange Carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in § 69.602 of this chapter may submit Access Tariff filings for that study area pursuant to either this section or § 61.39. However, the Commission may require any issuing carrier to submit such information as may be necessary for a review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in § 61.42 (d), (e), and (g).

(b) Explanation and data supporting either changes or new tariff offerings. The material to be submitted for a tariff change which affects rates or charges or for a tariff offering a new service, must include an explanation of the changed or new

matter, the reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter.

(1) For a tariff change the issuing carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A cost of service study for all elements for the most recent 12 month period;

(ii) A study containing a projection of costs for a representative 12 month period;

(iii) Estimates of the effect of the changed matter on the traffic and revenues from the service to which the changed matter applies, the issuing carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (b)(1)(ii) above.

(2) For a tariff filing offering a new service, the issuing carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A study containing a projection of costs for a representative 12 month period; and

(ii) Estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, the issuing carrier's other service classifications, and the issuing carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in paragraph (b)(2)(i) of this section.

(3) [Reserved]

(4) For a tariff that introduces a system of density pricing zones, as described in § 69.123 of this chapter, the issuing carrier must, before filing its tariff, submit a density pricing zone plan including, inter alia, documentation sufficient to establish that the system of zones reasonably reflects cost-related characteristics, such as the density of total interstate traffic in central offices located in the respective zones, and receive approval of its proposed plan.

(c) Working papers and statistical data.

(1) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the issuing carrier must file the working papers containing the information underlying the data supplied in response to paragraph (b) of this

section, and a clear explanation of how the working papers relate to that information.

(2) All statistical studies must be submitted and supported in the form prescribed in § 1.363 of this chapter.

(d) Form and content of additional material to be submitted with certain rate increases. In the circumstances set out in paragraphs (d)(1) and (2) of this section, the issuing carrier must submit all additional cost, marketing and other data underlying the working papers to justify a proposed rate increase. The issuing carrier must submit this information in suitable form to serve as the carrier's direct case in the event the rate increase is set by the Commission for investigation.

(1) Rate increases affecting single services or tariffed items.

(i) A rate increase in any service or tariffed item which results in more than $1 million in additional annual revenues, calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A single rate increase in any service or tariffed item, or successive rate increases in the same service or tariffed item within a 12 month period, either of which results in:

(A) At least a 10 percent increase in annual revenues from that service or tariffed item, and

(B) At least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(2) Rate increases affecting more than one service or tariffed item.

(i) A general rate increase in more than one service or tariffed item occurring at one time, which results in more than $1 million in additional revenues calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A general rate increase in more than one service or tariffed item occurring at one time, or successive general rate increases in the same services or tariffed items occurring within a 12 month period, either of which results in:

(A) At least a 10 percent increase in annual revenues from those services or tariffed items, and

(B) At least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(e) Submission of explanation and data by connecting carriers. If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data required by paragraphs (b) and (c) of this section on the date the issuing carrier files the tariff matter with the Commission.

(f) Copies of explanation and data to customers. Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated costs, the issuing carrier must transmit to the customer a copy of the explanation and data required by paragraphs (b) and (c) of this section.

(g) On each page of cost support material submitted pursuant to this section, the issuing carrier shall indicate the transmittal number under which that page was submitted.

The following 2017 regulations were modified and renumbered in 2018 in ways that do not impact this case.

47 C.F.R. § 1.720

§ 1.720 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated affidavits, exhibits and other attachments. Commission proceedings may also require or permit other written submissions such as briefs, written interrogatories, and other supplementary documents or pleadings. Those formal complaint proceedings handled on the Enforcement Bureau's Accelerated Docket are subject to pleading and procedural rules that differ in some respects from the general rules for formal complaint proceedings.

(a) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

47 C.F.R. § 1.721

§ 1.721 Format and content of complaints.

(a) Subject to paragraph (e) of this section governing supplemental complaints filed pursuant to § 1.722, and paragraph (f) of this section governing Accelerated Docket proceedings, a formal complaint shall contain:

(4) Citation to the section of the Communications Act and/or order and/or regulation of the Commission alleged to have been violated.

47 C.F.R. § 1.722

§ 1.722 Damages.

(d) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

(1) Comply with paragraph (a) of this section, and

(2) State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.