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

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	
	)	
v.	)	Proceeding Number 17-56
	)	Bureau ID Number EB-17-MD-001
Iowa Network Services, Inc. d/b/a	)	
Aureon Network Services,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2017 **Released: November 8, 2017**

By the Commission:

I. INTRODUCTION

1. Complainant AT&T Corp. (AT&T) alleges that Iowa Network Services, Inc. d/b/a Aureon Network Services (Aureon) violated Sections 201(b) and 203 of the Communications Act of 1934, as amended (Act), in charging AT&T for Centralized Equal Access (CEA) service on traffic destined for competitive local exchange carriers (CLECs) engaged in "access stimulation."[1] In this Memorandum Opinion and Order, we grant AT&T's Complaint in part. We conclude that Aureon is subject to the Commission's rate cap and rate parity rules and that it violated those rules by filing tariffs containing rates exceeding those prescribed by the Commission. We will determine in the damages phase of this proceeding what Aureon's rates should have been and whether refunds to AT&T are warranted.[2] We further order Aureon to revise its tariff to file rates that comply with the Commission's rules. We otherwise disagree with AT&T's assertions that Aureon acted unlawfully.

II. BACKGROUND

A. Parties

2. AT&T provides communications and other services, including interexchange or long distance services.[3] As a long distance telephone company—otherwise known as an interexchange carrier

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[1] Formal Complaint of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed June 8, 2017) (Complaint). *See* paragraph 10 below.

[2] Under Section 1.722(d) of the Commission's rules, AT&T elected to bifurcate its liability and damages claims. Complaint at 9, para. 20 (citing 47 CFR § 1.722(d)).

[3] Complaint at 12, para. 25, Iowa Network Services, Inc. d/b/a Aureon Network Services Answer to the Formal Complaint of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed June 28, 2017) (Answer) at 15, para. 25.

(IXC)—AT&T provides telecommunications services enabling customers from one local exchange area to call customers in other local exchange areas.[4] In general, AT&T offers its long distance telephone service to the public for a fee, collects revenue from the customers that place calls, and in some circumstances, pays a charge to other carriers for the use of their facilities.[5]

3. One such carrier is Aureon. AT&T is a customer of Aureon and uses Aureon's network to complete certain calls for AT&T's customers.[6] A group of small, rural incumbent local exchange carriers (ILECs) founded Aureon in 1988 to provide CEA service.[7] Aureon's various divisions provide a wide variety of telecommunications, advanced, and other services.[8] Aureon provides its CEA service through its Access Division.[9]

B. CEA Service

4. Local exchange carriers have traditionally been required to provide "equal access" service to long distance carriers.[10] "Equal access" refers to a "class of service whereby all long distance service providers receive equivalent connections to the local exchange carrier's network."[11] "1+ dialing" is an equal access feature that automatically directs all long distance numbers to the customer's chosen (or "presubscribed") long distance carrier.[12] Historically, equal access was not available because all 1+ calls were routed to AT&T, the then-dominant long distance provider.[13] Imposed as part of the 1982 divestiture of AT&T, equal access obligations promoted long distance competition by enabling customers to reach AT&T's competitors by dialing the same number of digits needed to reach AT&T.[14]

5. In the 1980s, many switches of small, rural ILECs could not provide service to more than one long distance carrier on a 1+ basis.[15] These small, rural ILECs claimed that they lacked the financial ability to upgrade or replace their existing switches to provide equal access.[16] They further maintained that, because of the low volume of traffic from each individual ILEC, IXCs would be unwilling to incur high costs to construct the facilities needed to interconnect long distance networks directly to ILECs' end

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[4] Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed July 20, 2017) (Joint Statement) at 2, Stipulated Fact 2.

[5] Joint Statement at 2, Stipulated Fact 3.

[6] Joint Statement at 2, Stipulated Fact 5.

[7] Joint Statement at 2, Stipulated Facts 6, 7.

[8] Joint Statement at 3, Stipulated Facts 10, 11. These services include (a) voice services (VoIP, IP Fax, hosted PBX); (b) dedicated Internet access; (c) cloud and data storage; (d) IT support (technology planning, help desk, disaster recovery, IT security); (e) human resources (administrative services, staffing, leadership development, senior living services); and (f) call centers. *Id.* at 3, Stipulated Fact 11.

[9] Joint Statement at 2, Stipulated Fact 6.

[10] *See United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 196 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (*U.S. v. AT&T*); *see also* 47 U.S.C. § 251(g).

[11] *See* Complaint, Exh. 10, FCC, Distribution of Equal Access Lines and Presubscribed Lines, 1997 WL 677407 (C.C.B. Nov. 3, 1997).

[12] Complaint at 13, para. 31; Answer at 17, para. 31.

[13] *See In re Applications of Iowa Network Access Div.*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd 1468 (1988) (*INS Section 214 Order*), para. 3.

[14] *See U.S. v. AT&T*, 552 F. Supp. at 196-98.

[15] Joint Statement at 4, Stipulated Fact 18.

[16] *Id.*

office switches.[17] In some states, groups of small, rural ILECs sought to address these issues by forming entities to provide CEA service.[18] CEA service enables IXCs to complete their customers' long distance telephone calls, without building their own networks, by connecting the IXCs' facilities to a centralized switch and network operated by the CEA provider.[19] The CEA provider, in turn, connects with local exchange carrier (LEC) networks at various points of interconnection (POIs).[20]

6. In 1988, the Commission authorized Aureon to provide CEA service for both originating and terminating traffic in Iowa.[21] Aureon does not serve end users.[22] Rather, it serves IXCs, enabling them to deliver long distance traffic to approximately 200 LECs that subtend Aureon's network.[23] In accordance with routing guidelines provided by LECs, AT&T sends traffic to Aureon's network for routing to LECs connected to Aureon's network.[24] Not every LEC operating in Iowa subtends Aureon's network, however.[25] Where a LEC does not subtend Aureon's network, AT&T sends calls to that LEC's Iowa customers through a network provider other than Aureon.[26]

C. The Commission's Access Tariff Regime and Intercarrier Compensation Reforms

7. The Commission's tariff regime for switched access charges differs for dominant carriers and non-dominant carriers, ILECs and CLECs.[27] ILECs, as dominant carriers,[28] are required to file and maintain tariffs either as rate-of-return or price-cap carriers.[29] Rate-of-return dominant carriers can participate either in the traffic-sensitive tariff filed annually by the National Exchange Carriers Association (NECA)[30] or file their own tariffs under rule 61.38 or 61.39.[31] Historically, such carriers

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[17] Joint Statement at 4, Stipulated Fact 19.

[18] Joint Statement at 4, Stipulated Fact 20.

[19] Joint Statement at 4, Stipulated Fact 21.

[20] *Id.*; Complaint at 14-15, para. 33.

[21] Joint Statement at 4, Stipulated Fact 22; *INS Section 214 Order*. The Commission also has authorized the provision of CEA service in Indiana, South Dakota, and Minnesota. Complaint at 15, para. 34.

[22] Joint Statement at 4, Stipulated Fact 26.

[23] Joint Statement at 4, Stipulated Fact 25.

[24] Joint Statement at 5, Stipulated Fact 29.

[25] Joint Statement at 4, Stipulated Fact 27.

[26] Joint Statement at 5, Stipulated Fact 28.

[27] *Compare* 47 CFR §§ 61.19-61.26, *with* 61.31-61.59. *See All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81, 84 (D.C. Cir. 2017) ("When it comes to determining the amount of that access charge, however, not all local carriers are the same … federal law divides local carriers into 'incumbent local exchange carriers' and 'competitive local exchange carriers.'").

[28] The Commmision developed the dominant/nondominant dichotomy in the *Competitive Carrier First Report & Order*, designating AT&T, independent telephone companies, Western Union, domestic satellite carriers (Domsats), Domsat resellers, and what were known as miscellaneous common carriers (providers of relay video signals and their corresponding audio components by terrestrial microwave links) as dominant. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 FCC 2d 1, 10-11, para. 26 (1980) (*Competitive Carrier First Report & Order*). All other carriers were classified as nondominant. *Id.*, 85 FCC 2d at 11, para. 27.

[29] *See* 47 U.S.C. § 203.

[30] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17992, para. 6 (2007).

[31] *See* 47 CFR §§ 61.38-61.39.

have set their tariffed interstate switched access rates at a level designed to give carriers an opportunity to recover their operating costs plus an authorized rate of return on the regulated rate base (plant in service minus accumulated depreciation).[32] Competitive access providers were classified as nondominant,[33] and, as such, are not required to file cost support.[34]

8. The Telecommunications Act of 1996 created its own dichotomy of local exchange carriers—ILECs and CLECs.[35] Carriers (including all ILECs) that were subject to dominant carrier regulation remained as such and new entrants in the exchange access market (including most CLECs) were subject to nondominant regulation.[36] Responding to substantial disputes regarding nondominant carrier switched access charges, the Commission in 2001 held that non-dominant CLECs could provide an IXC with, and charge for, interstate switched access services in one of two ways.[37] First, a CLEC may tariff interstate switched exchange access charges if its rates are no higher than the rates charged for such services by the competing ILEC (the benchmark rule).[38] Second, as an alternative to tariffing switched exchange access services, a CLEC may negotiate and enter into an agreement with an IXC to charge rates higher than those permitted under the benchmark rule.[39]

9. In 2011, the Commission comprehensively reformed and modernized its intercarrier compensation regime to facilitate the transition to Internet Protocol-based networks and curtail wasteful arbitrage.[40] In particular, the Commission adopted a uniform national bill-and-keep framework as the ultimate end state for all telecommunications traffic exchanged with a LEC.[41] Under a bill-and-keep arrangement, carriers look first to their subscribers to cover the costs of the network, then to explicit universal service support where necessary.[42] The Commission immediately capped *all* interstate switched access rates, as well as many intrastate rates, effective as of the date of the rules,[43] and mandated that

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[32] *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3215, para. 337 (2016) (*Rate-of-Return Reform Order*).

[33] *See Competitive Carrier First Report and Order*, 85 FCC 2d at 11, para. 27; *Tariff Filing Requirements for Non-Dominant Common Carriers*, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993), *vacated and remanded in part on other grounds*, *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995).

[34] Our rules requiring the filing of cost support, such as Rules 61.38 and 61.39, apply only to dominant carriers. 47 CFR §§ 61.38, 61.39.

[35] *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9926, para. 8 (2001) (*CLEC Access Charge Reform Order*).

[36] *See Access Charge Reform*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21475-76, para. 278 (1996).

[37] *See CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, para. 3.

[38] *See* 47 CFR § 61.26(b), (c). The Commission exempts a narrow class of rural CLECs from its benchmark rule permitting qualifying carriers to file tariffs containing rates "at the level of those in the NECA access tariff." 47 CFR § 61.26(a)(6) and (e).

[39] *CLEC Access Charge Reform Order*, 16 FCC Rcd at 9925, para. 3, 9938, para. 40.

[40] *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (*USF/ICC Transformation Order*), *pets. for review denied, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

[41] *USF/ICC Transformation Order*, 26 FCC Rcd at 17904-956, paras. 736-846.

[42] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17904, para. 737.

[43] *USF/ICC Transformation Order*, 26 FCC Rcd at 17932-34, paras. 798, 800-01 ("We also take measures today to start reforming other elements as well by capping all interstate switched access rates in effect as of the effective date

(continued ….)

LECs reduce their terminating intrastate access rates to the level of their interstate rates by July 1, 2013.[44] For CLECs, the Commission reaffirmed benchmarking as the main means of ensuring reform.[45] The Commission also established a schedule by which many interstate and intrastate terminating access rates would be reduced to bill-and-keep.[46] The Commission imposed these caps and prescribed reductions regardless of the resulting rate of return on investment relating to the affected services.[47]

10. In addition, the Commission promulgated new rules to address access stimulation.[48] Access stimulation occurs when a LEC with high switched access rates (1) enters into an arrangement with a provider of high call volume operations—typically, "free" chat line or conference calling companies (FCPs)—to stimulate the access minutes terminated to the LEC; and (2) shares a portion of the increased access revenues resulting from the increased demand, or some other benefit, with the FCP.[49] The Commission concluded that access stimulation is an arbitrage scheme that is wasteful, imposes undue costs on consumers, and harms competition.[50] To curtail this practice, the Commission adopted a rule that prohibits CLECs engaged in access stimulation from filing a tariff for their interstate exchange access services above the rate prescribed in the access tariff of the price cap ILEC with the lowest switched access rates in the state.[51]

D. Aureon's CEA Tariff and Proposed High-Volume Tariff

11. Aureon's Access Division provides CEA service and, as to that service, Aureon is classified as a dominant carrier.[52] Aureon filed its tariffed rates for CEA service under Section 61.38 of the Commission's rules.[53] Specifically, INAD Tariff F.C.C. No. 1 (Tariff) is captioned "Centralized Equal Access Service" and contains the "regulations, rates and charges applicable to the provision of Switched Access Services and other miscellaneous services … provided by [Aureon] … to customers."[54] Although the Tariff capitalizes the phrase "Centralized Equal Access Service" and uses it on the title page and as a caption on each page of the Tariff, the Tariff does not define the term.[55] Aureon charges for

(Continued from previous page)
of the rules, including originating access and all transport rates."), 17934, para. 801 ("Thus, at the outset of the transition, all interstate switched access and reciprocal compensation rates will be capped at rates in effect as of the effective date of the rules. We cap these rates as of the effective date of the rules.").

[44] *USF/ICC Transformation Order*, 26 FCC Rcd at 17936-37, para. 805 ("The transition imposes a cap on all intrastate rates for price cap carriers [and CLECS that benchmark access rates to price cap carriers], and all terminating intrastate access rates for rate-of-return carriers [and CLECS that benchmark access rates to rate-of-return carriers]). The Commission also required LECs to reduce their intrastate originating dedicated transport rates to interstate levels. *See USF/ICC Transformation Order*, 26 FCC Rcd 17934-35, para. 801.

[45] *USF/ICC Transformation Order*, 26 FCC Rcd at 17937, para. 807 ("Application of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule.").

[46] *USF/ICC Transformation Order*, 26 FCC Rcd 17934-36, para. 801, Figure 9.

[47] *See Rate-of-Return Reform Order*, 31 FCC Rcd at 3129, para. 229 n.500.

[48] 47 CFR § 61.26(g); *USF/ICC Transformation Order*, 26 FCC Rcd at 17874-90, paras. 656-701.

[49] *USF/ICC Transformation Order*, 26 FCC Rcd at 17874, para. 656. *See* Joint Statement at 6, Stipulated Fact 47; *see generally All American Tel. Co., Inc. v. FCC*, 867 F.3d 81, 85 (D.C. Cir. 2017).

[50] *USF/ICC Transformation Order*, 26 FCC Rcd at 17676, para. 33, 17873, para. 649, 17875-77, paras. 663-66.

[51] 47 CFR § 61.26(g)(1); *USF/ICC Transformation Order*, 26 FCC Rcd at 17886, para. 690.

[52] Joint Statement at 4, Stipulated Fact 24.

[53] *Id.*

[54] Joint Statement at 5, Stipulated Fact 34. *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, § 1.1, 2nd Revised Page 16 (issued Oct. 27, 2000).

[55] Joint Statement at 5, Stipulated Fact 35.

interstate CEA service using a single tariff rate called the "switched transport rate," which is non-distance sensitive and recovers the costs of both transport and tandem switching.[56] When Aureon first filed the Tariff on August 10, 1988,[57] the switched transport rate was $0.0117 per minute.[58] On December 29, 2011, when the Commission's rate cap went into effect, the switched transport rate was $0.00819 per minute.[59] Aureon reduced the per-minute rate to $0.00623 in June 2012, and increased the rate to its current level of $0.00896 in June 2013.[60]

12. In April 2017, Aureon proposed providing a separate, high-volume contract tariff service.[61] This service would be subject to a lower rate ($0.00649 per minute), and purchasers would be required to sign a separate contract with Aureon and agree not to challenge any of Aureon's rates.[62] According to Aureon's filing, "additional terms and conditions that are not applicable to [CEA service]" would govern the high-volume service.[63] Aureon delayed the effective date of its proposed high-volume tariff filing until the Commission could review the proposal.[64] One month later, Aureon filed an application for special permission to withdraw the proposed service and to substitute a new "volume discount" plan that would have the same rate as the proposed high-volume contract service and similarly would require execution of a separate service agreement.[65] The volume discount plan became effective on May 20, 2017.[66] Aureon has not negotiated an access services agreement with AT&T, however.[67]

E. The Parties' Dispute

13. AT&T provides long-distance services to customers in Iowa and purchases Aureon's services to complete calls.[68] In recent years, AT&T has seen a greatly increasing amount of alleged access stimulation traffic traverse its network in Iowa, for which it must pay access charges both to

[56] Joint Statement at 5, Stipulated Fact 37. The Commission recently requested that parties refresh the record regarding tandem switching and transport services in the intercarrier compensation reform proceedings. *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, Public Notice, DA 17-863, 2017 WL 3953397 (Sept. 8, 2017). Specifically, the Commission sought comments on "what steps [it] should take to transition the remaining elements associated with tandem switching and transport to bill-and-keep." *Id.* This request implicates carriers such as Aureon that provide tandem switching and transport, but are not terminating carriers.

[57] Joint Statement at 5, Stipulated Fact 34.

[58] Joint Statement at 9, Stipulated Fact 80.

[59] Joint Statement at 8, Stipulated Fact 59.

[60] Joint Statement at 8, Stipulated Facts 60, 61. Aureon's present tariffed intrastate rate is $0.0114 per minute for CEA switching services plus $0.003 per minute, per mile for transport, and it has been at the level since the early 1990s. Joint Statement at 8, Stipulated Fact 69.

[61] Joint Statement at 5, Stipulated Fact 38.

[62] *Id*.

[63] Joint Statement at 6, Stipulated Fact 39.

[64] Joint Statement at 6, Stipulated Fact 40.

[65] Joint Statement at 6, Stipulated Fact 41.

[66] Joint Statement at 6, Stipulated Fact 42.

[67] *Id.*

[68] Joint Statement at 9, Stipulated Facts 73, 74. Depending on the choices made by the end user's provider (i.e., whether it subtends Aureon's network), AT&T must connect to that provider through Aureon. *See* 47 U.S.C. § 251(a) ("Each telecommunications carrier has the duty … to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.").

Aureon (for tandem and transport services to the subtending LECs' POIs),[69] and to the subtending LECs (for transport from their POIs to their switches and for end office switching services)[70] that terminate the calls.[71] Aureon estimates that, over time, traffic owing to its subtending LECs engaged in access stimulation has amounted to roughly **[BEGIN CONFIDENTIAL]** ███ **[END CONFIDENTIAL]** of its total switched access service traffic.[72]

14. Aureon has sent monthly invoices to AT&T for access service.[73] AT&T fully paid Aureon's August 2013 invoice and previous invoices for access service.[74] In October 2013, AT&T disputed Aureon's billed access service charges and began withholding payment on access charges it claims were being improperly billed by Aureon.[75] AT&T has not fully paid Aureon's September 2013 invoice and subsequent invoices.[76]

15. On May 30, 2014, Aureon filed a complaint against AT&T in the United States District Court for New Jersey alleging that AT&T breached Aureon's federal and state tariffs.[77] AT&T filed counterclaims against Aureon alleging various violations of the Act.[78] On July 6, 2015, AT&T filed a letter with the District Court raising the issue of the primary jurisdiction doctrine.[79] In an Order dated October 14, 2015, the District Court stayed the case and referred it to the Commission pursuant to that doctrine.[80] In August 2016, the parties notified the Commission of the District Court's referral.[81] In a September 27, 2016, Letter Ruling, the Commission ordered AT&T to file a Formal Complaint to effectuate the District Court's referral.[82]

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[69] Joint Statement at 5, Stipulated Fact 37.

[70] *See AT&T Corp. v. Alpine Communications, LLC*, Memorandum Opinion and Order, 27 FCC Rcd 11511, 11513-14, paras. 6-8. *See also AT&T Corp. v. Great Lakes Communication Corp*, Proceeding No. 16-170, Bureau ID No. EB-16-MD-001 (filed Aug. 16, 2016), Complaint, Legal Analysis at 13 (*AT&T v. Great Lakes Complaint*).

[71] Principal among these access-stimulating LECs is Great Lakes Communication Corporation, against which AT&T has filed a formal complaint that is pending before the Commission. *See* footnote 70 above; *see also* Joint Statement of Stipulated Facts, Disputed Facts, Key Legal Issues, and Discovery and Scheduling, Proceeding Number 16-170, Bureau ID Number EB-16-MD-001 (filed Oct. 17, 2016) at 4, Stipulated Fact 24 ("GLCC is engaged in "access stimulation" as defined under the Commission's rules.").

[72] Joint Statement at 6-7, Stipulated Fact 48.

[73] Joint Statement at 9, Stipulated Fact 75.

[74] *Id.*

[75] Joint Statement at 9, Stipulated Fact 76.

[76] Joint Statement at 9, Stipulated Fact 77.

[77] Joint Statement at 3, Stipulated Fact 12.

[78] Complaint at 29, para. 60; Complaint, Exh. 45, Defendant's Answer and Counterclaims, *Iowa Network Services v. AT&T Corp*., No. 14-3439 (D.N.J. Aug. 4, 2014); Answer at 32, para. 60.

[79] Joint Statement at 3, Stipulated Fact 13.

[80] Joint Statement at 3, Stipulated Fact 14. On October 28, 2015, Aureon filed a motion asking the District Court to reconsider its October 14, 2015, Order. Joint Statement at 3, Stipulated Fact 15. The District Court denied Aureon's motion for reconsideration on December 8, 2015. Joint Statement at 3, Stipulated Fact 16.

[81] Letter to Marlene H. Dortch, Secretary, FCC, from James U. Troup, Counsel for Aureon (Aug. 5, 2016); Letter to Christopher Killion, Chief, Market Disputes Resolution Division, FCC Enforcement Bureau, from Michael J. Hunseder, Counsel for AT&T (Aug. 12, 2016).

[82] Joint Statement at 3, Stipulated Fact 17. *See* Letter from Lisa B. Griffin, Deputy Chief, Markets Dispute Resolution Division, FCC Enforcement Bureau, to James F. Bendernagel, Counsel for AT&T, and James U. Troup, Counsel of Aureon, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (Sept. 27, 2016).

16. On June 8, 2017, AT&T filed its Complaint with the Commission.[83] The Complaint asserts two counts: Count I, for violation of Section 201 of the Act,[84] and Count II, for violation of Section 203 of the Act.[85] Specifically, AT&T argues that (1) the Tariff applies only to CEA service, which it argues does not include access stimulation traffic;[86] (2) Aureon violated the Commission's rate cap and rate parity rules by raising its CEA tariffed rate in 2013 and by not ever lowering its intrastate CEA rate;[87] (3) Aureon is engaged in access stimulation but has not filed revised tariffs to conform its rates to the lower levels that the Commission has required for such traffic;[88] and (4) Aureon manipulated its CEA rates through a variety of improper accounting measures.[89] Aureon filed an answer on June 28, 2017, denying the allegations of wrongdoing and asserting various affirmative defenses.[90] AT&T submitted a Reply to the Answer on July 5, 2017.[91]

III. DISCUSSION

A. Aureon Did Not Violate Sections 203 and 201(b) of the Act by Billing at its CEA Tariff Rate for Traffic Terminating with Access Stimulators.

17. AT&T contends that Aureon violated Section 203 of the Act and committed an unreasonable practice in contravention of Section 201(b) of the Act by billing AT&T for access stimulation traffic, because access stimulation traffic is not CEA traffic under the Tariff.[92] The Tariff is titled "Centralized Equal Access Service," and that phrase appears as a caption throughout the Tariff.[93] Nonetheless, the Tariff does not define the term.[94] AT&T argues that the Commission should infer the

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[83] Consistent with the September 27, 2016, Letter Ruling, the Complaint addressed the affirmative defenses and counterclaims that AT&T raised in the District Court and that the District Court referred to the Commission. The District Court did not refer Aureon's collection action claims against AT&T, and they remain pending with the Court. Although Aureon requests that the Commission address its claims against AT&T, we decline to do so in this proceeding. *See* Initial Brief of Iowa Network Services, Inc. d/b/a Aureon Network Services, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 21, 2017) (Aureon Initial Brief) at 1-4. Aureon's claims against AT&T would be "cross-complaints" in this case, which the Commission's formal complaint rules prohibit. 47 CFR § 1.725 (prohibiting cross-complaints—including counterclaims—seeking relief against a carrier that is a party to a proceeding).

[84] Complaint at 64-68, paras. 134-46.

[85] Complaint at 68-70, paras. 147-54.

[86] Complaint, at 30-40, paras. 62-80; Complaint, Legal Analysis at 4-28; AT&T's Reply to the Answer, Response to Affirmative Defenses, and Information Designation, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed July 5, 2017) (Reply), Legal Analysis at 5-22.

[87] Complaint at 44-51, paras. 86-101; Complaint, Legal Analysis at 28-38; Reply, Legal Analysis at 22-31.

[88] Complaint at 51-57, paras. 102-17; Complaint, Legal Analysis at 38-48; Reply, Legal Analysis at 31-38.

[89] Complaint at 57-64, paras. 118-33; Complaint, Legal Analysis at 48-62; Reply, Legal Analysis at 38-58; Final Brief of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 21, 2017) (AT&T Initial Brief) at 3-9; Final Reply Brief of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 28, 2017) at 5-10 (AT&T Reply Brief).

[90] *See* footnote 78 above.

[91] *See* Reply.

[92] Complaint at 30-43, paras. 62-85, at 64-70, paras. 134-54; *see, e.g.*, Complaint, Legal Analysis at 1-2, 13-15; Reply, Legal Analysis at 5-22. AT&T has paid Aureon's charges for traffic that transits to and from LECs that AT&T does not contend are access stimulators. Joint Statement at 9, Stipulated Facts 76 and 77; AT&T Answer to Interrogatory No. 4; Aureon Initial Brief at 2; AT&T Initial Brief at 3-4.

[93] Joint Statement at 5, Stipulated Facts 34, 35.

[94] Joint Statement at 5, Stipulated Fact 35.

term's definition from other authority, and that the definition must exclude the provision of access services on access stimulation traffic.[95] We are unpersuaded by AT&T's arguments. As discussed below, we conclude that the service Aureon provided to AT&T is the service that the Tariff describes. Therefore, Aureon appropriately billed AT&T under the Tariff.[96]

18. Section 1 of the Tariff states that it contains the "regulations, rates and charges applicable to the provision of Switched Access Services and other miscellaneous services … provided by [Aureon] … to customers."[97] The Tariff provides that "Switched Access Service, when combined with the services offered by Exchange Telephone Companies, is available to Customers."[98] The Tariff later describes the technical characteristics of Switched Access Service as follows:

> [Aureon] provides a two-point electrical communications path between a point of interconnection with the transmission facilities of an Exchange Telephone Company at a location listed in Section 8 following and Iowa Network's central access tandem where the Customer's traffic is switched to originate or terminate its communications. It also provides for the switching facilities at [Aureon's] central access tandem.[99]

Although the provisions of Section 1 of the Tariff are captioned "Application of Tariff," AT&T contends that they "do not address the scope of [Aureon's] Tariff."[100] Rather, AT&T says that Section 1 "merely confirms that CEA service is a type of switched access service and describes the functions that [Aureon] will perform in connection with legitimate CEA traffic."[101] However, nothing in the language of the Tariff restricts its application to what AT&T calls "legitimate" CEA traffic (i.e., access traffic that is not bound for access stimulators).[102] Indeed, there is no mention at all of traffic being categorized in the way AT&T suggests. Nor do the references to "Centralized Equal Access Service" on the Tariff's title page and on the individual pages of the Tariff render the scope of the Tariff any different from that described with particularity in the "Application of Tariff" provisions. The specific provisions of the Tariff prevail

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[95] Complaint at 31-75, paras. 63-75; *see, e.g.*, Complaint, Legal Analysis at 6-7 (citing *AT&T Corp. v. YMax Commc'ns Corp*., 26 FCC Rcd 5742, 5748, para. 12 (2011) (*AT&T v. YMax*)); Reply, Legal Analysis at 5-15.

[96] *See, e.g.*, *AT&T Corp. v. All Am. Tel. Co.*, Memorandum Opinion and Order, 28 FCC Rcd 3477, 3492-96, at paras. 34–41 (2013); *AT&T v. YMax*, 26 FCC Rcd at 5748, para. 12 ("Consistent with these statutory provisions [in Section 203], a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff."); *MCI WorldCom Network Servs. v. PaeTec Commc'ns, Inc*., 204 Fed. Appx. 271, 272 n.2 (4th Cir. 2006) ("[A] carrier is expressly prohibited from collecting charges for services that are not described in its tariff."); *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 374 (4th Cir. 2014) (A carrier "must provide its services in exactly the way the carrier describes them in th[e] tariff." (emphasis added)).

[97] *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, § 1.1, 2nd Revised Page 16 (issued Oct. 27, 2000). The Tariff also states that "[s]witched access services provided under this tariff cover only the use of [Aureon's] central access tandem, the switched transport between an [Aureon] premises and such central access tandem, and the use of the [Aureon]/ONVOY Common Channel Signaling Access Network." *Id.*

[98] *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, § 6.1, 4th Revised Page 88 (issued Jan. 18, 2012).

[99] *See id.*

[100] Reply, Legal Analysis at 8.

[101] *See* Reply, Legal Analysis at 8.

[102] Nor did the Commission find in the *USF/ICC Transformation Order* that "traffic directed to access stimulators should not be subject to tariffed access charges in all cases." *USF/ICC Transformation Order*, 26 FCC Rcd at 17879, para. 672 (rejecting arguments that the Commission should prohibit the collection of switched access charges for traffic sent to access stimulators). Rather, the Commission chose to adopt a specific set of access stimulation rules as part of comprehensive intercarrier compensation reform to "address remaining incentives to engage in access stimulation." *Id.*

over general provisions and headings.[103] Aureon indisputably provided Switched Access Service in the manner delineated in the Tariff when it routed the calls AT&T sent to the LECs that subtend Aureon's network.[104] Consequently, Aureon did not violate Section 201(b) or 203 of the Act when it charged AT&T under the Tariff for the traffic Aureon delivered.[105]

19. AT&T argues that CEA service "was approved for the limited purpose of facilitating the provision of equal access service to small, rural LECs carrying very low traffic volumes"[106] and that "access stimulation traffic has virtually nothing in common with legitimate CEA traffic."[107] As an initial matter, AT&T overstates its claim concerning the "limited purpose" of the CEA service. The order authorizing a CEA network in Iowa states—and subsequent authority reaffirms—that Aureon's CEA network also would serve to "speed the availability of high quality varied competitive services to small towns and rural areas."[108] Further, AT&T's allegation that CEA networks were intended to carry low traffic volumes is of little weight since, as a Section 61.38 carrier, Aureon's calculated rates should decrease to reflect the increase in the volume of traffic.[109] In any event, we acknowledge that, at the time the Commission authorized Aureon to operate its CEA network, the Commission could not have anticipated the subsequent emergence and rapid growth of access stimulation arrangements. But in this adjudication, we must evaluate Aureon's conduct under existing rules and orders, along with the terms of its Tariff. Regardless of how access stimulation traffic compares in character and volume to the types of traffic that were originally anticipated for CEA service, we find that Aureon has acted lawfully and consistently with its Tariff in transporting access stimulation traffic. AT&T claims that Aureon's recent filing of a proposed high-volume traffic contract tariff shows that the Tariff does not cover access stimulation traffic.[110] But, as AT&T acknowledges, Aureon withdrew this filing,[111] and we will not rely on its language to circumscribe the scope of Aureon's existing Tariff. In any event, Aureon's proposed tariff did not purport to apply to high volumes of access traffic except in specific circumstances not present here. For example, the proposed tariff required the presence of a contract and a buyer who had

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[103] *CoreTel Virginia, LLC v. Verizon Virginia, LLC*, 752 F.3d 364, 375 (4th Cir. 2014) (holding that the more specific usage of language in a tariff prevails over general usage); *Associated Press v. FCC*, 452 F.2d 1290, 1296 (D.C. Cir. 1971) (referring to "the accepted principle that provisions under a specific tariff designation prevail over those included under a more general heading").

[104] Joint Statement at 5, Stipulated Facts 29-31.

[105] Because Aureon's tariff applies to access stimulation traffic, it did not violate Section 203 of the Act by not filing a new tariff or modifying its existing Tariff to specifically cover access stimulation traffic. *Cf.* Complaint, Legal Analysis at 6-15; Reply, Legal Analysis at 14-15, 21-22.

[106] Complaint, Legal Analysis at 7 (capitalization omitted).

[107] *Id*. at 10 (capitalization omitted).

[108] *INS Section 214 Order*, 3 FCC Rcd. at 1468, para 4; *id*. at 1474, para 38; Answer, Exh. 28, Iowa Network Access Division, Final Decision and Order, Docket No. RPU-88-2, 1988 Iowa PUC Lexis 1, slip op. at 10 (IUB Oct. 18, 1988); *Nw. Bell Tel. Co. v. Iowa Utils. Bd.*, 477 N.W.2d 678, 681 (Iowa 1991).

[109] *See* 47 CFR § 61.38; Answer, Exh. B, F. Hilton Decl. at 12, para. 19. *Cf. In re FCC 11-161*, 753 F.3d 1015, 1144-45 (10th Cir. 2014) (quoting *USF/ICC Transformation Order*, 26 FCC Rcd at 17874, para. 657).

[110] *See* Complaint at 35-36, paras. 74-75; Complaint, Legal Analysis at 13-15; Reply, Legal Analysis at 10, n.8; AT&T Initial Brief 14-15; Complaint, Exh. 46, INS April 2017 Revised Tariff Filing, § 7.1.1, Original Page 146.1 (filed Apr. 14, 2017).

[111] Complaint, Legal Analysis at 13 n.18; Joint Statement at 6, Stipulated Fact 41. On May 17, 2017, the Wireline Competition Bureau granted Aureon special permission to withdraw the filing. *See* Iowa Network Access Division Application for Special Permission No. 8 (filed May 16, 2017), and granted under Special Permission No. 17-06 (May 17, 2017).

not previously purchased CEA service.[112] Here, neither AT&T nor Aureon alleges that a relevant contract exists between them, and AT&T has purchased CEA service from Aureon for many years.

20. Contrary to AT&T's contention, changes in the nature of Aureon's network traffic and customer base over time have not exceeded the scope of Aureon's Section 214 authorization.[113] Aureon's original Section 214 authorization required Aureon to obtain "Section 214 authority prior to acquiring and operating any interstate lines of communications" and denied Aureon's general request for "Section 214 authority to serve ITCs [independent telephone companies] that may choose to utilize its services in the future."[114] In 1999, however, the Commission enacted revised rules conferring Section 214 authorization for new lines of all domestic carriers, so that no applications need be filed, and "codif[ied] the statutory exemptions" from Section 214 requirements for line extensions.[115] The *Section 214 Blanket Certification Order* expressly permitted Aureon to operate new domestic lines, regardless of the type of traffic that transits them.[116] The breadth of the blanket authority conferred on all carriers, expressly restricted only with regard to radio services not at issue here, rendered unnecessary the prior requirement that Aureon file an application to enter and provide service to ITCs. It follows, *a fortiori*, that as a result of the *Section 214 Blanket Certification Order*, Aureon similarly could use its existing, authorized lines to transmit any type of traffic, including access stimulation traffic.[117]

21. AT&T also argues that Aureon's billing of CEA rates for access stimulation traffic is unreasonable because it "is not economically justifiable" and because other transport methods exist that are significantly more efficient.[118] We are not persuaded by AT&T's arguments. We have found that Aureon properly billed for services under the terms of the Tariff, and none of the alternatives that AT&T suggests are services that the Tariff offers.[119] In any event, AT&T's real dispute is that it wants to bypass Aureon completely and directly interconnect with the subtending CLECs engaged in access

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[112] *See* Complaint, Exh. 46, INS April 2017 Revised Tariff Filing (filed Apr. 14, 2017), Transmittal No. 33, Description and Justification Cost Support Material, Introduction, (stating that the tariff "is based upon a contract that was negotiated with and voluntarily agreed to by an interexchange carrier that has not previously purchased centralized equal access [] service" and that INS is thereby "making the same contract rate, terms, and conditions generally available to similarly situated interexchange carriers that execute the same contract").

[113] *See* Complaint, Legal Analysis at 7-9, 20, n. 33; Reply, Legal Analysis at 14; *see also* Complaint at 13-17, paras 31-36.

[114] *See INS Section 214 Order*, 3 FCC Rcd at 1469, para. 9, at 1468, para. 2 & n.6. Independent telephone companies are telephone companies that are not affiliated with the Bell operating companies. *See MTS and WATS Market Structure, Phase III*, Notice of Proposed Rulemaking, 94 FCC 2d 292, 304 (1983), para. 27.

[115] *See In the Matter of Implementation of Section 402(B)(2)(A) of the Telecommunications Act of 1996*, Report and Order and Memorandum Opinion and Order, 14 FCC Rcd 11364, 11372, para. 12, 11377, para. 23 (1999) (*Section 214 Blanket Certification Order*).

[116] *See Section 214 Blanket Certification Order*, 14 FCC Rcd at 11372, para. 12. The Commission stated, "blanket authority for domestic telecommunications carriers is a deregulatory measure that allows carriers to construct, operate, or engage in transmission over lines of communication without filing an application with the Commission for 'entry' certification under section 214." *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd 5517, 5520, para. 4 and n.7 (2002). The Commission codified this authority in Section 63.01 of its rules, which states that "*any* party that would be a domestic interstate telecommunications common carrier is authorized to provide domestic, interstate services to *any* domestic point and to construct or operate *any* domestic transmission line, as long as it obtains all necessary authorizations from the Commission for use of radio frequencies." 47 CFR § 63.01 (emphasis added).

[117] *Cf.* Complaint, Legal Analysis at 14, nn.21, 20.

[118] Complaint at 37-40, paras. 76-80, at 65-66, para. 138; Complaint, Legal Analysis at 43-48.

[119] *See* paragraphs 17-18 above.

stimulation.[120] In fact, AT&T has filed with the Commission a complaint against the most prominent access stimulator, Great Lakes Communication Corporation (GLCC), alleging that GLCC has violated Section 201(b) of the Act by unreasonably refusing to provide AT&T a direct connection to GLCC at rates charged by CenturyLink, which has the lowest rates for switched access service of any price-cap ILEC in Iowa.[121]

22. Finally, we reject AT&T's assertion that Aureon's Section 214 authorization does not apply to access stimulation traffic, which is predominantly interstate, because its Section 214 application assumed that the majority of Aureon's costs would be recovered from intraLATA toll calls.[122] Aureon's original Section 214 approval was contingent on Aureon obtaining state agency approval without change to the fundamental assumption that Aureon would substantially recover its costs through revenue from intraLATA toll calls.[123] But this condition was satisfied, and Aureon did in fact obtain Section 214 approval.[124]

B. Aureon Violated Sections 201(b) and 203 of the Act by Raising Its CEA Tariffed Rate in 2013 and by not Lowering Its Intrastate CEA Rate.

23. AT&T argues that Aureon violated Sections 201(b) and 203 of the Act by raising its interstate access rates and by not reducing its intrastate access rates in contravention of the Commission's rate cap and rate parity rules, respectively.[125] We agree. In the *USF/ICC Transformation Order*, the Commission capped "*all* interstate switched access rates in effect as of [December 29, 2011], including originating access and all transport rates."[126] Rule 51.905(b) caps interstate "tariff rates [at] no higher than the default transitional rate,"[127] i.e., the interstate rates effective December 31, 2011. In addition, "to reduce the disparity between intrastate and interstate terminating end office rates," the Commission required that the rates be brought "to parity within two steps, by July 2013."[128] Specifically, the Commission promulgated Rule 51.911, which requires a "Competitive LEC" (1) to cap its intrastate rates that were in effect on December 29, 2011; (2) beginning on July 3, 2012, to move those intrastate rates halfway to the level of its capped interstate rates; and (3) beginning on July 1, 2013, to reduce its intrastate and interstate rates to those of the competing ILEC, which would be at parity at such time.[129]

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[120] *See* Complaint at 37, para. 77.

[121] *See AT&T v. Great Lakes Complaint* at 40-41, para. 86.

[122] *See* Complaint at 35, para. 73; Complaint, Legal Analysis at 8, nn.10, 12, 25, 57.

[123] *See INS Section 214 Order*, 3 FCC Rcd. at 1473, para. 32.

[124] *See In re the Application of Iowa Network Access Division*, Memorandum Opinion and Order, 4 FCC Rcd 2201, 2201, para. 7 (1989) ("[W]e conclude INAD's [the Access Division's] state authority satisfies our condition."). Indeed, the assumption concerning intraLATA toll calls remained valid until 20 years after the *INS Section 214 Order*. *See* Complaint, Rhinehart Decl. para. 29, Table G (showing that, prior to 2008, intrastate CEA service supplied most of the Access Division's overall revenue requirement). It was only after the *Section 214 Blanket Certification Order*, which imposed no conditions concerning intraLATA cost recovery, that Aureon's interstate traffic began to exceed intrastate traffic. *See id.*

[125] Complaint at 44-51, paras. 86-101.

[126] *USF/ICC Transformation Order*, 26 FCC Rcd at 17933, para. 800 (emphasis added). The Commission declined to adopt a "future date" for carriers to comply with the rate cap directive "to ensure that carriers cannot make changes to rates or rate structures to their benefit in light of the reforms adopted in this Order." *Id.*, 26 FCC Rcd at 17934-35, para. 801.

[127] 47 CFR § 51.905(b).

[128] *USF/ICC Transformation Order*, 26 FCC Rcd at 17676-77, para. 35.

[129] 47 CFR §§ 51.911(a)-(c).

24. We find that Aureon violated the interstate rate cap requirement when, in June 2013, it raised its interstate switched access rate from to $0.00896 per minute—$0.00077 above its $0.00819 cap.[130] We further conclude that Aureon violated Rule 51.911(b) because it did not lower its intrastate switched access rates halfway to the level of its interstate rates. Aureon's intrastate rate for CEA switching services has remained unchanged since the early 1990s at $0.0114 per minute plus $0.0003 per minute, per mile for transport, well above its interstate rate.[131] In light of these violations, we find the rates contained in Aureon's 2013 tariff filing and in Aureon's intrastate tariff to be unlawful. We do not reach the issue of whether Aureon's rates violate Rule 51.911(c) because we do not have an adequate record to determine the pertinent benchmark rate. To the extent that Aureon's rates exceed this benchmark, however, the rates in Aureon's intrastate or interstate tariff would also be unlawful under Rule 51.911(c).[132]

25. Aureon claims it did not violate the rate cap and rate parity requirements for several reasons, none of which we find convincing. To begin, Aureon claims that it is not subject to the Transitional Access Service Pricing rules because it is a dominant carrier under Rule 61.38. Aureon characterizes the statement in the *USF/ICC Transformation Order* capping all interstate switched access rates as "words of inordinately general connotation" that do not supersede "regulations dealing with a narrow, precise, and specific subject, such as the dominant carrier rate regulations in Section 61.38."[133] According to Aureon, the rules the Commission enacted in the *USF/ICC Transformation Order* capped only the rates of ILECs and CLECs. Aureon contends it is neither. But that is incorrect. For purposes of the *USF/ICC Transformation Order* and the attendant rules,[134] Aureon is a CLEC. First, Aureon is a LEC under Rule 51.5 because it "provi[des] . . . exchange access."[135] And Aureon has conceded as much.[136] Second, Aureon is not an ILEC under Rule 51.5 because it neither provided "telephone exchange service" on February 8, 1996, nor was it a member of NECA on February 8, 1996, (or a successor to a member).[137] Nor does Aureon anywhere claim it is an ILEC. Third, Aureon must therefore be a CLEC for purposes of the rules adopted by the *USF/ICC Transformation Order* because a "competitive local exchange carrier is

[130] Joint Statement at 8, Stipulated Facts 59, 61.

[131] Joint Statement at 8, Stipulated Fact 69. It is not possible, based on the current record, to calculate the precise cap on Aureon's intrastate rates under Rule 51.911(b) due to the difference in intrastate and interstate rate structures – that is, the separation of switching and transport rate elements. Nevertheless, because Aureon's intrastate switching rate, alone, is so far above its all-inclusive interstate rate, we can determine with certainty that *some* reduction in the rates for one or both of Aureon's intrastate rate elements was necessary.

[132] We intend to develop such facts in the damages phase of this proceeding. Because Rule 51.911(b) concerns the initial step toward rate parity, our reference to the rate parity requirement pertains to both subsections (b) and (c) of Rule 51.911. *See* 47 CFR § 51.911(b), (c).

[133] Answer, Legal Analysis at 16-19.

[134] *See* 47 CFR §§ 51.901-51.919.

[135] 47 CFR § 51.5. *See* 47 U.S.C. § 153(20).

[136] *See* Complaint, Exh. 53, Letter from James U. Troup and Brian D. Robinson (Counsel for Aureon) to Sherly Todd (FCC), dated Apr. 30, 1998 ("INS provides exchange access services to interexchange carriers and therefore meets the definition of a local exchange carrier.") (emphasis added); Complaint, Exh. 55, Opening Brief of Plaintiff Iowa Network Services, Inc. In Opposition to Motion of Qwest Corporation for Summary Judgment, *Iowa Network Servs., Inc. v. Qwest Corp.*, No. 02-40156, at 7 (S.D. Iowa Aug. 11, 2004) ("INS provides exchange access in conjunction with the many rural LECs which formed INS . . . . Because INS provides exchange access, it is a LEC."). *See also Iowa Network Servs. v. Qwest Corp.*, 385 F. Supp. 2d 850, 897 (S.D. Iowa 2005) ("INS is, however, a LEC").

[137] 47 CFR § 51.5.

any local exchange carrier, as defined in [Section] 51.5, that is not an incumbent local exchange carrier."[138]

26. Aureon argues that the rate cap and rate parity rules "must give way" to Section 61.38,[139] because the two sets of rules are inconsistent.[140] We disagree. The two sets of rules do not conflict; rather, they complement each other. To begin, a dominant carrier such as Aureon must comply with Section 61.38 and supply "supporting … material" justifying its rates.[141] If the underlying cost studies and other material support the rate filed in a dominant carrier's tariff, then the tariff usually will go into effect. Aureon acknowledges that it is subject to this obligation,[142] and, in fact, it has consistently filed cost support for its tariffed rates.[143] Next, like all LECs, Aureon is subject to additional obligations. As a CLEC, Aureon must comply with the rate cap and rate parity rules, which apply "[n]otwithstanding any other provision of the Commission's rules."[144] Under those rules, regardless of how a CLEC calculates its rates (e.g., via a non-dominant carrier's benchmarking or the procedures of Section 61.38), the rates may not exceed the specified cap.[145] Stated differently, Aureon must comply with the 61.38 rules to support its rates at or below the cap and therefore Section 61.38 is not superfluous.[146] But if the rates it calculates exceed the rate caps, as they did in Aureon's June 2013 tariff filing, Aureon must lower them.

27. Nothing in the Commission's 2016 *Technology Transitions Order* alters this conclusion.[147] In that Order, the Commission stated in a footnote that "non-dominant status does not extend to [CEA] providers because such carriers do not provide service to end users."[148] Aureon claims that the Commission's rate caps do not apply to CEA providers because the Commission has declined to extend non-dominant status to CEA providers.[149] As explained above, however, Aureon's status as a dominant carrier does not excuse it from the Commission's rate cap obligations—the rate caps depend on whether Aureon is a LEC and a CLEC, not non-dominance. In any event, Aureon misconstrues the *Technology Transitions Order.* A non-dominance determination (i.e., a determination that a carrier lacks market power) involves an examination of many factors concerning the market for the services in question.[150] Consistent with this approach, in the *Technology Transitions Order*, the Commission

[138] 47 CFR § 51.903(a).

[139] Answer, Legal Analysis at 14.

[140] *See* Answer, Legal Analysis at 10-14.

[141] 47 CFR § 61.38.

[142] Joint Statement at 4, Stipulated Fact 24.

[143] Joint Statement at 15, Aureon Disputed Fact 36.

[144] 47 CFR § 51.905.

[145] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17932-936, paras. 798-801; 47 CFR §§ 51.911(a)-(c).

[146] We note that Aureon's reliance on legal precedent relating to the "implied repeal" of statutes (*see* Answer, Legal Analysis at 10) is misplaced, as those cases do not address the lawfulness of an agency's discretion to interpret its own orders and rules. *See Global NAPs, Inc. v FCC*, 247 F.3d 252, 257-58 (D.C. Cir. 2001) (*Global NAPs v. FCC*), *Capital Network System, Inc. v FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

[147] *See Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 (2016) (*Technology Transitions Order*).

[148] *See Technology Transitions Order*, 31 FCC Rcd at 8290, para. 19 n.43.

[149] Answer, Legal Analysis at 6-7 ("The rate caps were the sole reason the Commission reclassified ILECs as non-dominant.").

[150] *See, e.g.*, *Technology Transitions Order*, 31 FCC Rcd at 8287, para. 11 ("To determine whether a carrier possesses market power and is thus dominant, the Commission historically has examined 'clearly identifiable market features' such as 'the number and size distribution of competing firms, the nature of barriers to entry, and the availability of reasonably substitutable services.'").

analyzed evidence about market demand in the context of its transition rules.[151] The Commission did not make a non-dominance finding as to Aureon and other CEA providers because there was no record concerning them. Neither Aureon nor any other CEA providers participated in the proceeding. In other words, there was no basis on which the Commission could find that CEA providers lacked market power. Thus, Aureon is reading into the Commission's sentence in footnote 43 of the *Order* a determination about rate caps that simply is not there. In fact, the *Technology Transitions Order* reaffirmed that "*[a]ll* interstate switched access rate elements are capped."[152] That includes when those elements are offered by CEA providers.

28. Aureon further maintains that the rate cap and rate parity rules do not apply to it, because it does not directly serve end users and, consequently, cannot directly offset any decrease in revenue from increased charges on end users.[153] However, nothing in the *USF/ICC Transformation Order* suggests that the Commission intended to exclude CEA providers from its scope.[154] On the contrary, the *Order* stated broadly that the Commission was "abandon[ing] the 'calling party-network-pays' model that dominated ICC regimes of the last century."[155] As part of the intercarrier compensation reform, the Commission took the initial step of adopting rate caps to "ensure[] that no rates increase during reform" and to "combat potential arbitrage and other efforts designed to increase or otherwise maximize sources of intercarrier revenues during the transition."[156] That is why the Commission recently rejected a similar argument made by another intermediate transport provider that also served no end users, concluding that there is "no 'longstanding [Commission] policy of not imposing rate caps on carriers that do not serve end-users,'" and that the carrier "must comply with existing rules during the transition to 'bill and keep.'"[157] In upholding the Commission's decision, the D.C. Circuit emphasized that the "issue here is not what Great Lakes may charge once the transition to bill-and-keep is complete in 2018, but rather whether Great Lakes was subject to the Commission's benchmark rule in the years prior to AT&T's 2014 complaint … [t]he Commission reasonably concluded that it was."[158] Whatever additional transition steps the Commission ultimately may decide apply to CEA providers such as Aureon (or other entities that do

[151] *Technology Transitions Order*, 31 FCC Rcd at 8287-98, paras. 13-39.

[152] *Technology Transitions Order*, 31 FCC Rcd at 8288-89, para. 15 (emphasis added).

[153] Answer at 99; Answer, Legal Analysis at 11-12, 15-16. Aureon's argument that because it has no end users, it cannot recover its costs if its tariff rates must be reduced is not correct. As a result of the Commission's decision to move *all* switched access services to a bill-and-keep regime, without regard to the impact on a carrier's rate of return, *all* access service providers must find new ways to recover their costs. CEA providers may, for example, need to revise their business model and consider recovering a portion of their costs from the LECs who subtend their networks. Those LECs have available all of the cost recovery options adopted by the Commission and affirmed by the Tenth Circuit. This alternative likely could have the additional benefit of discouraging access stimulating LECs from subtending CEA networks.

[154] **[BEGIN CONFIDENTIAL]** **[END CONFIDENTIAL]**

[155] *USF/ICC Transformation Order*, 26 FCC Rcd at 17676, para. 34.

[156] *USF/ICC Transformation Order*, 26 FCC Rcd at 17932-33, para. 798; *id.* at 17933-34, para. 800, n.1494.

[157] *See AT&T Servs. Inc. v. Great Lakes Comnet, Inc. and Westphalia Tel. Co.*, 30 FCC Rcd 2586, para. 22 (2015) (*AT&T v. Great Lakes Comnet*), *aff'd in relevant part, Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016) (*Great Lakes Comnet v. FCC*).

[158] *Great Lakes Comnet v. FCC*, 823 F.3d at 1003-04.

not directly serve end users) in the future has no relevance to Aureon's current duty to comply with existing law.[159]

29. Finally, Aureon contends that the CEA rate contained in its June 17, 2013, interstate tariff filing took effect on July 2, 2013, because the Commission neither suspended nor investigated the rate increase, and therefore it is "deemed lawful."[160] We disagree. Aureon's Tariff was not "deemed lawful" when filed. Nothing in Section 204(a)(3) of the Act transforms rates, terms, or conditions that are unlawful when filed into "deemed lawful" status. "[T]ariffs still must comply with the applicable statutory and regulatory requirements," and "[t]hose that do not may be declared invalid."[161] Where the Commission, as here, has prohibited the filing of a tariff with rates above the transitional default rate,[162] such a tariff cannot benefit from "deemed lawful" status. As of December 29, 2011, Aureon's interstate switched access rates should not have exceeded $0.00819 per minute. Aureon's 2013 tariff filing raising the interstate rates above that level (as well as its subsequent tariff filings containing rates above $0.00819 per minute) consequently was unlawful when filed and void *ab initio*.[163]

30. AT&T argues that Aureon's CEA rates also are unlawful because Aureon engaged in improper accounting practices.[164] We need not reach this issue, because we have decided that Aureon's interstate Tariff is void *ab initio*. Nevertheless, Aureon is subject to Section 61.38 of the Commission's rules, and AT&T has raised a number of significant questions about Aureon's CEA practices and rates that deserve further exploration. These include Aureon's treatment of network investment, its cost allocations, and the role of lease costs involving the regulated entity and a competitive services affiliate.[165] We will consider these arguments in the damages phase of this proceeding, where we will establish what the appropriate tariff rate should have been beginning June 17, 2013.[166]

C. Aureon Did Not Violate the Commission's Access Stimulation Rules.

31. AT&T alleges that Aureon violated Sections 201(b) and 203 by engaging in access stimulation and failing to file revised tariffs.[167] AT&T argues that Aureon satisfies the two "conditions" that "identify when an access stimulating LEC must refile its interstate access tariffs."[168] To begin, AT&T contends that Aureon's ratio of terminating minutes to originating minutes in a calendar month is well above the 3-1 ratio specified in the Commission's rules.[169] The parties' stipulations support this assertion.[170] Next, AT&T maintains that Aureon has implied revenue sharing agreements with the subtending CLECs, which inure to the benefit of the CLECs' FCP partners.[171] We disagree on the last point.

32. Our rule requires that an access stimulator be party to an "access revenue sharing agreement . . . that, over the course of the agreement, would directly or indirectly result in a net payment

[159] *AT&T v. Great Lakes Comnet*, 30 FCC Rcd at 2592-93, para. 22 (how the transition will occur in the future when a tandem owner does not own the end office has "no bearing" on how the Commission's rules "presently appl[y]").

[160] Answer, Legal Analysis at 33-34.

[161] *Global NAPs v FCC*, 247 F.3d at 260.

[162] 47 CFR 51.905(b).

[163] *See AT&T v. Great Lakes Comnet*, 30 FCC Rcd at 2595, at paras. 28-29.

[164] *See, e.g.*, Complaint at 57-64, paras. 118-33; Complaint, Legal Analysis at 48-63.

[165] *See* Complaint, Legal Analysis at 48-63; AT&T Initial Brief at 3-9; AT&T Reply Brief at 5-10.

[166] *See* Complaint at 70-71, para. 155(c) (requesting that the Commission find that Aureon "must refund amounts it improperly billed to AT&T, and which AT&T paid, in amounts to be determined in a subsequent proceeding), (d) (asking the Commission to conduct "a detailed review of [Aureon's] CEA rates in order to determine … whether [Aureon] engaged in 'furtive concealment' of violations of the Commission's rules by using improper accounting methods, thus allowing access customers to pursue refunds"). *See also Verizon v. FCC*, 269 F.3d 1098, 1104-06 (D.C. Cir. 2001) (holding that Section 208(b) of the Act applies to a finding of liability).

to the other party."[172] The problem for AT&T is that Aureon has provided an affidavit from an officer attesting that Aureon is not a party to any revenue sharing agreement,[173] and AT&T has not proven otherwise.

33. AT&T instead contends that Aureon's traffic agreements with "access stimulating CLECs fall within the parameters of the Commission's rule regarding revenue sharing" **[BEGIN CONFIDENTIAL]**

[END CONFIDENTIAL] However, Aureon has always charged IXCs—not subtending LECs—for its CEA switched access service, which facilitates the switching and transport of calls from the IXCs' customers to customers of Aureon's subtending LECs.[176] Although Aureon has traffic agreements with the subtending LECs, these agreements pertain to Aureon's ability to provide CEA service to IXCs and the mandatory termination requirement of its Section 214 authorization.[177] They have remained unchanged since 1989.[178] AT&T can identify no change in Aureon's practices indicating that its traffic agreements are intended to facilitate access stimulation beyond noting that certain CLECs and their FCP

(Continued from previous page)

[167] *See* footnote 88 above.

[168] Complaint at 52-56, paras. 105-114, Complaint, Legal Analysis at 38-43. *See USF/ICC Transformation Order*, 26 FCC Rcd at 17877, para. 667.

[169] Complaint at 53, para. 107; Complaint, Legal Analysis at 38-39 (citing 47 CFR §§ 61.3(bbb)(1)(i)-(ii)).

[170] Joint Statement at 8, Stipulated Fact 71.

[171] Complaint at 53-56, paras. 108-14; Complaint, Legal Analysis at 40-43.

[172] 47 CFR § 61.3(bbb)(1)(i).

[173] *See* Answer, Exh. 25, Affidavit of Frank Hilton, INS' Reply to AT&T's Opposition to Motion for Summary Judgment of Tariff Claims, at 7-8, para. 12; Answer, Legal Analysis at 26; *see also USF/ICC Transformation Order*, 26 FCC Rcd at 17889, para. 699.

[176] Joint Statement at 4, Stipulated Fact 25; *See* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1, Section 1.2, at 2nd Revised Page 16; Answer at 28-29, paras. 51-52; Answer, Exh. B, F. Hilton Decl. at 12, para. 21.

[177] *See* Answer at 27; Answer, Exh. B, F. Hilton Decl. at 11-12, paras. 20-21. *See also INS Section 214 Order*, 3 FCC Rcd at 1473, paras. 33-34 ("We do not believe that the mandatory termination requirement for interstate traffic is unreasonable or differs substantially from the normal way access is provided, as both an originating and terminating service …"); Answer, Exh. 29, In re: Iowa Network Access Division, Division of Iowa Network Services, Order Granting Rehearing for the Limited Purpose of Modification and Clarification and Denying Intervention, Iowa Utilities Board Docket No. RPU-88-2 (issued Dec. 7, 1988) at 4-5 ("[p]ursuant to their participation agreements with [Aureon], the PTCs [participating telephone companies] will be allowed to require at their option that all terminating traffic be routed over the [Aureon] network and [Aureon] will be allowed to charge its CEA rate for all such terminating traffic") (emphasis added).

[178] *See* Answer at 27-29, paras. 50-51; Answer, Exh. B, F. Hilton Decl. at 11-12, paras. 20-21. We disagree with AT&T's contention that the traffic agreements are anti-competitive. *See* Complaint at 40-45, paras. 81-85; Complaint, Legal Analysis at 16-19. These agreements have long been accepted as an integral aspect of Aureon's ability to terminate traffic, and neither the Commission nor the Iowa Utilities Board have determined differently since the agreements were first authorized in 1988. *See* footnote 139 above. *See also Northwestern Bell Telephone Company v. Iowa Utilities Board*, 477 N.W.2d 678 (1991) ("[W]e conclude that the board's rationales for allowing INS to enter into exclusive contracts with the [subtending LECs] for the provision of terminating access is adequately supported by the evidence.).

partners now engage in access stimulation.[179] As we held above, Aureon's handling of the traffic destined for access stimulating CLECs is consistent with its Section 214 authorization and the Tariff.[180]

34. AT&T requests that, in the event there is not an access stimulation agreement within the meaning of the Commission's rules, we nonetheless find that Aureon's conduct is an unreasonable practice under Section 201(b) because Aureon "facilitated access stimulation schemes by entering into traffic agreements to carry CLECs' access stimulation traffic that [otherwise] would have been subject to the pricing requirements of the access stimulation rules."[181] We decline to so rule in this adjudication. The premise of this argument is that the CLECs are required to "price their switched access services, including transport, at rates that do not exceed the rates for functionally equivalent service offered by the lowest-priced price cap LEC in the state, which is CenturyLink" and to offer a direct transport service like CenturyLink.[182] AT&T appropriately raised this assertion in another formal complaint proceeding against GLCC, , described above, and that is where the Commission will decide the issue.

IV. CONCLUSION

35. We have found above that Aureon violated Sections 201(b) and 203 of the Act because its rates were not just and reasonable. We therefore grant Counts I and II of AT&T's Complaint in part consistent with the findings in this Order. In the damages phase of this proceeding, we will conduct a detailed review of Aureon's rates to determine what the appropriate tariff rates should have been.[183] We also order Aureon to file a revised interstate tariff with rates that comply with this Order, as well as all necessary cost studies and support as required by Section 61.38 of the Commission's rules for its revised rates within 60 days of the date of this Order.[184]

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[179] Whether the CLECs engaged in access stimulation are abiding by the Commission's benchmarking rules is beyond the scope of this complaint proceeding involving AT&T and Aureon.

[180] AT&T advocates treating Aureon as a CLEC for purposes of the Commission's access stimulation rules, because (1) Aureon provides "some" of the interstate exchange access services that are used to send traffic to the FCPs, and (2) Aureon "stands in the shoes" of the access stimulating CLECs that would provide transport if Aureon did not. Complaint at 56, para. 114; Complaint, Legal Analysis at 44-45; Reply, Legal Analysis at 32-33. Alternatively, AT&T contends that Aureon is subject to the access stimulation rules as a rate-of-return carrier. Reply, Legal Analysis at 33, n.23. Because we find that Aureon has not entered into a revenue sharing agreement, we need not reach the issue of which, if any, of the Commission's access stimulation rules apply to intermediate carriers, such as CEA providers.

[181] Complaint at 56, para. 114; Complaint, Legal Analysis at 38, 45-48.

[182] Complaint, Legal Analysis at 46-48.

[183] *See* paragraph 30 above. Consequently, we deny as moot AT&T's Motion to Strike Portions of INS's Final Reply Brief and Supporting Declarations. *See* AT&T's Motion to Strike Portions of INS's Final Reply Brief and Supporting Declarations, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Aug. 31, 2017). In the context of the damages proceeding, the parties will have the opportunity to raise and address issues relating to Aureon's accounting practices.

[184] *See* 47 CFR § 61.38. The Commission may determine at such time whether to initiate an investigation of Aureon's proposed rates pursuant to Sections 204 and 205 of the Act. 47 U.S.C. §§ 204, 205. *See also* Complaint at 70-71, para. 155(d). In addition, pursuant to the outcome of the damages phase of this proceeding regarding the correct intrastate rate, the parties should work with the Iowa Utilities Board to ensure Aureon files a revised intrastate tariff containing lawful intrastate switched access rates.

V. ORDERING CLAUSES

36. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and Sections 1.720-1.736, 61.26, and 61.38 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 61.26, 61.38, that Count I is GRANTED IN PART as described herein.

37. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and Sections 1.720-1.736, 61.26 and 61.38 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 61.26, and 61.38 that Count II is GRANTED IN PART as described herein.

38. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and Sections 1.720-1.736, 61.26 and 61.38 of the Commission's Rules, 47 CFR §§ 1.720-1.736, 61.26 and 61.38 that Aureon is directed to file a revised interstate tariff within 60 days from the date of this Order, and that such revised tariff is to be compliant with the Commission's rate cap requirements, and must include required cost support.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary