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

NOS. 18-1258, 19-1014, 19-1087

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

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

AT&T SERVICES, INC.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

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

2. Rulings under review

The rulings under review are: *In the Matter of Iowa Network Access Division, Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 33 FCC Rcd 7517 (2018) ("*First Rate Order*"); *In the Matter of Iowa Network Access Division*, Order on Reconsideration, 33 FCC Rcd 11860 (2018) ("*Recon. Order*"); and *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 34 FCC Rcd 1510 (2019) ("*Second Rate Order*").

3. Related cases

The Court held the above-captioned cases in abeyance pending its decision in *AT&T Corp. v. FCC*, 970 F.3d 344 (D.C. Cir. 2020), which granted in part and denied in part Aureon's and AT&T's petitions for review of the FCC's orders in a separate but related administrative complaint proceeding. The Court is holding in abeyance South Dakota Network, L.L.C.'s petition for review of an FCC order in a

separate tariff investigation proceeding (Case No. 19-1014) pending the outcome of the above-captioned cases.

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GLOSSARY

Access Charges	Charges imposed on long-distance carriers for access to local telephone networks
Benchmark Rule	FCC rule limiting the access charge rate that competitive carriers may tariff to the rate tariffed for the same service by the incumbent carrier in the same area
Competitive Carrier	A local telephone company or intermediate carrier that is not an incumbent carrier
Cost-Based Pricing Rules	FCC rules regulating access charge rates, based on projected costs of providing service and projected demand for service
Incumbent Carrier	A local telephone company that provided access service prior to enactment of the Telecommunications Act of 1996, as defined in 47 U.S.C. § 251(h)
Transitional Pricing Rules	FCC rules implementing access charge system reforms

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INTRODUCTION

Petitioner Aureon is an intermediate carrier that connects telephone calls between long-distance and local carriers primarily in rural parts of Iowa. In *AT&T Corp. v. FCC*, 970 F.3d 344, 349-50 (D.C. Cir. 2020), this Court upheld the Commission's determination that Aureon is subject to the transitional pricing rules implementing reform of the FCC's "access charge" system governing intercarrier

compensation for exchanging telephone calls. The Commission's transitional pricing rules limit Aureon's tariffed access charge rate to a "benchmark" at or below the rate tariffed for like service by the incumbent carrier in the same area.

The orders on review concluded two successive Commission investigations into the lawfulness of Aureon's tariffed rate under the transitional pricing rules and the FCC's complementary, cost-based pricing rules. The Commission concluded both investigations by finding that Aureon failed to adequately justify its rate under the cost-based pricing rules, and directing Aureon to file additional cost support information and to revise its tariff to reflect the lower of (1) the benchmark rate or (2) a properly-justified cost-based rate.

Rather than challenge the Commission's findings regarding Aureon's cost-based rate, Aureon contends that subjecting it to the benchmark rule will violate the Communications Act and prevent Aureon over the long run from recovering its operating costs and a fair rate of return. Aureon's contentions are not properly before the Court and, in all events, are baseless. For its part, petitioner AT&T argues that the orders on review allow Aureon to tariff an excessive rate. The FCC reasonably rejected AT&T's arguments.

JURISDICTION

The FCC released the *First Rate Order* and the *Recon. Order* on July 31 and November 28, 2018, respectively. Aureon timely filed a petition for review of the

First Rate Order on September 19, 2018. AT&T timely filed a petition for review of both orders on January 18, 2019. The FCC released the *Second Rate Order* on February 28, 2019. Aureon timely filed a petition for review of the *Second Rate Order* on April 16, 2019. This Court has jurisdiction under 28 U.S.C. §§ 2342(1) and 2344, and 47 U.S.C. § 402(a). For the reasons set forth in detail below, however, Aureon's arguments are not properly before the Court.

QUESTIONS PRESENTED

This case presents the following questions:

1. Are Aureon's statutory challenges barred because they were beyond the scope of the proceeding below or because Aureon failed to raise them before the agency? If the Court were to reach Aureon's challenges, do they lack merit?

2. Are Aureon's arguments that limiting it to the benchmark rate will prevent Aureon over time from recovering its costs and a fair rate of return unripe because the Commission did not limit Aureon to the benchmark rate in the orders on review, and because facts regarding the impact on Aureon of charging the benchmark rate are absent from the record?

3. Did the FCC reasonably calculate the benchmark rate based on the average distance that calls travel on Aureon's network in connection with the tariffed service?

4. Did the FCC reasonably conclude that, for purposes of calculating Aureon's cost-based rate, Aureon's forecast of demand for its tariffed service need not include "bypass traffic" that does not use the tariffed service?

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT

A. Statutory and Regulatory Framework

1. Section 201(b) of the Communications Act of 1934, as amended (the "Act"), requires that rates for interstate communications services be "just and reasonable." 47 U.S.C. § 201(b). In service of this mandate, carriers in certain circumstances 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 up to five months before the tariff becomes effective to investigate its lawfulness. *Id.* § 204(a). The FCC may also prescribe just and reasonable rates to be charged in the future. *Id.* § 205(a). "Any person" may file a complaint with the Commission that a carrier's effective tariff is unlawful, *id.* § 208, and request damages. *Id.* §§ 206, 207.

2. This case involves the Commission's rules governing rates charged by local carriers to long-distance carriers for access to local telephone networks to complete long-distance calls. "For example, when an AT&T subscriber in New

York calls someone in Chicago, AT&T connects the call between local networks in both cities. Historically, the calling party would pay AT&T, which in turn would pay the appropriate local carriers" a fee to access the local networks at either end of the call. *AT&T Corp.*, 970 F.3d at 346.

The local carriers that generally provide access service are divided between "incumbents," carriers that were providing service when Congress enacted the Telecommunications Act of 1996 ("1996 Act"), and "competitive" carriers that subsequently entered local markets to compete with the incumbents. *See, e.g.*, *Fones4All Corp. v. FCC*, 550 F.3d 811, 813 (9th Cir. 2008). Historically, the FCC treated incumbents as "dominant carrier[s]," 47 C.F.R. § 61.3(q), that possessed market power in the provision of access service, and regulated their access rates based on their projected costs of providing service and projected demand for service. *See Access Charge Reform*, 16 FCC Rcd 9923, 9939 ¶ 41 (2001). In contrast, because the new competitive entrants were considered "nondominant carrier[s]," 47 C.F.R. § 61.3(z), their rates initially were largely unregulated.

But in 2001, the FCC concluded that competitive carriers exercised market power over access service to the detriment of consumers. *Access Charge Reform*, 16 FCC Rcd at 9938 ¶ 39.[1] To constrain that power, the FCC adopted a

[1] The FCC explained: "once an end user decides to take service from a particular [local carrier], that [carrier] controls an essential component of the system that

"benchmark rule," which limits competitive carriers' tariffed access rates to the tariffed rate for equivalent services by the incumbent carrier in the same geographic area (the benchmark rate). *Id.* at 9938-40 ¶¶ 40-44; 47 C.F.R. § 61.26. Rates at or below the benchmark are conclusively presumed to be "reasonable" under the Act and are not subject to refund. *Access Charge Reform*, 16 FCC Rcd at 9948 ¶ 60. If a competitive carrier wishes to charge a rate higher than the benchmark, it must negotiate that rate with the individual carrier that it wishes to charge and list the negotiated rate in a contract (rather than a published tariff on file at the FCC).

3. Over time, carriers devised schemes to increase profits under the FCC's intercarrier compensation rules that harmed other carriers and their subscribers. Partly to combat these harmful practices, the Commission in 2011 adopted a plan "to phase out regulated … intercarrier compensation charges," including access charges. *Connect America Fund*, 26 FCC Rcd 17663, 17904 ¶ 736 (2011) ("*Transformation Order*"), *aff'd*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). In its place, the FCC implemented "a uniform national bill-and-keep framework" for many types of access services, in which each carrier "bills" its own subscribers and "keeps" the revenue. *Id.* at

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provides [long-distance] calls, and it becomes the bottleneck for [long-distance carriers] wishing to complete calls to, or carry calls from, that end user." *Access Charge Reform*, 16 FCC Rcd at 9935 ¶ 30.

17676 ¶ 34. Finding that a gradual transition would minimize disruption, the FCC established "'transitional access service pricing rules'" to "progressively reduce the access charges that carriers may charge one another." *AT&T Corp.*, 970 F.3d at 347.

The transitional pricing rules reduce the access rates charged by competitive carriers indirectly through the benchmark rule. Thus, 47 C.F.R. § 51.911(c) says that competitive carrier rates "shall be no higher than the … rates charged by" the incumbent in the same geographic area. *See Transformation Order*, 26 FCC Rcd at 17937 ¶ 807 ("[C]ompetitive [carriers] are permitted to tariff interstate access charges at a level no higher than the tariffed rate for such services offered by the incumbent . . . serving the same geographic area (the benchmarking rule).").

4. "In most parts of the country, each local carrier directly connects its network to that of each long-distance carrier. But in sparsely populated areas, this can be prohibitively expensive. In rural Iowa, local carriers solved the problem by forming Aureon as a joint venture." *AT&T Corp*, 970 F.3d at 346. Functioning in the middle of the call path, Aureon "operates a set of switches connecting the networks of participating local carriers (known as subtending carriers) to those of long-distance carriers. So, when an AT&T subscriber in New York calls someone in rural Iowa, AT&T connects the call from the local New York network to

Aureon, which in turn connects it to the appropriate 'subtending carrier' [in Iowa that delivers the call to the intended party]." *Id.* at 346-47.

"Aureon charges long-distance carriers for connecting calls from their networks to those of its subtending carriers." *Id.* at 347. Historically, the FCC regulated Aureon as a dominant carrier, *Iowa Network Access Division*, 3 FCC Rcd 1468, 1473 ¶ 33 (1988), and Aureon's access rates were subject to the cost-based pricing rules. *See generally* 47 C.F.R. § 61.38, Part 69 (Access Charges). Many carriers file access tariffs that include multiple, separately-charged access rate elements, but Aureon charges a single, composite rate for its interstate access service. *AT&T Corp.*, 970 F.3d at 354-55.

5. AT&T, a long-distance carrier, "has long believed that Aureon's access charges violate the transitional pricing rules." *Id.* at 347. AT&T filed a complaint against Aureon with the Commission under 47 U.S.C. § 208. *Id.* at 348. The FCC granted AT&T's complaint in part. *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 32 FCC Rcd 9677 ¶ 1 (2017) ("*Section 208 Order*"). The FCC ordered Aureon "to revise its tariff to file rates that comply with the Commission's rules." *Id.*[2]

[2] The discussion that follows is confined to issues pertinent to this case and does not address additional issues raised by the Aureon-AT&T dispute that were addressed in the FCC's *Section 208 Order* and in this Court's *AT&T Corp.* decision.

The Commission concluded that Aureon is a competitive carrier within the meaning of the transitional pricing rules. *Id.* ¶¶ 23, 25. The FCC rejected Aureon's argument that, as a dominant carrier subject to the cost-based pricing rules, it could not be treated as a competitive carrier under the transitional pricing rules. *Id.* ¶¶ 25-27. The FCC explained that the two sets of rules "complement each other." *Id.* ¶ 26. "[A] dominant carrier such as Aureon must comply with Section 61.38 and supply 'supporting … material' justifying its rates" based on projected costs. *Id.* As a competitive carrier, Aureon must also comply with the transitional pricing rules, under which Aureon's rates "shall be no higher than the … rates charged by" the incumbent in the same area. 47 C.F.R. § 51.911(c); *Section 208 Order* ¶ 26.

6. This Court in *AT&T Corp.* affirmed that Aureon is a competitive carrier under the transitional pricing rules, rejecting Aureon's "attempts to exploit a separate regulatory distinction between dominant and nondominant carriers." 970 F.3d at 349. Aureon pointed out that Section 51.911(c) of the transitional pricing rules cross-references Section 61.26, the benchmark rule, which "is limited to 'nondominant carriers'" and "does not apply to Aureon." *AT&T Corp.*, 970 F.3d at 349 (quoting 47 C.F.R. § 61.26). Aureon reasoned, therefore, that it could not be subject to the benchmark rule. But the Court stated that Section 51.911(c) "is not so limited. By its terms, it applies to all 'competitive local exchange carriers,' and Aureon clearly falls into that category." *Id.* (quoting 47 C.F.R. § 51.911(c)).

B. The Proceedings Below

1. On February 22, 2018, in accordance with the Commission's direction in the *Section 208 Order*, Aureon filed a revised tariff with an interstate access rate of $0.00576 per minute. *Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Transmittal No. 36, § 6.8.1(A) (Feb. 22, 2018) (JA__). In response to petitions from AT&T and Sprint, the Commission suspended the rate for one day (allowing it to become effective on March 1, 2018) and instituted an investigation into the rate's lawfulness. *Iowa Network Access Division Tariff F.C.C. No. 1*, 33 FCC Rcd 2089 (Wireline Comp. Bur./Pricing Policy Div. 2018) (JA__);[3] *see Iowa Network Access Division Tariff F.C.C. No. 1*, 33 FCC Rcd 3825 (Wireline Comp. Bur./Pricing Policy Div. 2018) (JA__) (designating issues for investigation).

The Commission concluded its investigation of Aureon's revised tariff rate in Transmittal No. 36 on July 31, 2018. *First Rate Order*, 33 FCC Rcd 7517 (2018) (JA__). The FCC declined to revisit its determination in the *Section 208 Order* that, as a competitive carrier under the transitional pricing rules, Aureon must comply with those rules as well as the "complementary" cost-based pricing rules.

[3] The suspension order required Aureon to keep an account of amounts received in connection with the rate under investigation. 33 FCC Rcd at 2091 ¶ 9 (JA__). That requirement remained in effect through subsequent tariff investigations.

Id. ¶¶ 20 n.72, 115 (JA__, __). Addressing the relationship between the two sets of rules, the FCC explained "that Aureon may only tariff a rate at the *lower of* the benchmark rate or cost-based rate." *Id.* ¶ 115 (JA__); *see id.* ¶¶ 114-21 (JA__-__).

The FCC determined that the benchmark rate under the transitional pricing rules was $0.005634 per minute, based on the rates charged for similar service in Iowa by Qwest Corporation d/b/a CenturyLink QC (CenturyLink). *Id.* ¶¶ 2, 18-45 (JA__, __-__).[4] To calculate the benchmark rate, the FCC had to "translate" CenturyLink's four separate rates for the same service – three per-minute rates and one per-minute, per-mile rate – into a composite, per-minute rate. *Id.* ¶ 37 (JA__). The FCC converted CenturyLink's per-minute, per-mile rate to a per-minute rate by multiplying it by the average distance, expressed in miles, that calls travel on Aureon's network. *Id.* ¶¶ 37-41, 43 (JA__-__, __).[5] The FCC rejected AT&T's invitation to use instead AT&T's estimate of the smaller average distance that calls travel on CenturyLink's network, reasoning that AT&T's approach would have the

[4] Although the rate differences in this case appear to be *de minimis*, "they add up to millions of dollars across the billions of calling minutes that Aureon services." *AT&T Corp.*, 970 F.3d at 347.

[5] Specifically, the FCC multiplied CenturyLink's $0.000030 per-minute, per-mile rate by 103.519, the average mileage for calls carried on Aureon's network, weighted by the number of calls placed on each route. *First Rate Order* ¶ 43 (JA__). The FCC added the resulting $0.003106 per-minute rate to CenturyLink's three per-minute rates to calculate a benchmark rate of $0.005634 per minute. *Id.*

unprecedented effect of preventing Aureon from charging for the actual service that it provides. *Id.* ¶¶ 39, 42 (JA__, __).

Turning to the cost-based pricing rules, the Commission found Aureon's cost showing to be inadequate to justify its rate in Transmittal No. 36. *Id.* ¶¶ 2, 46-113 (JA__, __-__). Accordingly, the FCC ordered Aureon to file additional cost support information and to revise its tariff rate "to reflect the lower of the … benchmark rate or the corrected cost-based rate." *Id.* ¶¶ 2, 115 (JA__, __).

As to one element of Aureon's cost showing, however – projected demand for its tariffed access service – the FCC found that Aureon reasonably justified its demand forecast. *Id.* ¶¶ 92-113 (JA__-__). The FCC rejected AT&T's argument that Aureon's demand forecast should include "bypass traffic," *i.e.*, traffic from carriers that do not use Aureon's tariffed access service. *Id.* ¶ 112 (JA__).

2. AT&T petitioned for partial reconsideration, again arguing that the Commission should use AT&T's estimate of the average distance that CenturyLink transports calls to calculate the composite, per-minute benchmark rate. *Iowa Network Access Division*, Order on Reconsideration, 33 FCC Rcd 11860 (2018) (JA__) (*Recon. Order*). The FCC rejected AT&T's petition as procedurally flawed and without merit. On the merits, the FCC affirmed that its calculation approach was consistent with the text and purpose of the benchmark rule and with longstanding FCC policy. *Id.* ¶¶ 13-24 (JA__-__).

3. Aureon filed another revised tariff reducing its interstate access rate to $0.00296 per minute. *Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Transmittal No. 38, § 6.8.1(A) (Sept. 24, 2018) (JA__). The Commission again suspended the rate for one day and instituted an investigation into the rate's lawfulness. *Iowa Network Access Division Tariff F.C.C. No. 1*, 33 FCC Rcd 8547 (Wireline Comp. Bur./Pricing Policy Div. 2018) (JA__); *see Iowa Network Access Division Tariff F.C.C. No. 1*, 33 FCC Rcd 11131 (Wireline Comp. Bur./Pricing Policy Div. 2018) (JA__) (designating issues for investigation).

The FCC concluded its investigation of Aureon's revised tariff rate Transmittal No. 38 on February 28, 2019. *Iowa Network Access Division Tariff F.C.C. No. 1*, 34 FCC Rcd 1510 (2019) (JA__) (*Second Rate Order*). The FCC found that substantial questions of lawfulness remained regarding Aureon's rate under the cost-based pricing rules. *Id.* ¶ 1 (JA__). The FCC again ordered Aureon to file additional cost support information and to revise its tariff rate. *Id.*

C. Subsequent Developments

Following the conclusion of the Commission's second investigation of the lawfulness of Aureon's tariffed interstate switched access rate, Aureon filed Transmittal No. 44 on September 30, 2019, proposing another revised cost-based rate. *Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Transmittal No. 44, § 6.8.1(A) (Sept. 30, 2019) (available at

https://apps.fcc.gov/etfs/public/view_187897_pdf.action?id=187897) (last visited on January 15, 2021). The rate in Transmittal No. 44 went into effect on October 15, 2019, without suspension or investigation. *Id.* The effective rate is a cost-based rate, which is less than Aureon's recalculated benchmark rate. *Id.*, Cost Support Material at 2 (available at https://apps.fcc.gov/etfs/public/view_187898_pdf.action?id=187898) (last visited on January 15, 2021).

SUMMARY OF ARGUMENT

I. The Commission in the challenged orders concluded two successive tariff investigations by finding that Aureon did not adequately justify its cost-based rate for interstate access service. The FCC directed Aureon to file additional cost support information and to revise its tariff to reflect the lower of the benchmark rate under the transitional pricing rules or a properly justified cost-based rate. Rather than challenge the Commission's findings regarding Aureon's cost-based rate, Aureon contends that subjecting it to the benchmark rule will violate the Act and prevent Aureon over the long run from recovering its operating costs and a fair rate of return. Aureon's contentions are not properly before the Court and, in all events, are baseless.

A. Aureon's statutory arguments are procedurally barred because Aureon did not present them to the Commission, except for one argument that the FCC

ruled was beyond the scope of the proceeding below – a ruling that Aureon does not challenge. Indeed, all of Aureon's statutory arguments are beyond the scope of the underlying proceeding. At bottom, all challenge the decision that Aureon is subject to the transitional pricing rules, a decision that the FCC made in a separate administrative proceeding and declined to revisit below.[6] Hence, none of Aureon's statutory arguments is reviewable by this Court. Even if the Court were to reach the merits, Aureon's statutory arguments are unavailing.

B. Aureon's other arguments are not ripe. The Commission in the orders on review did not limit Aureon to the benchmark rate or prohibit it from charging a cost-based rate. Aureon's arguments are contingent on the benchmark rate being lower than Aureon's properly justified cost-based rate in a future tariff filing. If that contingency occurs, then the impact on Aureon will depend on facts that are absent from the record in this case. Aureon will suffer no hardship from postponing review until its arguments become ripe.

II. AT&T challenges one aspect of the Commission's benchmark rate determination and one aspect of the Commission's cost-based rate analysis as inconsistent with agency rules. Each of AT&T's challenges, if successful, would

[6] The Court affirmed the FCC's decision that Aureon is subject to the transitional pricing rules in *AT&T Corp. v. FCC*, 970 F.3d 344, 349 (D.C. Cir. 2020).

lower Aureon's per-minute rate and thus reduce the total amount of access charges that AT&T must pay. Both of AT&T's challenges, however, lack merit.

A. To convert the incumbent carrier CenturyLink's per-minute, per-mile rate into a per-minute rate for purposes of calculating the benchmark rate that applies to Aureon, the FCC multiplied the rate by the average distance that calls travel on Aureon's network in connection with Aureon's tariffed service. AT&T contends that the FCC should have used AT&T's estimate of the distance that calls travel on CenturyLink's network, and that the FCC's approach violated the text and purpose of the benchmark rule.

AT&T's rule interpretation, which effectively would reduce the rate Aureon could tariff below that charged by CenturyLink on a per-mile basis, has no foundation in the benchmark rule's language and mistakes the rule's purpose. The FCC reasonably explained that its decision would fulfill the rule's mandate of rate parity, and that AT&T's approach would be impractical and inconsistent with longstanding Commission policy that carriers should charge for the service that they actually provide. The FCC's decision easily satisfies the deferential standard of review.

B. The Commission reasonably rejected AT&T's argument that Aureon, in calculating its cost-based rate, must include "bypass traffic" in its forecast of

demand for the tariffed service. As the name implies, bypass traffic bypasses the facilities that Aureon uses to provide its tariffed access service.

AT&T argues that the rule requiring carriers to submit information to support their cost-based rates required inclusion of bypass traffic in Aureon's demand forecast. But that rule only identifies the information that carriers must submit to facilitate tariff investigations. The rule does not specify or even address how carriers should calculate their rates. AT&T also challenges two Commission statements in its analysis regarding bypass traffic, arguing that both statements ignore contrary evidence presented by AT&T. But AT&T misinterprets both statements, and neither was necessary to the FCC's analysis.

STANDARD OF REVIEW

"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.* (internal quotation marks and citation omitted)

The standard is especially deferential as applied to FCC rate-setting decisions, which are "appropriately treated as policy determinations in which the agency is acknowledged to have expertise." *United States v. FCC*, 707 F.2d 610,

618 (D.C. Cir. 1983); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980) (FCC "has broad discretion in selecting methods for the exercise of its powers to make and oversee rates."). "As long as the Commission makes a 'reasonable selection from the available alternatives,' its selection of methods will be upheld 'even if the court thinks [that] a different decision would have been more reasonable or desirable.'" *Sw. Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1352 (D.C. Cir. 1999) (quoting *MCI Telecommc'ns Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)).

As for interpretation of agency rules, the Court applies the same "'traditional tools' of construction" that it applies to statutes. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). If the rule's meaning is plain, "the court must give it effect." *Id.* But courts "presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules." *Id.* at 2414. To receive such deference, the rule interpretation must be reasonable, authoritative, implicate agency expertise, and reflect the agency's "fair and considered judgment." *Id.* at 2415-18 (internal quotations and citations omitted).

ARGUMENT

I. AUREON'S CHALLENGES ARE NOT PROPERLY BEFORE THE COURT AND, IN ALL EVENTS, LACK MERIT.

A. Aureon's Statutory Arguments Are Procedurally Barred.

1. Aureon first claims that the Commission violated 47 U.S.C. § 160 by applying the transitional pricing rules to Aureon without first determining that "forbearance" from the Act's tariff requirements for Aureon would satisfy the statutory criteria. Aureon Br. at 19-24.[7] This Court need not reach the merits of Aureon's claim. The FCC declined to address Aureon's forbearance argument, ruling that it was "beyond the scope of this tariff [review proceeding]." *First Rate Order* ¶ 20 n.72 (JA__). Aureon does not challenge the validity of that ruling in its opening brief, and so there is no basis for the Court to disturb it. *See, e.g.*, *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("Issues may not be raised for the first time in a reply brief.") (internal quotation marks omitted).

[7] The Act "vests the Commission with the unusual authority and responsibility to forbear from enforcing provisions of the Act and related regulations when they are no longer necessary for competition, consumer welfare, or the public interest." *COMPTEL v. FCC*, 978 F.3d 1325, 1328 (D.C. Cir. 2020). The FCC exercised that authority to prohibit competitive carriers from filing tariffs with rates above the benchmark. *Access Charge Reform*, 16 FCC Rcd at 9956-58 ¶¶ 82-87 . The FCC determined in the *Section 208 Order* that Aureon is a competitive carrier under the transitional pricing rules. *See* pg. 9 *supra*.

2. Aureon argues that the FCC violated Sections 2(b), 203(c), and 205 of the Act by limiting Aureon to the benchmark rate under the transitional pricing rules. Aureon Br. at 24-29 (FCC regulated Aureon's intrastate rates in violation of 47 U.S.C. § 152(b)), 29-32 (FCC failed to satisfy requirements to prescribe rates under 47 U.S.C. § 205), 42-44 (FCC violated the "filed rate doctrine" codified in 47 U.S.C. § 203(c)). Aureon did not present these arguments to the Commission, nor did any other party. Accordingly, the Court lacks jurisdiction to consider them. 47 U.S.C. § 405(a).

Section 405 of the Act "requires that the Commission be afforded an 'opportunity to pass' on an issue as a 'condition precedent to judicial review.'" *Charter Commc'ns, Inc. v. FCC*, 460 F.3d 31, 39 (D.C. Cir. 2006) (quoting 47 U.S.C. § 405(a)). Construing Section 405 "strictly," this Court has repeatedly held that it "generally lack[s] jurisdiction to review arguments that have not first been presented to the Commission." *Globalstar, Inc. v. FCC*, 564 F.3d 476, 483 (D.C. Cir. 2009) (quoting *Qwest Corp. v. FCC,* 482 F.3d 471, 474 (D.C. Cir. 2007)); *GLH Commc'ns, Inc. v. FCC*, 930 F.3d 449, 455 (D.C. Cir. 2019). The principle that "issues not raised before an agency are waived and will not be considered by a court on review" "holds special force where, as here, an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case." *Wallaesa v. FAA*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) (internal

quotations and citations omitted).[8] "In that setting, 'the rationale for requiring issue exhaustion is at its greatest,' and the appetite of appellate courts to consider new issues at its nadir." *Id.* (quoting *Sims v. Apfel*, 530 U.S. 103, 110 (2000)).

Because Aureon never "mentioned" its new theories based on Sections 2(b), 203(c), and 205 of the Act in the proceeding below, "even in passing," the Commission "was [not] given a reasonable 'opportunity to pass' upon the argument[s]" for purposes of Section 405. *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 972 (D.C. Cir. 1999); *Nat'l Lifeline Assoc. v. FCC*, -- F.3d --, 2020 WL 7511124, *7 (D.C. Cir. Dec. 22, 2020) (dismissing statutory argument that neither the petitioner nor any other party raised before the Commission). As a result, Section 405 precludes the Court from considering Aureon's arguments.

3. Aureon's Section 2(b), 203(c), and 205 arguments are not properly before the Court for another reason as well. The crux of these arguments is that Aureon cannot be subject to the transitional pricing rules. *See* Aureon Br. at 24-29, 29-32, 42-44. The FCC determined that Aureon is subject to the transitional pricing rules in the *Section 208 Order*, a determination that it declined to revisit in the

[8] *Cf. Nat. Res. Def. Council v. U.S. Nuclear Reg. Comm'n*, 879 F.3d 1202, 1209 (D.C. Cir. 2018) (just as "a court is not required to plumb the record for 'novel arguments a litigant could have made but did not," there is "no reason agency officials engaged in adjudication should be any more obligated than judges to do counsels' work for them") (citations omitted).

underlying proceeding. *First Rate Order* ¶ 20 n.72 (JA__). The agency's decision not to reopen an issue "'is not reviewable unless the petition is based upon new evidence or changed circumstances.'" *Advanced Commc'ns Corp. v. FCC*, 376 F.3d 1153, 1156 (D.C. Cir. 2004) (quoting *Sw. Bell Tel. Co. v. FCC*, 180 F.3d 307, 311 (D.C. Cir. 1999)); *see Biggerstaff v. FCC*, 511 F.3d 178, 185 (D.C. Cir. 2007) ("[F]or the court to examine the merits of his contention, Biggerstaff must demonstrate that … the Commission reopened consideration of [the issue], for otherwise his challenge is untimely."). Aureon makes no such showing here.

B. Aureon's Statutory Arguments Are Meritless.

Even if the Court were to reach the merits, Aureon's statutory arguments are unavailing.

1. Aureon maintains that "[t]he FCC is authorized to forbear from . . . the Act's tariff rate requirements only if the FCC … determines that 47 U.S.C. § 160 has been satisfied for a particular carrier." Aureon Br. at 20. On the contrary, Section 160 authorizes the FCC to "forbear from applying any regulation or any provision of this chapter to a … class of telecommunications carriers or telecommunications services." 47 U.S.C. § 160. The Commission properly exercised its forbearance authority two decades ago to prohibit competitive carriers as a class from filing tariffs with above-benchmark rates. *Access Charge Reform*, 16 FCC Rcd at 9956-58 ¶¶ 82-87. This Court affirmed the FCC's determination

that Aureon belongs to that class under the transitional pricing rules. *AT&T Corp.*, 970 F.3d at 349-50. Thus, the FCC satisfied the requirements of Section 160.

