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ORAL ARGUMENT NOT YET SCHEDULED

No. 21-71375

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WIDE VOICE, LLC,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

This case involves a complaint filed with the Federal Communications Commission by long-distance carriers AT&T Corp. and AT&T Services, Inc. (collectively, "AT&T") and MCI Communications Services LLC ("Verizon") against Petitioner Wide Voice, LLC. The complaint, which was filed pursuant to Section 208 of the Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. § 208, alleged that Wide Voice violated Section 201(b), which prohibits "unjust or unreasonable" charges and practices by

common carriers. *Id.* § 201(b). The Commission granted the complaint in part, releasing the order on review on June 9, 2021. Excerpts of Record ("ER") at 2. Wide Voice timely petitioned for reconsideration of the order on July 8, 2021. Appendix ("App.") at 1. The FCC dismissed and, in the alternative, denied Wide Voice's petition for reconsideration on September 28, 2021. *Id.* Wide Voice timely petitioned for review of the order on November 10, 2021. *See* 28 U.S.C. § 2344. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

QUESTIONS PRESENTED

This case concerns a harmful practice known as "access stimulation," or "traffic pumping," which occurs when local telephone companies "artificially inflate" the number of long-distance calls that they connect over local networks. *All Am. Tel. Co. v. FCC*, 867 F.3d 81, 85 (D.C. Cir. 2017). In doing so, they profit from a regulatory system that historically permitted local carriers to collect above-cost "access charges" from long-distance carriers. The Commission has worked to combat access stimulation for over a decade, and courts have repeatedly upheld its efforts. *See Great Lakes Commc'n Corp. v. FCC*, 3 F.4th 470, 472 (D.C. Cir. 2021); *All Am.*, 867 F.3d at 85; *In re FCC 11-161*, 753 F.3d 1015, 1144-47 (10th Cir. 2014); *N. Valley Commc'ns, LLC v. FCC*, 717 F.3d 1017, 1018-19 (D.C. Cir. 2013).

In 2019, the Commission concluded that imposing access charges on long-distance carriers in connection with access-stimulation traffic is an "unjust" and "unreasonable" practice that violates Section 201(b) of the Communications Act. The FCC accordingly amended its rules to make access-stimulating carriers financially responsible for such charges instead of long-distance carriers.

In the order on review, the Commission found that Wide Voice – which concededly engaged in access stimulation before the FCC's 2019 rulemaking – restructured its operations in concert with closely-related companies for the sole purpose of evading the revised rules and maintaining its profits from access stimulation. The FCC found that this sham arrangement violated Section 201(b) of the Communications Act by compelling long-distance carriers (and ultimately their customers) to shoulder costs that the Commission had made clear in 2019 they should not bear.

The questions presented are as follows:

(1) Whether the Commission reasonably found that Wide Voice restructured its business in 2019 for the sole purpose of circumventing the agency's revised access-stimulation rules.

(2) Whether the Commission reasonably concluded that Wide Voice's conduct violated the statutory prohibition on "unjust or unreasonable" carrier charges and practices.

(3) Whether Wide Voice had fair notice that its actions violated the statute.

PERTINENT STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Under Section 201(b) of the Communication Act, "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate wire] communication service[s], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. § 201(b); *CallerID4U, Inc. v. MCI Commc'ns Serv., Inc.*, 880 F.3d 1048, 1052 (9th Cir. 2018). "To ensure compliance with this mandate, carriers must generally file a 'schedule [of] charges,'" or "tariff," "with the FCC, listing interstate services and the applicable rates." *Wide Voice, LLC v. FCC*, 7 F.4th 796, 799 (9th Cir. 2021) (quoting 47 U.S.C. § 203). A party who believes that a carrier's charges or practices are unlawful – or who otherwise objects to "anything done or omitted to be done by" the carrier, "in contravention of the provisions of [the Communications Act]" – may file a complaint with the Commission. 47 U.S.C. § 208(a).

2. Historically, when a long-distance carrier connected a telephone call to a local carrier, the long-distance carrier paid per-minute fees, known as "access charges," to complete the call. *Wide Voice*, 7 F.4th at 798-99. Because those fees

frequently could "exceed the marginal cost to the [local] carrier," the access-charge regime created incentives for local carriers "to inflate the amount of traffic on" their networks. *Great Lakes*, 3 F.4th at 472.

As access stimulation originally developed, a local carrier "would enter into a contractual relationship with a company that generate[d] a high volume of telephone calls, such as a conference calling provider," *All Am.*, 867 F.3d at 85 – typically sending those calls to a rural area with high access rates. *AT&T Corp. v. FCC*, 970 F.3d 344, 347 (D.C. Cir. 2020). "The combination of high access charges and high call volumes generate[d] significant revenue for the local carriers" and their business partners. *Id.* It was "a win-win for" them, but a loss for long-distance carriers and the public. *Id.* (quoting *N. Valley*, 717 F.3d at 1018-19). Because long-distance carriers cannot collect the marginal cost of access-stimulated calls directly from the relatively few subscribers who use high-volume calling services, "the costs are … spread to all consumers," and "access stimulation raises the cost of calls for everyone." *Great Lakes*, 3 F.4th at 476; *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 34 FCC Rcd 9035, 9043-44 ¶ 20, 9045-46 ¶ 25 (2019) ("*Access Arbitrage Order*").

In 2011, as part of a comprehensive reform to the intercarrier compensation regime, the Commission adopted rules to curb access stimulation. *Connect America Fund*, 26 FCC Rcd 17663, 17874-90 ¶¶ 656-701 (2011). The 2011 rules

identified a local carrier as engaged in access stimulation when it had (1) an "access revenue sharing agreement" with a third party and (2) either three times more long-distance calls coming in ("terminating") than going out ("originating"), or more than 100 percent growth in monthly call minutes compared to the prior year. 47 C.F.R. § 61.3(aaa)(1) (2011). The 2011 reforms required access-stimulating carriers to file revised tariffs reducing their access rates. *Connect America Fund*, 26 FCC Rcd at 17882-89 ¶¶ 679-698.

The United States Court of Appeals for the Tenth Circuit upheld these rules as a reasonable exercise of the FCC's Section 201(b) authority to prohibit unjust and unreasonable access charges. *In re FCC 11-161*, 753 F.3d at 1144-47.

3. The Commission revisited its access-stimulation rules in 2019. *See Access Arbitrage Order*, 34 FCC Rcd at 9036-37 ¶ 4. Although the 2011 reforms had significantly reduced access stimulation, access-stimulation schemes continued to cost long-distance carriers (and their customers) "$60 million to $80 million" per year in fees. *Id.* at 9043 ¶ 20. Some access-stimulating carriers continued their existing schemes notwithstanding the lower rates that the FCC had established in 2011. *Great Lakes*, 3 F.4th at 473.

Other access-stimulating carriers took advantage of high tandem-switching-and-transport rates that the Commission had not lowered or phased out in its 2011

reforms. *See Access Arbitrage Order*, 34 FCC Rcd at at 9039 ¶ 11.[1] "[T]he vast majority of access stimulation traffic" was routed through two intermediate carriers in Iowa and South Dakota. *Id.* at 9039-40 ¶ 12, 9041-42 ¶¶ 15-16.[2] And still other carriers engaged in access stimulation had "re-arranged their business[es] to circumvent the [2011] rules by reducing reliance" on revenue-sharing agreements with third parties. *Id.* at 9053 ¶ 44.

In the *Access Arbitrage Order*, the Commission revised its rules to address the "evolving nature" of access-stimulation schemes. *Id.* at 9053 ¶ 43. The FCC updated the rule identifying access stimulators, *see* pp.5-6 *supra*, to include two "alternate tests" that "require no revenue sharing agreement" but focus on higher terminating-to-originating call ratios. *Id.* at 9053 ¶ 43.

The Commission additionally concluded in the *Access Arbitrage Order* that requiring long-distance carriers to pay tandem-switching-and-transport charges for

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[1] Tandem switches "operate much like railway switches, directing traffic" between carriers rather than directly to end users. *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 490 (2002). Long-distance carriers pay access fees for tandem service when they deliver calls to the tandem switches of local carriers or "intermediate carriers" that the local carriers select. The calls are then "switched" and transported to the local carriers' end offices for delivery to end users.

[2] Those intermediate carriers' high, tariffed access charges served "as a price umbrella for services offered on the basis of a [private, negotiated] commercial agreement by other providers," who could "attract business" "merely by offering a slight discount from the applicable tariffed rate[s]." *Access Arbitrage Order*, 34 FCC Rcd at 9042 ¶ 16 (internal quotations omitted); *see id.* at 9045 ¶ 24.

access-stimulation traffic is an unjust and unreasonable practice that violates Section 201(b) of the Communications Act. *Id.* at 9073-74 ¶ 92. It therefore amended the rules to prohibit access-stimulating carriers from collecting such charges from long-distance carriers, providing instead that the access stimulators should "recover their costs from high-volume calling service providers." *Id.* at 9053 ¶ 42. In addition, to ward off gamesmanship by access-stimulating carriers through the intermediate carriers that "they select to terminate their traffic," the FCC required access stimulators – not long-distance carriers – to pay the tandem-switching-and-transport charges of their chosen intermediate carriers. *Id.* In these ways, the Commission sought to "properly align financial incentives by making the access-stimulating [carrier] responsible for paying for the part of the call path that it dictates." *Id.* at 9042 ¶ 17; *see id.* at 9043-44 ¶¶ 20-23, 9052 ¶ 41.

Commenters expressed concern that the rule revisions could sweep in intermediate carriers who might "be unintentionally in the call path of access stimulation traffic from high volume applications." *AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC v. Wide Voice, LLC*, Memorandum Opinion and Order, 36 FCC Rcd 8891 ¶ 9 n.29 (2021) ("*Order*") (ER5); *see Access Arbitrage Order*, 34 FCC Rcd at 9060 ¶ 57, 9104, App. B ¶ 38. To exclude innocent providers that do not dictate a call's path, the FCC provided in its revised rule that only carriers that "serv[e] end user(s)" are access stimulators within the

meaning of the rule. 47 C.F.R. § 61.3(bbb)(1); *see Access Arbitrage Order*, 34 FCC Rcd at 9060 ¶ 57, 9104, App. B ¶ 38; *see also* 47 C.F.R. § 51.914(d).

The United States Court of Appeals for the District of Columbia Circuit upheld the revised access-stimulation rules as a reasonable exercise of the Commission's Section 201(b) authority. *Great Lakes*, 3 F.4th at 472.

B. Factual Background

Wide Voice is a "competitive [local exchange carrier]" that from 2012 to 2019 offered "'end-office termination services to high[-]volume voice applications'" – specifically, a free-to-the-caller conference-calling service known as "Free Conferencing." *Order* ¶¶ 5, 10 (ER3, 6) (quoting Decl. of Andrew Nickerson ¶ 11 (ER2534).[3] Wide Voice also provided tandem services. *Id.*

Shortly after the Commission released the *Access Arbitrage Order* – by January 2020, according to Wide Voice's brief (at 10) – Wide Voice stopped connecting calls to end users and began exclusively providing tandem services. *Order* ¶ 11 (ER6). It told the FCC that this shift was to "'transition away from the access stimulation business.'" *Id.* ¶ 10 n.30 (ER6) (quoting Answer to the

[3] References in this brief to "Free Conferencing" include, collectively, Free Conferencing Corporation, Carrier X, LLC d/b/a Free Conferencing, and FreeConferenceCall.com, an Internet application through which Free Conferencing Corporation provides free calling services. *Order* ¶ 6 (ER3). All three entities are "largely own[ed]" and managed by David Erickson, who is a founder of Wide Voice and settlor of an irrevocable trust that is the current controlling (88%) owner of Wide Voice. *See id.* ¶¶ 6 & n.12, 24, 25 & n.97 (ER3, ER11-12); Br. at 40.

Complaint, Proceeding No. 20-362 (filed Feb. 18, 2021) ("Answer"), Legal Analysis at 23 (ER2429)).

Although Wide Voice stopped serving end users, it continued to carry Free Conferencing's high-volume, free-to-the-caller call traffic. *Id.* ¶ 11 (ER6). Instead of delivering those calls to Free Conferencing directly, however, it began sending them to a Voice-over-Internet-Protocol provider called HD Carrier, LLC ("HD Carrier"), which terminated them to Free Conferencing. *See id.* HD Carrier is owned and managed by the same David Erickson who "largely owns" and manages Free Conferencing and who has close ties to Wide Voice. *Id.* ¶¶ 6, 25-27 (ER3, 12-13); *see* n.3 *supra*. In the new call path, or route, "[w]hen an individual dials one of [Free Conferencing's] numbers to attend a free conference call, her call makes more than three stops." *HD Carrier, LLC v. AT&T Corp.*, No. 2:20-cv-06509, 2020 WL 7059202, at *3 (C.D. Cal. 2020). "First, AT&T (or another [long-distance carrier]) connects the call to [Wide Voice]." *Id.* "Wide Voice then connects the call to HD Carrier, which connects the call to [Free Conferencing]." *Id.*[4]

Around the same time, several other local carriers that had engaged in access stimulation prior to the *Access Arbitrage Order* stopped providing service to "high volume applications" once that order was released. *Order* ¶ 12 (ER1267) (quoting

[4] The *HD Carrier* case is stayed pending resolution of the current dispute before the Commission. 2020 WL 7059202, at *9.

Answer, Legal Analysis at 19 (ER2425)). Those other carriers had previously connected calls to telephone numbers used by HD Carrier's customers, including Free Conferencing. *Id.* When they left the access-stimulation business, Free Conferencing chose HD Carrier to step into their shoes and deliver Free Conferencing's calls. *Id.* ¶ 13 (ER6). HD Carrier, in turn, designated Wide Voice as the tandem-service provider to which long-distance carriers would deliver this traffic for delivery to HD Carrier. *Id.* (ER6-7). Wide Voice billed long-distance carriers tandem-switching-and-transport charges for these calls. *Id.* (ER7).

The volume of calls that Wide Voice switched to HD Carrier for delivery to Free Conferencing "increased dramatically" in January 2020. *Id.* ¶ 15 (ER8). Wide Voice notified AT&T and Verizon that, for each of them, it projected increases in long-distance call traffic that would traverse Wide Voice tandems in Los Angeles, California and Miami, Florida of over 100 million minutes per month. *Id.* ¶¶ 42-43 (ER20). In comparison, AT&T "is only billed about 22 million minutes per month in New York City by … the largest local carrier there." *Id.* ¶ 43 n.165 (ER20). Wide Voice's sudden rerouting of such a large volume of call traffic caused "significant and preventable" call congestion. *Id.* ¶ 41 (ER20).[5]

[5] Wide Voice also "insisted that" AT&T and Verizon deliver the increased call traffic not to the parties' established interconnection points in Los Angeles and Miami, but instead to Wide Voice's tandem switch in Rudd, Iowa – population 358

Wide Voice billed AT&T and Verizon for tariffed tandem service in connection with calls to Free Conferencing that traversed the call path. *Order* ¶¶ 18, 29 (ER9, 14-15); Stipulated Facts Nos. 6-8 (ER2073). Wide Voice claimed that it was not engaged in access stimulation under the revised access-stimulation rules because it was not "serving end user(s)." 47 C.F.R. § 61.3(bbb)(1). It further claimed that those rules did not make HD Carrier responsible for paying the charges – in place of the long-distance carriers – because Voice-over-Internet-Protocol providers are not common carriers subject to the access-charge regime. *Order* ¶¶ 13, 29 n.115 & accompanying text (ER7, 15).

AT&T and Verizon disputed the Wide Voice charges. *See id.* ¶ 18 (ER9). Unable to resolve their dispute through informal proceedings before the FCC, AT&T and Verizon ultimately filed a formal complaint pursuant to Section 208 of the Communications Act. *Id.* ¶ 18 (ER9); Formal Complaint, Proceeding No. 20-362 (filed Jan. 11, 2021) (ER2693) ("Complaint").

C. *Order* under Review

The Commission ruled that Wide Voice "may not bill AT&T and Verizon in connection with the traffic at issue … and must refund any amounts AT&T and Verizon already have paid." *Order* ¶ 67 (ER31). Invoking its power under Section

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at the 2020 Census. *Order* ¶ 44 (ER21); *id.* ¶¶ 17, 58 (ER9, 27). AT&T and Verizon refused this demand. *Id.* ¶¶ 59-61 (ER28).

208 to decide complaints that allege violations of Section 201(b) of the Communications Act – and without deciding whether Wide Voice had violated the access-stimulation rules – the agency found that Wide Voice had violated Section 201(b). *Id.* ¶ 20 (ER10); *see id.* ¶¶ 21-36 (ER10-17). Wide Voice's unjust and unreasonable conduct consisted of arranging the terminating call path for the disputed AT&T and Verizon calls (1) "for the sole purpose of avoiding the financial obligations that accompany the Commission's [2019] access stimulation rules," *id.* ¶ 31 (ER16); *see id.* ¶¶ 28-30 (ER13-15), (2) as part of a "common enterprise" with HD Carrier and Free Conferencing. *Id.* ¶ 24 (ER11); *see id.* ¶¶ 24-27 (ER11-13). The result of this conduct was to shift costs for which Wide Voice should itself have been financially responsible under the *Access Arbitrage Order* onto AT&T and Verizon – and ultimately onto consumers. *See id.* ¶¶ 28-30 (ER13-15).[6]

D. Subsequent Administrative Proceedings

Wide Voice petitioned for agency reconsideration of the *Order*. *AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC v. Wide Voice, LLC*, Memorandum Opinion and Order, 2021 WL 4500449 ¶ 1 (Sept. 28,

[6] The FCC also found that Wide Voice had attempted to further its scheme in violation of Section 201(b) by causing call congestion and demanding to interconnect with AT&T and Verizon in Rudd, Iowa. *Order* ¶¶ 39-46, 58-64 (ER18-22, 27-30). Wide Voice does not challenge those findings. Br. at 21 n.5.

2021) (App. at 1) ("*Reconsideration Order*"). The Commission dismissed the petition on procedural grounds and, in the alternative, denied it on the merits. *Id.* The petition for review does not challenge the *Reconsideration Order*. *See* Petition for Review at 1.

SUMMARY OF ARGUMENT

Imposing access fees on long-distance carriers for tandem service in connection with artificially-inflated, high-volume call traffic is a harmful practice that "raises the costs of calls for everyone." *Great Lakes*, 3 F.4th at 476. The Commission sought to end that practice in 2019 by revising its access-stimulation rules to address more fully the variety of abusive schemes that have evolved since the agency's initial reforms in 2011, *see Access Arbitrage Order*, 34 FCC Rcd at 9053-57 ¶¶ 43-50, and by "mak[ing] the party responsible for selecting the terminating call path" in such schemes financially responsible for the associated tandem-service charges. *Id.* at 9079 ¶ 104; *see* 47 C.F.R. § 51.914. The FCC determined that the practice of imposing those charges on long-distance carriers is "unjust and unreasonable under Section 201(b) of the [Communications] Act" and it "prohibited" that practice. *Access Arbitrage Order*, 34 FCC Rcd at 9073-74 ¶ 92; *see also id.* at 9048-49 ¶ 33 ("[W]e are attacking implicit subsidies that allow high-volume calling services to be offered for free, sending incorrect pricing signals and distorting competition.").

Nonetheless, in the wake of the *Access Arbitrage Order*, Wide Voice continued to charge AT&T and Verizon for tandem service in connection with Free Conferencing's high-volume calling service. *Order* ¶¶ 11, 13, 18 (ER6-7, 9). Indeed, Wide Voice imposed much higher total charges on AT&T and Verizon as it filled a vacuum created when access-stimulating carriers stopped carrying calls to Free Conferencing in response to the rule changes. *Id.* ¶¶ 11-13, 30 (ER6-7, 15).

Although AT&T and Verizon alleged that Wide Voice's conduct violated the revised rules against access stimulation, *see* Br. at 16, the Commission determined that it did not need to address those claims. *Order* ¶ 67 (ER31). Independent of any possible rule violation, the FCC found that Wide Voice had violated Section 201(b) of the Communications Act by its efforts, "in concert with closely related companies," "to evade the Commission's access stimulation rules by rearranging traffic flows" for calls for which it "otherwise could not charge." *Id.* ¶ 23 (ER11). "[T]he Commission could not have been clearer in [the *Access Arbitrage Order*] that it did not want [long-distance carriers] (and, in turn, their customers) to bear the costs of access stimulation." *Id.* ¶ 37 (ER18). Wide Voice sought to continue imposing such costs on AT&T and Verizon by restructuring its operations to circumvent the rules.

As set forth below, substantial evidence supports the FCC's finding that Wide Voice restructured its operations for the sole purpose of evading the access-

stimulation rules and maintaining its profits from fees that the Commission has made clear long-distance carriers and their subscribers should not have to pay. The agency reasonably determined that Wide Voice's conduct was "unjust" and "unreasonable" within the meaning of Section 201(b). 47 U.S.C. § 201(b); *Order* ¶ 38 (ER18). And Wide Voice had "ample notice" that its conduct was unlawful. *Id.* ¶ 37 (ER18). The Court should affirm the FCC's decision.

STANDARD OF REVIEW

The Court evaluates "challenges under the Administrative Procedure Act by examining whether 'an agency's decreed result [is] within the scope of its lawful authority,' and whether 'the process by which it reaches [a given] result [is] logical and rational.'" *City of Portland v. United States*, 969 F.3d 1020, 1036-37 (9th Cir. 2020) (quoting *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) (internal quotations omitted)); *see* 5 U.S.C. § 706(2)(A), (C). "Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021).

Challenges to factual findings are reviewed for "substantial evidence" – "that is, evidence 'a reasonable mind might accept as adequate to support a conclusion.'" *City of Portland*, 969 F.3d at 1037 (quoting *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal quotations omitted)). "[W]hatever the meaning of substantial in other contexts, the threshold for such evidentiary sufficiency is not

high." *Id.* (internal quotations omitted). Evidence that a reasonable mind might accept as adequate is substantial "even if it is possible to draw two inconsistent conclusions from the evidence." *Nat'l Fam. Farm Coal. v. EPA*, 966 F.3d 893, 914 (9th Cir. 2020) (cleaned up).

The FCC's interpretation of the Communications Act is reviewed under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). When "the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If so, then the Court "defer[s]" to the FCC's reasonable interpretations of the statute. *City of Portland*, 969 F.3d at 1037; *accord Mendez-Garcia v. Lynch*, 840 F.3d 655, 663 (9th Cir. 2016); *see City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (*Chevron* applies to an agency's interpretation of an ambiguous provision that concerns the scope of the agency's statutory authority).

ARGUMENT

I. THE COMMISSION REASONABLY FOUND THAT WIDE VOICE RESTRUCTURED ITS BUSINESS FOR THE SOLE PURPOSE OF CIRCUMVENTING THE ACCESS-STIMULATION RULES.

The determination that Wide Voice restructured its business "for the sole purpose of avoiding the financial obligations that accompany the Commission's access stimulation rules" rests on two principal findings. *Order* ¶ 31 (ER16). First,

Wide Voice, together with HD Carrier and Free Conferencing, devised the path for calls to Free Conferencing solely to evade the access-stimulation rules and force AT&T and Verizon to bear the cost of carrying that artificially-inflated, high-volume traffic. Second, Wide Voice formed a "common enterprise" with HD Carrier and Free Conferencing. *Id.* ¶ 24 (ER11). Substantial evidence supports both findings.

A. The Commission Reasonably Found That Wide Voice Arranged the Call Path to Evade the Rules and Maintain Profits from Access Stimulation.

Substantial evidence supports the Commission's finding that the call path was a sham devised by Wide Voice, together with HD Carrier and Free Conferencing, solely to evade the revised access-stimulation rules and compel AT&T and Verizon (and ultimately their customers) to subsidize the cost of carrying high-volume call traffic. *See id.* ¶¶ 28-30 (ER13-15). The FCC's finding is supported by (1) the history of the call traffic at issue, (2) the design of the call path, (3) the lack of credible evidence that Wide Voice's actions had a business or economic purpose other than dodging the new rules, and (4) the timing of Wide Voice's actions.

1. Before the *Access Arbitrage Order*, Wide Voice concededly "was in the 'access stimulation business.'" *Id.* ¶ 10 (ER6) (quoting Nickerson Decl. ¶ 9 (ER2533)). It admits that "[m]ost of the call traffic" at issue "flows to numbers

associated with Free Conferencing, which provides 'free or low-cost calling services.'" *Id.* ¶ 6 (ER3); Answer ¶ 25 (ER2354); Complaint ¶ 25 (ER2702); *see Access Arbitrage Order*, 34 FCC Rcd at 9036 ¶ 1 (access-stimulation schemes involve "arrangements with entities that offer high-volume calling services").

Moreover, Wide Voice inherited most of the call traffic at issue from access-stimulating carriers who "left the business rather than comply with the new access stimulation rules." *Order* ¶ 30 n.119 (ER15); *Reconsideration Order* ¶ 13 (App. at 10). Although Wide Voice disputes this finding, Br. at 26-27, the record includes a letter from the carriers in question stating that they "terminated … participation in access stimulation as defined in the [*Access Arbitrage Order*]." *Order* ¶ 30 n.119 (ER15) (quoting Answer, Exh. 9 at WV_000103-114 (ER309-20)). Wide Voice's president and chief executive officer stated that the carriers "decid[ed] to give up their business … due to the regulatory changes enacted through the *Access Arbitrage Order*." Nickerson Decl. ¶ 18 (ER2536); *see* Answer, Legal Analysis at 19 (ER2425) (stating that the carriers served "high volume applications"). And David Erickson, "Wide Voice's own declarant, judged the traffic to be access stimulation traffic." *Reconsideration Order* ¶ 13 (App. at 11). This comfortably passes the substantial-evidence test. *See Biestek*, 139 S. Ct. at 1154 ("Substantial evidence … is 'more than a mere scintilla.'") (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

2. The call path was designed to enable Wide Voice to impose fees that the Commission made clear in the *Access Arbitrage Order* long-distance carriers should not have to pay. The current rules prohibit charging long-distance carriers for tandem service in connection with access-stimulation traffic, and provide that financial responsibility for such charges lies with the access-stimulating carrier. 47 C.F.R. § 51.914; *Access Arbitrage Order*, 34 FCC Rcd at ¶ 92. Thus, there is no dispute that, if Wide Voice had continued to provide end-office termination services to end users, it "could no longer [have] force[d]" AT&T and Verizon to subsidize the cost of carrying artificially-inflated, high-volume call traffic by charging them for tandem service. *Order* ¶ 32 (ER16).

For this reason, "Wide Voice devised a workaround." *Id.* It "stopped serving end users and focused instead on functioning as a 'competitive tandem' provider." *Id.* ¶ 29 (ER14). Free Conferencing, a related entity and Wide Voice's former customer, transferred to HD Carrier the call traffic that it had formerly received from access-stimulating carriers. *Id.* HD Carrier – also related to Wide Voice – in turn "designated Wide Voice as the tandem provider." *Id.* "Wide Voice – now … acting solely as [a] tandem provider – billed AT&T and Verizon tandem charges, claiming that the . . . arrangement [did] not run afoul of the . . . access stimulation rules" because HD Carrier, a non-common carrier, delivered the calls to Free Conferencing rather than Wide Voice. *Id.*; *see id.* ¶ 28 (ER14) ("The rules, by their

terms, apply to [local carriers] 'serving end user(s)'") (quoting 47 C.F.R. § 61.3(bbb)(1)). Given that, absent this arrangement, "Wide Voice would have been prohibited from charging the [long-distance carriers] for the traffic," *id.* ¶ 30 (ER15), the call path "was clearly designed to evade the Commission's rules." *Id.* ¶ 32 (ER16); *see AT&T Corp. v. All Am. Tel. Co.*, 28 FCC Rcd 3477, 3491 ¶ 30 (2013), *pets. for review granted in part and denied in part*, *All Am.*, 867 F.3d at 91-92 (finding Section 201(b) violation where a "scheme would have ended" "[b]ut for the creation of [a sham arrangement]").

3. The Commission found no credible evidence that Wide Voice's conduct had any business or economic purpose other than to circumvent the new rules. *See Reconsideration Order* ¶ 9 (App. at 9). Wide Voice claimed that its transition to operating only as a tandem provider was due to "a number of changes in the industry." Nickerson Decl. ¶ 5 (ER253l); *see id.* ¶¶ 5-8 (ER253l-33). But two of the four changes that it identified "directly relate to Wide Voice's loss of access revenues and clearly reflect Wide Voice's desire to continue to collect tandem switching and transport charges" from AT&T and Verizon. *Reconsideration Order* ¶ 9 (App. at 9); *id.* ¶ 7 n.42 (App. at 6); *see* Nickerson Decl. ¶¶ 5 (ER253l) ("Wide Voice understood the Commission was focused on eliminating access stimulation."), 7 (ER2532) (citing the FCC's 2019 decision – upheld in *Wide Voice*,

7 F.4th at 801 – that Wide Voice could not impose tandem service charges for calls that Wide Voice delivered to end users).

The Commission, relying on countervailing evidence, appropriately discounted the other two changes that Wide Voice identified as independent reasons for restructuring its business. *Reconsideration Order* ¶ 7 (App. at 6-7); *see id.* n.45 (App. at 7) (noting discrepancies in the Nickerson Declaration). Moreover, Wide Voice failed to explain why those changes necessitated the new call path. *Id.* ¶ 9 (App. at 8). The FCC was not required to take Wide Voice's claims at face value. *See, e.g.*, *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) (agency determination "[did] not lack substantial evidence simply because petitioners offered some contradictory evidence").

4. The Commission also considered it significant that the timing of Wide Voice's new call-routing arrangement directly coincided with the *Access Arbitrage Order*, which the agency had released on September 27, 2019. *See Order* ¶ 29 (ER15). Wide Voice decided to stop delivering call traffic to end users after the FCC proposed the revised rules, Nickerson Decl. ¶ 5 (ER2531), and it completed the transition from terminating Free Conferencing calls to serving solely as a tandem provider shortly after the *Access Arbitrage Order*'s release. *See* Br. at 10;

Reconsideration Order ¶ 7 n.43 (App. at 6).[7] The volume of traffic on the new call path increased suddenly in January 2020, roughly one month after the new rules went into effect, as Wide Voice filled the vacuum created by other carriers' exit from the access-stimulation business. *Order* ¶ 30 (ER15). This timing supported the FCC's finding that Wide Voice devised the call path for the purpose of evading the new rules. *See Reconsideration Order* ¶ 7 (App. at 6); *Order* ¶¶ 29-30 (ER14-15). Indeed, Wide Voice effectively concedes that it devised the call path in response to the new rules when it asserts that it "[made] arrangements, at the FCC's encouragement," calculated to "comply[] with the … rules." Br. at 42. Wide Voice characterizes the change to its business model as "compliance" with the revised rules, but abundant evidence supports the agency's findings that Wide Voice sought to circumvent the rules and to continue access stimulation in a new form. *See Order* ¶ 32 (ER16) (calling Wide Voice's claim of compliance "disingenuous.").

Contrary to Wide Voice's contention (Br. at 7-8, 42, 47), language in the *Access Arbitrage Order* that carriers were "free to respond" to the revised rules by

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[7] Wide Voice has cited different dates for this transition in different contexts. *Compare* Br. at 10 (January 2020) *with Reconsideration Order* ¶ 7 n.43 (App. at 6) (citing other filings from Wide Voice in which the dates provided were [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]] and [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]). "Regardless of the exact date, Wide Voice completed its transition within roughly [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]] of the effective date of the rules adopted in the *Access Arbitrage Order*." *Id.*; *see Order* ¶ 11 n.35 (ER6).

"selecting an alternative intermediate access provider or route for traffic," 34 FCC Rcd at 9069 ¶ 79, was not an invitation for carriers to continue to impose the financial responsibility for access-stimulated calls on long-distance carriers. The quoted passage simply explains that access-stimulating carriers may mitigate the impact of "assuming financial responsibility for the intermediate [carrier's access] charges" under the new rules in several ways, including "changing end-user rates," "self-provi[ding]" tandem-service, and choosing a "less costly" tandem service provider. *Id.*; *see id.* at 9069 ¶ 77 (distinguishing "com[ing] into compliance with the rules" from "chang[ing] business model in light of the change in the rules"). Because Wide Voice does not – and cannot – explain how its actions comply with the Commission's clear intention to "make the party responsible for selecting the terminating call path" responsible for the associated tandem-service charges, *id.* at 9079 ¶ 104, the FCC reasonably considered the timing of Wide Voice's revised business operations to support the finding that it acted to evade the rules.

B. The Commission Reasonably Found That Wide Voice, HD Carrier, and Free Conferencing Formed a Common Enterprise.

1. Although Wide Voice argued that HD Carrier routed the call traffic at issue rather than Wide Voice itself, *Order* ¶ 46 (ER22), the Commission disagreed, and found a "common enterprise" even "broader than the relationship between HD Carrier and Wide Voice." *Id.* ¶ 24 (ER11); *see id.* ¶¶ 24-27 (ER11-13). David Erickson founded Wide Voice, HD Carrier, and Free Conferencing. *Id.* ¶¶ 6, 24

(ER3, 11-12). He currently owns and operates Free Conferencing and HD Carrier. *Id.* ¶¶ 25, 27 (ER12, 13). And although Wide Voice is now owned by a trust, David and Susan Erickson were the settlors of that trust, *id.* ¶¶ 24, 27 (ER12, 13), and [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]] are its beneficiaries. *Id.* ¶¶ 24, 27 (ER12, 13, 1273); Wide Voice Ex. O, Decl. of Susan Callaghan ¶ 2 (ER1659). David Erikson [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]] of the trust that holds Wide Voice, [[BEGIN CONFIDENTIAL]] [redacted] [[END CONFIDENTIAL]]. *Order* ¶ 24 (ER12, 1273). Moreover, Erickson has attested to detailed personal knowledge of Wide Voice's "business model and strategic direction." Decl. of David Erickson ¶ 2 (ER2519); *id.* 7-8 ¶¶ 20-22 (ER2525-26); *Order* ¶ 24 (ER12).[8] In contrast, the record contains no evidence that the trustee had any personal knowledge of, or played any substantive role in, the operation of Wide Voice. *Id.*; *see* Callaghan Decl. ¶ 3 (ER1659).

The record showed several additional connections among Wide Voice, HD Carrier, and Free Conferencing as well:

[8] Wide Voice claims that the FCC relied on "boilerplate language at the beginning" of this declaration describing Wide Voice's "creation" and "early strategy," not its current affairs. Br. at 40 n.14 (internal quotations omitted). This claim ignores the FCC's emphasis on Erickson's personal knowledge of Wide Voice's "current business, including Wide Voice's … attempts to convince [AT&T and Verizon] to enter into commercial arrangements.'" *Order* ¶ 24 (ER12).

- Wide Voice's Chief Executive Officer, Andrew Nickerson, used Wide Voice and Free Conferencing email addresses interchangeably. *Order* ¶ 26 (ER13); Wide Voice Ex. N, WV_000505-507 (ER1501-03).
- Wide Voice and Free Conferencing "provide each other with administrative or technical support services." *Order* ¶ 26 (ER13).
- One of the Wide Voice [[BEGIN CONFIDENTIAL]] [redacted] [redacted] [[END CONFIDENTIAL]] works for Free Conferencing. *Reconsideration Order* ¶ 7 n.40 (App. at 6).
- Erickson submitted a declaration to the FCC in connection with this dispute on behalf of Wide Voice. Erickson Decl. (ER2519-28).
- Nickerson has appeared before the FCC on behalf of Free Conferencing. *Reconsideration Order* ¶ 7 n.45 (App. at 7).[9]

The Commission reasonably took account of these additional indications that the companies worked together as a common enterprise. *See id.* ¶ 7 (App. at 5-7).

[9] Erickson and Nickerson have each also submitted declarations in federal district court on behalf of both Wide Voice and HD Carrier. *See* Complainants' Ex. 51 at ATTVZ00253, Declaration of D. Erickson in Support of Mot. for Prelim. Inj., Dkt. 11-1; Complainants' Ex. 50 at ATTVZ00246, Declaration of A. Nickerson in Support of Mot. for Prelim. Inj., Dkt. 11-2, *HD Carrier, LLC v. AT&T Corp.*, No. 2:20-cv-06509 (C.D. Cal. July 24, 2020).

2. Wide Voice claims that similar relationships between tandem providers and Voice-over-Internet-Protocol providers like HD Carrier are common in the telecommunications industry, and that neither it nor its related companies are sham companies. *See* Br. at 36-37, 39 n.13. But the Commission did not find that any of the companies themselves are shams, nor did it "fault[]" the companies "for their relatedness" alone. *Reconsideration Order* ¶ 10 (App. at 9) (internal quotations omitted). It simply recognized that the companies are "highly intertwined." *Order* ¶ 31 (ER16). There was no need for the FCC to pierce the corporate veil to find a degree of interrelatedness among Wide Voice, HD Carrier, and Free Conferencing that is characteristic of access-stimulation schemes. *See Order* ¶ 24 (ER11).[10]

Pointing to other evidence in the record – including statements from the Erickson and Nickerson declarations, *see* Erickson Decl. ¶ 10 (ER2522); Nickerson Decl. ¶ 10 (ER2534) – Wide Voice also claims independence from Erickson and his other companies. Br. at 40-42.[11] But the Commission, relying on the evidence as a

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[10] "Non-arm's length relationships are a hallmark of access stimulation schemes," *Order* ¶ 24 (ER11), just as certain tax abuses are unique to related companies because they have no "incentive to maximize profit" or "allocate costs and income consistent with economic realities" in transactions with one another. *Altera Corp. v. Comm'r of Internal Rev.*, 926 F.3d 1061, 1068 (9th Cir. 2019).

[11] In addition, Wide Voice points to a "Master Services Agreement" with HD Carrier, but it fails to explain why the agreement or the fact that it "predates the traffic at issue" proves "an arm's length relationship" or contradicts the FCC's finding that Wide Voice and HD Carrier formed a common enterprise. Br. at 41.

whole, "including statements in those same declarations," did not credit that claim. *Reconsideration Order* ¶ 7 (App. 5).[12] Again, the FCC was not required to take Wide Voice's claims at face value. *See AT&T Corp. v. Alpine Commc'ns, LLC*, 27 FCC Rcd 11511, 11529 ¶ 46 (2012) (carriers' "strained attempts to manufacture other reasons for moving the [interconnection points] utterly lack credibility").

The Commission's recognition that the call path is not unlawful *per se* – and that other carriers "may provide tandem access services in this or a similar structural manner," Br. at 29 (quoting *Order* ¶ 31 (ER15-16)); *see id.* at 49, 51 – is beside the point. The FCC found that, in these particular circumstances, Wide Voice acted in concert with "highly intertwined" entities "for the sole purpose of avoiding the financial obligations that accompany the Commission's access stimulation rules." *Order* ¶ 31 (ER16). A reasonable mind would accept those findings. *See City of Portland*, 969 F.3d at 1037.

C. Wide Voice's Other Challenges to the Commission's Findings Are Unpersuasive.

Wide Voice repeatedly asserts that it "[i]s [n]ot – [a]nd [c]annot [be] – [a]n [a]ccess [s]timulator" under the Commission's rules. Br. at 28, 30; *see id.* at 28-34. But the FCC did not conclude that either Wide Voice or HD Carrier violated the

[12] For example, Wide Voice's above-stated connections to Free Conferencing contradict Andrew Nickerson's statement that the two entities do "not share personnel, resources or network support." Nickerson Decl. ¶ 12 (ER2535).

access-stimulation rules. *Order* ¶ 36 (ER17). Rather, it concluded that Wide Voice engaged in an unjust and unreasonable practice in violation of Section 201(b). As we show in the next section, that conclusion is reasonable. The FCC also did not – as Wide Voice contends – "concede[]" that Wide Voice's conduct did not violate the terms of the rules. Br. at 19; *see id.* at 17, 19-20, 29, 35. The agency did not reach that question because it considered Wide Voice's evasive conduct unjust and unreasonable in all events. *See Order* ¶ 18 (ER9-10).

Wide Voice faults the agency for not having evaluated "Wide Voice's overall traffic," Br. at 26, *id.* at 26-27, arguing that the *Access Arbitrage Order*'s "focus was on encouraging carriers to maintain traffic profiles that balanced inbound/terminating traffic volumes with outbound/originating traffic volumes." *Id.* at 6. But Wide Voice did not produce its traffic ratios for the FCC to evaluate, because it "maintained throughout [the] proceeding that neither it nor HD Carrier was subject to the access stimulation rules." *Reconsideration Order* ¶ 14 (App. at 11); *see* 47 C.F.R. §§ 1.721(b), 1.721(d) (claims or defenses "must be supported by relevant evidence"), 1.726(b), (c); *AT&T Services, Inc. and AT&T Corp. v. 123.Net, Inc.*, 35 FCC Rcd 6401, 6410 ¶ 23 (2020) (claim waived where the defendant "fail[ed] to cite any evidence supporting this claim, as required by our rules").

In all events, the record strongly suggests that Wide Voice would far exceed the trigger of a "terminating-to-originating traffic ratio of at least 6:1." 47 C.F.R.

§ 61.3(bbb)(1)(ii). Wide Voice forecasted that hundreds of millions of minutes of terminating traffic bound to Free Conferencing would traverse its tandems during the relevant time period. *Order* ¶¶ 42-43 (ER20); *see* Answer ¶ 25 (ER2354) (admitting that calls to Free Conferencing numbers make up a substantial portion of the calls at issue). "Wide Voice [] stated that it provides no … originating[] services to its customers." *Reconsideration Order* ¶ 14 n.86 (App. at 11) (citing Nickerson Decl. ¶ 8 (ER2533)). Thus, Wide Voice's traffic ratio was millions to none.

Wide Voice suggests that it did not violate the *Access Arbitrage Order* because, unlike many access-stimulating carriers, it does not operate in a remote area where access rates are high. Br. at 43-44. Leaving aside the fact that Wide Voice tried to operate – and force AT&T and Verizon to operate – in remote Rudd, Iowa, *Order* ¶¶ 58-66 (ER27-30), the general prevalence of access stimulation in remote areas does not mean that the FCC meant to discourage it only in such areas.

Similarly, the fact that Wide Voice no longer has revenue-sharing agreements or serves end users does not suggest that it complied with the *Access Arbitrage Order* or the revised access-stimulation rules. *Contra* Br. at 28-29, 42-44. The Commission revised the rules to include carriers without revenue-sharing agreements in recognition of the "evolving nature" of access-stimulation schemes. *Access Arbitrage Order*, 34 FCC Rcd at 9053 ¶ 43; *id.* at 9053-54 ¶ 44. The rules

exclude carriers that do not serve end users because the intermediate carriers at the center of many access-stimulation schemes at the time of the *Access Arbitrage Order* lacked agency in such schemes. *See id.* at 9039 ¶ 11 ("Access stimulators … are causing intermediate access providers … to be included in the call path."); Wide Voice, in contrast, did not lack agency. *See Order* ¶¶ 29-30 (ER14-15).

II. THE COMMISSION'S CONSTRUCTION OF SECTION 201(B) IS SOUND.

1. Section 201(b) declares "unlawful" "any" carrier "practice" or "charge" "that is unjust or unreasonable." 47 U.S.C. § 201(b) "On its face, Section 201(b) gives the Commission broad authority to" determine what conduct is "unreasonable." *Great Lakes*, 3 F.4th at 475. The FCC determined in the *Access Arbitrage Order* that "requiring [long-distance carriers] to pay the tandem switching and tandem switched transport charges for access-stimulation traffic is an unjust and unreasonable practice" that Section 201(b) prohibits. 34 FCC Rcd at 9073 ¶ 92. Wide Voice perpetuated that practice by its efforts, "in concert with closely related companies," "to evade the Commission's access stimulation rules" and continue to impose "tandem access charges on [long-distance carriers]." *Order* ¶ 23 (ER11). The FCC's determination that Wide Voice's conduct violated Section 201(b) reflects a common-sense interpretation of "unjust or unreasonable" that is well within its broad authority. *Id.*; *see Great Lakes*, 3 F.4th at 475.

The FCC's application of Section 201(b) in the *Order* also is consistent with longstanding agency precedent. For example, in *Total Telecommunications*, the FCC found that Atlas, a local carrier, "created Total as a sham entity designed solely to extract inflated access charges from [long-distance carriers], and that this artifice constitute[d] an unreasonable practice in connection with the provision of access service, in violation of section 201(b) of the [Communications] Act." *Total Telecom. Servs., Inc. v. AT&T Corp.*, 16 FCC Rcd 5726, 5733 ¶ 16 (2001), *aff'd in relevant part*, *AT&T Corp. v. FCC*, 317 F.3d 227, 232-33 (D.C. Cir. 2003). The FCC rejected the argument that Atlas and Total did not violate Section 201(b) because their relationship complied with FCC regulations. *Id.* at 5734 ¶ 17. It explained, "[w]e … will not permit Atlas to charge indirectly, through a sham arrangement, rates that it could not charge directly." *Id.* at 5734 ¶ 18.

The Commission reached similar conclusions in *All American* and *Alpine*. In *All American*, it found Section 201(b) violations where carriers had engaged in sham arrangements to inflate access revenues and billed AT&T in furtherance of their schemes. *See All Am.*, 28 FCC Rcd at 3487 ¶ 24. In *Alpine*, the FCC recognized a Section 201(b) violation when local carriers manipulated points of interconnection with long-distance carriers "with the intent and effect of 'pumping' mileage charges." 27 FCC Rcd at 11529 ¶ 45.

Notably, the D.C. Circuit affirmed the only one of these Section 201(b) determinations – in *Total Telecommunications* – to be appealed in court. *AT&T*, 317 F.3d at 233.[13] "Clearly," the court held, "the entire arrangement" at issue in that proceeding "was devised solely in order to circumvent regulation of Atlas as a dominant carrier" and "deserve[d] to be treated as a sham" that violated Section 201(b). *Id.*

2. Wide Voice's efforts to distinguish these precedents (Br. at 35; *id.* at 36-39) are unpersuasive. The Commission based its application of Section 201(b) on the finding that Wide Voice's arrangement with HD Carrier – a closely-related entity – was devised solely to avoid the access-stimulation rules, *Order* ¶ 32 (ER16), just as it disregarded the sham entities in *All American* and *Total Telecommunications* because they were created for an equivalent evasive purpose. *See All Am.*, 28 FCC Rcd at 3492 ¶ 33 ("The gravamen of the Complaint is that Defendants violated Section 201(b) of the [Communications] Act by operating as sham entities *for the purpose of inflating access charges that AT&T and other [long-distance carriers] had to pay*.") (emphasis added).

[13] The *All American* petitioners did not challenge the FCC's finding that they violated Section 201(b) by creating a sham arrangement "to capture access revenues that could not otherwise be obtained by lawful tariffs." 867 F.3d at 88 (internal quotations omitted).

Contrary to Wide Voice's contention (Br. at 37-38), the FCC did not hold in either *All American* or *Total Telecommunications* that a sham arrangement must involve the creation of a sham business entity. *See Reconsideration Order* ¶ 8 (App. at 7); *Order* ¶ 36 (ER17). "Although Wide Voice may not be a newly-created company, it fundamentally changed its operations to continue and to create new opportunities to bill [long-distance carriers] for tandem services relating to access stimulation traffic." *Id*.

Wide Voice (Br. at 38 n.12) also contends that *Alpine*, 27 FCC Rcd at 11529 ¶ 45, is "inapposite" because it "deals not with a sham arrangement among corporate entities but with an improper routing decision designed to inflate costs through 'mileage pumping.'" The routing decision *was* the sham arrangement in *Alpine*, just as the new call path – inserting HD Carrier in the place of Wide Voice as the entity delivering calls to Free Conferencing – was the sham arrangement here.

The Commission's decision to recognize Wide Voice's conduct as unjust and unreasonable without regard to whether Wide Voice violated the access-stimulation rules was consistent with the agency's "general authority to administer the Communications Act through rulemaking and adjudication." *Order* ¶ 34 n.130 (ER16-17) (quoting *City of Arlington*, 569 U.S. at 307); *see id.* ¶ 21 (ER10-11). The FCC's "discretion to decide whether to proceed by adjudication or rulemaking" is

"very broad." *Neustar, Inc. v.* FCC, 857 F.3d 886, 893 (D.C. Cir. 2017) (internal quotations omitted); *see SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947). Adjudication "is especially well-suited to cases like this one – where a carrier has modified its business practices to engage in unjust and unreasonable charges and practices not specifically addressed by the Commission's rules." *Order* ¶ 21 (ER10). And adjudication is expressly contemplated in Section 208 of the Communications Act, which directs the FCC to resolve "complain[ts] of anything done or omitted to be done by any common carrier subject to [the Act], in contravention of the provisions thereof." 47 U.S.C. § 208(b). The reference to provisions of the Communications Act includes Section 201(b) and thus shows that the FCC's authority is not limited to enforcing implementing rules.

Global Crossing Telecom., Inc. v. Metrophones Telecom., Inc., 550 U.S. 45 (2007), does not suggest otherwise. *Contra* Br. at 47-48. The Supreme Court in that case addressed whether a private plaintiff may seek damages in federal court based on allegations that a carrier has violated Section 201(b). *See Metrophones*, 550 U.S. at 52-54. The Communications Act authorizes suits for "'damages sustained in consequence of' [a] carrier's doing 'any act, matter, or thing in this chapter [*i.e.*, the Communications Act] prohibited or declared to be unlawful.'" *Id.* at 53 (emphasis omitted; quoting 47 U.S.C. § 206); *see* 47 U.S.C. § 207. Interpreting that language, the Court held that, because "the FCC has long implemented § 201(b)

through the issuance of rules and regulations," private plaintiffs may sue in federal court for damages arising from violations of FCC rules and regulations that lawfully identify "unreasonable" practices. *Metrophones*, 550 U.S. at 53. But that holding is not reasonably understood to confine the Commission to implementing Section 201(b) through substantive rulemaking. Indeed, the Court elsewhere in *Metrophones* acknowledged the FCC's authority "to apply § 201 through regulations *and orders* with the force of law." *Id.* at 58 (emphasis added); *see* 5 U.S.C. § 551(6) (providing that "order," under the Administrative Procedure Act, "means the whole or a part of a final disposition … of an agency in a matter other than rulemaking").

Likewise, none of the other cases on which Wide Voice relies supports its view that the FCC may only address "unjust or unreasonable" carrier conduct through rules. *See* Br. at 48-49. Instead, they reject private lawsuits based on conduct that the FCC had not first determined to violate the statute. *See Stuart v. Glob. Tel*Link Corp.*, 956 F.3d 555, 561-62 (8th Cir. 2020) (affirming that claims alleging unjust and unreasonable charges could not proceed in district court because they lacked the necessary predicate action by the agency); *Havens v. Mobex Network Servs., LLC*, 820 F.3d 80, 89 (3d Cir. 2016) (same); *Rindahl v. Noem*, 2020 WL 6728840, at *6–7 (D.S.D. Nov. 16, 2020) ("[T]he [Federal Universal Service Fee] is authorized by the FCC and is not an unjust,

unreasonable, or unlawful charge. Thus, Rindahl has not stated a claim under 47 U.S.C. § 201(b) generally."). As this Court has explained, the problem in suits of that type is that the plaintiffs "would … put interpretation of a finely-tuned regulatory scheme squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission." *N. Cnty. Comm'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149, 1158 (9th Cir. 2010) (internal quotations omitted). There is no such problem where it is the FCC making the decision.[14]

Wide Voice misplaces reliance on cases holding that "sham corporations" are limited to those "established with no valid purpose." Br. at 36 (quoting *Wolfe v. United States*, 798 F.2d 1241, 1243 (9th Cir. 1986) (internal quotations and subsequent history omitted)); *id.* at 36-37. The Commission did not find that Wide Voice, HD Carrier, or Free Conferencing is a sham company. *See* p.27 *supra*. "The violation" it recognized was "based on Wide Voice's use of those relationships to reroute traffic and charge [AT&T and Verizon] for tandem services in

[14] As in *Metrophones*, the statements in two unreported district court decisions that the FCC sometimes implements Section 201(b) by promulgating rules do not imply that the agency is prohibited from doing so by adjudication. *See* Br. at 48 (citing *T2 Techs., Inc. v. Windstream Commc'ns, Inc.*, 2016 WL 9735763 (D. Colo. Sept. 26, 2016), and *N. Cty. Commc'ns Corp. v. Cricket Commc'ns Inc.*, 2010 WL 2490621 (D. Ariz. June 16, 2010)).

contravention of the *Access Arbitrage Order*." *Reconsideration Order* ¶ 10 (App. at 9).

Wide Voice also invokes "tax" law in one sentence without citing any tax cases. Br. at 35. To whatever extent tax law is relevant, it supports the Commission's finding that Wide Voice's conduct – working with closely-related entities to restructure its business operations for no other purpose than to evade the access-stimulation rules – was unlawful. *See Reddam v. Comm'r of Internal Revenue*, 755 F.3d 1051, 1059 (9th Cir. 2014) (Court treats transactions that lack a non-tax business purpose or "any economic substance other than creation of tax benefits" as illegitimate shams); *Brown v. United States*, 329 F.3d 664, 671 (9th Cir. 2003) (distinguishing "illegitimate 'tax evasion'" from "legitimate 'tax avoidance' – actions which, although motivated in part by tax considerations, also have an independent purpose or effect").

Finally, Wide Voice mistakenly argues that it lacked "fair notice of what was prohibited," and that the *Order* thus violates due process. Br. at 50; *see id.* at 47, 50-52. To be sure, "an agency's abrupt change in its interpretation of a rule or statute may deprive a party of fair notice in violation of due process." *Order* ¶ 37 (ER17-18). But there was no "change of course" in this case – "much less an abrupt one." *Id.* (ER18). The determination that Wide Voice violated Section 201(b) by scheming to avoid the rules follows "precedent involving sham arrangements

dating back two decades." *Id.* ¶ 37 (ER18); *see United States v. Schulman*, 817 F.2d 1355, 1359 (9th Cir. 1987) ("the law is well settled that sham transactions are illegal."). And "the Commission could not have been clearer in [the *Access Arbitrage Order*] that it did not want [long-distance carriers] (and, in turn, their customers) to bear the costs of access stimulation." *Order* ¶ 37 (ER18). In seeking "to saddle" AT&T and Verizon "with a substantial portion of the financial cost of carrying access stimulation traffic," Wide Voice created "the exact inequity that the *Access Arbitrage Order* sought to remedy." *N. Valley Commc'ns, LLC*, 35 FCC Rcd 6198, 6210 ¶ 25 (2020), *pet. for review filed and held in abeyance*, *N. Valley Commc'ns, LLC v. FCC*, No. 20-187 (D.C. Cir. Oct. 20, 2020).[15]

[15] Wide Voice argues that the *Order* is "punitive" because, if it were an access stimulator under the rules, "it would be entitled to charge [AT&T and Verizon] a portion of the charges it assessed." Br. at 44. The FCC held that Wide Voice forfeited this argument by raising it for the first time on reconsideration, a holding that Wide Voice does not challenge. *Reconsideration Order* ¶ 5 (App. at 5).

CONCLUSION

The petition for review should be denied.

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Respectfully submitted,

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APPENDIX

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

In the Matter of	)	Proceeding No. 20-362
	)	Bureau ID No. EB-20-MD-005
AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC,	)	
Complainants,	)	
v.	)	
Wide Voice, LLC,	)	
Defendant.	)	

ORDER ON RECONSIDERATION

Adopted: September 28, 2021 **Released: September 28, 2021**

By the Commission:

I. INTRODUCTION

1. Wide Voice, LLC (Wide Voice), a competitive local exchange carrier (LEC), asks the Commission to reconsider various aspects of its June 9, 2021, Memorandum Opinion and Order granting several counts of a formal complaint that AT&T Corp., AT&T Services, Inc. (collectively, AT&T) and MCI Communications Services LLC (Verizon) filed against Wide Voice under section 208 of the Communications Act of 1934, as amended (Act).[1] AT&T and Verizon are interexchange carriers (IXCs) that purchase tandem services from Wide Voice under tariff. The IXCs alleged, among other things, that Wide Voice violated section 201(b) of the Act by rearranging traffic flows in an effort to circumvent the Commission's access stimulation rules, causing network congestion and call failure by rerouting large quantities of traffic, and attempting to force the IXCs to deliver traffic to a remote location that created no net public benefit as required by the Commission. The Commission ruled in the IXCs' favor as to these contentions, granting Counts I, II, III, and V of the Complaint and dismissing the remaining Counts without prejudice. Thereafter, Wide Voice filed a Petition for Reconsideration under section 1.106 of the Commission's rules.[2] The IXCs oppose Wide Voice's Petition.[3] For the reasons explained below, we dismiss the Petition on procedural grounds and, as an independent and alternative basis for this decision, deny it on the merits.

[1] *AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC v. Wide Voice LLC*, Memorandum Opinion and Order, 2021 WL 2395317 (2021) (*Order*); Formal Complaint of AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Jan. 11, 2021) (Complaint).

[2] 47 CFR § 1.106. *See* Petition for Reconsideration of Wide Voice, LLC, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed July 8, 2021) (Petition). *See also* Reply Comments of Wide Voice, LLC, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed July 26, 2021) (Reply).

[3] *See* AT&T Corp, AT&T Services, Inc., and MCI Communications Services LLC's Opposition to Wide Voice, LLC's Petition for Reconsideration, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed July 19, 2021) (Opposition).

II. BACKGROUND

2. The *Order* recites in detail the facts underlying this dispute.[4] To summarize, in 2019, Wide Voice—which admittedly was in the "access stimulation business"—changed its business model to cease providing end-office termination services to high volume voice applications and instead provide tandem services exclusively.[5] Wide Voice and its closely related entities Free Conferencing Corporation (Free Conferencing) and HD Carrier, LLC (HD Carrier) largely accomplished this by means of rerouting traffic destined for Free Conferencing.[6] This process involved several steps. To begin, Wide Voice "stop[ped] . . . connecting to end users."[7] Around the same time, several other access-stimulating LECs ceased providing service to Free Conferencing, and Free Conferencing moved its traffic to HD Carrier for termination.[8] HD Carrier then designated Wide Voice as the tandem service provider.[9] Finally, Wide Voice billed the IXCs under its Tariff F.C.C. No. 3 (Tariff) for terminating tandem switching and tandem switched transport access charges relating to the calls terminating through HD Carrier to Free Conferencing.[10] The IXCs disputed these charges, contending that the Commission's *Access Arbitrage Order* expressly prohibited such charges being imposed on IXCs.[11] After negotiations failed to resolve the parties' dispute, AT&T and Verizon filed the Complaint, asserting multiple counts against Wide Voice.

3. Based on the voluminous record in the case, the Commission found that Wide Voice violated section 201(b) of the Act in three respects: by restructuring its business operations so it could impose tandem charges that it was not entitled to bill;[12] by causing call congestion and not taking reasonable steps to address it;[13] and by attempting to require interconnection with the IXCs in Iowa.[14] The *Order* started from the premise that "requiring IXCs to pay the tandem switching and tandem

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[4] *See Order*, 2021 WL 2395317, at *1-5, paras. 3-18.

[5] *Order*, 2021 WL 2395317, at *1, para. 5, *3, paras. 10-11 (quoting Legal Analysis in Support of Answer to Formal Complaint by Wide Voice, LLC, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Feb. 18, 2021) (Answer Legal Analysis) at 23 ("Wide Voice has pivoted its business model to transition away from the access stimulation business."). Traditionally, the "practice . . . known as access stimulation" involved LECs charging inefficiently high access rates for terminating calls in certain rural areas and then stimulating call volumes through arrangements with entities that offer high-volume calling services in order to artificially increase their access charge revenues. *See Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Report and Order and Modifications of Section 214 Authorizations, 34 FCC Rcd 9035, 9035-36, para. 1 (2019) (*Access Arbitrage Order*), *review denied, Great Lakes Communication Corp. v. FCC*, 3 F.4th 470 (D.C. Cir. 2021). As explained in the *Order*, access stimulation practices have evolved over time. *Order*, 2021 WL 2395317, at *2, para. 9.

[6] *Order*, 2021 WL 2395317, at *3, para. 13. For ease of reference, the *Order* depicts the relationships among the various entities created by David Erickson (including Wide Voice, Free Conferencing, and HD Carrier) in diagrammatic form. *See Order*, 2021 WL 2395317, at *7, para. 27.

[7] *Order*, 2021 WL 2395317, at *3, para. 11.

[8] *Id*. at *3, para. 13.

[9] *Id*.

[10] *Id*. *See* Supplemental Joint Statement of Stipulated Facts, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Mar. 29, 2021) (Supplemental Joint Statement) at 14, Stipulated Facts 52, 53.

[11] *See Access Arbitrage Order* at 9073-74, para. 92 ("[T]he practice of imposing tandem switching and tandem switched transport access charges on IXCs for terminating access-stimulation traffic . . . is unjust and unreasonable under section 201(b) of the Act and is therefore prohibited.").

[12] *Order*, 2021 WL 2395317, at *5-10, paras. 21-38, *19, para. 68.

[13] *Id*. at *10-16, paras. 39-57, *19, para. 68.

[14] *Id.* at *16-18, paras. 58-66, *19, para. 68.

switched transport charges for access-stimulation traffic is an unjust and unreasonable practice"[15] and explained that the Commission has authority under section 201(b) to address such practices through the section 208 complaint process.[16] Noting that non-arm's length transactions are a "hallmark of access stimulation schemes that the Commission has held violate section 201(b),"[17] the Commission examined the relationships among Wide Voice, HD Carrier, and Free Conferencing. It concluded that they were closely related and that, with regard to the rearrangement of traffic at issue here, did not operate independently.[18] Considering these conclusions, the Commission found that Wide Voice "may not bill AT&T and Verizon in connection with the traffic at issue in the Complaint and must refund any amounts the IXCs already have paid with respect thereto."[19] Because that finding affords AT&T and Verizon all the relief to which they are entitled, the Commission did not reach the remaining counts of the Complaint and dismissed them without prejudice.[20] Wide Voice challenges several aspects of the *Order*. None of Wide Voice's arguments persuades us that we should grant the Petition.

III. DISCUSSION

A. We Dismiss Wide Voice's Petition on Procedural Grounds

4. The Petition repeats many arguments that the Commission has already fully considered and rejected. These include Wide Voice's assertions that (1) the *All American* and *Total Tel* decisions are inapposite;[21] (2) the evidence does not support a finding of a "sham relationship";[22] (3) the Commission must make a finding under the access stimulation rules in order to "penalize" Wide Voice for charging for access stimulation traffic;[23] (4) a coordinated wholesale relationship between Verizon and AT&T

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[15] *Order*, 2021 WL 2395317, at *5, para. 19 (citing *Access Arbitrage Order*, 34 FCC Rcd at 9073-74, para. 92). *See also Northern Valley Communications, LLC, Tariff F.C.C No. 3*, Memorandum Opinion and Order, 35 FCC Rcd 6198, 6209, para. 25 (2020), *pet. for review filed and held in abeyance*, *Northern Valley Commc'ns, LLC v. FCC*, No. 20-187 (D.C. Cir. Oct. 20, 2020) (*Northern Valley Tariff Order*).

[16] The complaint process, the *Order* noted, is "especially well-suited to cases like this one—where a carrier has modified its business practices to engage in unjust and unreasonable charges and practices not specifically addressed by the Commission's rules." *Order*, 2021 WL 2395317, at *5, para. 21.

[17] *Order*, 2021 WL 2395317, at *6, para. 24.

[18] *Id*.

[19] *Order*, 2021 WL 2395317, at *1, para. 2, *18, para. 67.

[20] *Id*.

[21] *See AT&T Corp. v. All American Telephone Co.*, Memorandum Opinion and Order, 28 FCC Rcd 3477 (2013) (*All American*), *pets. for review granted in part and denied in part, All American Tel. Co., Inc. v. FCC*, 867 F.3d 81 (D.C. Cir. 2017); *Total Telecommunications Service, Inc. and Atlas Telephone Company, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, (2001) (*Total Tel*), *pets. for review granted in part and denied in part*, *AT&T Corp. v. FCC*, 217 F.3d 227 (D.C. Cir. 2003). *Compare* Answer Legal Analysis at 51-52 and Petition at 5-6 *with Order*, 2021 WL 2395317, at *9, para. 36. *See also Order*, 2021 WL 2395317, at *6, para. 22.

[22] *Compare* Answer Legal Analysis at 23-24, 48-51; Wide Voice, LLC's Answer to Number Paragraphs of Formal Complaint of AT&T Corp., AT&T Services, Inc. and MCI Communications Services LLC, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Feb. 18, 2021) (Answer), Declaration of Andrew Nickerson (Nickerson Answer Decl.) at 2-5, paras. 3-9 and Petition at 2-4 *with Order*, 2021 WL 2395317, at *7-8, paras. 29-30, 32 (addressing Wide Voice's business "pivot") and Answer Legal Analysis at 11-12, 19, 48-53, Nickerson Answer Decl. at 8-9, para. 18, Petition at 7-10 *with Order*, 2021 WL 2395317, at *6-10, paras. 23-38 (addressing traffic rearrangement to preserve ability to impose tandem charges).

[23] *Compare* Answer Legal Analysis at 54-72, Petition at 10-12 and Reply at 2-3 *with Order*, 2021 WL 2395317, at *5, para. 20, *7-8, paras. 29-30.

perpetuated the exponential growth of the wholesale traffic Verizon transmitted to Wide Voice; [24] (5) the *Order* "unjustifiably allows the IXCs to send calls down a single path;" [25] (6) AT&T, unlike every other IXC in the industry, forced Wide Voice to pay for all connections to its tandems; [26] (7) the evidence demonstrates that blocking occurred at Wide Voice's tandems far longer than 60 days; [27] and (8) the IXCs "rigged" the proceeding to avoid disclosing their internal efforts to block traffic. [28] Wide Voice's repetition of the same arguments here does not provide grounds for reconsideration. [29]

5. Wide Voice's other arguments do not warrant our consideration because they "[f]ail to identify any material error, omission, or reason warranting reconsideration." [30] First, Wide Voice's claims concerning the "punitive" effect of the *Order* are not ripe for review. [31] In the *Order*, the Commission granted the IXCs' request to bifurcate the complaint proceeding. [32] The *Order* neither settles on a method for calculating damages nor applies such a method to determine the amount of such damages. [33] Second, Wide Voice's contention that it is barred from charging for these calls *ad infinitum* is too speculative to address because we have no basis for determining the legality of Wide Voice's future actions with regard

[24] *Compare* Answer Legal Analysis at 20, 29, 32-35, 40, 44, 47, 85 and Petition at 14-15 *with Order*, 2021 WL 2395317, at *15, para. 56 & n.242.

[25] *Compare* Answer Legal Analysis at 28-34 and Petition at 14 *with Order*, 2021 WL 2395317, at *14-15, paras. 53-54.

[26] *Compare* Answer Legal Analysis at 36, 38, 39, 41-44 and Petition at 15 *with Order*, 2021 WL 2395317, at *11, 13, para. 40 & n.149, *13, n.194.

[27] *Compare* Answer Legal Analysis at 28-47 and Petition at 14 *with Order*, 2021 WL 2395317, at *14, para. 50 & nn.210, 211 (addressing the IXCs' actions to accommodate the increased traffic over a 12-month period from January 2020 and January 2021).

[28] *Compare* Wide Voice, LLC's Motion to Compel, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (dated Apr. 8, 2021) (Motion to Compel) at 4-7 and Petition at 15-16 *with* Letter Ruling from Lisa B. Griffin, FCC, EB, MDRD, to Michael J. Hunseder, Counsel for AT&T, Scott H. Angstreich, Counsel for Verizon, and Lauren Coppola, Counsel for Wide Voice, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (dated Apr. 14, 2021) (Motion to Compel Letter Ruling).

[29] *See* 47 CFR § 1.106(p)(3) (providing that petitions for reconsideration of a Commission action that "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding" are among those that "plainly do not warrant consideration by the Commission" and that a bureau may therefore dismiss). *See also Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522–23, paras. 5–6 (2011) ("It is 'settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.'") (*citing S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002) (citations omitted)); *All American v. AT&T*, Order on Reconsideration, 28 FCC Rcd 3469, 3471–72, para. 6 (same). *See also* 47 CFR §§ 1.106(c)(1), (p)(1)-(2). *Cf. Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Order on Reconsideration, 35 FCC Rcd 6223, 6229, para. 17 (2020), *review denied, Great Lakes Communication Corp. v. FCC*, 3 F.4th 470 (D.C. Cir. 2021).

[30] 47 CFR § 1.106(p)(1).

[31] Petition at 12-13. *See also* Reply at 4-5.

[32] *Order*, 2021 WL 2395317, at *5, para. 18 & n.77, *18, para. 67 n.277. *See also* Opposition at 9-10.

[33] *Order*, 2021 WL 2395317, at *5, para. 18 & n.77, *18, para. 67 n.277. *See also* Opposition at 10 (citing *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1112 (D.C. Cir. 2001) (if Commission bifurcates complaint proceedings, damages issues are not final when "the amount that the [carriers] will ultimately have to pay, and the time period that those payments will cover, remain for determination. . . . Only after the Commission both commits itself to a method for calculating the proper amount of the award, and concretely applies that method to the [carrier], will [an appellate] court be in a position to evaluate the arguments regarding damages. By bifurcating the proceedings as it did, the FCC left those decisions for another day.").

to this traffic.[34] Finally, Wide Voice argues that it is being treated too harshly because the "*Access Arbitrage Order* allows even access stimulating CLECs to charge other rate elements such as entrance facility charges, dedicated tandem trunk port charge ('DTTP'), and dedicated multiplexing charges ('DMUX')."[35] This contention is barred because Wide Voice did not sufficiently raise the issue in the underlying case.[36] As such, we will not hear it on reconsideration.[37]

B. We Deny the Petition on the Merits

6. As an independent and alternative basis for our decision, we also deny the Petition on the merits. As detailed below, the Petition offers no basis that warrants altering the Commission's findings.

1. The Commission Reasonably Determined that Wide Voice Cannot Lawfully Charge for Calls to HD Carrier

7. Wide Voice's claim that the rearranged traffic flows at issue are the product of arms-length business decisions is contradicted by the overwhelming weight of the evidence in the record and is simply not credible. Contrary to Wide Voice's argument that the *Order* ignored "evidence that contradicts the Commission's findings of a 'sham relationship,'"[38] the Commission considered the three declarations to which Wide Voice cites,[39] but it reached a different conclusion based on countervailing record evidence, including statements in those same declarations.[40] Wide Voice does not contest the

[34] In any event, nothing prevents Wide Voice from assessing access charges if it ceases its unreasonable practices and complies with the relevant Commission rules.

[35] Petition at 13.

[36] *See* 47 CFR § 1.726(b), (c) (answers must advise the complainant and the Commission "fully and completely of the nature of any defense" and must include a legal analysis "relevant to the claims and arguments set forth therein"). Wide Voice's Answer consisted of the same declarative statement that is in the Petition and a citation to a footnote in the *Access Arbitrage Order*. *See* Answer at 34, para. 98, Answer Legal Analysis at 83-84 n.375 (citing *Access Arbitrage Order*, 34 FCC Rcd at 9042, para. 17 n.49 ("These access services may be referred to using different terms in a LEC's tariff or applicable contracts. For example, a LEC may have rate elements for tandem switched transport termination and tandem switched transport facility or may have a rate element called 'common transport' as part of its tandem switched transport offering.")). The footnote does not address how DTTP and DMUX charges are to be treated in the access stimulation context, and Wide Voice's Answer offered no analysis pertaining to that issue.

[37] *See* 47 CFR § 1.106(p)(2) (providing that petitions for reconsideration of a Commission action that "[r]ely on facts or arguments which have not previously been presented to the Commission" and do not fall within one of the exceptions articulated by the rule are among those that "plainly do not warrant consideration by the Commission" and may therefore be dismissed by a bureau). *Cf. Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Third Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 17 FCC Rcd 8520, 8527, para. 19 (2002) (citing *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998) ("even where an issue has been 'raised' before the Commission, if it is done in an incomplete way . . . the Commission has not been afforded a fair opportunity [to pass on the issue]")); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-80 (D.C. Cir. 1997) (Commission "'need not sift pleadings and documents' to identify arguments that are not 'stated with clarity'").

[38] *See* Petition at 7-10

[39] *Id.* at 7-9 (referencing Nickerson's declaration stating that "David Erickson does not control Wide Voice," Wide Voice's Trustee's declaration describing Erickson's limitations as to the Trust that is majority owner of Wide Voice, and Erickson's declaration that Nickerson "took over in 2014, operating the business since that time, without my involvement or control").

[40] *Order*, 2021 WL 2395317, at *6-7, paras. 24-27. To summarize, HD Carrier and Free Conferencing share the same majority owner, David Erickson. *Order*, 2021 WL 2395317, at *7, para. 25. Erickson was also involved in the "business creation process" for four companies that each play a substantial role in the practices at issue here: CarrierX, Wide Voice, HD Carrier, and Free Conferencing. *Order*, 2021 WL 2395317, at *7, paras. 25, 27. *See*

(continued….)

evidence that supports the Commission's holding.[41] Similarly, the Commission did not ignore "substantial countervailing evidence of Wide Voice's business planning and compliance with the access stimulation rules."[42] Rather, the timing of Wide Voice's business transition,[43] which coincided with the move of Free Conferencing access stimulation traffic,[44] as well as Andrew Nickerson's testimony about

Answer, Declaration of David Erickson, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Feb. 18, 2021) (Erickson Answer Decl.) at 2, para. 4. Wide Voice's majority owner now is an irrevocable family trust created by Erickson, whose {[ ]} are the sole beneficiaries, and Erickson {[ ]}. *Order*, 2021 WL 2395317, at *6, para. 24; *see also* Reply at 4, n.6 (describing trust as "family trust"). One of the {[ ]} apparently works for Free Conferencing. *See* Supplemental Brief of AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC, Proceeding Number 20-362, Bureau ID No. EB-20-MD-005 (filed Apr. 5, 2021) at 4-5; Complainants' Exh. 81 at ATTVZ00613-614. Wide Voice does not dispute this claim. Prior to the creation of the trust, Erickson was an owner of Wide Voice. Erickson Answer Decl. at 1, para. 2, 2, para. 4. Contrary to Wide Voice's claim, the Commission did not ignore the Trustee's statements or suggest that the Trustee was in "breach of its [fiduciary] duties." Petition at 8. Rather, in considering evidence of the interrelationship among the companies, the Commission gave more weight to Erickson's statements about his personal knowledge of Wide Voice's operations and other record evidence on their relationship than the Trustee's statements. *Order*, 2021 WL 2395317, at *6-10, paras. 23-38; *see also* Erickson Answer Decl. at 1, para. 2, 3, para. 8, 4, para. 11, 7, para. 20. Material set off by double brackets {[ ]} is confidential and is redacted from the public version of this document.

[41] *See Order*, 2021 WL 2395317, at *7, para. 26 (citing to additional connections among the several entities), *7-8, paras. 29-30 (explaining the rearrangement of access stimulation traffic among the closely related companies). *See* Opposition at 5-6 n.22 (citing Memorandum Opinion, *HD Carrier, LLC v. AT&T Corp.*, No. 2:20-cv-06509, 2020 WL 7059202 at *8 & n.41 (C.D. Cal. Dec. 2, 2020) (noting the close relationship between Wide Voice and HD Carrier and "David Erickson's ownership of both companies"); *see also* Reply in Support of Formal Complaint of AT&T Corp., AT&T Services, Inc., and MCI Communications Services LLC, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Mar. 1, 2021) at 8 n.22 (same).

[42] Petition at 2-4. Wide Voice posited four reasons for its pivot to providing solely tandem service. Petition at 3 ("the NPRM demonstrated that there would be reforms to 'access stimulation' and Wide Voice therefore intended to focus its efforts on its tandem services"; "the Commission's November 2019 order in an enforcement action held that Wide Voice was not entitled to bill for calls transmitted from its tandem to its own end office;" "Wide Voice saw an opening in the market to sell its costly network infrastructure to other CLEC and VoIP providers, as it was not profitable for CLECs to continue to pay rapidly increasing dedicated interconnection costs to ILECs"; and "Wide Voice determined it would be more profitable long term to invest in IP technologies and provide TDM-IP conversion services to its customers rather than termination services to end users."). The first two reasons specifically relate to the loss of access revenues, but the latter two do not.

[43] *Order*, 2021 WL 2395317, at *3, para. 11, *7, para. 29; *see also* Wide Voice, LLC's Objections and Answers to IXCs' First Set of Interrogatories, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Feb. 2, 2021) at 3, Wide Voice's Response to Interrogatory No. 3 (claiming it completed its transition to solely a tandem provider in {[ ]}; Wide Voice, LLC's Objections and Supplemental Answers to IXCs' Interrogatories, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Mar. 29, 2021) (Wide Voice Supplemental Interrogatory Responses) at 5, Supplemental Response to Interrogatory 3 (claiming it ceased providing all end-office services by {[ ]}). Regardless of the exact date, Wide Voice completed its transition within roughly {[ ]} of the effective date of the rules adopted in the *Access Arbitrage Order*. *Order*, 2021 WL 2395317, at *3, para. 11.

[44] *Order*, 2021 WL 2395317, at *3, paras. 11-12, *7, para. 29.

the detrimental impact the *Access Arbitrage Order* had on Wide Voice's business model,[45] led the Commission to discount the reasons unrelated to the loss of access revenue that Wide Voice posited.[46]

8. Wide Voice maintains that *Total Tel* and *All American* do not support the *Order*'s conclusion.[47] We disagree. Those decisions stand for the proposition that even in the absence of an applicable rule violation the Commission may find a violation of section 201(b) when a carrier acts through sham or artifice to obtain charges that it is not entitled to bill.[48] Wide Voice clearly did that. Based on the entire record,[49] the *Order* reasonably determined that "Wide Voice acted in concert with HD Carrier and Free Conferencing to reroute access stimulation traffic in order to impose tandem charges that are otherwise prohibited by the *Access Arbitrage Order*."[50] Wide Voice's attempts to draw factual distinctions between its relationships with HD Carrier and Free Conferencing and those in *Total Tel* and *All American* are beside the point.[51] Even assuming, *arguendo*, that Wide Voice has business relationships independent of HD Carrier and Free Conferencing, that Wide Voice's relationships with HD Carrier and Free Conferencing predate the Commission's NPRM on access stimulation, and that HD

[45] *Order*, 2021 WL 2395317, at *3, para. 11, *7, para. 29; *see also* Nickerson Answer Decl. at 2-3, paras. 4-5 ("Wide Voice understood the Commission was focused on eliminating access stimulation . . . . As the policy environment clarified, I led a strategic review to determine how Wide Voice was to respond to the forthcoming changes to the Commission's access stimulation rules . . . . During the NPRM's public comment period that spanned an entire calendar year, Wide Voice decided to stop selling telephone numbers and connecting to end users."). Discrepancies in Nickerson's declaration led the Commission to rely more on other record evidence about Wide Voice's business transition. For example, Wide Voice claimed in its interrogatories, signed by Nickerson, that it has no "overlapping officers, directors, or employees with any other non-LEC." Yet Nickerson has an email address at Free Conferencing, *see Order*, 2021 WL 2395317, at *7, para. 26, and he recently appeared before the Commission on behalf of CarrierX, which owns and operates Free Conferencing. *See* Letter from Lauren Coppola, Counsel, CarrierX, LLC to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-155 et al., at 1 (filed May 19, 2021). *See also Order*, 2021 WL 2395317, at *1, para. 6.

[46] Wide Voice takes issue with the *Order*'s conclusion that "Wide Voice stopped serving end users" and that this "coincided with the decision by several LECs to cease providing services to 'high volume applications' such as Free Conferencing in late 2019." Petition at 4 (citing *Order*, 2021 WL 2395317, at *7, para. 29). These two facts are uncontroverted. *See Order*, 2021 WL 2395317, at *3, para. 11. The Commission did not refer to Wide Voice's alleged "long planned business transition to stop serving end users" in this discussion, because, as explained below, it found that evidence not to be credible. Petition at 4 n.10.

[47] Petition at 5 ("The Commission's ruling that Wide Voice is engaging in sham relationships with Free Conferencing . . . and HD Carrier . . . is made without support under the case law it relies upon" and "[t]o support its sham finding, the Commission relies upon the *Total Tel* and *All American* Orders as legal precedent. Both cases are factually distinguishable from the record in this matter.").

[48] *See Total Tel*, 16 FCC Rcd at 5726, para. 1, 5733, para. 16, 5734, para. 18; *All American*, 28 FCC Rcd at 3487-88, para. 24, 3490-91, paras. 29-30. *See also Order*, 2021 WL 2395317, at *5, para. 21 n.81 (citing *AT&T Corp. v. YMAX Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5761, paras. 52-53 & n.147 (2011); *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, 16141, para. 363 (1997)). Nothing in these orders suggests that the Commission limited its concerns with arbitrage schemes only to instances where there is a sham company involved.

[49] *See supra* paragraph 7 and *infra* paragraphs 9-11. *Order*, 2021 WL 2395317, at *6-7, paras. 23-28.

[50] *Order*, 2021 WL 2395317, at *10, para. 38.

[51] As the Commission has acted to address inefficiencies and opportunities for wasteful access arbitrage, including access stimulation, companies have responded by shifting and evolving their practices to retain access revenues. *See e.g.*, *Access Arbitrage Order*, 34 FCC Rcd at 9035-36, paras. 1-2, 9037-39, paras. 7-11, 9053-54, paras. 44-45 (explaining that access stimulation schemes have evolved over time). Section 201(b) is a tool the Commission can use to investigate the conduct of a carrier—like Wide Voice—that has attempted to construct a means of evading the Commission's rules.

Carrier has business relationships independent of Wide Voice,[52] the totality of the evidence supported the Commission's section 201(b) finding.[53]

9. Wide Voice claims that its transition to a tandem provider was a "long planned strategic decision" based on "four different business related reasons."[54] Importantly, two of those reasons directly relate to Wide Voice's loss of access revenues[55] and clearly reflect Wide Voice's desire to continue to collect tandem switching and transport charges.[56] Wide Voice does not explain how its other two business objectives necessitate rerouting traffic to avoid the *Access Arbitrage Order*,[57] and nothing in the Commission's *Order* prevents Wide Voice from lawfully pursuing those objectives.

10. Wide Voice's remaining evidentiary claims are without merit. According to Wide Voice, the Commission's finding of a sham arrangement is "based on the flawed finding that Erickson tried to coerce the IXCs to enter commercial arrangements to alleviate call congestion (and admitted as much in his affidavit)."[58] What the *Order* in fact said was that Erickson had personal knowledge "regarding *Wide Voice's* current business, including *Wide Voice's* . . . attempts to convince the IXCs to enter into commercial arrangements to alleviate call congestion."[59] The Commission considered Erickson's knowledge to be relevant, but it did not find that Erickson directly participated in such "coercion."[60] Wide Voice also chides the Commission for "fault[ing] Wide Voice, HD Carrier and Free Conferencing

[52] Petition at 6.

[53] *See, e.g.*, *All American*, 28 FCC Rcd at 3487, para. 24 (finding "based on the totality of the record").

[54] Petition at 2-4. Wide Voice also notes that it does not charge the IXCs for calls to self-identified access stimulating LEC, Northern Valley Communications (Northern Valley). This fact, Wide Voice claims, proves that it did not transition to solely a tandem provider "for the purpose of finding a loophole such that [it] could charge IXCs for access stimulation traffic." Petition at 4; *see also* Reply at 4. We disagree. Even assuming that, in some circumstances, Wide Voice provides tandem service in a way that is not intended to evade our access stimulation rules, that is not the case with respect to calls at issue in this case (i.e., those involving Wide Voice and its various related entities, HD Carrier and Free Conferencing).

[55] *See supra* paragraph 7 and n.42.

[56] Petition at 3 ("[T]he NPRM demonstrated that there would be reforms to 'access stimulation' and Wide Voice therefore intended to focus its efforts on its tandem services"; "[T]he Commission's November 2019 order in an enforcement action held that Wide Voice was not entitled to bill for calls transmitted from its tandem to its own end office"). *See MCI Communications Services, Inc. v. Wide Voice, LLC*, Memorandum Opinion and Order, 34 FCC Rcd 11010 (2019), *pet. for review granted in part and denied in part, Wide Voice v. FCC*, 2021 WL 3235760 (9th Cir. 2021).

[57] Petition at 3 ("Wide Voice saw an opening in the market to sell its costly network infrastructure to other CLEC and VoIP providers, as it was not profitable for CLECs to continue to pay rapidly increasing dedicated interconnection costs to ILECs"; and "Wide Voice determined it would be more profitable long term to invest in IP technologies and provide TDM-IP conversion services to its customers rather than termination services to end users.").

[58] Petition at 9.

[59] *Order*, 2021 WL 2395317, at *6, para. 24 (emphasis added).

[60] Wide Voice also argues that Erickson's statement does not specifically reference Wide Voice's actions regarding "commercial agreements," but speaks to Wide Voice's "offering an IP (instead of TDM) connection" to the IXCs. Petition at 9. The specific type of connection that Erickson's statement addresses is not material to our decision, because the Commission considered Erickson's personal knowledge of Wide Voice's business. *Order*, 2021 WL 2395317, at *6, para. 24. We note, however, that the Commission concurred with the IXCs and found "based on the record, that Wide Voice's acceptance of massive volumes of access stimulation traffic onto its network when it did not have sufficient capacity to handle that traffic was intended to force the IXCs into commercial arrangements with Wide Voice or entities closely connected to Wide Voice or Erickson." *Order*, 2021 WL 2395317, at *12, para. 45 n.178.

for their relatedness."[61] To be clear, Wide Voice's relatedness to other companies does not contravene section 201(b). The violation, rather, is based on Wide Voice's use of those relationships to reroute traffic and charge the IXCs for tandem services in contravention of the *Access Arbitrage Order*. Finally, Wide Voice claims there is no evidence that it "inserted itself in the call flow from the IXCs to the other 'closely related companies' as a means of exploiting its 'sham' relationships."[62] Although Wide Voice claims it was simply pursuing its "normal function" as a "nationwide tandem provider," the Commission concluded that Wide Voice took on that role, with respect to the massive quantities of traffic previously destined for access-stimulating LECs, in order to evade the Commission's rules.[63]

11. In sum, the Commission carefully considered the interrelationships among Wide Voice, HD Carrier, and Free Conferencing; the timing of, and reasons for, Wide Voice's shift in its self-described "business model"; and the timing and rearrangement of the Free Conferencing traffic.[64] This evidence reasonably led the Commission to conclude that Wide Voice undertook action to avoid the access stimulation rules so that it could continue to charge the IXCs for tandem services. The Commission exercised its broad discretion to weigh the record,[65] and its findings were entirely consistent with section 201(b) precedent.[66]

2. The Commission Was Not Required to Find that Wide Voice Violated the Access Stimulation Rules

12. Access stimulation, Wide Voice asserts, is "defined by regulation," and "[w]hether or not a carrier is entitled to charge for terminating 'access stimulation' is determined by that regulation—namely, a carrier's traffic ratio."[67] Wide Voice claims that the Commission improperly failed to "look at the regulatory definition of access stimulation or apply it to the traffic at issue."[68] Wide Voice admits that the "calls at issue are calls to high volume applications."[69] But it argues that "calls to free or low cost voice applications is not *per se* access stimulation,"[70] and the Commission "has never made the determination that transmitting calls to such platforms is unjust and unreasonable."[71] According to Wide Voice, the Commission's finding that Wide Voice would not have been able to charge for the calls at

[61] Petition at 9-10.

[62] *Id*. at 10. For clarity, we note that we found, based on the record, that "Wide Voice inserted a VoIP provider into the call path for the sole purpose of avoiding the financial obligations that accompany the Commission's access stimulation rules." *Order*, 2021 WL 2395317, at *8, para. 32.

[63] *Order*, 2021 WL 2395317, at *6-10, paras. 23-38.

[64] *Id*.

[65] *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). *See also Rejoynetwork, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14917, 14922, para. 10 (2008) (citing *Quatron Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 4749, 4754, para. 15 (2000)).

[66] *See e.g.*, *All American*, 28 FCC Rcd at 3487, para. 24; *North County Communications Corp v. Cricket Communications*, Memorandum Opinion and Order, 31 FCC Rcd 10739, 10747, para. 16, 10748, para. 19 (Enf. Bur. 2016).

[67] Petition at 11.

[68] *Id.* at 12.

[69] *Id.* at 11.

[70] *Id*.

[71] *Id*.

issue but for the sham is unfounded" because the Commission has made no specific determination that the calls are access stimulation.[72]

13. Wide Voice is correct that the *Order* did not apply section 61.3(bbb) of the Commission's rules to determine whether Wide Voice was engaging in access stimulation.[73] However, Wide Voice is wrong that failing to do so renders the *Order* invalid. The Commission explicitly did not decide the IXCs' claim that Wide Voice violated the access stimulation rules.[74] Instead, it decided the IXCs' claim under section 201(b), analyzing the record before it and concluding that Wide Voice acted unreasonably by restructuring its business operations so it could impose tandem charges that it was not entitled to bill.[75] But there is no dispute that (1) the traffic at issue largely flowed to numbers associated with Free Conferencing,[76] (2) Free Conferencing migrated the traffic to HD Carrier after several rural LECs ceased providing service to "high volume applications",[77] (3) the traffic would have been access stimulation traffic under the Commission's rules had it not been moved from the LECs previously serving Free Conferencing,[78] and (4) Wide Voice began handling—and billing for—this same traffic.[79] Indeed,

[72] *Id*. at 12 ("The Order states that 'Wide Voice would have triggered the access stimulation rule,' but does not (and cannot) explain how.").

[73] *See* 47 CFR § 61.3(bbb).

[74] *Order*, 2021 WL 2395317, at *18, para. 67 (stating that, in light of the section 201(b) finding, which afforded the IXCs "all the relief to which they are entitled," the Commission did not need to reach the claims stated in the remaining counts of the Complaint, including the IXCs' claim that Wide Voice violated the access stimulation rules).

[75] *Order*, 2021 WL 2395317, at *5-10, paras. 21-38.

[76] *Order*, 2021 WL 2395317, at *1, para. 6. *See also* Complaint at 10, para. 25; Answer at 9, para. 25.

[77] *Order*, 2021 WL 2395317, at *3, paras. 12-13, *7-8, paras. 29-30 n.119. *See also* Nickerson Answer Decl. at 8-9, para. 18; Answer Legal Analysis at 19.

[78] *Order*, 2021 WL 2395317, at *8, para. 30 & n.119. *See also* Answer Legal Analysis at 18-19 (acknowledging that five rural LECs decided to stop serving high volume end users, including Free Conferencecall.com); Nickerson Answer Decl. at 8-9 ("HD Carrier's migration of traffic homed to Wide Voice tandems in early January 2020 was accelerated by five rural LECs deciding to give up their business with calling applications *due to the regulatory changes enacted through the Access Arbitrage Order*.") (emphasis added). Answer Exh. 9 at WV_000103-114 (Letters submitted in WC Docket No. 18-155 from Goldfield Access Network, BTC, Inc., Louisa Communications, Inc., Interstate Cablevision, LLC, and OmniTel Communications, Inc., all stating that these rural LECs "terminated [their] participation in access stimulation as defined in the [*Access Arbitrage Order*]" and that they terminated their end user relationships with "high volume calling providers" and were working "diligently to transition stimulated traffic off of [their] networks").

[79] *Order*, 2021 WL 2395317, at *8, para. 30 & n.119. *See also* Nickerson Answer Decl. at 8-9; Answer at 15, para. 39 (acknowledging that updated traffic forecast of "127 million additional minutes of traffic in January 2020 for HD Carrier due to the fact that 5 rural LEXs declared that they would no longer be hosting applications."). Wide Voice does not deny that it handled the same access stimulation traffic that the five rural LECs previously delivered to Free Conferencing.

Erickson, Wide Voice's own declarant, judged the traffic to be access stimulation traffic.[80] The traffic may have been rerouted, but its fundamental nature remained the same.[81]

14. Wide Voice wrongly claims that we were compelled to apply the "definition" of access stimulation from our rules to reach our decision under section 201(b).[82] Wide Voice maintained throughout this proceeding that neither it nor HD Carrier was subject to the access stimulation rules,[83] stating that it "did not produce the traffic ratios . . . because a tandem provider cannot be an access stimulator by definition . . . . [and] it is unclear how a tandem provider could calculate its traffic ratios."[84] Yet Wide Voice, which has asserted that section 61.3(bbb) is inapplicable, now claims that the Commission erred by not applying the rule as part of its section 201(b) analysis.[85] Regardless, the Commission did observe, based on the record, that had the traffic at issue terminated to Wide Voice's end office, it "would have triggered the revised access stimulation rule."[86] That observation was not a finding that the traffic at issue was access stimulation under the rules.[87] Rather, the support for that statement—provided in footnote 119 of the *Order*—was Wide Voice's admissions that "rural LECs left the business rather than comply with the new access stimulation rules" and that it "now handles the same access stimulation traffic that the five rural LECs previously delivered to Free Conferencing."[88] We have

[80] In discussing call failure issues, Erickson stated that he "decided to absorb business losses on HD Carrier traffic by not pursuing non-access stimulation business." Erickson Answer Decl. at 6, para. 17. Stripped of the double negative, Erickson appears to characterize the traffic flowing to HD Carrier through Wide Voice as access stimulation traffic.

[81] We agree with Wide Voice that the "Commission has never made the determination that transmitting calls to [high volume voice applications offering free, 'freemium,' and paid services] is unjust and unreasonable." Petition at 11; Reply at 3. And the Commission did not reach that conclusion in the *Order*.

[82] Reply at 2 ("Access Stimulation is defined by regulation . . . . Whether or not a carrier is entitled to charge for terminating 'access stimulation' is determined by that regulation – namely, a carrier's traffic ratio . . . Section 201(b) may supply the Commission with some conceptual authority to declare unreasonable practices *per se* however the determination that Wide Voice would not otherwise be entitled to charge for the calls at issue is an assumption the Commission makes, rather than a finding based on logic, reason, and most importantly, evidence of the Commission's own ratio-based test."). *See also* Petition at 11-12.

[83] *Order*, 2021 WL 2395317, at *3, para. 13; Answer Legal Analysis at 50.

[84] Wide Voice's Response to the IXCs' Supplemental Brief, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Apr. 12, 2021) at 6.

[85] Petition at 11-12; Reply at 2-3.

[86] *Order*, 2021 WL 2395317, at *8, para. 30. Tellingly, Wide Voice's projected traffic volumes with AT&T and Verizon ballooned to 262 and 304 million minutes of use (MOU) per month, respectively. *Id.* Ultimately, Wide Voice billed AT&T and Verizon for over 100 million MOUs each month in almost every month of 2020. *Order*, 2021 WL 2395317, at *1, para. 6, *3, para. 13. *See also* Exhibits in Support of Wide Voice, LLC's Submissions Dated March 29, 2021, Proceeding No. 20-362, Bureau ID No. EB-20-MD-005 (filed Mar. 29, 2021) (Wide Voice Supplemental Exhibit Submission), Exh. R (Summary of Wide Voice Invoices to AT&T and Verizon – 2020) (showing minutes of use exceeding 100 million in every month of 2020 except January and February). Wide Voice also stated that it provides no outbound, i.e., originating, services to its customers. Nickerson Answer Decl. at 5, para. 8 (("Wide Voice has plans to offer outbound tandem services to its CLEC and VoIP customer, but has been unable to do so as the IXCs willingly refuse to provide enough capacity to Wide Voice to provide these services.").

[87] Wide Voice takes issue with the Commission's statement that it had "insufficient evidence on the record on which to evaluate the significance of [HD Carrier's designation of other tandem providers for Free Conferencing traffic]." Petition at 6 n.22 (citing *Order*, 2021 WL 2395317, at *7, para. 29 n.116). Wide Voice claims that "this information is not within Wide Voice's possession, custody or control," and it instead resides "[o]nly [with] HD Carrier, who is not a party to this proceeding." Even if the information is not within Wide Voice's control, the Commission's statement merely explained that Wide Voice failed to substantiate a claim it made.

[88] *Order*, 2021 WL 2395317, at *8, para. 30 n.119.

authority to find practices unjust and unreasonable under section 201(b) without determining that a particular rule has been violated.[89] The Commission reasonably exercised that authority based on the record in this case—i.e., the interrelationships among Wide Voice, HD Carrier, and Free Conferencing; the timing of, and reasons for, Wide Voice's shift in its self-described "business model" solely to a tandem provider; and the timing and rearrangement of the Free Conferencing traffic. These facts substantiate our conclusion that Wide Voice attempted to evade the access stimulation ratios set forth in section 61.3(bbb).

3. Wide Voice's Challenge to the Commission's Call Congestion Ruling is Unfounded

15. Wide Voice disagrees with the *Order*'s conclusion on the call congestion claim, but does not identify any material error, omission, or reason warranting a change in the *Order*'s conclusion.[90] Nevertheless, we address Wide Voice's specific arguments in turn.[91]

16. To begin, Wide Voice mischaracterizes the *Order* by contending that it grants the IXCs an "indefinite right to block [calls]."[92] The *Order* does no such thing. The Commission found that Wide Voice acted in an unjust and unreasonable manner by restructuring its business operations so that it could impose tandem charges that it was not entitled to bill.[93] It further concluded that Wide Voice could not bill the IXCs for such traffic and must refund any amounts the IXCs already have paid.[94] The *Order* also determined that Wide Voice's conduct resulted in call congestion[95] and that the IXCs made reasonable efforts to upgrade their facilities in response.[96] Nothing in the *Order* gives the IXCs a right to block calls.

17. Wide Voice argues that, although the *Order* found that it typically takes the IXCs 30-60 days to add and activate new DS3 circuits, the *Order* failed to address the evidence that blocking occurred because of the failure to add capacity at Wide Voice's tandems longer than 60 business days.[97] On the contrary, the Commission found that the IXCs reasonably responded to the call congestion that Wide Voice caused[98] and that "[t]here is no evidence supporting Wide Voice's claim that, after receiving traffic forecasts, the IXCs refused or failed to expand capacity to the best of their ability in a timely manner."[99] The Commission further determined that the parties worked together *throughout 2020* to add additional capacity to alleviate call failures and were successful doing so.[100] The process by which the parties added

[89] *See supra* paragraph 8.

[90] *See* 47 CFR § 1.106(p)(1).

[91] Contrary to Wide Voice's contention, the Commission did not ignore evidence relating to (1) the exponential growth of Verizon's wholesale traffic and its wholesale relationship with AT&T; (2) traffic being transmitted over historical call paths; and (3) the payment responsibilities associated with Wide Voice's interconnection arrangement with AT&T. The *Order* addressed Wide Voice's assertions on these claims (*see supra* footnotes 24, 25, and 26), and we therefore deny them as repetitive and unsubstantiated.

[92] Petition at 13.

[93] *See Order*, 2021 WL 2395317, at *7, para. 29, *9, para. 36, and *19, para. 68.

[94] *Id.* at *18, para. 67.

[95] *Id.* at *11-12, paras. 40-46.

[96] *Id.* at *13-16, paras. 47-57.

[97] Petition at 13-14. There is no doubt that Wide Voice and HD Carrier would have carried additional traffic if AT&T agreed to use non-regulated paths to connect with Wide Voice. *See* Petition at 14 (citing Erickson's declaration).

[98] *Order*, 2021 WL 2395317, at *15, para. 54 n.224.

[99] *Id.* at *13, para. 49.

[100] *See Order*, 2021 WL 2395317, at *14, paras. 50-51 (emphasis added).

capacity to their carry out interconnection arrangements involved efforts on both sides, [101] and the Commission determined that, in some instances, Wide Voice did not complete its tasks in a timely manner. [102] Indeed, Wide Voice has yet to respond to the IXCs' requests, dating back to March 2020, to add additional capacity. [103]

18. Wide Voice asks the Commission to "make clear that IXCs must take all reasonable measures to connect calls." [104] Commission precedent clearly prohibits carriers from unreasonably blocking calls, [105] and the record amply demonstrates that the IXCs acted reasonably to expand capacity to handle Wide Voice's cascading, increasing traffic forecasts. Indeed, there is no evidence in the record that AT&T and Verizon refused to connect calls because they were access stimulation. [106]

19. Finally, Wide Voice contends that the Commission ignored bad faith discovery tactics by the IXCs, arguing that such tactics warrant an adverse inference against IXCs. [107] The Commission, however, addressed—and rejected—the very same alleged discovery issues when Wide Voice raised them in a Motion to Compel during the discovery phase of the case. [108] Wide Voice's Petition is based upon those same allegations. We this deny this argument as repetitive and unsubstantiated.

20. Commission staff denied Wide Voice's Motion to Compel discovery on the ground that AT&T and Verizon had provided an adequate response. [109] As the IXCs correctly noted in their Opposition, they had "produced more than six thousand pages of documents, including 867 purely internal emails," compared to Wide Voice's production of "only four email chains, which included zero internal emails and zero emails with HD Carrier and Free Conferencing, despite these entities' entangled business relationships." [110] Moreover, staff found that, to the extent AT&T and Verizon did not have documents responsive to a specific Wide Voice request, they had so stated in their pleadings, which their counsel signed under oath. [111] Staff further denied the Motion to Compel because it sought to compel responses to requests not included in the parties' Joint Statement, where the parties were directed to "[detail] their positions on any outstanding discovery disputes and the basis for those positions." [112]

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[101] *See Order*, 2021 WL 2395317, at *12-14, paras. 44, 48-51 and nn.149 & 218.

[102] *See id.* at *13-14, paras. 48, 51.

[103] *See id.* at *14, para. 50 nn.210 & 211; Opposition at 8.

[104] Petition at 14. Wide Voice's request exceeds the scope of the complaint proceeding, in which the Commission was asked to decide whether Wide Voice caused the call congestion.

[105] *See Order*, 2021 WL 2395317, at *10, para. 39 (citing *Call Blocking Declaratory Ruling*, 22 FCC Rcd at 11631-32, paras. 5-7).

[106] Petition at 14-15. As explained above, the Commission did not need to decide whether Wide Voice violated the access stimulation rules, because the *Order* resolved the case under section 201(b) of the Act. *See supra* paragraph 13. Thus, Wide Voice is incorrect that the *Order* is flawed because "there was no finding that Wide Voice is an access stimulator or that the traffic is indeed 'access stimulation.'" Petition at 14-15. In addition, there is no dispute that Wide Voice did not have enough capacity to handle the volume of traffic at issue, and whether the traffic was access stimulation traffic is irrelevant to the finding about who caused the call congestion.

[107] Petition at 15-16.

[108] Motion to Compel Letter Ruling at 2. To the extent that Wide Voice's challenge based upon bad faith discovery tactics is a request that the Commission review the Bureau's Letter Ruling denying its Motion to Compel, it is untimely filed. *See* 47 CFR § 1.115(d).

[109] Motion to Compel Letter Ruling at 2.

[110] *See* Opposition at 9 (citing AT&T Opposition at 1 and Verizon Opposition at 1).

[111] Motion to Compel Letter Ruling at 2. *See* 47 CFR § 1.721(m).

[112] Motion to Compel Letter Ruling at 2.

21. The Petition does not present any evidence of bad faith discovery tactics.[113] Wide Voice again asserts—without any support—that the IXCs improperly hid documents and falsely claimed that such documents do not exist.[114] Wide Voice has not identified any documents listed on the IXCs' privilege logs that purportedly should not have been included on the logs. Nor has Wide Voice presented any facts calling into question the veracity of the IXCs' attestation that no other documents exist.

IV. ORDERING CLAUSE

22. Accordingly, **IT IS HEREBY ORDERED**, pursuant to sections 4(i), 4(j), 201, 203, 204, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 204, 208, 405, and section 1.106 of the Commission's rules, 47 CFR § 1.106, that Wide Voice's Petition for Reconsideration is **DISMISSED** on procedural grounds and, as an independent and alternative basis, **DENIED** for the reasons stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[113] Petition at 16.

[114] *Id*. at 15.

STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

5 U.S.C. § 551 provides:

§ 551. Definitions

For the purpose of this subchapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title--

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency--

> **(A)** prohibition, requirement, limitation, or other condition affecting the freedom of a person;
>
> **(B)** withholding of relief;
>
> **(C)** imposition of penalty or fine;
>
> **(D)** destruction, taking, seizure, or withholding of property;
>
> **(E)** assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

5 U.S.C. § 706 provides:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 2342 provides:

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of--

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344 provides:

§ 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 201 provides:

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

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

47 U.S.C. § 203 provides:

§ 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. § 206 provides:

§ 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 provides:

§ 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 provides:

§ 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. § 402 provides:

§ 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 C.F.R. § 1.721 provides:

§ 1.721 General pleading requirements.

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also require or permit other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplementary documents or pleadings.

(a) All papers filed in any proceeding subject to this part must be drawn in conformity with the requirements of §§ 1.49, 1.50, and 1.52.

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

(c) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or a Commission regulation or order, or a defense to an alleged violation.

(d) Averred facts, claims, or defenses shall be made in numbered paragraphs and must be supported by relevant evidence. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.

(e) Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.

(f) Opposing authorities must be distinguished.

(g) Copies must be provided of all non–Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies. In addition, copies of state authorities relied upon shall be provided.

(h) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner before a decision is rendered on the merits of the complaint.

(i) Specific reference shall be made to any tariff or contract provision relied on in support of a claim or defense. Copies of relevant tariffs, contracts, or relevant portions that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such pleading.

(j) Pleadings shall identify the name, address, telephone number, and email address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party's attorney.

(k) All attachments shall be Bates-stamped or otherwise numbered sequentially. Parties shall cite to Bates-stamped page numbers in their pleadings.

(l) Pleadings shall be served on all parties to the proceeding in accordance with § 1.734 and shall include a certificate of service.

(m) Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.

(n) Parties may petition the staff, pursuant to § 1.3, for a waiver of any of the rules governing formal complaints. Such waiver may be granted for good cause shown.

(o) A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(p) Amendments or supplements to complaints to add new claims or requests for relief are prohibited.

(q) Failure to prosecute a complaint will be cause for dismissal.

(r) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act, or a Commission regulation or order, will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within any applicable statutory limitations of actions.

(s) Any other pleading that does not conform with the requirements of the applicable rules may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

(t) Pleadings shall be construed so as to do justice.

(u) Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the Commission may be subject to appropriate sanctions.

47 C.F.R. § 1.726 provides:

§ 1.726 Answers

(a) Any defendant upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within 30 calendar days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

(c) The answer shall include legal analysis relevant to the claims and arguments set forth therein.

(d) Averments in a complaint or supplemental complaint filed pursuant to § 1.723(d) are deemed to be admitted when not denied in the answer.

(e) Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (b) of this section.

(f) The answer shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint or answer.

(g) Failure to file an answer may be deemed an admission of the material facts alleged in the complaint. Any defendant that fails to file and serve an answer within the time and in the manner prescribed by this part may be deemed in default and an order may be entered against such defendant in accordance with the allegations contained in the complaint.

47 C.F.R. § 51.914 provides:

§ 51.914 Additional provisions applicable to Access Stimulation traffic.

(a) Notwithstanding any other provision of this part, if a local exchange carrier is engaged in Access Stimulation, as defined in § 61.3(bbb) of this chapter, it shall, within 45 days of commencing Access Stimulation, or within 45 days of November 27, 2019, whichever is later:

(1) Not bill any Interexchange Carrier for terminating switched access tandem switching or terminating switched access transport charges for any traffic between such local exchange carrier's terminating end office or equivalent and the associated access tandem switch; and

(2) Shall designate, if needed, the Intermediate Access Provider(s) that will provide terminating switched access tandem switching and terminating switched access tandem transport services to the local exchange carrier engaged in access stimulation and that the local exchange carrier shall assume financial responsibility for any applicable Intermediate Access Provider's charges for such services for any traffic between such local exchange carrier's terminating end office or equivalent and the associated access tandem switch.

(b) Notwithstanding any other provision of this part, if a local exchange carrier is engaged in Access Stimulation, as defined in § 61.3(bbb) of this chapter, it shall, within 45 days of commencing Access Stimulation, or within 45 days of November 27, 2019, whichever is later, notify in writing the Commission, all Intermediate Access Providers that it subtends, and Interexchange Carriers with which it does business of the following:

(1) That it is a local exchange carrier engaged in Access Stimulation; and

(2) That it shall designate the Intermediate Access Provider(s) that will provide the terminating switched access tandem switching and terminating switched access tandem transport services to the local exchange carrier engaged in access stimulation and that it shall pay for those services as of that date.

(c) In the event that an Intermediate Access Provider receives notice under paragraph (b) of this section that it has been designated to provide terminating switched access tandem switching or terminating switched access tandem transport services to a local exchange carrier engaged in Access Stimulation and that local exchange carrier shall pay for such terminating access service from such Intermediate Access Provider, the Intermediate Access Provider shall not bill Interexchange Carriers for terminating switched access tandem switching or terminating switched access tandem transport service for traffic bound for such local exchange carrier but, instead, shall bill such local exchange carrier for such services.

(d) Notwithstanding paragraphs (a) and (b) of this section, any local exchange carrier that is not itself engaged in Access Stimulation, as that term is defined in § 61.3(bbb) of this chapter, but serves as an Intermediate Access Provider with respect to traffic bound for a local exchange carrier engaged in Access Stimulation, shall not itself be deemed a local exchange carrier engaged in Access Stimulation or be affected by paragraphs (a) and (b).

(e) Upon terminating its engagement in Access Stimulation, as defined in § 61.3(bbb) of this chapter, the local exchange carrier engaged in Access Stimulation shall provide concurrent, written notification to the Commission and any affected Intermediate Access Provider(s) and Interexchange Carrier(s) of such fact.

(f) [Reserved by 85 FR 35209]

47 C.F.R. § 61.3 provides in pertinent part:

* * *

(bbb) Access Stimulation.

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

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

(A) Has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this part, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return local exchange carrier or Competitive Local Exchange Carrier to the other party to the agreement shall be taken into account; and

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

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

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

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

(3) A rate-of-return local exchange carrier will continue to be engaging in Access Stimulation until: For a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section, it terminates all revenue sharing agreements covered in paragraph (bbb)(1)(i) of this section and does not engage in Access Stimulation as defined in paragraph (bbb)(1)(iii) of this section; and for a carrier engaging in Access Stimulation as defined in paragraph (bbb)(1)(iii) of this section, its interstate terminating-to-originating traffic ratio falls below 10:1 for six consecutive months and its monthly interstate terminating minutes-of-use in an end office falls below 500,000 for six consecutive months, and it does not engage in Access Stimulation as defined in paragraph (bbb)(1)(i) of this section.

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