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.	)	

ORDER ON RECONSIDERATION

Adopted: August 1, 2018 **Released: August 1, 2018**

By the Commission:

I. INTRODUCTION

1. On June 8, 2017, AT&T Corp. (AT&T) filed a formal complaint against Iowa Network Services, Inc. d/b/a Aureon Network Services (Aureon) under Section 208 of the Communications Act of 1934, as amended (Act).[1] Five months later, the Commission issued a *Liability Order* that partially granted AT&T's Complaint.[2] Aureon subsequently filed a Petition for Reconsideration of the *Liability Order*.[3] For the reasons explained below, we grant the Petition in part and otherwise deny it.

II. BACKGROUND[4]

2. As authorized by the Commission, Aureon provides Centralized Equal Access (CEA) service in Iowa.[5] With respect to AT&T—an interexchange carrier (IXC)—Aureon furnishes terminating interstate access services under a federal tariff that Aureon files with the Commission.[6] Beginning in

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

[2] *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, 32 FCC Rcd 9677 (Nov. 8, 2017) (*Liability Order*).

[3] *See* Petition for Reconsideration, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Dec. 8, 2017) (Petition); 47 CFR § 1.106.

[4] This is an abridged description of the factual and legal background. The *Liability Order* contains a more complete discussion, which we incorporate by reference. *See Liability Order*, 32 FCC Rcd at 9677-9684, paras. 2–16.

[5] *Liability Order*, 32 FCC Rcd at 9678-79, paras. 4-6. *See In re Applications of Iowa Network Access Div.*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd 1468 (1988), para. 3.

[6] *Liability Order*, 32 FCC Rcd at 9678, 9679, 9681-82, paras. 3, 6, 11. *See, e.g.,* Complaint, Exh. 3, INAD Tariff F.C.C. No. 1 (filed Aug. 10, 1988).

September 2013 and continuing through the present, AT&T has refused to pay the majority of Aureon's charges.[7]

3. On May 30, 2014, Aureon sued AT&T in the United States District Court for New Jersey, alleging that AT&T breached Aureon's federal and state tariffs.[8] In response, AT&T filed counterclaims against Aureon for various violations of the Act.[9] The District Court stayed the case on October 14, 2015, and referred certain issues to the Commission under the primary jurisdiction doctrine.[10]

4. To effectuate the Court's referral, on June 8, 2017, AT&T filed its Complaint with the Commission.[11] Counts I and II asserted that Aureon violated Sections 201 and 203 of the Act, respectively.[12] Specifically, AT&T argued that (1) Aureon's tariff applies only to CEA service, which does not include access stimulation traffic; (2) Aureon violated the Commission's rate cap and rate parity rules by raising its CEA tariffed rate in 2013 and by not lowering its intrastate CEA rate; (3) Aureon is engaged in access stimulation but has not filed revised tariffs as the Commission requires; and (4) Aureon has manipulated its CEA rates through a variety of improper accounting measures.[13]

5. The Commission rejected AT&T's assertions that Aureon is itself engaged in access stimulation and that Aureon's tariff does not cover traffic bound for other carriers that are engaged in access stimulation.[14] The *Liability Order* further determined, however, that Aureon failed to comply with the Commission's rate cap and rate parity rules when it raised its CEA rate in 2013.[15] Finally, the Commission declined to address AT&T's rate manipulation claim, reserving that issue for the damages proceeding.[16]

III. DISCUSSION

A. The *Liability Order* Properly Applied an Existing Rule Against Aureon.

6. Aureon argues that the Commission failed to provide fair notice that it would apply its rate cap and rate parity rules to Aureon and "classify Aureon as a CLEC" under those rules.[17] As a result, Aureon contends that any relief must be prospective only. We disagree. The plain text of the Commission's rules and orders in existence at the time Aureon filed its tariff provided Aureon ample notice of its regulatory status and obligations.[18]

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[7] *Liability Order*, 32 FCC Rcd at 9683, para. 14. Between September 2013 and March 2017, Aureon billed AT&T [REDACTED]. AT&T has paid [REDACTED], less than a quarter of the billed amount. *See* Complaint, Exh. 80, AT&T Billing Summary.

[8] *Liability Order*, 32 FCC Rcd at 9683, para. 15.

[9] *Id*.

[10] *Id*.

[11] *Id.* at 9684, para. 16.

[12] *Id*.

[13] *Id*.

[14] *Id.* at 9684-88, 9692-94, paras. 17-22, 31-34.

[15] *Id.* at 9688-92, paras. 23-29.

[16] *Id.* at 9692, para. 30.

[17] *See* Petition at 8-14.

[18] *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

7. The *Liability Order* enforced rate cap and rate parity rules and policies that the Commission adopted in 2011, well before Aureon's 2013 tariff filing.[19]

8. As the *Liability Order* explained—and as Aureon itself conceded—Aureon is a local exchange carrier (LEC) providing switched access service.[20] In 2011, the *USF/ICC Transformation Order* stated—unequivocally and without exception—that, "at the outset of the transition, ***all interstate switched access*** and reciprocal compensation rates ***will be capped*** at rates in effect as of the effective date of the rules."[21] Thus, there should have been no question that Aureon is subject to the Commission's transition rules,[22] including the rate cap and rate parity rules.[23] Moreover, the *Liability Order* further described why Aureon necessarily is a competitive local exchange carrier (CLEC) for purposes of the transition rules.[24] Those rules define a CLEC as "*any* local exchange carrier" that is not an incumbent local exchange carrier (ILEC); Aureon is not an ILEC, nor does it claim to be one.[25]

9. Furthermore, retroactivity is the "norm in agency adjudications no less than in judicial adjudications."[26] In general, "retroactive effect is appropriate for new applications of existing law, clarifications, and additions."[27] Unless Aureon can point to a "settled rule on which it reasonably relied" and that the Commission changed, [28] the *Liability Order* is properly presumed retroactive.[29] The Petition makes no such showing.

10. Aureon's fair notice claim fails because Aureon "does not and indeed cannot point . . . to a settled rule on which it reasonably relied" in maintaining that it was not subject to the rate cap and rate

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[19] *Liability Order*, 32 FCC Rcd at 9689-92, paras. 23-28.

[20] *See id.*, 32 FCC Rcd at 9689, para. 25; Answer at 53, para. 94.

[21] *Connect America Fund et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17934 at para. 801 (2011) (*USF/ICC Transformation Order*), *pets. for review denied, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (emphasis added).

[22] 47 CFR §§ 51.901-51.919.

[23] *See Liability Order*, 32 FCC Rcd at 9689-90, para. 25. The Commission's regulations are similarly broad and unambiguous. Section 51.901(b) of the Commission's rules, which is entitled "Purpose and scope of transitional access service pricing rules," states that the Commission's transition rules "apply to reciprocal compensation for *telecommunications traffic* exchanged between telecommunications providers *that is interstate* or intrastate *exchange access*, information access, or exchange services for such access, other than special access." 47 CFR § 51.901(b) (emphasis added). This provision describes the scope of the transition rules in Subpart J and notified Aureon, as well as other CEA providers, that they are subject to them. Indeed, at least one other CEA provider correctly concluded that it was subject to the rate caps. *See Liability Order*, 32 FCC Rcd at 9692, para. 28.

[24] *Liability Order*, 32 FCC Rcd at 9689-90, para. 25.

[25] *Id.* (emphasis added); 47 CFR § 51.903(a). Aureon does not satisfy the definition of an ILEC, 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). In fact, Aureon admitted that, although it is a LEC, it is not a "Price Cap LEC" or a "Rate of Return Carrier" under Subpart J. *See* Complaint at 12, para. 26; 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 16, para. 26; Answer, Exh. B, Declaration of Frank Hilton at 9, para. 17-18; Answer, Proposed Findings of Facts at 113, paras. 37-38.