Aureon nevertheless argues otherwise, noting that it is a "dominant" carrier under Commission rules. Aureon Br. at 21. But Aureon's dominant carrier status is no more relevant here than it was in the *AT&T Corp.* case. *See AT&T Corp.*, 970 F.3d at 349 (affirming the ruling that Aureon is a competitive carrier subject to the transitional pricing rules and rejecting Aureon's "attempts to exploit a separate regulatory distinction between dominant and nondominant carriers").

2. Aureon argues that the Commission violated Section 2(b) of the Act by regulating Aureon's intrastate rates. Aureon Br. at 24-29.[9] But the proceeding below pertained to Aureon's *interstate* rate only, *see First Rate Order* ¶ 57 (JA__) ("Aureon's rate that is the subject of this investigation solely applies to interstate traffic."), as Aureon itself emphasized before the agency. Direct Case of Aureon, WC Docket No. 18-60, pgs. 22-23 (May 3, 2018) (JA__) (stating that the transitional pricing rule governing intrastate rates "has no relevance in this proceeding regarding Aureon's interstate tariff rates.") (underline in original).

[9] Section 2(b) provides, in part, that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier …." 47 U.S.C. § 152(b).

Aureon nevertheless maintains that the orders on review effectively regulated its intrastate rates because a competitive carrier's intrastate rate may not exceed its benchmark rate for interstate access service under the transitional pricing rules. *See* Aureon Br. at 25-26. But the Commission in the challenged orders did not require Aureon to tariff or charge a benchmark rate.[10]

3. Aureon contends that, under 47 U.S.C. § 205, the Commission must determine "at the time of the rate prescription that Aureon's … tariff rates are not just and reasonable." Aureon Br. at 29.[11] According to Aureon, the appropriate time was 2001 (when the FCC adopted the benchmark rule) and 2011 (when it adopted the transitional pricing rules). *Id.* at 30. As the FCC did not determine that Aureon's rates were not just and reasonable in 2001 and 2011, Aureon reasons, the FCC is now prohibited from limiting Aureon to the benchmark rate. *Id.*

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[10] To the extent that Aureon seeks to challenge the transitional pricing rules themselves, that challenge is not properly before the Court. *See Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1005 (D.C. Cir. 2016) (in rejecting argument that applying the transitional pricing rules imposed an unlawful taking, reasoning that "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"); *First Rate Order* ¶ 121 (JA__) ("Aureon cannot now challenge nor collaterally attack the [*Transformation Order*].").

[11] Section 205 provides, in part, that the Commission may "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" in certain circumstances. 47 U.S.C. § 205.

This argument reflects confusion regarding the Act's tariff provisions. The FCC conducted the investigations at issue pursuant to 47 U.S.C. § 204(a), which authorizes it to suspend and investigate carrier-initiated tariff revisions. *First Rate Order* ¶ 17 (JA__). "At the conclusion of an investigation conducted pursuant to section 204 of the Act, the Commission may, pursuant to section 205 of the Act, 'determine and prescribe what will be the just and reasonable charge' or the maximum and/or minimum, charge or charges going forward." *Id.* (quoting 47 U.S.C. § 205). Consistent with these provisions, the FCC concluded its tariff investigations by finding that questions remained as to the lawfulness of Aureon's 2018 tariff revisions, and directing Aureon to revise its rate "to reflect the lower of the … benchmark rate or the corrected cost-based rate." *Id.* ¶ 2 (JA__); *see Second Rate Order* ¶ 1 (JA__). The investigations did not concern Aureon's rate before 2018. *See, e.g.*, *First Rate Order* ¶ 20 n.72 (JA__) ("Our task in this proceeding is to investigate the rate Aureon filed in its [February 22, 2018] tariff [revisions] and determine whether that rate is lawful"). The notion that the FCC had to travel back in time to apply its rules going forward contradicts the statutory scheme.

Aureon also argues that the FCC violated the statutory requirement to prescribe a "just and reasonable" rate because the FCC directed Aureon to charge the lower of the benchmark rate or justified cost-based rate, proving that the Commission "does not consider the [benchmark rate] to be a just and reasonable

. . . rate." Aureon Br. at 31. This argument seems to assume that Section 205 requires the FCC to prescribe a specific rate, whereas it actually authorizes prescription of "the just and reasonable charge *or the maximum … charge* or charges to be thereafter observed." 47 U.S.C. § 205(a) (emphasis added). That authority encompasses the FCC's action here prescribing a maximum charge of the benchmark rate or properly justified cost-based rate, whichever was lower. *First Rate Order* ¶ 115 (JA__). Aureon argues that "[t]he FCC provided no explanation" for its action, Aureon Br. at 31, but fails to engage with the explanation that the FCC did provide. *See First Rate Order* ¶¶ 114-15 (JA__).[12]

4. Aureon's "filed rate doctrine" argument is based on a mistaken premise. Aureon Br. at 42-44.[13] Aureon argues that the Commission violated the doctrine by requiring Aureon to charge the benchmark rate rather than the cost-based rate

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[12] Aureon further argues that the FCC's action is "a nullity" under *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co*., 284 U.S. 370, 387 (1932), because the FCC did not permit Aureon to charge a rate "equal to or less than the prescribed rate." Aureon Br. at 31-32. Again, the FCC prescribed a rate limit rather than a specific rate. Aureon also misplaces reliance on *Arizona Grocery*, which held that if an agency "were avowedly to attempt to set an unreasonably high maximum, its order would be a nullity." 284 U.S. at 387.

[13] The filed rate doctrine "generally requires that all parties that take service under a tariff pay the tariff rate." *Farmers and Merchants Mutual Tel. Co. of Wayland, Iowa v. FCC*, 668 F.3d 714, 722 (D.C. Cir. 2011). Section 203(c) codifies the doctrine by providing, in pertinent part, that "no carrier shall (1) charge … a greater or less or different compensation … than the charges specified in the [tariff] then in effect." 47 U.S.C. § 203(c).

proposed in Aureon's tariff filing. *Id*. The FCC, however, did not require Aureon to tariff or charge the benchmark rate. The FCC directed Aureon "to amend its [tariff] to reflect the lower of the [] benchmark rate or the corrected cost-based rate." *First Rate Order* ¶ 2 (JA__); *see Second Rate Order* ¶ 1 (JA__). Thus, the FCC did not force Aureon to "charge … different compensation … than the charges specified" in its tariff. 47 U.S.C. § 203(c).[14]

C. Aureon's Remaining Arguments Are Not Ripe.

Aureon claims that by prohibiting it from charging a cost-based rate that exceeds the benchmark rate, the challenged orders would, over time, prevent Aureon from recovering its operating costs and earning a fair rate of return. Aureon Br. at 32-41. This claim is premature. The challenged orders did not prevent Aureon from charging a cost-based rate; rather, they determined that Aureon had not justified the cost-based rate that it proposed in its filings. Aureon's arguments are contingent on the benchmark rate being lower than Aureon's adequately-justified cost-based rate in a future tariff revision. Even if that contingency occurs in a subsequent proceeding, the record contains no facts

[14] Aureon (Br. at 44) invites the Court to "curtail further unnecessary litigation over this issue by confirming that AT&T's payment of the unfiled $0.005634 [benchmark] rate in lieu of the filed tariff rates would violate the filed rate doctrine and result in impermissible retroactive rulemaking." Aureon's meaning is not clear. There would be no basis for AT&T to pay Aureon the $0.005634 benchmark rate because that rate never became effective.

regarding the impact on Aureon of charging the benchmark rate. Aureon will suffer no hardship from waiting until its arguments are ripe for review. Finally, Aureon claims that CenturyLink, the incumbent carrier in the same area, does not provide the same service as Aureon within the meaning of the benchmark rule, Aureon Br. at 41-42, but fails to engage with the FCC's explanation for rejecting this claim. *First Rate Order* ¶¶ 27-28 (JA__).

1. Aureon's arguments that subjecting it to the benchmark rate may prevent it over time from recovering its operating costs and a fair rate of return are not ripe. The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Nat'l Parks Hosp. Ass'n v. Dept. of the Interior*, 538 U.S. 803, 807-08 (2003). The two-part ripeness test considers "the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Importantly, a "claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

Aureon's arguments depend on "contingent future events that may not occur." *Id.* Aureon contends that the Commission, by prohibiting Aureon from charging a cost-based rate, "will in the long run preclude earnings needed to retain [Aureon's] capital investors and to attract additional required investment.'" Aureon Br. at 35 (internal quotations and citations omitted). Aureon's concerns are "premature" because the FCC did not prohibit Aureon from charging a cost-based rate. *First Rate Order* ¶ 116 (JA__). Rather, the FCC found that Aureon did not adequately justify the cost-based rate set forth in its tariff filings, and directed Aureon to file additional cost support information and to revise its rate to reflect the lower of the benchmark rate or the justified cost-based rate. *Id.* ¶ 2 (JA__); *Second Rate Order* ¶ 1 (JA__).[15] Because Aureon's arguments are contingent on the benchmark rate being lower than the cost-based rate in a future Aureon tariff revision, the arguments are not ripe. *In re Aiken Cty.* , 645 F.3d 428, 435 (D.C. Cir. 2011) (claim was not ripe where it rested on contingent future events).

Aureon's arguments also are not ripe for review because they require "further factual development." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 713-14 (D.C. Cir. 2011) (internal quotations and citations omitted). There is no evidence in this record that application of the rules "'threatens [Aureon's] financial

[15] The tariff rate that ultimately went into effect after the tariff investigations at issue here is a cost-based rate. *See* pg. 13-14 *supra*.

integrity or otherwise impedes [its] ability to attract capital.'" *Transformation Order*, 26 FCC Rcd at 17997-98 ¶¶ 925, 926 (review of an incumbent carrier's claim that the transitional pricing rules provide inadequate cost recovery would "consider all factors affecting a carrier and its ability to earn a return on its relevant investment") (quoting *Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993)). Aureon relies on unsupported statements that, if it is limited to the benchmark rate, then "over the long run" it will be unable to recover its operating costs or the prescribed minimum rate of return. Aureon Br. at 41; *id.* at 35. Because Aureon's as-applied challenge "depends on facts … that are absent from the administrative record," it is not ripe. *Cablevision Sys. Corp.*, 649 F.3d at 713; *see Illinois Bell. Tel. Co. v. FCC*, 911 F.2d 776, 779-80 (D.C. Cir. 1980) (decision to exclude certain investments from carrier rate base was not ripe where it could not be determined whether the "net effect" would be confiscatory until the FCC applied a particular rate of return in a ratemaking case); *see also In re FCC 11-161*, 753 F.3d at 1135-36 (as-applied challenge to FCC's bill-and-keep recovery mechanism was premature where carrier had not yet invoked total cost and earnings review process).

As to the second part of the ripeness test, Aureon has not shown, and there is no reason to believe, that delaying consideration of its contingent and fact-bound arguments would impose any hardship. The harms that Aureon fears from

application of the transitional pricing rules are "insufficient to outweigh the strong institutional interests favoring postponing . . . review." *Cablevision Sys. Corp.*, 649 F.3d at 714. "If '[t]he only hardship [a claimant] will endure as a result of delaying consideration of [the disputed] issue is the burden of having to [engage in] another suit,' this will not suffice to overcome an agency's challenge to ripeness." *AT&T Corp.*, 349 F.3d at 700 (quoting *City of Houston v. Dept. of Hous. & Urban Dev.*, 24 F.3d 1421, 1431-32 (D.C. Cir. 1994)). Accordingly, Aureon's arguments are not ripe.

2. Finally, Aureon argues that the Commission erred in finding CenturyLink to be the relevant incumbent carrier for purposes of calculating the benchmark rate. Aureon Br. at 41-42. The benchmark rule defines a "competing . . . incumbent local exchange carrier" as the carrier "that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by" the competitive carrier. 47 C.F.R. § 61.26(a)(2); *First Rate Order* ¶ 25 (JA__). The FCC reasonably determined that CenturyLink meets that definition because CenturyLink is the carrier that would provide the tariffed access service if Aureon did not provide it. *First Rate Order* ¶ 23 (JA__); *see id.* ¶ 26 (JA__); *Great Lakes*, 823 F.3d at 1005 (in determining the carrier to which Great Lakes should benchmark, the "relevant question" was which carrier would have performed the

role played by Great Lakes "had Great Lakes not inserted itself into the traffic path").

Aureon argues that CenturyLink does not provide the "same" service as Aureon within the meaning of the rule because Aureon's tariffed service includes critical functionalities beyond CenturyLink's tandem switching and transport services. Aureon Br. at 41-42 (citing 47 C.F.R. § 61.26(f)). But Aureon fails to engage with the FCC's rationale for rejecting this argument. *First Rate Order* ¶¶ 27-28 (JA__). The Commission reasoned that there is no longer significant demand for Aureon's "equal access" functionality (which provides customers with equal access to different long-distance carriers) due to the prevalence of bundled and mobile services, and because the FCC has forborne from requiring incumbent carriers to provide equal access for most customers. *Id.* ¶ 27 (JA__). In any event, CenturyLink (or its predecessor) provided equal access functionality when it was required. *Id.* The FCC further reasoned that Aureon's more centralized point of interconnection with long-distance carriers does not change the basic nature of the tariffed service in question, which both Aureon and CenturyLink provide. *Id.* ¶ 27 (JA__); *see* pg. 45 *infra* (defining tandem-switched transport service).

II. AT&T'S CHALLENGES LACK MERIT.

A. The FCC's Decision Comports With the Benchmark Rule's Text.

Under the benchmark rule, Aureon's tariffed rate cannot exceed "the rate charged by the competing [incumbent carrier] for the same access services." 47 C.F.R. § 61.26(f). To calculate the benchmark rate for Aureon's tariffed "switched transport service,"[16] the Commission had to "translate" the incumbent carrier CenturyLink's four separate rate elements for the same service – a per-minute, per-mile rate for "Tandem Switching Transport" and three per-minute rates – into a composite, per-minute rate. *First Rate Order* ¶¶ 36-37 (JA__); 47 C.F.R. §§ 51.911(c), 61.26(f). Converting CenturyLink's per-minute, per-mile rate to a per-minute rate that could be included in the benchmark rate required "a reasonable estimate of the average distance" that calls travel in connection with the tariffed service. *First Rate Order* ¶ 37 (JA__). The FCC had to choose whether to use an estimate based on Aureon's network or CenturyLink's network. *Id.* ¶ 38 (JA__). The FCC concluded that the former would "result in the same effective per-mile transport charge for a call placed on [Aureon's] network as CenturyLink would charge." *Recon. Order* ¶ 19 (JA__).

[16] The Commission used "the term switched transport service[] to refer to the service[] that Aureon has tariffed and the term 'switched transport rate' to refer to Aureon's tariffed rate for th[at] service[]." *First Rate Order* ¶ 3 n.6 (JA__).

The FCC rejected AT&T's argument that the benchmark rule's text requires use of an estimate based on the distance that calls would travel on CenturyLink's network instead. *Recon. Order* ¶¶ 13-17 (JA__-__). The rule states that "'the rate'" Aureon charges "may not exceed 'the rate charged by'" CenturyLink "'for the same access services.'" *Id.* ¶ 14 (JA__) (quoting 47 C.F.R. § 61.26(f)). Here, the FCC reasoned, "that 'rate' … is CenturyLink's . . . per-mile transport rate." *Id.* The rate "is a constant and does not change based on the number of miles that traffic is carried by the provider." *Id.*; *see* 47 C.F.R. § 61.3(ii) (defining "[r]ate" as "[t]he tariffed price per unit of service"). Accordingly, the benchmark rate calculation need not account for "the transport miles that would be used by [CenturyLink]." *Recon. Order* ¶ 17 (JA__). Put differently, the rule limits the rate that Aureon may charge, but not the total amount that Aureon charges "if the mileage applied to that rate is different." *Id.* ¶ 14 (JA__).

1. AT&T now argues that the FCC's decision is inconsistent with 47 C.F.R. § 61.26(a)(5), which defines "[t]he rate for interstate switched . . . access services" for purposes of the benchmark rule as "the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges." AT&T Br. at 27-30. The Court need not reach this argument because AT&T never mentioned it in the proceeding below. 47 U.S.C. § 405(a).

In all events, AT&T's argument lacks merit. Consistent with Section 61.26(a)(5), the FCC calculated a "composite, per-minute rate" that included "all applicable fixed and traffic-sensitive charges" for the same service as Aureon's switched transport service: CenturyLink's per-minute, per-mile rate for "Tandem-Switched Transport" and the three per-minute rates. *First Rate Order* ¶ 43 (JA__).[17]

AT&T interprets "all applicable fixed and traffic-sensitive charges" to refer to "the overall price charged" by CenturyLink rather than the tariffed rate. AT&T Br. at 28; *see id.* at 33 (arguing "'applicable' 'charges'" "include CenturyLink's mileage charges"). The plain meaning of the text, however, is that all "charges" must be included in the "composite, per-minute rate," regardless of whether they are "fixed" or "traffic-sensitive," *i.e.*, vary according to the volume of traffic carried on the incumbent carrier's network. 47 C.F.R. § 61.26(a)(5). The text does not "specify or even suggest" a limit on the total price charged for access service. *Recon. Order* ¶ 15 (JA__) (reasoning that a different rule provision on which

[17] There was no dispute below that, assuming CenturyLink is the relevant incumbent carrier, these four charges "should be used in determining the composite rate to which Aureon should benchmark." *First Rate Order* ¶ 35 (JA__).

AT&T relied does not "specify or even suggest that the incumbent [carrier]'s average transport mileage should be used to calculate the benchmark rate").[18]

AT&T further argues that the "rate" charged by an incumbent carrier cannot be divorced from the "services" that carrier provides on its own network. AT&T Br. at 29-30 (benchmark rule looks to incumbent's "actual rate *and* service"). Again, AT&T's view is not grounded in the benchmark rule's text. As the FCC explained in adopting the rule, "certain basic services … make up interstate switched access service offered by most carriers." *Access Charge Reform*, 16 FCC Rcd at 9946 ¶ 55. Just as the "benchmark rate … does not require any particular rate elements or rate structure," *id.*, the rule defines "services" as the "functional equivalent" of the incumbent carrier's services, "regardless of the specific functions provided or facilities used." 47 C.F.R. § 61.26(a)(3); *see Recon. Order* ¶ 21 (JA__) ("[T]he networks and facilities" of carriers "may be different" without "imped[ing] the ability to benchmark access services.").

2. AT&T next argues that the Commission's decision permits Aureon to charge a higher overall price for the same service by transporting calls farther on

[18] In addition to Section 61.26(a)(5), AT&T relies on a passage from the FCC decision adopting the benchmark rule that has no relevance here. AT&T Br. at 28 (quoting *Access Charge Reform* , 16 FCC Rcd at 9942 ¶ 47 n.109). The passage explains the FCC's "understanding of current [competitive carrier] access rates." *Access Charge Reform*, 16 FCC Rcd at 9942 ¶ 47.

its own network than CenturyLink would transport the calls on CenturyLink's network. AT&T Br. at 30-33. In AT&T's view, the benchmark rate should be *lower* than CenturyLink's rate for the same service to compensate for Aureon's "circuitous mileage charges." *Id.* at 30. It is not precisely clear from AT&T's brief how this argument relates to the rule's language, which addresses "rates that may be tariffed and not revenues that may be earned as a result of those tariffed rates." *Recon. Order* ¶ 22 (JA__); *see id.* ¶ 23 (JA__) ("To the extent that AT&T complains that Aureon's network routing choices result in inflated transport miles and thus encourage arbitrage, that issue is different from an allegation that Aureon's rate violates the benchmark rule."); *see also* pg. 43 *infra*. Whereas the FCC's decision ensures rate parity, *Recon. Order* ¶ 22 (JA__), the approach that AT&T advocates would sacrifice the parity required by the rule to an effort to limit Aureon's revenues.

3. AT&T next responds to "criticisms of AT&T's interpretation" of the benchmark rule in the orders on review. AT&T Br. at 33; *id.* at 33-37. The Court need not consider these responses because they do not concern AT&T's argument based on 47 C.F.R. § 61.26(a)(5), which is new to this appeal. *See* pg. 34 *supra*. Instead, they concern prior AT&T arguments based on different rule provisions.

In all events, AT&T's responses are unpersuasive. *First*, AT&T takes issue with the FCC's statement that "the benchmark rate 'is a constant and does not

change based on the number of miles that traffic is carried,'" pointing out that the FCC's calculation method increased the benchmark rate "based on the historical number of miles that Aureon has carried its traffic." AT&T Br. at 33 (quoting *Recon. Order* ¶ 14 (JA__)). But the FCC's statement concerned how the benchmark rate is *applied*, not how it is calculated. *Cf. Recon. Order* ¶ 24 (JA__) ("AT&T confuses calculation of a composite benchmark rate for use by Aureon with Aureon's application of the rate in its tariff.").

Second, in response to the FCC's statement that AT&T's calculation method would make the benchmark rate "impractical" and perhaps "impossible" to determine because competitive carriers would have "to guess how other carriers might route traffic over a different network," *Recon. Order* ¶ 17 (JA__), AT&T argues that "Aureon has this data readily available" concerning CenturyLink. AT&T Br. at 34. Even assuming this were true,[19] the FCC's essential point is unassailable: carriers know their own networks better than other carriers' networks.

Alternatively, AT&T argues that Aureon could avoid guesswork by simply mirroring CenturyLink's rate structure. *Id.* at 35-36. But the Commission intended the benchmark rule to permit competitive carriers to maintain their own rate

[19] The FCC explained that AT&T's estimate was "based on AT&T's knowledge of the traffic AT&T sends over" CenturyLink's network, "information unavailable to Aureon." *Recon. Order* ¶ 17 (JA__) (citing AT&T Opp. to Direct Case of Aureon, WC Docket No. 18-60, pg. 27 (May 10, 2018) (JA__)).

structures. *First Rate Order* ¶ 36 n.129 and accompanying text (JA__) (citing *Access Charge Reform*, 16 FCC Rcd at 9945 ¶ 54, 9946 ¶ 55) ("our benchmark rate … does not require any particular rate elements or rate structure").

Third, AT&T argues that "the FCC improperly rejected AT&T's argument that mileage restrictions applicable to [incumbent carrier] rates must also be applied to the benchmark rate." AT&T Br. at 36 (citing 47 C.F.R. § 69.111). AT&T does not dispute the Commission's reasoning that "[b]y its terms, … section 69.111(a)(2)(i) does not apply to competitive [carriers] and there is nothing in the text of the . . . benchmark rule that requires a competitive [carrier] to comply with section 69.111 when benchmarking." *Recon. Order* ¶ 16 (JA__). Instead, AT&T contends that the FCC "misse[d] the point," repeating its complaint that the FCC's decision fails to discourage inefficient network routing choices. AT&T Br. at 36. But that is a policy rather than an interpretive issue – and, as discussed below, one that the FCC declined to address here. *See* pg. 43 *infra*.

B. The FCC's Decision Comports With the Benchmark Rule's Purpose.

The Commission reasonably concluded that its method of calculating the benchmark rate serves the rule's goals better than AT&T's alternative approach. The FCC intended the rule to permit "a simple determination" of the benchmark rate by competitive carriers. *Access Charge Reform*, 16 FCC Rcd at 9939 ¶ 41; *see id.* at 9946 ¶ 55 (the rule's "only requirement" is "a per-minute cap"). The FCC's

decision sensibly allows such a determination based on Aureon's knowledge of its own network. *See Recon. Order* ¶ 17 (JA__). In contrast, AT&T's approach would force competitive carriers to "guess how other carriers might route traffic over a different network," making the benchmark rate calculation "impractical" or even "impossible." *Id.*; *cf. Mary V. Harris Found. v. FCC*, 776 F.3d 21, 29 (D.C. Cir. 2015) ("An agency does not abuse its discretion by applying a bright-line rule consistently in order … to realize the benefits of easy administration that the rule was intended to achieve.").

The FCC's decision also comports with the "long-standing policy [] that competing [carriers] should charge only for services they actually provide." *Recon. Order* ¶ 21 (JA__). "[U]sing the average distance for calls carried on Aureon's network … to calculate the distance-sensitive component of the composite benchmark rate," the FCC explained, "ensures that when Aureon charges for the service it actually provides, the effective per-mile rate it charges will be equal to but not higher than the CenturyLink tariffed per-mile rate." *Id.* In contrast, AT&T's approach requires "that the mileage component of competitive [carrier] transport rates reflect something other than the actual network used." *First Rate Order* ¶ 42 (JA__).

1. AT&T argues that the Commission's decision thwarts the benchmark rule's goal of "revenue equivalency" between incumbent and competitive carriers.

AT&T Br. at 40; *id.* at 37-40. AT&T exaggerates the importance of "revenue equivalency" as a purpose of the benchmark rule. The FCC's focus in the 2001 decision adopting the rule was on "rates … and not revenues that may be earned as a result of those . . . rates." *Recon. Order* ¶ 22 (JA__); *see id.* ¶ 20 (JA__) (citing *Access Charge Reform*, 16 FCC Rcd at 9945 ¶ 54)). "This reading . . . is most consistent with the" rule language, which only addresses rates. *Id.* ¶ 20 (JA__). The FCC, however, expressed only "a policy preference to more generally limit the revenues a competitive [carrier] might earn." *Id.* ¶ 22 (JA__).

In arguing otherwise, AT&T quotes stray sentences from FCC orders out of context. AT&T quotes a sentence from the 2001 *Access Charge Reform* order in support of the proposition that the benchmark rule was meant to compare "[competitive carrier] rates against the [incumbent] rates on an *aggregate* basis." AT&T Br. at 39. But the quoted language refers to the composite, per-minute rate that the rule requires, not to AT&T's "revenue equivalency" concept. *Id.* at 40; *see Access Charge Reform*, 16 FCC Rcd at 9946 ¶ 55 (referring to a competitive carrier's "aggregate charge for [the same] services" as the incumbent).[20]

AT&T also attacks a straw man by arguing that the Commission "claimed that the revenue objective is irrelevant where Aureon's rates are concerned,

[20] Paragraph 59 of the *Access Charge Reform* order, which AT&T (Br. at 39) quotes in the next sentence of its brief, likewise addresses rates, not revenues.

because the objective only 'concerns differences between per-[minute] rates and flat rates ….'" AT&T Br. at 38 (quoting *Recon. Order* ¶ 20 (JA__)). The FCC actually stated that "*[t]he pertinent discussion* in the [*Access Charge Reform* order] concerns differences between per-[minute] rates and flat rates …." *Recon. Order* ¶ 20 (JA__) (emphasis added). AT&T's argument as to the scope of the revenue objective has no bearing on the FCC's reading that the 2001 *Access Charge Reform* order's focus was on competitive carrier rates, not revenues.

According to AT&T, "the FCC adopted the revenue objective" because "[competitive carriers] like Aureon had long structured their rates (and networks) to enable the recovery of excessive access charges." AT&T Br. at 39. Nothing in the 2001 *Access Charge Reform* order, however, suggests that the Commission shared AT&T's concern with how competitive carriers structure their networks or their rates. The Commission was concerned with the *level* of competitive carriers' rates, not the structure of those rates. Moreover, Aureon was not even a competitive carrier in 2001. Aureon was – and remains – subject to the same cost-based pricing rules as the incumbent carriers with whom the benchmark rule is meant to achieve rate parity. *See First Rate Order* ¶¶ 114-15 (JA__-__).

2. AT&T also maintains that by not requiring "revenue equivalency," the challenged decision fails to realize the Commission's broad goals of eliminating access arbitrage and preventing competitive carriers from exploiting market power.

AT&T Br. at 40-41. The FCC did not intend the benchmark rule as a cure-all, however. The rule is a "transitional mechanism" that was "not designed as a permanent solution to the issues surrounding [competitive carrier] access charges." *Access Charge Reform*, 16 FCC Rcd at 9925 ¶ 7.

The FCC explained that AT&T's arbitrage-related arguments raise concerns "different from an allegation that Aureon's rate violates the benchmark rule or the stated objectives of that rule." *Recon. Order* ¶ 23 (JA__). And the Commission was "considering new rules in the context of a rulemaking proceeding to address these very concerns." *Id.* (citing *Updating the Intercarrier Compensation Regime*, 33 FCC Rcd 5466 (2018)).[21] The FCC's decision to handle AT&T's concerns in that parallel rulemaking proceeding falls within its "broad discretion to manage its docket as it sees fit." *Telecommc'ns Resellers Ass'n v. FCC*, 141 F.3d 1193, 1196 (D.C. Cir. 1998); *accord U.S. Telecom. Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) ("The FCC generally has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings when

[21] The FCC recently concluded that proceeding by adopting rules to, *inter alia*, "reduce the incentive" of certain carriers "to inefficiently route high-volume, purposely inflated, call traffic." *Updating the Intercarrier Compensation Regime*, 34 FCC Rcd 9035, 9036 ¶ 4 (2019), *pets. for review pending sub nom. Great Lakes Commc'ns Corp. et al. v. FCC*, No. 19-1233 (D.C. Cir. filed Oct. 29, 2019).

it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice.").

C. The FCC Reasonably Determined That Aureon's Demand Forecast Need Not Include "Bypass Traffic" That Does Not Use the Tariffed Service.

As the name implies, bypass traffic means traffic that bypasses the facilities that Aureon uses to provide its switched transport service.[22] The Commission reasonably held that such traffic need not be included in Aureon's projected demand for the tariffed service. *First Rate Order* ¶¶ 112-13 (JA__). AT&T argues that Section 61.38 of the FCC's rules requires inclusion of bypass traffic in Aureon's demand forecast. 47 C.F.R. § 61.38. But Section 61.38 does not address how carriers calculate rates; it identifies the information that carriers must submit to support their own tariff filings. AT&T's argument that the FCC ignored record evidence also is unavailing.

1. Under the cost-based pricing rules, a carrier "calculate[s] its rate by allocating a revenue requirement across distinct services (or rate elements) and dividing it by projected demand for such services (or rate elements)." *First Rate*

[22] *See, e.g.*, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 4 FCC Rcd 4797, 4798 ¶¶ 13,14 (1988) ("customers' choice of special access rather than switched … is often called 'service bypass' because the customer still uses [local carrier] facilities, but not the switched services most ordinary customers rely on").

Order ¶ 46 (JA__); *id.* ¶ 92 (JA__). Here, "the demand projection process is simplified because Aureon only provides one service/rate . . . in its interstate tariff – (tandem) switched transport service." *Id.* ¶ 46 (JA__); *see* n.16 *supra*. That service has two essential components: "tandem switching and transport." *First Rate Order* ¶ 28 (JA__). Aureon provides the tariffed service when a long-distance carrier delivers a call to Aureon's tandem switch. *Id.* ¶ 3 (JA__).[23] Aureon then "switches" or directs the call and transports the call to a subtending carrier for delivery to the end user. *Id.*; *AT&T Corp.*, 970 F.3d at 354; *see* 47 C.F.R. § 69.2(ss) (defining "Tandem-switched transport," in pertinent part, as "transport of traffic that is switched at a tandem switch").

The Commission found Aureon's projection of demand for its tariffed switched transport service to be reasonably justified. *First Rate Order* ¶¶ 46, 92-113 (JA__, __-__). The FCC rejected AT&T's argument that Aureon underestimated demand by not including bypass traffic. *Id.* ¶¶ 112-13 (JA__). Historically, the Commission required long-distance carriers to use Aureon's switched transport service to deliver calls to Aureon's subtending carriers. *See Updating the Intercarrier Compensation Regime*, 34 FCC Rcd at 9080 ¶ 107.

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

Material Under Seal Deleted

AT&T disputed the continued existence of such a "mandatory use" requirement,[24] but argued that "to the extent Aureon is taking that position [*i.e.*, that the requirement exists], bypass traffic should be included in the demand forecast." AT&T Opp. at 80 (JA__). Otherwise, AT&T argued, carriers that use Aureon's switched transport service "are required to bear the burden (through increased rates) of Aureon's failure to enforce the alleged requirement." *Id.*

AT&T contended that Aureon's omission of bypass traffic from its demand forecast was "particularly troubling given that some of that bypass traffic [[**BEGIN CONFIDENTIAL**]] [redacted] [[**END CONFIDENTIAL**]]

The Commission concluded that requiring Aureon to include bypass traffic in its demand forecast would improperly "treat this traffic as if [Aureon] had provided access services" for the traffic. *First Rate Order* ¶ 113 (JA__). That "would be inconsistent with" longstanding FCC policy that carriers may "charge only for access services actually provided." *Id.* Because Aureon does not provide

[24] The FCC declined to address the requirement in the proceeding below. *First Rate Order* ¶ 112 n.339 (JA__). It recently eliminated the requirement for call traffic directed to subtending carriers engaged in access stimulation. *Updating the Intercarrier Compensation Regime*, 34 FCC Rcd at 9079-83 ¶¶ 106-14.

access service for bypass traffic, the FCC also stated that Aureon cannot know the amount of such traffic for purposes of projecting demand. *Id.*

2. AT&T now argues that the Commission erred because Section 61.38 of its rules requires that demand projections include "'overall traffic and revenues.'" AT&T Br. at 42 (quoting 47 C.F.R. § 61.38(b)(1)).[25] AT&T's argument lacks merit. Section 61.38(b)(1) requires that "[t]he material to be submitted for a tariff change which affects rates or charges" include, *inter alia*, "the carrier's overall traffic and revenues." 47 C.F.R. § 61.38(b)(1). As is plain from the text, the rule does not dictate how carriers are to calculate their cost-based rates. Rather, it "requires certain supporting economic data to be filed with proposed tariff changes … primarily to aid the Commission in exercising its discretion as to investigation and suspension of tariff filings." *Aeronautical Radio, Inc.*, 642 F.2d at 1234-35 (citations omitted); *see* 35 Fed. Reg. 16247-02, 16248 ¶ 12 (1970) (Section 61.38 "was intended to provide the Commission and the staff with the information necessary to evaluate tariff filings"). Evaluating a tariff change may require holistic analysis of a carrier's activities, including unregulated activities that must not be reflected in the carrier's tariff rates for regulated services under FCC rules.

[25] AT&T also cites paragraph 93 of the *First Rate Order*, but does not explain why it believes that paragraph, which generally states the importance of assessing demand in reviewing tariff rates, supports its argument. AT&T Br. at 42.

Material Under Seal Deleted

See, e.g., *First Rate Order* ¶ 50 (JA__) (affiliate transaction rules "protect ratepayers of regulated telecom-munications services from bearing the costs and risks associated with a carrier's nonregulated activities") (citations omitted). It does not follow that the tariffed rate itself must reflect all such activities. Indeed, the opposite is true. An all-inclusive approach would lead to the very abuses that the cost-based pricing rules are intended to prevent.

AT&T also challenges two statements in the Commission's analysis regarding bypass traffic, arguing that the FCC ignored contrary evidence presented by AT&T. AT&T Br. at 44-45. AT&T misinterprets both statements, neither of which was necessary to the FCC's decision.

First, AT&T challenges the statement that no party disputed that bypass traffic "'does not traverse Aureon's [centralized equal access] network,'" pointing to evidence that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** AT&T Br. at 44 (quoting *First Rate Order* ¶ 113 (JA__)). Yet there is a critical difference between (1) **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** as AT&T maintains happened here, AT&T Br. at 43,[26] and (2) transport using circuits in common with

[26] [[**BEGIN CONFIDENTIAL**]] [redacted]

Material Under Seal Deleted

other carriers' traffic, after the traffic traverses Aureon's tandem switch. Only the second comprises Aureon's tariffed service. *See* pg. 45 *supra*. In context, the challenged statement clearly referred to the latter. Furthermore, AT&T's evidence has no bearing on the Commission's conclusion that bypass traffic for which Aureon does not provide the tariffed access service does not belong in Aureon's projection of demand for that service under the policy that carriers may "charge only for access services actually provided." *First Rate Order* ¶ 113 (JA__).

Second, AT&T challenges the FCC's statement that Aureon "'cannot account for [bypass] traffic in its rate development,'" contending that Aureon can **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** AT&T Br. at 44-45 (quoting *First Rate Order* ¶ 113 (JA__)). But the FCC was referring to *all* bypass traffic, in response to AT&T's argument before the agency that Aureon must include all bypass traffic in its demand forecast. *See* AT&T Opp. at 80-81 (JA__) AT&T's contention that Aureon can account for certain bypass traffic in its rate development has no application to bypass traffic that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** AT&T Br. at 44-45. And even if AT&T's

---

[redacted]
[[**END CONFIDENTIAL**]]

Material Under Seal Deleted

contention was correct,[27] it has no bearing on the FCC's conclusion that bypass traffic has no place in Aureon's demand forecast for an entirely different reason.

In sum, AT&T's arguments are unavailing. AT&T does not dispute that Aureon does not provide tariffed service for bypass traffic, or that requiring Aureon to include bypass traffic in its demand forecast would be inconsistent with longstanding Commission policy. Accordingly, there is no basis for the Court to disturb the FCC's exercise of its broad discretion in ratemaking decisions. *See Sw. Bell Tel. Co.*, 168 F.3d at 1352 ("agency ratemaking is far from an exact science and involves policy determinations in which the agency is acknowledged to have expertise.").

CONCLUSION

The Court should dismiss the petitions for review to the extent that they present issues that are not properly before the Court, and otherwise should deny them.

[27] Aureon argued that [[**BEGIN CONFIDENTIAL**]] [redacted] [[**END CONFIDENTIAL**]] Aureon Rebuttal at pg. 58 n.199 (JA__).

Respectfully submitted,

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January 15, 2021

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CERTIFICATE OF FILING AND SERVICE

I, William J. Scher, hereby certify that on January 15, 2021, I filed the foregoing 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. § 152
Application of chapter

* * *

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 160
Competition in provision of telecommunications service

(a) Regulatory flexibility
Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--
(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
(3) forbearance from applying such provision or regulation is consistent with the public interest.
(b) Competitive effect to be weighed
In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance

will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a).

47 U.S.C. § 201

Service and charges

* * *

(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. § 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

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.

* * *

47 U.S.C. § 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

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

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

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 U.S.C. § 251

Interconnection

*** * ***

(h) "Incumbent local exchange carrier" defined
(1) Definition
For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--
(A) on February 8, 1996, provided telephone exchange service in such area; and
(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).
(2) Treatment of comparable carriers as incumbents
The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);
(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and
(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

* * *

47 U.S.C. § 405

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

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. § 51.911

Access reciprocal compensation rates for competitive LECs.

* * *

(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

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.

* * *

(ii) Rate. The tariffed price per unit of service.

* * *

47 C.F.R. § 61.26

Tariffing of competitive interstate switched exchange access services.

(a) Definitions. For purposes of this section, the following definitions shall apply:
(1) CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).
(2) Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.
(3) Switched exchange access services shall include:
(i) The functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: Carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem

switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching;
(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.
(4) Non-rural ILEC shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(44).
(5) The rate for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.
(6) Rural CLEC shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:
(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or
(ii) An urbanized area, as defined by the Census Bureau.
(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:
(1) The rate charged for such services by the competing ILEC or
(2) The lower of:
(i) The benchmark rate described in paragraph (c) of this section or
(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.
(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.
(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.
(e) Rural exemption. Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Beginning July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.
(f) If a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services, except if the CLEC is listed in the database of the Number Portability Administration Center as providing

the calling party or dialed number, the CLEC may, to the extent permitted by § 51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.
(g) Notwithstanding paragraphs (b) through (e) of this section:
(1) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.
(2) A CLEC engaging in access stimulation, as that term is defined in § 61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in § 61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in § 61.3(bbb).
(3) Notwithstanding any other provision of this part, if a CLEC is engaged in Access Stimulation, as defined in § 61.3(bbb), it shall:
(i) Within 45 days of commencing Access Stimulation, or within 45 days of November 27, 2019, whichever is later, file tariff revisions removing from its tariff terminating switched access tandem switching and terminating switched access tandem transport access charges assessable to an Interexchange Carrier for any traffic between the tandem and the local exchange carrier's terminating end office or equivalent; and
(ii) Within 45 days of commencing Access Stimulation, or within 45 days of November 27, 2019, whichever is later, the CLEC shall not file a tariffed rate that is assessable to an Interexchange Carrier for terminating switched access tandem switching or terminating switched access tandem transport access charges for any traffic between the tandem and the local exchange carrier's terminating end office or equivalent.

47 C.F.R. § 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.

47 C.F.R. § 69.2

Definitions

* * *

(ss) Tandem-switched transport means transport of traffic that is switched at a tandem switch—
(1) Between the serving wire center and the end office, or
(2) Between the telephone company office containing the tandem switching equipment, as described in § 36.124 of this chapter, and the end office.
Tandem-switched transport between a serving wire center and an end office consists of circuits dedicated to the use of a single interexchange carrier or other person from the serving wire center to the tandem (although this dedicated link will not exist if the serving wire center and the tandem are located in the same place) and circuits used in common by multiple interexchange carriers or other persons from the tandem to the end office.

* * *

47 C.F.R. § 69.111

Tandem–switched transport and tandem charge.

(a)(1) Through June 30, 1998, except as provided in paragraph (l) of this section, tandem-switched transport shall consist of two rate elements, a transmission charge and a tandem switching charge.
(2) Beginning July 1, 1998, except as provided in paragraph (l) of this section, tandem-switched transport shall consist of three rate elements as follows:
(i) A per-minute charge for transport of traffic over common transport facilities between the incumbent local exchange carrier's end office and the tandem switching office. This charge shall be expressed in dollars and cents per access minute of use and shall be assessed upon all purchasers of common transport facilities between the local exchange carrier's end office and the tandem switching office.

(ii) A per-minute tandem switching charge. This tandem switching charge shall be set in accordance with paragraph (g) of this section, excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section, and shall be assessed upon all interexchange carriers and other persons that use incumbent local exchange carrier tandem switching facilities.
(iii) A flat-rated charge for transport of traffic over dedicated transport facilities between the serving wire center and the tandem switching office. This charge shall be assessed as a charge for dedicated transport facilities provisioned between the serving wire center and the tandem switching office in accordance with § 69.112.
(b) [Reserved]
(c)(1) Until June 30, 1998:
(i) Except in study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(1) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, geographically averaged on a study-area-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.
(ii) In study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(1) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, averaged on a zone-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.
(2) Beginning July 1, 1998:
(i) Except in study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(2)(i) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, geographically averaged on a study-area-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(ii) In study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(2)(i) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, averaged on a zone-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(d)(1) Through June 30, 1998, the tandem-switched transport transmission charges may be distance-sensitive. Distance shall be measured as airline distance between the serving wire center and the end office, unless the customer has ordered tandem-switched transport between the tandem office and the end office, in which case distance shall be measured as airline distance between the tandem office and the end office.

(2) Beginning July 1, 1998, the per-minute charge for transport of traffic over common transport facilities described in paragraph (a)(2)(i) of this section may be distance-sensitive. Distance shall be measured as airline distance between the tandem switching office and the end office.

(e)(1) Through June 30, 1998, if the telephone company employs distance-sensitive rates:

(i) A distance-sensitive component shall be assessed for use of the transmission facilities, including intermediate transmission circuit equipment between the end points of the interoffice circuit; and

(ii) A non-distance-sensitive component shall be assessed for use of the circuit equipment at the ends of the interoffice transmission links.

(2) Beginning July 1, 1998, if the telephone company employs distance-sensitive rates for transport of traffic over common transport facilities, as described in paragraph (a)(2)(i) of this section:

(i) A distance-sensitive component shall be assessed for use of the common transport facilities, including intermediate transmission circuit equipment between the end office and tandem switching office; and

(ii) A non-distance-sensitive component shall be assessed for use of the circuit equipment at the ends of the interoffice transmission links.

(f) [Reserved]

(g)(1) The tandem switching charge imposed pursuant to paragraphs (a)(1) or (a)(2)(ii) of this section, as applicable, shall be set to recover twenty percent of the annual part 69 interstate tandem revenue requirement plus one third of the portion of the tandem switching revenue requirement being recovered through the interconnection charge recovered by §§ 69.124, 69.153, and 69.155, excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section.

(2) Beginning January 1, 1999, the tandem switching charge imposed pursuant to paragraph (a)(2)(ii) of this section shall be set to recover the amount prescribed in paragraph (g)(1) of this section plus one half of the remaining portion of the tandem switching revenue requirement then being recovered through the interconnection charge recovered by §§ 69.124, 69.153, and 69.155, excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section.

(3) Beginning January 1, 2000, the tandem switching charge imposed pursuant to paragraph (a)(2)(ii) of this section shall be set to recover the entire interstate tandem switching revenue requirement, including that portion formerly recovered through the interconnection charge recovered in §§ 69.124, 69.153, and 69.155, and excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section.
(4) A local exchange carrier that is subject to price cap regulation as that term is defined in § 61.3(x) of this chapter shall calculate its tandem switching revenue requirement as used in this paragraph by dividing the tandem switching revenue requirement that was included in the original interconnection charge by the original interconnection charge, and then multiplying this result by the annual revenues recovered through the interconnection charge, described in § 69.124, as of June 30, 1997. A local exchange carrier that is subject to price cap regulation as that term is defined in § 61.3(x) of this chapter shall then make downward exogenous adjustments to the service band index for the interconnection charge service category (defined in § 61.42(e)(2)(vi) of this chapter) and corresponding upward adjustments to the service band index for the tandem-switched transport service category (defined in § 61.42(e)(2)(v) of this chapter) at the times and in the amounts prescribed in paragraphs (g)(1) through (g)(3) of this section.
(h) All telephone companies shall provide tandem-switched transport service.
(i) Except in the situations set forth in paragraphs (j) and (k) of this section, telephone companies may offer term and volume discounts in tandem-switched transport charges within each study area used for the purpose of jurisdictional separations, in which interconnectors have taken either:
(1) At least 100 DS1–equivalent cross-connects for the transmission of switched traffic (as described in § 69.121(a)(1) of this chapter) in offices in the study area that the telephone company has assigned to the lowest priced density pricing zone (zone 1) under an approved density pricing zone plan as described in §§ 61.38(b)(4) and 61.49(k) of this chapter; or
(2) An average of at least 25 DS1–equivalent cross-connects for the transmission of switched traffic per office assigned to the lowest priced density pricing zone (zone 1).
(j) In study areas in which the telephone company has implemented density zone pricing, but no offices have been assigned to the lowest priced density pricing zone (zone 1), telephone companies may offer term and volume discounts in tandem-switched transport charges within the study area when interconnectors have taken at least 5 DS1–equivalent cross-connects for the transmission of switched traffic (as described in § 69.121(a)(1) of this chapter) in offices in the study area.
(k) In study areas in which the telephone company has not implemented density zone pricing, telephone companies may offer term and volume discounts in tandem-switched transport charges when interconnectors have taken at least 100 DS1–equivalent cross-connects for the transmission of switched traffic (as described in § 69.121(a)(1) of this chapter) in offices in the study area.
(l) In addition to the charges described in this section, price cap local exchange carriers shall establish separate charges for multiplexers and dedicated trunk ports used in conjunction with the tandem switch as follows:
(1) Local exchange carriers must establish a traffic-sensitive charge for DS3/DS1 multiplexers used on the end office side of the tandem switch, assessed on purchasers of common transport to the tandem switch. This charge must be expressed in dollars and cents per access minute of use. The maximum charge shall be calculated by dividing the total costs of the multiplexers on the end office-side of the tandem switch by the annual access minutes of use calculated for purposes

of recovery of common transport costs in paragraph (c) of this section. A similar charge shall be assessed for DS1/voice-grade multiplexing provided on the end-office side of analog tandem switches.

(2)(i) Local exchange carriers must establish a flat-rated charge for dedicated DS3/DS1 multiplexing on the serving wire center side of the tandem switch provided in conjunction with dedicated DS3 transport service from the serving wire center to the tandem switch. This charge shall be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the number of DS3 trunks provisioned for that interexchange carrier between the serving wire center and the tandem-switch.

(ii) Local exchange carriers must establish a flat-rated charge for dedicated DS1/voice-grade multiplexing provided on the serving wire center side of analog tandem switches. This charge may be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the interexchange carrier's transport capacity on the serving wire center side of the tandem.

(3) Price cap local exchange carriers may recover the costs of dedicated trunk ports on the serving wire center side of the tandem switch only through flat-rated charges expressed in dollars and cents per trunk port and assessed upon the purchaser of the dedicated trunk terminating at the port.

(m) In addition to the charges described in this section, non-price cap local exchange carriers may establish separate charges for multiplexers and dedicated trunk ports used in conjunction with the tandem switch as follows:

(1)(i) Non-price cap local exchange carriers may establish a flat-rated charge for dedicated DS3/DS1 multiplexing on the serving wire center side of the tandem switch provided in conjunction with dedicated DS3 transport service from the serving wire center to the tandem switch. This charge shall be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the number of DS3 trunks provisioned for that interexchange carrier between the serving wire center and the tandem switch.

(ii) Non-price cap local exchange carriers may establish a flat-rated charge for dedicated DS1/voice-grade multiplexing provided on the serving wire center side of analog tandem switches. This charge may be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the interexchange carrier's transport capacity on the serving wire center side of the tandem.

(2) Non-price cap local exchange carriers may recover the costs of dedicated trunk ports on the serving wire center side of the tandem switch through flat-rated charges expressed in dollars and cents per trunk port and assessed upon the purchaser of the dedicated trunk terminating at the port.