

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

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

SECOND ORDER ON RECONSIDERATION

Adopted: November 28, 2018

Released: November 28, 2018

By the Commission:

I. INTRODUCTION

1. In its Petition for Further Reconsideration,1 AT&T Corp. (AT&T) asks the Commission to revisit one aspect of its recent Order on Reconsideration2 regarding AT&T’s complaint against Iowa Network Services, Inc. d/b/a Aureon Network Services (Aureon). The Order on Reconsideration affirmed the Commission’s findings that Aureon filed its 2013 Tariff in violation of rate caps the Commission had established in 2011 and that, as a result, the 2013 Tariff was void ab initio and thus not “deemed lawful” by operation of Section 204(a)(3) of the Communications Act of 1934, as amended (Act).3 The Order on Reconsideration further determined, however, that Aureon’s 2012 Tariff remained in effect during the relevant period unless and until AT&T can establish in the damages phase of this proceeding that Aureon furtively employed improper accounting practices to conceal potential rate of return violations.4 AT&T takes issue with the Commission’s clarification. It argues that the Commission should find that the 2012 Tariff, which complied with the applicable rate cap when filed and became deemed lawful, lost its deemed lawful status over time.5 We dismiss AT&T’s reconsideration request to the extent indicated herein and otherwise deny it.

1 Petition for Further Reconsideration, Proceeding No. 17-56, File No. EB-17-MD-001 (filed Aug. 31, 2018) (Petition for Further Reconsideration).

2 AT&T Corp. v. Iowa Network Servs., Inc., d/b/a Aureon Network Servs., Order on Reconsideration, FCC 18-116, 2018 WL 3703276 (2018) (Order on Reconsideration).

3 Order on Reconsideration, 2018 WL 3703276 at paras. 11-15.

4 Id. at paras. 16-18.

5 Petition for Further Reconsideration at 13-19.

II. BACKGROUND

2. This dispute stems from AT&T's refusal to pay tariffed charges for terminating interstate access services that Aureon, a Centralized Equal Access (CEA) provider, furnished to AT&T.⁶ To effectuate a primary jurisdiction referral from the United States District Court for the District of New Jersey, on June 8, 2017, AT&T filed with the Commission a formal complaint against Aureon under Section 208 of the Act.⁷ At AT&T's request, the Commission bifurcated liability and damages in this case. The discovery and pleading cycle in the liability phase of this case closed on August 28, 2017. AT&T did not address in its pleadings or request discovery regarding whether Aureon's 2012 Tariff rate exceeded the Commission's benchmark rule that became effective on July 1, 2013.

3. In November 2017, the Commission issued the *Liability Order*, which granted AT&T's Complaint in part.⁸ Aureon subsequently sought reconsideration of the *Liability Order*.⁹ The *Order on Reconsideration* upheld the findings in the *Liability Order* with the exception of the Commission's determination concerning the 2012 Tariff rate, which the *Order on Reconsideration* found governs during the 2013-2018 period absent a showing of "furtive concealment."¹⁰

4. AT&T makes a number of arguments as to why the Commission should reconsider its *Order on Reconsideration*, all centering on AT&T's contention that the 2012 Tariff rate is unlawfully high. In particular, AT&T asserts that Aureon's 2012 Tariff rate "could not constitute the just and reasonable rate for periods after July 1, 2013" because that rate "almost certainly exceeds the CLEC benchmark rate—which, as of July 1, 2013, became the applicable rate cap for Aureon."¹¹

III. DISCUSSION

5. AT&T's Petition for Further Reconsideration and Reply repeat many arguments that the Commission has already fully considered and rejected. These include AT&T's assertions that (1) the imposition of the 2012 Tariff rate is premature;¹² (2) it was arbitrary for the Commission to put into effect a 2012 Tariff rate that Aureon withdrew, that was based on unlawful methodologies, and that may be far

⁶ We do not repeat here all of the facts underlying this case and instead incorporate the background discussions from our prior two orders. See *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, 32 FCC Rcd 9677-84, paras. 2-16 (Nov. 8, 2017) (*Liability Order*); *Order on Reconsideration*, 2018 WL 3703276 at paras. 2-5; *petitions for review pending, AT&T Corp. v. FCC*, D.C. Circuit No. 18-1007 (filed Jan. 8, 2018); *Iowa Network Services, Inc. v. FCC*, D.C. Circuit No. 18-1257 (filed Sept. 18, 2018).

⁷ Formal Complaint of AT&T Corp., Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed June 8, 2017) (Complaint).

⁸ *Liability Order*, 32 FCC Rcd at 9685-86, para. 18, 9688, para. 23, 9689-90, para. 31, 9693, para. 34, 9695, paras. 36-37.

⁹ See Petition for Reconsideration, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Dec. 8, 2017) (Petition for Reconsideration).

¹⁰ *Order on Reconsideration*, 2018 WL 3703276 at paras. 16, 18.

¹¹ Petition for Further Reconsideration at 3. See also Reply of AT&T Corp. in Support of Petition for Further Reconsideration, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Sept. 17, 2018) (Reply) at 1-2.

¹² Compare Petition for Further Reconsideration at 8-13, with Opposition of AT&T Corp. to Aureon's Petition for Reconsideration, Proceeding Number 17-56, Bureau ID Number EB-18-MD-001 (filed Dec. 18, 2017) (Opposition to Aureon Petition) at 7-8 and *Order on Reconsideration*, 2018 WL 3703276 at paras. 17-18. AT&T's reliance upon Section 206 in support of its contention that using Aureon's 2012 Tariff rate prematurely determines its damages is the same argument, albeit with different legal support, that AT&T made in opposition to Aureon's Petition for Reconsideration. In any event, contrary to AT&T's assertion, Section 206 does not overcome the deemed lawful protection against refunds.

higher than Aureon's actual cost-of-service rate;¹³ and (3) the 2012 Tariff had to be refiled in 2014.¹⁴ AT&T's repetition of those same arguments here does not warrant reconsideration.¹⁵

6. AT&T also argues in its Petition for Further Reconsideration that the 2012 Tariff rate is unlawful because it exceeded the benchmark that went into effect on July 1, 2013, and, therefore, that the Commission wrongly determined that the 2012 Tariff rate governed during the 2013 to 2018 period.¹⁶ AT&T admits, however, that it did not claim in this formal complaint proceeding that the 2012 Tariff violated the benchmark.¹⁷ It is too late to do so now.¹⁸ As a result, AT&T's petition must be dismissed.¹⁹

7. As the complainant, AT&T was required to assert in its complaint²⁰ and adduce evidence showing that the rate in the 2012 Tariff exceeded the applicable benchmark.²¹ Because AT&T did neither, nothing in the record in this case establishes whether—and, if so, when—the 2012 Tariff rate

¹³ Compare Petition for Further Reconsideration at 19-22, with Opposition to Aureon Petition at 7-8 and *Order on Reconsideration*, 2018 WL 3703276 at para. 18.

¹⁴ Compare Petition for Further Reconsideration at 23-24, with Opposition to Aureon Petition at 7-8 and *Order on Reconsideration*, 2018 WL 3703276 at para. 18.

¹⁵ 47 CFR § 1.106(p)(3) (providing that petitions for reconsideration of a Commission action that “[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding” are among those that “plainly do not warrant consideration by the Commission” and may therefore be dismissed by a bureau). See *Qwest Commc’ns Co. v. N. Valley Commc’ns, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522–23, paras. 5–6 (2011) (“It is ‘settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.’”) (citing *S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002) (citations omitted); see also *AT&T Corp. v. All American Tel. Co.*, Order on Reconsideration, 29 FCC Rcd 6393, 6395, paras. 6-7 (2014) (same) (*AT&T v. All American*); *All American Tel. Co. v. AT&T Corp.*, Order on Reconsideration, 28 FCC Rcd 3469, 3471–72, para. 6 (2013) (same) (*All American v. AT&T*).

¹⁶ See Petition for Further Reconsideration at 14 (“[T]he 2012 rate violates Section 51.911(c) and the CLEC benchmark rules for the entirety of that period.”), 15 (“Aureon’s 2012 rate thus substantially exceeds the Commission’s own determination of the current CLEC benchmark rate . . .”), 19-20 (arguing that Aureon’s cost of service rate for 2012, if properly computed, would have been less than the 2012 Tariff rate); Reply at 2 (“Aureon’s 2012 tariff rate exceeded the CLEC benchmark rate and was thus subject to mandatory detariffing.”), 3 (arguing that the 2012 Tariff rate “could not have lawfully been on file as a result of mandatory detariffing”), 4 (the 2012 Tariff did not contain a rate that is “the *lower of* the benchmark rate or cost-based rate”), 5 (“[T]he 2012 rate—like the 2013 rate—violated the Commission’s rate caps *and* its cost of service rules.”).

¹⁷ Reply at 7 (“Apart from its claim that Aureon engaged in furtive concealment in filing its 2012 tariff, AT&T has not challenged Aureon’s charges under its 2012 tariff.”).

¹⁸ See *infra* note 20.

¹⁹ See 47 CFR § 1.106(p)(2) (warranting dismissal of arguments on reconsideration not previously presented to the Commission); see also *Qwest v. N. Valley*, Order on Reconsideration, 26 FCC Rcd at 14522–23, paras. 5–6 (finding reconsideration unwarranted with respect to arguments that the petitioner previously had an opportunity to present in response to the underlying complaint); *AT&T v. All American*, 29 FCC Rcd at 6396, para. 7 (same); *All American v. AT&T*, 28 FCC Rcd at 3471–72, para. 6 (same).

²⁰ The Commission’s rules require a complainant to plead all matters concerning its claims fully and with specificity. See 47 CFR §§ 1.720(a) (“All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity”); 1.721(4) (requiring a formal complaint to include the “[c]itation to the section of the [Act] and/or order and/or regulation . . . alleged to have been violated”).

²¹ See *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (“Well-established FCC precedent imposes the burden of proof on the complainant in section 208 proceedings.”); *Beehive Tel., Inc. v. The Bell Operating Cos.*, *Memorandum Opinion and Order*, 12 FCC Rcd 17950, 17961-62 (1995) (“[I]t is well settled that complainants in Section 208 formal complaint proceedings bear the burden of proof.”), *aff’d on other grounds*, 179 F.3d 941 (D.C. Cir. 1999).

exceeded the benchmark rate.²² Aureon's 2012 Tariff rate was \$0.00623 per minute, which is less than the 2011 capped rate of \$0.00819 per minute.²³ AT&T maintains that the Commission's separate investigation into Aureon's 2018 Tariff rate is somehow dispositive as to the appropriate benchmark and cost-based rate from mid-2013 to 2018.²⁴ It is not. The 2018 tariff investigation is prospective only, relates to a tariff that Aureon submitted in 2018, and has no bearing on Aureon's 2012 or 2013 Tariffs.²⁵ We reject AT&T's arguments that it could not reasonably have been expected to address this issue in its pleadings.²⁶ The Commission's finding that the 2012 Tariff rate applies flows logically from AT&T's request that the Commission find that Aureon's 2013 Tariff was void *ab initio*. AT&T should have understood that the 2012 Tariff rate would have remained in place if the Commission declared the 2013 Tariff void *ab initio*.²⁷

8. AT&T also forfeited another opportunity to challenge the 2012 Tariff's compliance with the 2013 benchmark in response to Aureon's Petition for Reconsideration in this proceeding. When Aureon requested that the Commission find that the 2012 Tariff remained in effect as a result of the 2013 Tariff being declared void *ab initio*, AT&T did not allege in its response that the 2012 Tariff rate exceeded the benchmark, but argued instead that it was premature to declare the 2012 rate to be the lawful rate because the Commission had not yet established the proper benchmark.²⁸ AT&T made general arguments about what that benchmark should be without attempting to apply its benchmark approach to the 2012 Tariff rate or arguing why its benchmark approach would defeat the deemed lawful status of the 2012 Tariff.²⁹ Even now—long after it was procedurally required to do so—AT&T has no firm argument that the 2012 Tariff rate exceeded the 2013 benchmark, stating only that the rate “almost certainly” exceeds the CLEC benchmark based on analogy to a 2018 ratemaking proceeding that is inapplicable.³⁰

²² AT&T also contends that “there is substantial evidence that the 2012 rate was significantly higher than a properly computed cost-of-service rate for the post July 2013 period.” See Petition for Further Reconsideration at 3. AT&T will have an opportunity to raise that issue during the damages phase of this case if AT&T can show that Aureon furtively concealed improper accounting practices. AT&T will also have an opportunity to demonstrate whether it is entitled to damages under Section 206 for any payments made in excess of the 2012 Tariff rate. See Opposition to Petition for Further Reconsideration, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed Sept. 10, 2018) at 6.

²³ See *Order on Reconsideration*, 2018 WL 3703276 at para. 17.

²⁴ See Petition for Further Reconsideration at 15-16, 18-19, 21, 24-25; see also *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, FCC 18-105, 2018 WL 3641034 (2018) (*Rate Order*); petition for review pending, *Iowa Network Services v. FCC*, D.C. Circuit No. 18-1258 (filed Sept. 19, 2018).

²⁵ Accordingly, we deny AT&T's request that we find that Aureon's 2013 Tariff is not deemed lawful because it exceeds the benchmark rate established in the *Rate Order*. See Petition for Further Reconsideration at 24-25.

²⁶ Reply at 7-8 (“Surely AT&T was not required to file suit by ‘July 3, 2014,’ Opp. at 5, challenging the 2012 tariff on the grounds that, years in the future, the Commission would decide that that rate (even though Aureon purported to supersede it on July 1, 2013) must be put back in place from mid-2013 to 2018.”).

²⁷ See *Order on Reconsideration*, 2018 WL 3703276 at para. 17.

²⁸ Opposition to Aureon Petition for Reconsideration at 5-6, 8 n.11 (“... once the Commission later decides the applicable benchmark, then if the 2012 rate exceeds that benchmark, that rate cannot be the currently effective rate”).

²⁹ Opposition to Aureon Petition for Reconsideration at 20-23; see *Order on Reconsideration*, 2018 WL 3703276 at para. 17.

³⁰ Petition for Further Reconsideration at 3.

Therefore, AT&T's belated challenge to Aureon's 2012 Tariff rate is independently barred because AT&T did not make that challenge in response to Aureon's Petition for Reconsideration.³¹

9. The Commission granted AT&T's request to void the 2013 Tariff. AT&T now suggests that the Commission's findings allow it to pay Aureon nothing whatsoever for the services Aureon provided for a period of nearly five years, based on its mistaken belief that no tariff would have been in place if Aureon's 2013 Tariff were declared void *ab initio*.³² The problem for AT&T is that, prior to 2013, Aureon had an existing tariff that was "deemed lawful," that contained rates below the rate cap, and that AT&T did not address in its complaint before the Commission.³³ The 2012 Tariff remains in effect because AT&T asked the Commission to declare the 2013 Tariff a legal nullity.

IV. ORDERING CLAUSES

10. 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 AT&T's Petition for Further Reconsideration is DISMISSED to the extent indicated herein and otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³¹ See 47 CFR § 1.106(p)(2) (warranting dismissal of arguments on reconsideration not previously presented to the Commission).

³² See Petition for Further Reconsideration at 9, n.22; Reply at 4, n.6.

³³ See Petition for Further Reconsideration at 12; Reply at 4-5. AT&T cites to the Commission's statement in paragraph 13 of the *Order on Reconsideration* that rate caps take "the place of the legal tariff rates that carriers had previously set." Petition for Further Reconsideration at 18. But the Commission explained later in that paragraph that it would be "obligated to enforce [the rate caps] *in complaint proceedings* like this one." *Order on Reconsideration*, 2018 WL 3703276 at para 13 (emphasis added). AT&T did not claim in this complaint proceeding that Aureon's 2012 Tariff rate exceeded the benchmark, however. There is no record allowing the Commission to make any determinations concerning the 2012 Tariff beyond the undisputed fact that it is deemed lawful.