[26] *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).

[27] *Verizon v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

[28] *AT&T v. FCC*, 454 F.3d at 332.

[29] *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 540 (D.C. Cir. 2007) ("Clarifying the law and applying that clarification to past behavior are routine functions of adjudication.").

parity rules.[30] Stated differently, nothing in the past precedent Aureon identifies made it "reasonably clear" that Aureon was exempt from those rules.[31] Specifically, although Aureon cites to certain Commission statements in the 2001 *Seventh Report and Order*,[32] they have no bearing on the issue of whether Aureon received fair notice from the 2011 *USF/ICC Transformation Order* that it was subject to the Commission's transitional access rules.[33] Moreover, although Aureon correctly notes that the Commission has held it to be a dominant carrier,[34] that in no way precludes a finding that Aureon also is subject to the Commission's rate cap and rate parity rules. Aureon's dominant carrier status does not excuse it from complying with the additional duties imposed by more general regulations governing LECs providing switched access service.[35]

B. Because Aureon Filed Its 2013 Tariff in Violation of the Rate Caps the Commission Established Through Its Ratemaking Authority, the Tariff Is Void *Ab Initio*.

11. Aureon does not seek reconsideration of the *Liability Order*'s finding that the 2013 tariff rates exceeded their 2011 levels, in violation of the Commission's rate cap and rate parity rules. Nevertheless, Aureon takes issue with the Commission's decision that the 2013 tariff was, as a result, void *ab initio* and thus not "deemed lawful." According to Aureon, the *Liability Order* is inconsistent with precedent and renders Section 204(a)(3) of the Act "impotent and meaningless."[36] That is incorrect.

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[30] *AT&T v. FCC*, 454 F.3d at 332.

[31] Petition at 5-20 (citations omitted); *see Verizon v. FCC*, 269 F.3d at 1109.

[32] *See* Petition at 9-10 (citing *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 (2001) (*Seventh Report and Order*).

[33] *Compare Seventh Report and Order*, 16 FCC Rcd at 9936-49, *with USF/ICC Transformation Order*, 26 FCC Rcd at 17932-38. Aureon claims that, based upon comments made by a Commission staff member during an April 2017 *ex parte* meeting, it believed it was no type of LEC (i.e., neither an ILEC nor a CLEC) and that "non-dominant CLEC regulations" did not apply to it. Petition at 12-13. Even assuming that Aureon correctly understood the staff member's statements, informal staff guidance does not bind the Commission. *See, e.g.*, *Petition for Waiver of Section 61.45(d)*, Memorandum Opinion and Order, 21 FCC Rcd 14293, 14299, para. 15 (2006) (finding informal staff letters non-binding on the Commission); *C.F. Communications Corp. v. Century Telephone of Wisconsin, Inc.*. Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759, 8768-8769, para. 28 (2000) (finding unpublished letter rulings non-binding on the Commission when no party had actual knowledge of the letters); *Kojo Worldwide Corp. San Diego, California*, Memorandum Opinion and Order, 24 FCC Rcd 14890, 14894, para. 8 (2009) (rejecting argument that staff had promised nonenforcement of provisions of the Act); *Applications of Hinton Tel. Co.*, Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11625, 11637, para. 42 (1995) (noting that when staff advice is contrary to the Commission's rules, the Commission may enforce its rules despite reliance by the public).

[34] Petition at 10, 13.

[35] *See Liability Order*, 32 FCC Rcd at 9690, para. 26 (although a dominant carrier, "like all LECs, Aureon is subject to additional obligations" such as the rate cap and rate parity rules). Contrary to Aureon's contention, its regulatory status under the Commission's 2011 transition rules and its tariff filing obligations under Part 61 of the Commission's rules are two different things. Aureon is a CLEC with regard to the transitional access service pricing rules (*see Liability Order*, 32 FCC Rcd at 9689-90, para. 25), which means that Aureon must cap its rates based on the appropriate benchmark rate of the competing ILEC. 47 CFR § 51.911. At the same time, Aureon also is a dominant carrier and remains subject to the rules for dominant carriers, including Section 61.38. *Liability Order*, 32 FCC Rcd at 9690, para. 26. Thus, Aureon's rates under Section 61.38 control, if they are lower under cost-of-service rate making principles.

[36] Petition at 22.

12. Section 204(a)(3) provides that a LEC "may file with the Commission a new or revised charge … on a streamlined basis" and that "any such charge . . . shall be deemed lawful."[37] The provision limits a customer's right to assert in a complaint proceeding that a carrier's filed rate is unreasonably high.[38] It does nothing, however, to restrict the Commission's authority to fix rates or rate limits for the future, and those rates necessarily place per se limits on carriers' filed rates.[39]

13. In this case, the Commission set maximum rate caps in a notice-and-comment rulemaking.[40] In doing so, the Commission acted in its ratemaking capacity; consequently, the rate caps took the place of the legal tariff rates that carriers had previously set. The rate caps represent the Commission's judgment that higher rates would be per se unreasonable and would encourage arbitrage.[41] Once the Commission issued the rate caps, "its pronouncement has the force of a statute," and carriers "were bound to conform."[42] Moreover, the courts have found that the Commission cannot "in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed."[43] Thus, once the Commission determined in 2011 that Aureon—and every other carrier providing interstate switched access—was subject to the rate caps, the Commission was obligated to enforce them in complaint proceedings like this one. The cases Aureon cites applying Section 204(a)(3) and the "deemed lawful" doctrine are inapposite.[44] They involved complaints challenging rates that neither customers nor the Commission could determine were unlawful at the time the tariff was filed but that ultimately resulted in rate-of-return violations.[45] In contrast, the rates in this case clearly exceeded the established rate cap at the time Aureon filed its tariff.

14. We find that nothing in the language of Section 204(a)(3) suggests that a rate that was prohibited by the Commission's rules could be one that a carrier "may" file under Section 204(a)(3). To the extent that Aureon believes that Section 204(a)(3) permits it to file any rate on a streamlined basis, including an unlawful one, we disagree. We find that the reading of Section 204(a)(3) that Aureon advances would transform the statutory "deemed lawful" protection for streamlined filings into a safe

[37] 47 U.S.C. § 204(a)(3). The statute provides for certain waiting periods—7 days for a reduction in rates and 15 days for an increase in rates—before such a rate filed on a streamlined basis shall be effective. *See id.*

[38] Such a right first arose under the common law and was carried forward in Section 201(b) of the Act. *See Ariz. Grocery v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370, 383-85 (1932) (*Arizona Grocery*).

[39] *Arizona Grocery*, 284 U.S. at 387 ("Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rate.").

[40] *See USF/ICC Transformation Order*, 26 FCC Rcd at 17934, para. 801.

[41] *Id.*, 26 FCC Rcd at 17933-34, paras. 800-01, n.1494, 17937-38, para. 808.

[42] *Arizona Grocery*, 284 U.S. at 386-87.

[43] *Id.* at 389. Unlike Congress, administrative agencies do not enact legislation, but courts at times have used the term "quasi-legislative" to refer to an agency's power to establish standards (such as rates) that have future effect and general applicability—usually through notice-and-comment rulemaking. *See, e.g.*, Black's Law Dictionary 1040 (10th ed. 2014) (defining "quasi-legislative power" as "[a]n administrative agency's power to engage in rulemaking"); *Verizon v. FCC*, 269 F.3d at 1108 ("there is an important distinction between rules resulting from quasi-adjudication and rules resulting from quasi-legislation"); *Ariz. Grocery*, 284 U.S. at 388-89 ("the system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts, and may involve a liability to pay reparation;" the Commission has also been delegated "undoubted power" to set rates for the future).

[44] *See* Petition at 20-22 (citing *Virgin Islands Tel . Corp. v FCC*, 444 F.3d 666 (D.C. Cir. 2006) (*V.I. Tel. v. FCC*), *ACS of Anchorage*, 290 F.3d 403 (D.C. Cir. 2002) (*ACS of Anchorage v FCC*).

[45] *See ACS of Anchorage v. FCC*, 290 F.3d at 413 ("it is virtually impossible to tell in advance just what rate of return a given rate may yield").

haven for carriers that file tariffs clearly containing unlawful rates. Such an outcome would allow carriers to exploit the Commission's practical inability to review and, if necessary, suspend within 15 days, each of the well over 6,000 tariff filings it receives annually. We disagree that this is what Congress intended when it established a streamlined review process to speed the implementation of new or revised tariff filings.[46]

15. We note that the D.C. Circuit has construed the term "deemed lawful" in Section 204(a)(3) in a manner that supports our interpretation. In *Virgin Islands Telephone Corporation v. FCC*, the court described a lawful tariff as one that "is not only legal, but also contains rates that are 'just and reasonable' within the meaning of § 201(b)."[47] The court also described a "legal" tariff as one that "contains the published rates the carrier is permitted to charge."[48] The court went on to describe "two ways for a merely legal tariff to become substantively lawful," one of which includes being "deemed lawful" under Section 204(a)(3).[49] A filing that contains rates that the carrier is not permitted to charge does not even meet the preliminary standard for a legal tariff filing, and therefore cannot become a "deemed lawful" tariff by operation of Section 204(a)(3). A contrary reading would have the effect of immunizing from later attack rates that directly violate Commission rules prohibiting specific rate levels at the time of filing. Nothing in the statute indicates that Congress intended such a result.

C. We Clarify That Aureon's 2012 Tariff Remains in Effect Unless and Until AT&T Establishes in the Damages Phase That Aureon Furtively Employed Improper Accounting Practices to Conceal Potential Rate of Return Violations.

16. Notwithstanding the above findings, we grant Aureon's Petition in one respect. The *Liability Order* stated that the Commission will determine in the damages phase of this proceeding what Aureon's rates should have been as of June 13, 2013.[50] Aureon asks that, if the Commission upholds its "deemed lawful" and void *ab initio* findings, it confirm that the rates in Aureon's 2012 tariff apply.[51] We do so now, subject to the caveat that AT&T will have the opportunity in the damages phase to demonstrate that, in connection with the 2012 tariff, Aureon furtively employed improper accounting practices to conceal potential rate of return violations.[52]

17. As discussed above, Aureon's 2013 tariff is void *ab initio* and therefore never went into effect.[53] Because the 2013 tariff did not cancel or supersede Aureon's 2012 tariff, the 2012 tariff retained its legal status.[54] Aureon's 2012 tariff rate was $0.00623 per minute, which is less than the 2011 capped

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[46] *See Streamlined Tariff Order*, 12 FCC Rcd at 2172, n.2 (quoting Sen. Robert Dole, sponsor of the streamlined tariffing amendments to the Communications Act, as saying the provisions would "[s]peed up FCC action for phone companies").

[47] *V.I. Tel. v. FCC*, 444 F.3d at 669.

[48] *Id.*

[49] *Id.*; *see also ACS of Anchorage v. FCC*, 290 F.3d at 413 (noting in a section of the opinion construing the "deemed lawful" provision that it was not addressing a situation involving "misconduct"); *Tariff Streamlining Order*, 12 FCC Rcd at 2175-84, paras. 7-24 (discussing whether a rate is conclusively presumed to be "reasonable" under Section 204(a)(3)—which the Commission might find the rate to be after hearing (204(a)(1)), complaint (208), or investigation (205)—but not whether the rate was prohibited by Commission order at the time of filing).

[50] *Liability Order*, 32 FCC Rcd at 9677, 9692, paras. 1, 30.

[51] Petition at 3-5.

[52] This clarification renders moot Aureon's argument that the appropriate benchmark rate is the NECA rate. *See* Petition at 22-25.

[53] "Void *ab initio*" means "[n]ull from the beginning." Black's Law Dictionary 1085 (10th ed. 2014).

[54] *See*, *e.g.*, *V.I. Tel. v. FCC*, 444 F.3d at 671-72 (finding that an order vacating the suspension of a streamlined filed tariff restored the *status quo ante* status of it as a deemed lawful tariff).

rate of $0.00819 per minute.[55] The FCC did not suspend the tariff. Nor did AT&T or any other carrier challenge Aureon's 2012 tariff filing; accordingly, it was "deemed lawful."

18. We are unpersuaded by AT&T's arguments that the 2012 tariff cannot be the "currently effective tariff rate."[56] To begin, AT&T contends that, as a dominant carrier, Aureon must refile its rates periodically to insure that they properly reflect Aureon's costs of service.[57] AT&T claims that Aureon violated Rule 69.3 now that the Commission has determined the 2013 tariff to be void (i.e., no tariff was on file).[58] But, AT&T offers no support for its contention that a failure to comply with Rule 69.3 vitiates an operative tariff. Indeed, Aureon's 2012 tariff did not expire by its own terms and it remains in effect until it is amended or cancelled. Next, AT&T argues that Aureon's 2012 tariff rate "might not be accurate" because of accounting discrepancies relating to "uncollectible revenues" and lease rates.[59] This narrow exception to the "deemed lawful" provision in Section 204(a)(3) of the Act may be triggered when a carrier "furtively employs improper accounting techniques" that "conceal[] potential rate of return violations."[60] The *Liability Order* reserved resolution of this aspect of AT&T's Complaint for the damages phase of the case, and AT&T will have the opportunity to present evidence on this claim then.[61] Unless and until AT&T is able to demonstrate that Aureon's 2012 tariff rate should not be "deemed lawful," the 2012 tariff rate governs for the relevant period.

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[55] *Liability Order*, 32 FCC Rcd at 9682, para. 11.

[56] *See* Opposition of AT&T Corp. to Aureon's Petition for Reconsideration, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Dec. 18, 2017) at 7-8 (AT&T Opposition). In accordance with the *Liability Order*, Aureon filed a revised interstate tariff with rates that complied with the terms of the *Order*. Aureon did so on February 22, 2018, and the Commission suspended the tariff for one day and launched an investigation. *See In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Transmittal No. 36, Order, DA 18-199 (WCB/Pricing Feb. 28, 2018). Accordingly, our determination here pertains only to Aureon's rate from June 13, 2013, to February 22, 2018.

[57] AT&T Opposition at 7 (citing 47 CFR § 69.3(a), (f)(1) ("[a] tariff for access service provided by a telephone company that is required to file an access tariff pursuant to § 61.38 of this Chapter shall be filed for a biennial period")).

[58] AT&T Opposition at 7. AT&T also argues that Aureon's 2012 tariff rate cannot be the effective rate because it does not accurately reflect Aureon's cost of service. *Id.* at 8. As discussed below, the Commission will address in the damages phase of this case alleged improprieties in Aureon's 2012 tariff rate. Specifically, the Commission will examine whether Aureon engaged in any improper conduct that would satisfy the high legal threshold necessary to negate the "deemed lawful" status of its 2012 tariff.

[59] AT&T Opposition at 8; *see* Complaint at 57-64, paras. 118-33; Complaint, Legal Analysis at 48-63; *see also Liability Order* at para. 30.

[60] *ACS of Anchorage v FCC*, 290 F.3d at 411-13 ("We do not, of course, address the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations. The Order here makes no claim of such misconduct."). This language was dicta, and the Commission has never awarded refunds on this basis.

[61] *See Liability Order*, 32 FCC Rcd at 9692, para. 30.

IV. ORDERING CLAUSES

19. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, 405, and Section 1.106 of the Commission's Rules, 47 CFR § 1.106, that Aureon's Petition for Reconsideration is GRANTED IN PART, and otherwise DENIED as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary