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October 7, 2019

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Iowa Network Access Division Tariff F.C.C. No. 1, WC Docket No. 18-60,***
Transmittal No. 44 (Sept. 30, 2019 Revised Tariff Filing)

Dear Ms. Dortch:

AT&T Services, Inc. (“AT&T”) submits for filing the **Public Version** of its Petition to Reject or to Suspend and Investigate the proposed tariff in Transmittal No. 44 filed on September 30, 2019 by Iowa Network Services, Inc. d/b/a Aureon Network Services (“Aureon”). Consistent with the Commission’s rules and the March 26, 2018 Protective Order entered by the Commission Staff, AT&T has redacted all “Confidential Information” from the **Public Version**, which it is filing by ECFS.

AT&T is also filing by hand with the Secretary’s office four hard copies of the **Confidential Version** of this submission. In addition, copies of all versions of the submission are being served electronically and by facsimile on Aureon’s counsel.

Please contact me if you have any questions regarding this matter.

/s/ James F. Bendernagel, Jr.
James F. Bendernagel, Jr.

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October 7, 2019

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**PUBLIC VERSION
REDACTED - FOR PUBLIC INSPECTION**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Iowa Network Access Division
Tariff F.C.C. No. 1**

WC Docket No. 18-60

**Transmittal No. 44
September 30, 2019 Access Charge
Tariff Filing**

**PETITION OF AT&T SERVICES, INC. TO REJECT OR TO SUSPEND AND
INVESTIGATE IOWA NETWORK SERVICES, INC. TARIFF FILING**

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Dated: October 7, 2019

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**Iowa Network Access Division
Tariff F.C.C. No. 1**

WC Docket No. 18-60

**Transmittal No. 44
September 30, 2019 Access Charge
Tariff Filing**

**PETITION OF AT&T SERVICES, INC. TO REJECT, OR TO SUSPEND AND
INVESTIGATE, IOWA NETWORK SERVICES, INC. TARIFF FILING**

Pursuant to Section 204(a)(1) of the Communications Act (“Act”), 47 U.S.C. § 204(a)(1), and Section 1.773 of the Commission’s rules, 47 C.F.R. § 1.773, AT&T Services, Inc., on behalf of its affiliates (“AT&T”), petitions the Commission to reject the above-captioned revised tariff filed by Iowa Network Services, Inc. d/b/a Aureon Network Services (“Aureon”) on September 30, 2019, under Transmittal No. 44. Alternatively, the Commission should suspend Aureon’s proposed tariff and set for investigation the numerous issues that continue to exist.¹

INTRODUCTION

On three separate occasions since November 2017, the Commission has identified serious defects in Aureon’s tariff filings for its Centralized Equal Access (“CEA”) service, and has ordered Aureon to file a “revised” tariff and “revised cost support” in compliance with the Commission’s

¹ A tariff is subject to rejection when it is *prima facie* unlawful, in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order. *See, e.g., Am. Broad. Cos. v. AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI Telecomms Corp. v. AT&T*, 94 F.C.C.2d 332, 340-41 (1983). Suspension and investigation are appropriate where a tariff raises substantial issues of lawfulness. *See AT&T (Transmittal No. 148)*, 101 F.C.C.2d 144 (1985); *ITT (Transmittal No. 2191)*, 73 F.C.C.2d 709, 716, n.5 (1979) (citing *AT&T (Wide Area Telecomms. Serv.)*, 46 F.C.C.2d 81, 86 (1974)).

rules. *See Liability Order*, ¶ 35;² *First Rate Order*, ¶ 122;³ *Second Rate Order*, ¶¶ 1, 36.⁴ On each occasion, Aureon has failed to comply with the Commission's directives. Most recently, on April 29, 2019, Aureon filed a proposed tariff that sought to raise Aureon's rate for CEA service to \$0.00363/min beginning May 14, 2019, but did nothing to address the serious issues previously identified regarding Aureon's existing CEA rate.⁵ After AT&T filed a petition to reject or suspend that proposed tariff,⁶ and after communicating with FCC staff, Aureon deferred the effective date of its April 2019 Proposed Tariff for nearly six months (until October 15, 2019), via three separate deferral requests.⁷ During that six months period, Aureon submitted two *ex parte* letters in an attempt to address deficiencies raised in discussions with Commission Staff,⁸ as well as deficiencies raised in AT&T's *ex parte* submissions.⁹

On September 30, 2019, Aureon formally withdrew its April 2019 Proposed Tariff and filed a new proposed tariff.¹⁰ In its new tariff, Aureon proposes to raise its CEA rate from \$0.00296/min. (the effective rate since October 2018) to \$0.00411/min.¹¹ To justify this increased

² *See* Memorandum Opinion and Order, *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, 2017 WL 5237210, ¶ 35 (Nov. 8, 2017) ("*Liability Order*").

³ Memorandum Opinion and Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, 2018 WL 3641034, ¶ 122 (July 31, 2018) ("*First Rate Order*").

⁴ *See* Memorandum Opinion and Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, 2019 WL 1010709, ¶¶ 1, 36 (Feb. 28, 2019) ("*Second Rate Order*").

⁵ *See* Aureon Transmittal No. 40 (Apr. 29, 2019) ("April 2019 Proposed Tariff").

⁶ *See* Petition of AT&T Services, Inc. to Reject or to Suspend and Investigate Iowa Network Services, Inc. Tariff Filing, WC Docket No. 18-60, Transmittal No. 40 (May 6, 2019) ("AT&T May 6 Pet.").

⁷ *See* Aureon Transmittal No. 41 (May 10, 2019); Aureon Transmittal No. 42 (June 21, 2019); Aureon Transmittal No. 43 (July 22, 2019).

⁸ *See* Aureon Ex Parte Letter, WC Docket No. 18-60 (July 22, 2019) ("Aureon July 22 Ex Parte"); Aureon Ex Parte Letter, WC Docket No. 18-60 (September 13, 2019) ("Aureon Sept. 13 Ex Parte").

⁹ *See* AT&T Ex Parte Letter, WC Docket No. 18-60 (June 3, 2019) ("AT&T June 3 Ex Parte"); AT&T Ex Parte Letter, WC Docket No. 18-60 (Aug. 20, 2019) ("AT&T Aug. 20 Ex Parte").

¹⁰ *See* Aureon Transmittal No. 44 (Sept. 30, 2019) ("September 2019 Proposed Tariff").

¹¹ [[BEGIN CONFIDENTIAL]]

rate, Aureon relies on an estimate of the fair market value of its unregulated DS-3 leases -- a methodological departure from each of its previous tariff filings, which relied on a “Black Box” lease facility charge that Aureon was never able to explain or justify. Aureon’s rate increase is also attributable to Aureon’s revised traffic forecast, in which Aureon has slashed its estimated traffic by an additional 40% (from about 1.4 billion MOUs/year to about 850 million MOUs/year).¹² Further, Aureon continues to include a sizeable proposed switching investment in its rate base, and has failed to address significant issues pertaining to its allocation of its network facilities costs.

For the reasons set forth below, the Commission should reject Aureon’s proposed tariff. The Commission’s rules and regulations contemplate that the Commission will first resolve the deficiencies with Aureon’s March 2018 and October 2018 tariff rates before considering Aureon’s request to charge a new, higher rate on a going forward basis. *See* 47 U.S.C. § 204(a)(1) (Commission must give the prior filings “preference over all other questions pending before it and decide the same as speedily as possible”). The existing record developed over the course of the past 19 months makes clear that Aureon’s tariffed rate for CEA service should have been no greater than **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]** when it was filed in February 2018, and substantial and un rebutted evidence supports the imposition of an even lower rate of **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]**

[[END CONFIDENTIAL]]

¹² In its now abandoned April 2019 tariff filing, Aureon reduced the traffic forecast it had relied on in its two prior tariff filings from about 2.5 billion MOUs /year to the 1.4 billion level. **[[BEGIN CONFIDENTIAL]]**

Moreover, Aureon's September 2019 Proposed Tariff suffers from many of the same defects that led the Commission to reject Aureon's prior tariffs. Indeed, Aureon's new tariff does not fully address the issues that the Commission identified in its *First* and *Second Rate Orders*, nor has Aureon complied with the Commission's affiliate transaction rules or cost of service regulations. Aureon has also not recalculated the CLEC benchmark rate (based on its revised traffic forecast) to verify that its proposed rate of \$0.00411/min. is lower than that benchmark rate.

Alternatively, the Commission should suspend and set for investigation the numerous issues that continue to exist regarding the reasonableness of Aureon's proposed tariff rates. Aureon has been afforded numerous opportunities to explain the derivation of the lease cost expense allocated to its Access Division, but was never able to do so, and has now abandoned that effort altogether. Nor has Aureon shown that its allocation of Central Office Equipment ("COE") and Cable & Wire Facilities ("C&WF") costs are in compliance with the Commission's affiliate transaction rules (i.e., lower than both the fair market value and the fully distributed costs of the leased facilities). Indeed, Aureon's fair market value analysis is based on an inventory of DS-3 leases that is demonstrably incomplete. In addition, Aureon has not addressed the many ratemaking deficiencies that AT&T identified in its June 3 *Ex Parte*, or the various circuit count and circuit routing issues that AT&T identified in its August 20 *Ex Parte*.

BACKGROUND

A. The *Second Rate Order*

In its *Second Rate Order*, the Commission rejected Aureon's September 2018 revised tariff rate and directed Aureon to re-file its tariff and address the specific deficiencies the Commission had identified in both its *First* and *Second Rate Orders*. *Second Rate Order* ¶¶ 12-13, 18-19, 31, 35-36. Those deficiencies principally related to the lease cost expense Aureon's non-regulated

Network Division had charged to its Access Division for use of Aureon's fiber network. *Id.* As the Commission noted, Aureon had once again failed to establish, as required by the Commission's affiliate transaction rules, that its proposed tariff rate was less than the lower of: (1) the fair market value of the leased facilities; and (2) the fully distributed costs of those facilities. *Id.* ¶ 12.

The Commission rejected Aureon's fair market value analysis because Aureon had failed to take into account the rates at which its Network Division had sold DS-3 circuits to third parties on a nonregulated basis, or at the very least, justify the [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

To address these deficiencies, the Commission further directed Aureon to provide:

- a comprehensive and well-defined database of third-party sales for DS-3 transport service (including the customer, detailed service description including identifying the rate elements that comprise the service, service dates, number of circuits, mileage, and per-circuit rate); and
- an explanation regarding how this information should inform the calculation of fair market value in evaluating the Filed Lease Expense.

Id. ¶ 18.

With respect to the fully distributed cost issue, the Commission identified several deficiencies in Aureon's submission. Most notably, the Commission concluded that Aureon's method of allocating C&WF costs failed to accurately reflect how those costs were incurred. *Id.* ¶ 34. The Commission also concluded that Aureon's proposed method of valuing its nonregulated Ethernet rings was overly simplistic. *Second Rate Order*, ¶ 35. It therefore ordered Aureon to provide:

- a more satisfactory explanation for the reported difference in DS-1 circuits between its 2015 and 2018 circuit inventories (*id.* ¶ 31);
- a full cost support that includes, but is not limited to, the specific explanations and analyses described in the *Second Rate Order* (*id.* ¶ 36); and

- a reasonable methodology to convert Aureon’s inventory of Ethernet circuits to physical rings so that a proper number of ring-miles can be allocated to its Ethernet circuits (and, thus, to nonregulated activity) (*id.* ¶ 35).

Finally, the Commission directed Aureon Aureon to address the “other issues and questions raised in the [*First Rate Order*] and in the record but not explicitly addressed in [the *Second Rate Order*]” (*id.* ¶ 35), including Aureon’s unjustified inclusion of \$4.4 million in additional central office switching investment. *Id.* ¶ 13. As to that last issue, AT&T has previously shown that Aureon failed to provide the following:¹⁴ **[[BEGIN CONFIDENTIAL]]**

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED] **[[END CONFIDENTIAL]]**

B. Aureon’s April 29, 2019 Revised Tariff Filing

In response to the *Second Rate Order*, Aureon chose to ignore most of the defects in its previously filed tariff rate and instead filed a new tariff for the period May 14, 2019 through June 28, 2020. *See* Aureon Transmittal No. 40.¹⁵ Aureon’s revised tariff was based on a new 2019 test year and a new 2019 traffic forecast, but it used 2017 financial data.¹⁶ The reason for Aureon’s

¹⁴ *See, e.g.*, AT&T Ex Parte Letter, Ex. 50, WC Docket No. 18-60 (Feb. 6, 2019) (“AT&T Feb. 6 *Ex Parte*”).

¹⁵ Aureon initially set a date of May 14, 2019, but later deferred the effective date to October 15, 2019. *See* Aureon Transmittal No. 43 (July 22, 2019).

¹⁶ *See* AT&T May 6 Pet. at 9.

approach was obvious: [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

In the *Second Rate Order*, the Commission said nothing about submitting a new tariff filing, nor had it invited Aureon to re-open issues that already had been litigated and resolved, such as Aureon's traffic forecast. Further, if Aureon's April 2019 proposed tariff rate were applied both to past periods (March 1, 2018 to October 15, 2019) and to the future (October 15, 2019 to June 30, 2020), it would have resulted in an excessive return because the actual volume of traffic transported during the past periods greatly exceeded the traffic volumes included in Aureon's test year projections.¹⁸

For this and other reasons, AT&T requested that the Commission reject Aureon's tariff outright and prescribe a rate substantially lower than Aureon's existing rate of \$0.00296/min.¹⁹ In the alternative, AT&T asked the Commission to suspend and investigate Aureon's revised tariff. In that connection, AT&T noted that that: (1) Aureon's fair market value analysis was deficient in several respects;²⁰ (2) serious questions persisted with Aureon's calculation of its cost of service rate;²¹ (3) the dramatic increase in Aureon's central office switching investment did not satisfy the

¹⁷ [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]]

¹⁸ See AT&T May 6 Pet. at 10.

¹⁹ See *id.* at 8-13.

²⁰ See *id.* at 13-22.

²¹ See *id.* at 22-33.

Commission’s “used and useful” standard (or its Part 32 accounting rules);²² and (4) Aureon’s new traffic forecast was unsubstantiated.²³

On May 10, 2019, Aureon filed a Reply opposing AT&T’s Petition,²⁴ but on that same day—and in apparent response to communications with FCC staff—it submitted a letter deferring the effective date of its newly filed tariff from May 14, 2019 to June 28, 2019.²⁵ It subsequently deferred the effective date first until August 1, 2019,²⁶ and subsequently to October 15, 2019.²⁷

C. AT&T’s and Aureon’s Subsequent Ex Parte Filings

On June 3, 2019, AT&T submitted an *ex parte* letter to the Commission reiterating its request that the Commission prescribe a rate for Aureon’s CEA service based on the existing record, describing the significant deficiencies in Aureon’s April 2019 Proposed Tariff, and identifying the specific types of information the Commission should direct Aureon to produce in support of that tariff.²⁸ Aureon did not respond to that submission but did submit an *ex parte* letter on July 22, 2019 addressing a number of the Commission’s concerns related to Aureon’s switch investment and network cost calculations.²⁹

On August 20, 2019, AT&T submitted a second *ex parte* letter renewing its request for the Commission to immediately resolve the issues regarding Aureon’s rate for the period March 2018 forward, or to issue an order requiring Aureon to show cause why its rate for that period should

²² See *id.* at 33-34.

²³ See *id.* at 34-36.

²⁴ See Aureon Reply, WC Docket No. 18-60 (May 10, 2019) (“Aureon May 10 Reply”).

²⁵ See Aureon Transmittal No. 41 (May 10, 2019).

²⁶ See Aureon Transmittal No. 42 (June 21, 2019).

²⁷ See Aureon Transmittal No. 43 (July 22, 2019).

²⁸ See AT&T June 3 *Ex Parte*.

²⁹ See Aureon July 22 *Ex Parte*.

not be set at [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]] AT&T also reiterated its request that the Commission direct Aureon to provide the data identified in AT&T's June 3 *Ex Parte* and identified a number of significant questions related to Aureon's circuit inventory and the routing of Aureon's CEA DS-1 and DS-3 circuits.³¹

Aureon submitted an *ex parte* letter on September 13, 2019 that purported to address the issues raised in AT&T's August 20 *Ex Parte*. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

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[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

³⁰ See AT&T Aug. 20 *Ex Parte*, at 1-2.

³¹ See *id.* at 2-8.

³² [[BEGIN CONFIDENTIAL]] [REDACTED]

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D. Aureon’s September 30, 2019 Tariff Filing

On September 27, 2019, Aureon filed an application for waiver of the Commission’s rules, in order to increase its rates on fifteen days’ notice, rather than the thirty days required under Section 61.59 of the Commission’s rules because of Aureon’s pending April 2019 Proposed Tariff submission.⁴⁰ See 47 C.F.R. § 61.59(b) (“Changes to rates and regulations for dominant carriers that have not yet become effective, i.e., are pending, may not be made unless the effective date of the proposed changes is at least 30 days after the scheduled effective date of the pending revisions.”). To support this waiver of the Commission’s rules, Aureon stated only that the waiver “would permit [Aureon] to ensure that the provisions of its tariff are fully compliant with applicable laws.”⁴¹

On September 30, 2019, Aureon withdrew its April 2019 Proposed Tariff and filed yet another revised tariff. While this newly proposed tariff purports to correct some of the deficiencies in Aureon’s April 2019 Proposed Tariff (discussed *supra*), it still does not comply with the directive in the *Second Rate Order* to file a revised tariff that corrects the deficiencies in Aureon’s prior tariff filings. Instead, like its April 2019 Proposed Tariff, Aureon’s new filing only addresses the rate for future periods. Further, it does not correct the many deficiencies identified in AT&T’s May 6 Petition, or in AT&T’s June 3 and August 20 *ex parte* letters, and for these reasons and the additional reasons set forth below, it should be rejected, or at a minimum suspended for investigation.

⁴⁰ See Application No. 9 (Sept. 27, 2019).

⁴¹ See *id.* at 2.

ARGUMENT

I. THE COMMISSION SHOULD REJECT AUREON’S REQUEST FOR A WAIVER, AS WELL AS ITS TARIFF FILING, AND PRESCRIBE A RATE FOR THE POST-FEBRUARY 2018 PERIOD NO GREATER THAN [[BEGIN CONFIDENTIAL]] [REDACTED] [[END CONFIDENTIAL]]

As an initial matter, the Commission should reject Aureon’s request for a waiver of the Commission’s rules. “[F]or ‘good cause shown,’” the Commission “may exercise its discretion to waive a rule where: (a) the particular facts make strict compliance inconsistent with the public interest; (b) special circumstances warrant a deviation from the; and (c) such deviation will serve the public interest”⁴² Aureon’s application for special permission fails to satisfy this standard: Aureon does not address any of the factors relevant to the Commission’s waiver analysis, nor can Aureon satisfy those factors given the history of its tariff filings. Aureon states only that a waiver would ensure “that the provisions of its tariff are fully compliant with applicable laws.”⁴³ However, that statement says about the “public interest” and does not identify any “special circumstances.” Aureon has had a full *seven months* to ensure that the provisions of its tariff are fully compliant with the Commission’s rules and prior orders, including the *Second Rate Order*, which was adopted on February 28, 2019. Accordingly, the Commission should reject Aureon’s application for special permission.

The Commission should likewise reject Aureon’s September 2019 Proposed Tariff. Notwithstanding the Commission’s clear directive in the *Second Rate Order* that Aureon file a “revised” tariff, along with “revised cost support,” addressing the specific issues raised regarding

⁴² *In the Matter of July 1, 2018 Annual Access Charge Tariff Filings*, 33 FCC Rcd. 5400, 5401 (2018) (quoting 47 C.F.R. § 1.3).

⁴³ See Application No. 9, at 2 (Sept. 27, 2019).

the rates it had previously filed for the post-February 2018 period,⁴⁴ Aureon's September 2019 Proposed Tariff once again applies to a different period (October 15, 2019 to June 30, 2020), and is based on a new test year, a new traffic forecast and, in contrast to its April 2019 Proposed Tariff, new financial data. Aureon also proposes to increase its rate for CEA service to an even higher level (\$0.00411/min.) without ever addressing whether its existing rate for CEA service was excessive when it was initially filed in February 2018, or whether that excessive rate contributed to the loss of traffic that Aureon now argues justifies its proposed rate increase.

[[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

Section 204 of the Act provides that if a carrier files a new tariff before the Commission has resolved the issues relating to the carrier's prior tariff, "the Commission shall give to the

⁴⁴ See *Second Rate Order*, ¶ 36.

⁴⁵ [[BEGIN CONFIDENTIAL]]

[[END CONFIDENTIAL]]

hearing and decision of such questions preference over *all other questions* pending before it and decide the same as speedily as possible.” *Id.* § 204(a)(1) (emphasis added). Thus, when confronted with a situation where there were unresolved issues with a carrier’s prior and future tariffs, the Commission has ordered the hearing officer to quickly resolve the issues in the first docket, and only then to “proceed to receive additional evidence necessary to conclude the proceedings in [the second] docket.”⁴⁷ In so ruling, the Commission recognized that “the best interests of the ... users and the respondent carriers will be served by [first] developing a full and complete record on costs and rate structure” in the first docket, because doing so would resolve questions at issue both for the prior period, and for the future period.⁴⁸

That approach makes eminent good sense, particularly in the context of this case. As AT&T has previously demonstrated, the evidence of record establishes that if Aureon’s CEA rate had been properly computed when it was initially filed in February 2018, it would have been no greater than [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

⁴⁷ *In the Matter of AT&T*, 26 FCC 101, ¶ 9 (1959).

⁴⁸ *Id.* ¶ 8; see also *In the Matter of AT&T, Charges for Interstate and Foreign Communication Service*, 13 F.C.C.2d 853, ¶ 8 (1968) (resolving matter in first docket was of “threshold essentiality to a determination of the reasonableness and lawfulness” of the rates in separate dockets); *Associated Press v. FCC*, 448 F.2d 1095, 1105 (D.C. Cir. 1971) (“There was a rational basis for the Commission’s decision to defer proceedings in [the third docket] pending findings and determinations in [the first and second dockets].”).

⁴⁹ [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** Additionally, resolution of the issues that remain outstanding regarding Aureon's current rate (the reasonableness of Aureon's circuit forecast and its C&WF cost allocation methodology) will not only bring the prior rate proceeding to a close, but it will also facilitate the Commission's setting of "rates that should be made effective for the future."⁵²

Finally, as previously noted, Aureon's proposed rate increase is largely the result of its revised traffic forecast, which projects traffic levels significantly lower than Aureon has previously experienced. While that forecast is based on certain recent declines in traffic Aureon has experienced, it fails to take into account the Commission's recent decision regarding access stimulation.⁵³ In that decision, the Commission adopted new rules that could have a significant impact on the levels of Aureon's CEA traffic on a going forward basis. At this juncture, however, no one knows what the impact of that decision will be. It is conceivable that Aureon's traffic volumes could revert to their earlier levels, in which case there would be no justification for a rate increase. On the other hand, the traffic volumes could further decline in which case questions would arise as to the prudence of Aureon's proposed new switch investment. Accordingly, the appropriate path forward is for the Commission to reject Aureon's current tariff submission and give "preference over all other questions" to resolving the outstanding issues relating to Aureon's rates that have been in effect since March 2018. *See* 47 U.S.C. § 204(a)(1).

⁵¹ [REDACTED]

[[END CONFIDENTIAL]]

⁵² *In the Matter of AT&T*, 26 FCC 101, ¶ 8.

⁵³ *See* Report and Order and Modification of Section 214 Authorizations, *In the Matter of Updating the Inter-carrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155 (Sept. 27, 2019) ("Access Arbitrage Order").

II. THE COMMISSION SHOULD SUSPEND AUREON'S PROPOSED TARIFF BECAUSE SUBSTANTIAL QUESTIONS REMAIN REGARDING AUREON'S PROPOSED RATE.

If the Commission does not reject Aureon's September 2019 Proposed Tariff outright, it should suspend Aureon's tariff and set for investigation the substantial questions raised by Aureon's tariff filing.⁵⁴ As explained in greater detail below, those issues include: (1) Aureon's continued failure to justify its lease rate; (2) its improper inclusion of \$1.20 million in yet to be expended, undocumented switch investment in its rate base; (3) its unsubstantiated traffic forecast, which nearly halves the traffic forecast it submitted just five months ago; and (4) its failure to recalculate the CLEC benchmark, based on updated traffic volumes, to ensure that its proposed tariff does not exceed the CLEC benchmark rate.

[[BEGIN CONFIDENTIAL]] [REDACTED]

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[REDACTED]

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[REDACTED]

⁵⁴ Simultaneously, the Commission should move forward with prescribing a rate for the post-February 2018 time period.

⁵⁵ **[[BEGIN CONFIDENTIAL]]** [REDACTED]

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A. Substantial Issues Remain Regarding Aureon's Lease Rate

In its prior rate filings, Aureon has been unable to explain the basis for the lease amounts that it has charged to its Access Division for use of its fiber network (the "Filed Lease Expense").⁵⁸ Instead, it has sought to justify that lease cost under the Commission's affiliate transaction rules, which require that the Filed Lease Expense be less than the lower of: (1) the fair market value of the leased facilities; and (2) the fully distributed costs of those facilities.⁵⁹ Although Aureon has now abandoned the "Black Box" lease cost used in its three prior filings, it still seeks to justify the network facilities costs assessed to the Access Division under the Commission's affiliate transaction rules. As explained below, significant issues continue to exist with both Aureon's fair market value analysis and its fully distributed cost calculation.

[REDACTED]

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

⁵⁸ See, e.g., AT&T May 6 Pet. at 31.

⁵⁹ 47 C.F.R. § 32.27(c).

1. Aureon's Fair Market Value Analysis Remains Severely Flawed

In its April 2019 Proposed Tariff, Aureon provided a fair market value analysis that compared its selected "Black Box" lease cost to a number of purportedly comparable rates, including several rates from NECA and CenturyLink, as well as rates from other CEA providers and a "Replacement Cost" analysis compiled by one of Aureon's consultants.⁶⁰ Also, per the Commission's directives in the *First* and *Second Rate Orders*, **[[BEGIN CONFIDENTIAL]]**

[REDACTED]

[REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** As AT&T explained in

its May 6 Petition, all of these comparisons and analyses suffered from significant defects.⁶² In particular, AT&T demonstrated that the most accurate assessment of the fair market value of Aureon's Filed Lease Expense would be a wholesale price based on an analysis of all of Aureon's nonregulated sales of fiber transport.

In its September 2019 Proposed Tariff, Aureon has abandoned the CenturyLink, NECA, and CEA rates, as well as its Replacement Cost analysis. Instead, Aureon focuses exclusively on its previous "Approach A" and "Approach B" valuations of its unregulated DS-3 sales,⁶³ which Aureon claims establish a "baseline" for the fair market value of its CEA transport service.⁶⁴

⁶⁰ See April 2019 Rate Development, "Network Lease – Cost Market Comp" Tab, Rows 156-230 & 262-294; *id.*, "Replacement Cost Comp" Tab.

⁶¹ **[[BEGIN CONFIDENTIAL]]** [REDACTED] **[[END CONFIDENTIAL]]**

⁶² See AT&T May 6 Pet. at 13-22.

⁶³ Aureon does not expressly abandon these comparators, but it makes no reference to them in its updated Description and Justification, and it hides those rows from view in its market comparison analysis. See September 2019 Rate Development, "Network Lease – Cost Market Comp" Tab, Rows 263-315.

⁶⁴ See September 2019 Proposed Tariff, Description & Justification, at 3-4.

Aureon has also included a new “supplemental analysis” in an attempt to show that the fair market value of its CEA transport service may be even higher.⁶⁵ As discussed below, there are multiple problems with Aureon’s analysis.

First, Aureon’s DS-3 database is incomplete, which undercuts the validity of Aureon’s entire fair market value study. **[[BEGIN CONFIDENTIAL]]** [REDACTED]

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⁶⁵ See *id.* at 6-8; “DS-3 Pricing Database” Excel File (“2019 Lease Inventory”), Tabs 2-5.

⁶⁶ **[[BEGIN CONFIDENTIAL]]** [REDACTED]

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[REDACTED] [[END CONFIDENTIAL]]

Second, Aureon’s fair market value analysis is based on a severely mistaken assumption that its unregulated DS-3 lease rates would act as a pricing floor.⁷³ In the *Second Rate Order*, the Commission directed Aureon to explain the differences between its CEA transport service and its

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

⁷³ See September 2019 Proposed Tariff, Description & Justification, at 4 (“the fair market value might need to be adjusted *upwards* ... Aureon did not make an *upward* adjustment.”) (emphasis added).

nonregulated DS-3 sales. The Commission further noted that if Aureon’s CEA transport service, in fact, provided greater features and functionality, Aureon’s nonregulated lease rates “*might* help establish a baseline for the fair market value of its CEA transport services.”⁷⁴ The problem is that Aureon has not presented any documentary evidence justifying any upward variance. Indeed, as AT&T has previously pointed out, a *downward* variance might be warranted, given the features of Aureon’s nonregulated service offerings.⁷⁵ Tellingly, aside from an offhand statement that its CEA service offers comparably “robust” features, Aureon does not attempt to justify a higher (or even an equivalent) rate.

Third, as AT&T has previously shown Aureon’s “Approach A” and “Approach B” calculations are flawed. [[BEGIN CONFIDENTIAL]] [REDACTED]

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⁷⁴ *Second Rate Order*, ¶ 16 (emphasis added).

⁷⁵ See AT&T May 6 Pet. at 14-15 & n.14.

⁷⁶ [[BEGIN CONFIDENTIAL]] [REDACTED]

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In sum, significant issues continue to exist with Aureon’s fair market value analysis. Accordingly, the Commission should suspend Aureon’s September 2019 Proposed Tariff and designate those issues for investigation.

2. Aureon’s Fully Distributed Cost Calculation

Aureon’s cost of service calculation continues to suffer from many of the same problems that the Commission identified in its *First* and *Second Rate Orders*. While Aureon has now abandoned its prior “Black Box” lease expense, it has now *doubled*—without justification—the “CWF Facility Lease” included in its rate calculations (from about \$15 million in its April 2019 Proposed Tariff to over \$30 million in its September 2019 Proposed Tariff). In addition, Aureon still has not fully addressed the significant questions that exist regarding the reliability of its circuit inventories, the reasonableness of its circuit forecast, or the accuracy of its COE and CW&F cost allocations. Each of these issues is discussed in further detail below.

a. Aureon Has Abandoned its “Black Box” Lease Expense

In each of its three prior rate filings, Aureon based its cost of service rate calculation on the same total lease cost of \$21,001,174.⁹⁴ However, despite repeated inquiries from both AT&T and the Commission, Aureon could not explain the basis for that amount, nor could it explain how that amount related to the “CWF Facility Lease” amount (\$15,057,998) included in line 68a of Part 64 of its TYCOS rate calculations. It also could not explain the derivation that “CWF Facility Lease” amount. Instead, it took the position that it did not matter, because the lease amount charged to the Access Division was less than Aureon’s calculation of both the fair market value and the fully distributed costs of the leased facilities.

⁹⁴ See April 2019 Rate Development, “Network Lease – Cost Market Comp” Tab, Cell F8 (\$21,001,274).

[illegible]

⁹⁵ **[[BEGIN CONFIDENTIAL]]**

■ [REDACTED]
 ■ [REDACTED]
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[REDACTED] [[END CONFIDENTIAL]]

Finally, it needs to be understood that Aureon's unexplained abandonment of its prior lease amount has resulted in an increase in its proposed CEA rate. Aureon seeks to justify this result by claiming that it is now relying on its fair market value analysis to justify its lease rate.¹⁰⁰ In actuality, however, what Aureon is doing is substituting the same fair market value estimate it presented in support of the rate in its April 2019 Proposed Tariff for the lease cost that it previously selected for use in its February 2018, September 2018, and April 2019 tariff filings. The net impact of this substitution is that the Access Division is now being charged *more* to lease network capacity even though the volume of CEA traffic has declined and more facilities have been constructed for non-CEA services. There is no rational explanation for this conclusion, and for this reason alone, the Commission should suspend and investigate Aureon's September 2019 Proposed Tariff.

b. Aureon Has Again Failed to Justify its Circuit Inventory

In connection with its April 2019 Proposed Tariff, Aureon did not provide adequate responses to the specific issues identified by the Commission in its *Second Rate Order* regarding the reliability of Aureon's prior circuit inventories.¹⁰¹ In fact, Aureon's April 2019 Proposed Tariff raised more questions about the reliability of its circuit inventories than it answered. [[BEGIN

[REDACTED] [[END CONFIDENTIAL]]

¹⁰⁰ See September 2019 Proposed Tariff, Description & Justification, at 9.

¹⁰¹ See AT&T May 6 Pet. at 24-28.

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[REDACTED]

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[REDACTED] **[[END CONFIDENTIAL]]**

Accordingly, the Commission should suspend Aureon's Proposed Tariff and designate the foregoing issues for investigation.

c. Substantial Issues Remain Regarding Aureon's Circuit Forecasts.

In its April 2019 Proposed Tariff, Aureon did not specifically document the basis for its circuit projections (which remained unchanged from its September 2018 tariff filing), nor did it respond to Mr. Pitkin's criticisms of those projections or Mr. Pitkin's alternative projections.¹⁰⁸

[[BEGIN CONFIDENTIAL]] [REDACTED]

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¹⁰⁸ See AT&T May 6 Pet. at 29-30.

¹⁰⁹ **[[BEGIN CONFIDENTIAL]]** [REDACTED]

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d. **Aureon's COE and C&WF Cost Allocation Methodology Still Suffers from Significant Defects**

While the method of allocating COE and C&WF costs used in Aureon's April 2019 Proposed Tariff (which Aureon adopts without change in its September 2019 Proposed Tariff) is a significant improvement over its prior methodologies, that allocation method still does not correctly allocate COE and C&WF costs to Aureon's CEA service. [[BEGIN CONFIDENTIAL]] [REDACTED]

[REDACTED]

[REDACTED]

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- 30

| Government | Percentage |
|---------------------|------------|
| Current government | 85% |
| Previous government | 15% |

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

Given the potential impact of these issues on Aureon’s cost of service and fully distributed cost allocations, the Commission should suspend Aureon’s Proposed Tariff and designate the foregoing issues for investigation.

B. Substantial Issues Remain Regarding Aureon’s Inclusion of \$1.20 million in Additional Switch Investment.

Beginning with its September 2018 tariff submission, Aureon has advocated for the inclusion of up to \$4.4 million dollars in additional central office switching investment in its rate base. Aureon’s proposed addition of switching investment raises a number of concerns, most of which the Commission has highlighted in its previous orders and communications with Aureon. Those issues include: (1) whether Aureon can supply documentation demonstrating the need for and justifying the cost of the additional switch investment; (2) whether that investment satisfies the Commission’s “used and useful” standard; (3) whether that investment is prudent, especially given the actual and projected declines in demand for Aureon’s CEA service;¹²⁷ and (4) whether that investment is based on a proper allocation factor, and whether it complies with the

[REDACTED]

[REDACTED] [[END CONFIDENTIAL]]

¹²⁷ See Order Designating issues for Investigation, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1, WC Docket No. 18-60* (Nov. 9, 2018), ¶ 17 (“*Second Designation Order*”).

Commission's Part 32 accounting rules.¹²⁸ To this day, Aureon has not satisfactorily addressed these issues, and the Commission therefore should suspend Aureon's tariff and designate the foregoing issues for further investigation.

1. **Aureon's Switching Investment Remains Undocumented and Unexplained**

Over the past year, Aureon has sought to include a significant amount of new switching investment in its rate base, but has been repeatedly unable to document the need for that investment, to establish the validity the proposed investment costs, or to commit to a schedule as to when the new switching equipment would be purchased, installed and placed into service.

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¹²⁸ See Aureon July 22 *Ex Parte*, at 1-6 (addressing a number of the Commission's questions regarding Aureon's proposed switching investment).

¹²⁹ [[BEGIN CONFIDENTIAL]] [REDACTED]
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| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
| [REDACTED] | [REDACTED] | [REDACTED] | [REDACTED] |
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[REDACTED] **[[END CONFIDENTIAL]]**

The continuing uncertainties surrounding both the costs and the schedule associated with this additional building and switching investment are a cause for concern and should be investigated before Aureon's September 2019 Proposed Tariff is approved.

2. Aureon's "Anticipated" Switching Investment is Not "Used and Useful"

After suspending Aureon's September 2018 tariff, the Commission directed Aureon to justify its proposed switching investment and to explain "why the [proposed] increase is 'used and useful in [Aureon's] provision of regulated service.'"¹⁵⁶ Aureon's immediate response was to state only that the "anticipated" investment satisfied the Commission's standard because it would, at some future point, "be used."¹⁵⁷ Apparently recognizing the inadequacy of this response, Aureon has attempted in its April 2019 and September 2019 Proposed Tariffs to provide more detail, explaining that its existing switches are old and outdated, and that long distance service to consumers in rural Iowa could be jeopardized if the Commission does not permit the inclusion of this new switching investment in rate base before any funds are expended.¹⁵⁸ However, what Aureon is proposing is a clear violation of the Commission's "used and useful" standard.

The Commission recently discussed the "used and useful" standard in its *Sandwich Isles Order*.¹⁵⁹ In that decision, the Commission highlighted three factors that have guided its consideration of the standard, including "1) the need to compensate the investor for capital devoted to serving ratepayers; 2) the need to charge ratepayers for only those investments which benefit them; and 3) the need for such benefit to be either immediate or realized within a reasonable future

¹⁵⁶ *Second Designation Order*, ¶ 17.

¹⁵⁷ Aureon Direct Case (Nov. 28, 2018), at 24.

¹⁵⁸ Aureon September 2019 Proposed Tariff, Description & Justification, at 10-12.

¹⁵⁹ See 31 FCC Rcd. 12977 (2016).

period of time.”¹⁶⁰ In applying these factors, the Commission has considered three categories of plant: (a) plant in service, (b) excess capacity, and (c) plant not in service.¹⁶¹ As a general rule, carriers may only include the first category of plant (i.e., plant in service) in their rate base; further, inclusion of plant is only ever permissible if it is “fully constructed,” because the benefit of unconstructed plant will not be “realized within a reasonable future period of time.”¹⁶² And, carriers are prohibited from including investment that has not yet been incurred.¹⁶³

Aureon’s “anticipated” investment falls far short of this standard. The new switching equipment is not, by Aureon’s own admission, in service. At this juncture, it has not even been purchased, and even when it is purchased it will not be in service during the majority (if not all) of the test year. In response to AT&T’s discussion of this issue,¹⁶⁴ Aureon has recently suggested that its switching equipment falls into the second category of plant as excess capacity.¹⁶⁵ However, Aureon ignores the fact that, even if excess capacity is permitted to be included in a carrier’s rate base, it must still be “fully constructed” before it is allowed. As noted above, Aureon’s installation schedule continues to slip, and it is highly unlikely that the new switching equipment will become

¹⁶⁰ *Id.* ¶ 10.

¹⁶¹ See AT&T Feb. 6 *Ex Parte*, Ex. 50, at 1-2.

¹⁶² See *Sandwich Isles Order*, 31 FCC Rcd. 12977, ¶ 11 (“in 1996, the Commission allowed inclusion of costs only for fully constructed plant ...”); *In the Matter of Intermedia Partners*, 11 FCC Rcd. 12586, ¶ 9 (1996) (rejecting nearly \$200k of “in progress” construction costs).

¹⁶³ See L. Goodman, *Process of Ratemaking*, Part 12 (Rate Base) (“The ‘used and useful’ principle presupposes that the actual dollars of investment have been expended. If the properties are in service during the test period, the company may be entitled to include related operating and maintenance expense in its cost of service; but if the capital costs have not been incurred, it is not entitled to a return on a payment not yet made. The accrual of an obligation to pay is insufficient to justify inclusion in rate base.”).

¹⁶⁴ See AT&T Feb. 6 *Ex Parte*, Ex. 50, at 1-2.

¹⁶⁵ See April 2019 Proposed Tariff, Description & Justification, at 7 (discussing spare capacity); September 2019 Proposed Tariff, Description & Justification, at 12-13 (same).

operative during the period (October 15, 2019 to June 30, 2020) that the September 2019 Proposed Tariff will be in effect.

Further, even if it were true that this new switching equipment is necessary for the continued viability of Aureon's CEA service, Aureon's current ratepayers cannot be forced to shoulder this cost, because they will not benefit from the investment during the applicable test year. And even if there is a small likelihood that current ratepayers will benefit, the massive uncertainty surrounding this investment (both in terms of cost and timing) suggests that the prudent course is to wait until the project has crystallized. This is particularly true in light of Aureon's acknowledgement that only a very small portion of the switch investment is predicted to be used and useful in its test year. The better course is to wait until Aureon files its next tariff to see if the investment is actually in place prior to burdening rate payers with this expense.

Under these circumstances, Aureon's proposed investment certainly is not "used and useful."

3. Aureon's Switching Investment is Not Prudent

Aureon's switching investment is also imprudent, given the uncertainties affecting CEA service at this time. **First**, CEA traffic volumes on Aureon's network continue to decline. Traditional CEA traffic has been declining since at least 2007, and the volume of access stimulation traffic on Aureon's CEA network could be substantially reduced as a result of bypass or other factors. This would counsel against any additional switching investment. Yet in Aureon's numerous attempts to justify the need for increased switching investment, Aureon has yet to address this issue.¹⁶⁶ **Second**, the prudence of the investment is questionable, given Aureon's uncertain viability in the wake of the *Access Arbitrage Order*. That order has now been adopted,

¹⁶⁶ See AT&T Feb. 6 *Ex Parte*, Ex. 50, at 6.

which Aureon has stated would cause it to go out of business.¹⁶⁷ If that is true, millions of dollars in additional investment at this juncture are highly imprudent. *Third*, in view of the significant declines in traffic, it is unclear why Aureon cannot accommodate the reduced volumes using whichever tandem switch it is not replacing (Des Moines or Kamrar) as those switches were sized to handle a much greater traffic volume. Put another way, the significant decreases in traffic reflected in Aureon's tariff filing do not justify having two switches with such significant capacity.

4. **Aureon's Anticipated Switching Investment is Based on an Improper Allocation Factor and Has Been Improperly Recorded**

The Commission also raised concerns related to the allocation and recording of Aureon's switching investment. But Aureon has failed to properly address these issues in its September 2019 Proposed Tariff. [[BEGIN CONFIDENTIAL]]

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[REDACTED] [[END

CONFIDENTIAL]]

¹⁶⁷ See *Access Arbitrage Order*, ¶ 109.

¹⁶⁸ [[BEGIN CONFIDENTIAL]] [REDACTED]

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■ [REDACTED] [[END CONFIDENTIAL]]

Second, Aureon’s anticipated switching investment violates the Commission’s Part 32 accounting rules.¹⁷⁰ Those rules permit only certain types of plant to be recorded in a carrier’s regulated accounts, and all of these accounts presuppose that the expense has already been incurred. In particular, Account 2210 (and its subaccounts) are for central office switching equipment, and carriers can only record “the original cost of switching assets” in these accounts. *See* 47 C.F.R. § 32.2210. Other accounts are reserved for plant not yet in service, or plant under construction.¹⁷¹

Prior to Aureon’s July 22 *Ex Parte*, the Commission raised concerns regarding the accounting treatment of Aureon’s switching expense. **[[BEGIN CONFIDENTIAL]]**

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[REDACTED] **[[END**

¹⁷⁰ *See* AT&T Feb. 6 *Ex Parte*, Ex. 50, at 4-5; Pitkin Supp. Decl. ¶¶ 30-32.

¹⁷¹ *See id.*

¹⁷² **[[BEGIN CONFIDENTIAL]]**

[REDACTED]

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[REDACTED] **[[END CONFIDENTIAL]]**

CONFIDENTIAL]] As AT&T has previously explained, the Commission’s accounting rules forbid Aureon from recording its “anticipated” switching investment in Account 2210 (or subaccount 2212); they only permit the “original cost” of the switching assets to be recorded, and not hypothetical or anticipated costs. *See* 47 C.F.R. § 32.2210.¹⁷⁶ Those rules further make clear that an investment can only be recorded *once the asset is actually purchased*. *See supra*. Accordingly, Aureon has improperly recorded its switching investment.

In sum, rather than require Aureon’s ratepayers to bear the burden of its “anticipated” switching investment, the Commission should direct Aureon to remove that investment from its proposed rate base and instruct Aureon that it should only include that investment in next year’s biennial filing if it is actually made. At a minimum, the Commission should suspend Aureon’s tariff, designate the above issues for investigation, and direct Aureon to provide information that validates the need for, purchase of, and installation of the new switching equipment.¹⁷⁷

C. Substantial Issues Remain Regarding Aureon’s New Traffic Forecast.

In developing the new traffic forecast used in its April 2019 Proposed Tariff, Aureon did not take into account traffic volumes from 2017. Instead, it based its new forecast solely on traffic from 2018 and the first few months of 2019, and thereby reduced the traffic forecast used in its February 2018 and its September 2018 tariff filings from about 2.6 billion MOUs/year to about

¹⁷⁶ *See* Pitkin Supp. Decl. ¶¶ 30-32.

¹⁷⁷ *See* Pitkin Supp. Decl. ¶¶ 30-32; AT&T Feb. 6 *Ex Parte*, Ex. 50. Aureon also suggests in its April and September 2019 Proposed Tariffs that equitable factors warrant inclusion of its switch investment in its rate base, because IXCs “will all benefit from CEA service provided through the new equipment.” *See* September 2019 Proposed Tariff, Description & Justification, at 12. However, it is highly unlikely that Aureon will install the switch within the test period so as to benefit current ratepayers, including IXCs (*see supra*), so this equitable consideration is irrelevant. As the Commission has explained, “[e]qually central to the used and useful concept ... is the equitable principle that the ratepayers may not fairly be forced to pay a return *except on investment which can be shown directly to benefit them*.” *AT&T Phase II Order*, 64 FCC 2d 1, ¶ 112 (1977) (emphasis added).

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[REDACTED] [[END CONFIDENTIAL]] And, its makes no effort to evaluate

[REDACTED] [[END CONFIDENTIAL]] And, its makes no effort to evaluate or take into account the potential impact of the Commission's recent decision regarding access

¹⁷⁸ Compare April 2019 Rate Development, “Sec 2 Rate Development” Tab, Cell G15 (2,599,778,953 MOUs), with *id.*, Cell F15 (1,403,273,249 MOUs).

179 **[[BEGIN CONFIDENTIAL]]** [REDACTED]
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[REDACTED] **[[END CONFIDENTIAL]]**

arbitrage.¹⁸³ As previously noted, it is not at all clear at this time what impact that decision will have on Aureon's traffic – it could increase or it could decrease. However, rather than attempt to evaluate that issue, Aureon instead presents a series of statistical calculations,¹⁸⁴ which it then abandons in favor of a monthly decline rate of -1.6 percent, which is not supported by any specific analysis.¹⁸⁵ Indeed, it is little more than a guess.

Aureon's approach should give the Commission pause, especially when there is palpable uncertainty in the marketplace that could lead the carrier's "mid-course filing" to violate the "principle of rate neutrality."¹⁸⁶ In 2007, a large number of carriers submitted questionable demand forecasts, which raised concerns as to whether the carriers' rates would "remain just and reasonable if demand increase[d] dramatically."¹⁸⁷ Rather than allow those tariffs to go into effect, the Commission instead chose to monitor the demand levels on a monthly basis, or to require the carriers to include language in their tariffs agreeing to submit tariff revisions if demand hit certain benchmarks.¹⁸⁸

¹⁸³ See generally *Access Arbitrage Order*.

¹⁸⁴ Statistics used for predictive analysis must be performed to test a hypothesis (i.e., that Aureon's traffic is dependent on time). However, Aureon's change in traffic is clearly the result of decisions made by IXCs terminating traffic and not a function of time. Furthermore, given the regulatory changes, it is disingenuous for Aureon to suggest that a trend over time has any predictive capability with regard to future traffic volumes.

¹⁸⁵ See Aureon September 2019 Proposed Tariff, Description & Justification, at 17 ("Aureon determined that it would use an even more conservative percentage for its traffic projections than that indicated by the foregoing LWA analyses").

¹⁸⁶ *In the Matter of Regulation of Small Tel. Companies*, 2 F.C.C. Rcd. 3811 (1987) ("We believe that the basic principle of rate neutrality should govern such mid-course filings, but that the specifics of such filings can best be considered on a case-by-case basis as individual circumstances dictate.").

¹⁸⁷ See *In the Matter of Investigation of Certain 2007 Annual Access Tariffs*, 22 F.C.C. Rcd. 16109, ¶ 15 (2007). For the same reason, the Commission requires carriers to file revised tariffs every two years: "a period of more than two years between filings could allow small telephone companies to charge excessive rates and would 'violate the rate neutrality principle.'" *In the Matter of Denver & Ephrata Tel. & Tel. Co.*, 9 FCC Rcd. 1792 (1994).

¹⁸⁸ *Id.* ¶ 26.

The Commission should adopt a similar approach and, at a very minimum, suspend Aureon's September 2019 Proposed Tariff and designate for investigation the reasonableness of Aureon's revised traffic forecast. This approach will not only permit the Commission to monitor the impact on Aureon's traffic volumes of its recent *Access Arbitrage Order*, it will also prevent Aureon's September 2019 Proposed Tariff from prematurely being "deemed lawful."

D. Substantial Issues Remain Regarding the Appropriate CLEC Benchmark Rate

As the Commission made clear in the *First Rate Order*, "CEA providers are subject to multiple independent regulatory limitations when tariffing switched interstate access rates," and Aureon must tariff a rate at the lower of either "the allowable [CLEC] benchmark rate ... or the revised cost-supported rate, *whichever is lower*."¹⁸⁹ During that proceeding, the Commission determined that the CLEC benchmark rate was \$0.005634/min.¹⁹⁰ This rate was determined based on: (a) Aureon's traffic volume for the year 2017, which was about 3.2 billion minutes; and (b) the average weighted mileage for that traffic, which the Commission determined was 103.519 miles.¹⁹¹

As noted above, in developing its April 2019 traffic forecast, Aureon did not take into consideration traffic volumes from 2017, but instead based its forecast solely on traffic from 2018 and 2019. Similarly, in putting together its September 2019 Proposed Tariff, Aureon does not appear to have taken any steps to determine whether the significant decline in traffic from 2017 (in particular, the decline in access stimulation traffic) has impacted the average weighted mileage used by the Commission in calculating the CLEC benchmark rate. Accordingly, there is no way

¹⁸⁹ *First Rate Order*, ¶¶ 114, 122.

¹⁹⁰ *Id.* ¶ 43.

¹⁹¹ *See id.*

to determine based on the current record whether Aureon's proposed rate complies with the Commission's CLEC benchmark regulations. The Commission should therefore suspend Aureon's September 2019 Proposed Tariff and direct Aureon to recalculate the CLEC benchmark rate based on the weighted average mileage for its 2018-19 traffic volumes.

Suspension is also appropriate given AT&T's pending appeal of the Commission's determination in its *First Rate Order* that the CLEC benchmark should be calculated based on CenturyLink's rates and Aureon's transport mileages.¹⁹² As AT&T has previously shown, **[[BEGIN CONFIDENTIAL]]** [REDACTED]

[REDACTED] **[[END CONFIDENTIAL]]** In other words, if AT&T prevails on its appeal, Aureon's proposed rate would exceed the CLEC benchmark and would thus be unlawful. For this additional reason, the Commission should either suspend Aureon's September 2019 Proposed Tariff, or at the very least, make clear that the "deemed lawful" doctrine will not operate to undercut AT&T's rights on appeal.

CONCLUSION

For the foregoing reasons, the Commission should reject Aureon's September 2019 Proposed Tariff and based on the existing record, prescribe a rate for the post-February 2018 period of no greater than **[[BEGIN CONFIDENTIAL]]** [REDACTED] **[[END CONFIDENTIAL]]** Alternatively, the Commission should suspend and set for investigation the numerous issues that continue to exist with Aureon's proposed tariff.

¹⁹² See *First Rate Order*, ¶¶ 39, 42-43.

¹⁹³ **[[BEGIN CONFIDENTIAL]]** [REDACTED] **[[END CONFIDENTIAL]]**

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Dated: October 7, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, I caused a copy of the foregoing Petition, as well as all accompanying materials, to be served as indicated below to the following:

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