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REDACTED – FOR PUBLIC INSPECTION

July 16, 2018

VIA ECFS

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

Re: Ex Parte Presentation, *In re Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60; Transmittal No. 36

Dear Ms. Dortch:

Pursuant to the FCC's ex parte rules, 47 C.F.R. 1.1206, Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"), transmits for filing in the above-referenced proceeding the Public version of Aureon's Surreply to the Surrebuttal of AT&T Services, Inc.

On March 26, 2018, the FCC entered a Protective Order covering confidential materials submitted in this proceeding. Pursuant to the terms of the Protective Order, Aureon has designated certain information in its filing as Confidential, and all confidential information has been redacted in this filing. A Confidential version of the foregoing filing is being submitted contemporaneously via the Secretary's Office as required by the Protective Order.

Should there be any questions with respect to this submission, please contact the undersigned.

Respectfully submitted,

James U. Troup

James U. Troup
Tony S. Lee

Counsel for Iowa Network Services, Inc. d/b/a Aureon Network Services

REDACTED - FOR PUBLIC INSPECTION

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

In the Matter of	)	WC Docket No. 18-60
	)	
Iowa Network Access Division Tariff	)	Transmittal No. 36
F.C.C. No. 1	)	

SURREPLY OF IOWA NETWORK ACCESS DIVISION D/B/A
<u>AUREON NETWORK SERVICES TO AT&T SERVICES, INC.'S SURREBUTTAL</u>

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Dated: July 16, 2018

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SUMMARY

AT&T's assertion that Aureon's rate for centralized equal access ("CEA") service is excessive because the rate exceeds the rate benchmark for competitive local exchange carriers ("CLEC") is without merit because Aureon is not even a CLEC in the first instance. Prior to the issuance of the Commission's November 2017 *Liability Order*, it had, for decades, been the FCC's policy to classify carriers as either dominant or non-dominant, and then to apply different rate regulations on carriers depending upon their classification. Dominant carriers are required to conduct cost studies to establish their tariff rates in accordance with Section 61.38, whereas non-dominant CLECs are allowed to tariff interstate access charges if the charges are no higher than the rate charged for such services by the competing ILEC. The *Liability Order* changed Part 61 of the FCC's rules, or adopted a new rule, imposing dual dominant/non-dominant rate regulation to a single service. The proper process for the FCC to adopt such a change to Part 61 of its rules, or to adopt such a new rule, is through a rulemaking proceeding. Although the Administrative Procedures Act ("APA") requires such a rulemaking proceeding, the FCC did not conduct a rulemaking before applying its new dominant/non-dominant rate regulation regime to CEA service. The FCC's *Designation Order* in this proceeding also does not satisfy the APA's requirements, and no comments were solicited from or filed by the public to change the FCC's rules. Furthermore, agencies are required to explain their reasons for departing from their prior regulatory regime, and the FCC did not do this when it decided to change its rules and apply dual dominant/non-dominant rate regulation to Aureon.

Even if, *arguendo*, Aureon were a CLEC, which it is not, Aureon's CEA rate is not excessive because Aureon's tariff rate complies with the FCC's affiliate transaction rules, and is fully supported by Aureon's cost and demand data. The allocation factor used by Aureon to assign costs to its regulated division was reasonable and consistent with NECA accounting guidelines. AT&T's contentions that Aureon's cost support and demand data are insufficient or questionable, including Aureon's lease calculations, allocations of CWF costs used in its lease cost, DS-1 circuit counts/DS-0 miles, COE costs and CWF allocations, and traffic projections, are without merit. All of Aureon's cost support and other accompanying information show that the facilities lease rate charged by Aureon's Network Division to the Access Division are less than the Network Division's fully distributed cost, and does not result in cross-subsidization of Aureon's non-regulated services.

Furthermore, to the extent that CLEC non-dominant carrier rules even apply to Aureon, AT&T is incorrect in its assertion that Aureon should only be permitted to bill a rate less than or equal to the CenturyLink CLEC rate benchmark. CenturyLink does not provide service that is comparable to CEA service, and CenturyLink is not the competing ILEC for benchmarking purposes. As "competing ILEC" is defined by the Commission's rules, which incorporate the statutory definition of ILEC, the competing ILECs are Aureon's subtending LECs. There can only be a single ILEC for each study area, and the CEA subtending ILECs are the ILECs that exchange traffic with the intermediate carrier, Aureon, terminating to the end users located in each ILEC's distinct study area. Because the vast majority of those carriers are NECA members, the applicable CLEC rate benchmark (again, to the extent that it is even applicable) are the rates in the NECA tariff.

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F.C.C. No. 1	)	

SURREPLY OF IOWA NETWORK ACCESS DIVISION D/B/A AUREON NETWORK SERVICES TO AT&T SERVICES, INC.'S SURREBUTTAL

Iowa Network Access Division d/b/a Aureon Network Services ("Aureon") hereby files its Surreply in response to the Surrebuttal of AT&T Services, Inc. ("AT&T") filed on June 25, 2018[1] in the above-captioned proceeding.

INTRODUCTION

In its Surrebuttal, AT&T repeats its groundless assertions that Aureon's proposed rate for centralized equal access ("CEA") service "greatly exceeds" the competitive local exchange carrier ("CLEC") rate benchmark, and that Aureon has not supported its cost-of-service rate calculation with adequate cost and demand data.[2] AT&T is wrong because, as an initial matter, Aureon is not a CLEC for which a CLEC rate benchmark must be determined. The fact that the FCC is, for the first time, attempting to determine what the CLEC rate benchmark should be for Aureon demonstrates that, despite the Commission's *Liability Order*[3] stating that Aureon was a CLEC for purposes of the 2011 *USF/ICC Transformation Order*,[4] that order did not transform

[1] Surrebuttal of AT&T Services, Inc., WC Docket No. 18-60, Transmittal No. 35 (filed June 25, 2018) ("AT&T Surrebuttal").

[2] AT&T Surrebuttal at 2.

[3] *AT&T Corp. v. Iowa Network Services, Inc.*, Memorandum Opinion and Order, 32 FCC Rcd. 9677, 9688 ¶ 25 (2017) ("*Liability Order*").

[4] *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*USF/ICC Transformation Order*").

dominant carriers, such as Aureon, into non-dominant carriers subject to Section 61.26 non-dominant rules.[5]

Prior to the Commission's *Liability Order*, the FCC had regulated Aureon only as a dominant carrier, and required Aureon to file tariffs and cost support pursuant to Section 61.38 of the Commission's rules. The *Liability Order* changed the Commission's prior rules regarding the treatment of dominant and non-dominant carriers, and for the first time, applied both dominant carrier and non-dominant carrier regulations to the same carrier for the exact same service. The FCC was required to undertake a rulemaking proceeding to make such a sweeping change in its regulatory policies. There is no Commission rule that applies a dual dominant carrier/non-dominant carrier classification. Because the Commission did not adopt such a rule in a rulemaking proceeding, the Commission cannot enforce such a rule and regulate Aureon both as a dominant and a non-dominant carrier providing CEA service, and cannot apply CLEC non-dominant regulations to Aureon's dominant carrier tariff in this proceeding.

Even if, *arguendo*, Aureon were a CLEC, which it is not, Aureon should be permitted to set a rate that is equal to or less than the $0.00819 default transitional rate, and if not the default transitional rate, then a cost-supported rate. Contrary to AT&T's contentions, Aureon's

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[5] Aureon does not concede, and continues to dispute, the Commission's ruling in the *Liability Order* that Aureon is a CLEC. *See, e.g.*, Aureon Direct Case at 14 ("Because Aureon's CEA service does not serve any end user in urban areas, or, indeed, end users in any area, the Commission should find that Aureon meets the definition of a rural CLEC *to the extent that it maintains its conclusion that Aureon is a CLEC at all.*" (emphasis added)); *id.* at 18 ("The Commission should find it inappropriate to attribute 'indirect' end users to a CLEC for purposes of the rural exemption, and because Aureon's CEA service does not serve any end users, Aureon should be considered a rural CLEC for purposes of the CLEC rate benchmarking rules *to the extent that the FCC persists in its conclusion that Aureon is a CLEC at all.*" (emphasis added)); Aureon Rebuttal at 6 ("AT&T ignores the operative regulatory language confirming that – *to the extent that Aureon is deemed a CLEC at all, which Aureon continues to dispute* – Aureon meets the definition of a 'Rural CLEC.'" (emphasis added)).

proposed CEA rate is fully supported by Aureon's cost data and complies with the FCC's affiliate transaction rules. Furthermore, to the extent that the CLEC rate benchmark even applies, CenturyLink is not the competing incumbent local exchange carrier ("ILEC") for benchmarking purposes. The competing ILECs are Aureon's subtending LECs. Because the vast majority of those carriers are NECA members, the applicable CLEC rate benchmark (again, to the extent that it is even applicable) are the rates in the NECA tariff. Accordingly, the Commission should set Aureon's CEA tariff rate at $0.00576 per minute.

ARGUMENT

I. Contrary to AT&T's Contentions, Aureon is not a CLEC, and the CLEC Rate Benchmark does not Apply to Aureon.

Throughout this proceeding, AT&T has asserted that Aureon's rate is too high because Aureon is allegedly a CLEC, and as such, Aureon's CEA rate must, according to AT&T, be benchmarked to the competing ILEC rate.[6] In AT&T's view, the ILEC to which Aureon' tariff rate must be benchmarked is CenturyLink. AT&T is wrong. Aureon is not a CLEC because it is not a non-dominant carrier. Aureon is, and continues to be, a dominant carrier, and the FCC has never ruled, even in the *Liability Order*, that Aureon's CEA service is a non-dominant carrier service. Indeed, as recently as 2016, the Commission affirmed Aureon's decades-long status as dominant-only when the FCC reclassified ILECs as non-dominant. The Commission's confirmation, which specifically cited its 1988 order granting Section 214 authority to Aureon and classifying Aureon as a dominant carrier, could not have been clearer:

[6] AT&T Opposition at 4; AT&T Surrebuttal at 3.

> The scope of this declaratory ruling [classifying ILECs as non-dominant] is limited to interstate switched access services. . . . *[N]on-dominant status does not extend to centralized equal access providers* because such carriers do not provide service to end users.[7]

As further explained below, the FCC has never before applied dual dominant/non-dominant regulations to the same carrier for the same service. Before the Commission may do so, it must undertake a rulemaking proceeding to adopt rules to implement a brand new dual dominant/non-dominant regulatory regime. The Commission must also fully explain its decision to deviate from its previous rules classifying a carrier as either dominant or non-dominant and then applying rate regulations for a dominant carrier that are completely separate from and different than the ratemaking rules for non-dominant carriers.

A. Prior to the *Liability Order*, the FCC had Always Regulated Dominant and Non-Dominant Carriers Under Separate and Mutually Exclusive Regulatory Regimes, and the FCC was Required to Undertake a Rulemaking to Change its Rules.

For many years, it has been the FCC's policy to classify carriers as either dominant or non-dominant, and then to apply different rate regulations on carriers depending upon their classification. In determining the rate regulations applicable to CEA providers, the Commission must give effect to the overall regulatory scheme, which applies different rate regulations depending upon whether the Commission has classified a carrier as dominant or non-dominant.[8] Dominant carriers are required to conduct cost studies to establish their tariff rates in accordance

[7] *Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd. 8283, 8290, n.43 (2016) (emphasis added) (citing *Application of Iowa Network Access Division for Authority Pursuant to Section 214 of the Communications Act of 1934 and Section 63.01 of the Commission's Rules and Regulations to Lease Transmission Facilities to Provide Access Service to Interexchange Carriers in the State of Iowa*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd. 1468 (1988)).

[8] *Richman Bros. Records, Inc. v. U.S. Sprint Commc'ns Co.*, 953 F.2d 1431, 1436 (3d Cir. 1991) (recognizing that the Commission "divided common carriers into two groups: dominant and non-dominant").

with Section 61.38.[9] In contrast, non-dominant CLECs are allowed to tariff interstate access charges if the charges are no higher than the rate charged for such services by the competing ILEC.[10] The FCC's rules, as evidenced by their headings, provide rate regulations for dominant carriers that are completely distinct from the rate regulations for non-dominant CLECs.[11]

Before the FCC may alter its regulations, it is required to provide adequate notice before doing so. This requirement:

> [I]s rooted in the APA's [Administrative Procedures Act] provisions governing the administrative rulemaking process. Under the APA, whenever an agency decides to 'formulat[e], amend[ ], or repeal[ ] a rule,' it must first publish an NPRM setting forth 'either the terms or substance of the proposed rule[,] or a description of the subjects and issues involved.'[12]

The *Liability Order* changed Part 61 of the FCC's rules, or adopted a new rule, imposing dual dominant/non-dominant rate regulation to a single service. The proper process for the FCC to adopt such a change to Part 61 of its rules, or to adopt such a new rule, is through a rulemaking proceeding.[13] Although the APA requires such a rulemaking proceeding,[14] the FCC did not conduct a rulemaking proceeding before applying this new dominant/non-dominant rate regulation to CEA service.

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[9] 47 C.F.R. § 61.38.

[10] *Id.* at § 61.26.

[11] Section 61.38 is contained in Subpart E entitled "General Rules for Dominant Carriers." In contrast, Section 61.26 is contained in Subpart C entitled "General Rules for Nondominant Carriers."

[12] *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1373 (Fed. Cir. 2017) (quoting 5 U.S.C. §§ 553(b), 551(5)).

[13] *Id.* at 1375.

[14] *See* 5 U.S.C. § 553.

Not only did the FCC fail to conduct a rulemaking to change its dominant/non-dominant rate regulations for CEA service, the FCC's *Designation Order*[15] also does not satisfy the APA's notice-and-comment rulemaking requirements. The *Designation Order* was not published in the Federal Register as a notice of proposed rulemaking, and it did not indicate that the FCC was considering a rulemaking. No parties filed comments in response to the *Designation Order* raising the issue of revising Part 61 of the FCC's rules to provide for dual dominant/non-dominant rate regulation, and the FCC did not suggest such a revision itself. The APA does not permit the FCC, "under the guise of interpreting a regulation, to create de facto a new regulation."[16] It follows that the *Designation Order* did not provide adequate notice and opportunity for comment necessary for compliance with the APA.[17]

It is important to note that the *Liability Order* and the instant tariff investigation proceeding impacts more than just Aureon. Two other CEA providers, South Dakota Network, LLC ("SDN") and Minnesota Independent Equal Access Corporation ("MIEAC") have filed petitions for waiver of Section 69.3(f)(1), which requires them to submit their biennial access tariff filings with an effective date of July 1, 2018, pending the outcome of this proceeding.[18] Because changes to the FCC's dominant and non-dominant carrier rules also affects other

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[15] *Iowa Network Access Division Tariff F.C.C. No. 1*, Order Designating Issues for Investigation, WC Docket No. 18-60, Transmittal No. 36, DA 18-395 (WCB rel. Apr. 19, 2018) ("*Designation Order*").

[16] *Glycine 7 More, Inc. v. U.S.*, 880 F.3d 1335, 1345 (Fed. Cir. 2018).

[17] *Id.* at 1378.

[18] *Wireline Competition Bureau Seeks Comment on Petitions for Waiver & Expedited Temporary Waiver Pleading Cycle Established*, Public Notice, DA 18-499 (rel. May 15, 2018). *See also* Petition for Waiver of South Dakota Network, LLC, WC Docket No. 18-100 (filed May 4, 2018); Petition for Expedited Temporary Waiver of Minnesota Independent Equal Access Corporation, WC Docket 18-100 (filed May 9, 2018).

parties, the FCC was required to undertake a rulemaking proceeding to adopt new rules for the simultaneous application of dominant and non-dominant rules to dominant CEA providers.

B. The FCC has not Explained its Departure from its Prior Policy of Regulating Dominant and Non-Dominant Carriers Differently, and Applying Both Regulatory Regimes to Aureon.

"When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms."[19] "Whatever the ground[s are] for departure from prior norms . . . [they] must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."[20] "[If] the agency distinguishes earlier cases[, it must] assert [] distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing."[21]

Prior to the *Liability Order*, Aureon had always calculated its tariff rates as a dominant carrier pursuant to Section 61.38, and not as a CLEC pursuant to Section 61.26. When the FCC first implemented rate benchmarks for CLECs, it ruled that it should do so because "a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of 'reasonableness.'"[22] The FCC stated in the *Seventh Report and Order* that it was "especially

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[19] *Telecoms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) (quoting *Atchinson, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973)).

[20] *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36–37 (1st Cir. 1989) (quoting *Atchison, Topeka & Santa Fe Ry.*, 412 U.S. at 808-09).

[21] *Atchison, Topeka & Santa Fe Ry.*, 412 U.S. at 808-09.

[22] *Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd. 9923, 9939 ¶ 41 (2001) ("*Seventh Report and Order*").

reluctant to impose similar legacy [cost and traffic support] regulation on new competitive carriers . . . . [and that] no CLEC has suggested that [the Commission] adopt such a heavily [sic] regulatory approach to setting their access rates."[23] The Commission made clear in the *Seventh Report and Order* that CLECs would not be permitted to file detailed cost support with their tariffs.[24] The consequence for a CLEC that exceeded the benchmark rate was forbearance from the Act's tariff filing requirements and the mandatory detariffing of the CLEC's tariff rates, rendering them void *ab initio*.[25] Significantly, the Commission has never exercised its forbearance authority with respect to dominant carrier tariffs, like Aureon's tariff, and therefore, the Commission cannot legally void *ab initio* a dominant carrier's tariff.

In the *2011 USF/ICC Transformation Order*, the FCC considered alternative pricing proposals applicable to dominant carriers subject to Section 61.38. The Commission explicitly considered and rejected a proposal to require Section 61.38 carriers, such as Aureon, to benchmark their rates to the Bell Operating Company rate.

> An established ratemaking procedure for section 61.38 LECs already exists. No party has demonstrated why either of the proposed rates would be preferable to the rates developed under existing ratemaking procedures. Thus, the rule we adopt will require section 61.38 carriers to set their rates based on projected costs and demand data.[26]

Despite nearly three decades of operating as a dominant carrier and filing tariff cost studies for CEA service as required by Section 61.38, which is applicable only to dominant carriers, the FCC nonetheless ruled for the first time in the *Liability Order* that Aureon is a CLEC that is also subject to Section 61.26 non-dominant carrier regulation. The FCC has never before

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[23] *Id.*; *id.* at 9939, ¶ 41, n.93.

[24] *Id.*

[25] *Id.* at 9925, ¶ 3.

[26] *Id.*

simultaneously applied dominant and non-dominant regulations to the same entity for the exact same service, which in this case, is CEA service. As a dominant carrier, Aureon is required to file cost studies in support of its tariff. In contrast, the FCC has consistently ruled that non-dominant CLECs are prohibited from filing cost studies to support their tariff rates.[27]

The FCC should not apply non-dominant CLEC rules to Aureon in this tariff investigation proceeding as a result of the erroneous determination in the *Liability Order* that Aureon is a CLEC because the Commission did not provide any explanation for its abrupt departure from established policy and precedent. Aureon is a dominant carrier required to calculate its tariff rates on the basis of cost studies and detailed accounting regulations. The Commission determined for the first time in the *Liability Order* that Aureon was a CLEC subject to the Section 61.26 CLEC rate benchmark and the CLEC rate caps and parity rules adopted in the *USF/ICC Transformation Order*, even though the prior dominant/non-dominant carrier dichotomy was that a carrier was either subject to only dominant carrier regulation, or non-dominant carrier regulation, but not both – especially for the exact same service. The FCC's classification of Aureon as both a dominant carrier and a non-dominant CLEC in the provision of CEA service is an abrupt departure from prior FCC precedent regarding the treatment of dominant carriers, such as Aureon, that are required to calculate their tariff rates pursuant to Section 61.38 only.

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[27] *Seventh Report and Order*, 16 FCC Rcd. at 9938-39, ¶¶ 40-41; *see also Access Charge Reform; Prairiewave Telecommunications, Inc. Petition for Waiver*, Order, 23 FCC Rcd. 2556, 2560-61, ¶¶ 13-14 (2008) (denying Prairiewave's petition for waiver of Section 61.26, which prohibits CLECs from filing cost studies, in order to tariff a rate higher than the CLEC rate benchmark because "[t]he Commission has specifically disclaimed reliance on cost to set competitive LEC access rates", and "doing so would undermine the 'bright-line' presumption of reasonableness adopted in the [*Seventh Report and Order*]" (citations omitted)).

The Commission did not provide any explanation in the *Liability Order* for its departure from the FCC's prior policy of treating carriers only as dominant or non-dominant for a particular service, nor did it articulate any reason for requiring Aureon to comply with the CLEC rate benchmark and rate parity rules as a CLEC, while also mandating that Aureon also comply with dominant carrier-only rules and file cost studies in support of its tariff rate when CLECs are not even permitted to file such studies. No other carrier in the nation is regulated in this manner, which further demonstrates that the FCC's *Liability Order* is contrary to established FCC policy and precedent. Accordingly, the FCC should follow its own established precedent, the CLEC rate benchmark should not be applied in this proceeding, and Aureon should not be prohibited from charging a cost-supported rate.

C. The FCC has not Adopted Rules to Forebear Application of its Tariff Rules to Dominant Carrier Tariffs.

In addition to failing to comply with the APA's mandate to adopt new rules simultaneously applying dual dominant and non-dominant regulations to dominant CEA providers, the FCC also did not forbear from the statutory requirements for dominant carrier tariffs, which is a prerequisite to voiding *ab initio* a tariff. Tariff rates can only be retroactively stripped of their lawful status and rendered void *ab initio* when the FCC has expressly made "mandatory detariffing a retroactive punishment."[28] The FCC's *USF/ICC Transformation Order* did not adopt such a retroactive punishment that would detariff a dominant carrier's service, such as CEA, and also did not address CEA tariff rates at all. Rather, the *Seventh Report and Order* adopted forbearance from the tariff requirements in the Communications Act only for non-dominant CLEC tariffs so that non-dominant tariff rates in excess of CLEC rate benchmarks

[28] *PAETEC Commc'ns, Inc. v. MCI Commc'ns Servs., Inc.*, 712 F. Supp. 2d 405, 421 (E.D. Pa. 2010), *appeal withdrawn*, No. 11-2268 (3d Cir. 2012).

would be void *ab initio*.[29] The Commission has never adopted forbearance from the Act's tariff requirements for dominant carriers like Aureon, and therefore, the ruling in the *Liability Order* that voided Aureon's tariff *ab initio* is invalid.

II. Aureon's CEA Rate of $0.00576 Per Minute Complies with the Affiliate Transaction Rules, and is Fully Supported by Cost and Demand Data.

AT&T asserts that Aureon has not explained the basis for its cost-of-service rate calculations or demonstrated the reasonableness of its current CEA rate. Contrary to AT&T's allegations, Aureon's rate calculations are fully supported. The so-called deficiencies identified by AT&T are red herrings, and do not impact the validity of Aureon's cost support and other data submitted to the Commission. Despite AT&T's use of improper assumptions and methodologies in its attempt to impeach Aureon's cost support, those efforts simply cannot refute the fact that Aureon's proposed rate is lawful because it fully complies with the affiliate transaction rules. Specifically, Aureon's rate calculation is proper because the lease rate charged by Aureon's unregulated division – the Network Division – to the regulated division – the Access Division – is less than the Network Division's fully distributed cost for the facilities leased to the Access Division.

A. AT&T Fails to Rebut the Fact That Aureon's CEA Rate Complies with the Affiliate Transaction Rules.

As an initial matter, AT&T argues that the non-regulated Network Division's lease charge must be the lower of the Network Division's fair market value ("FMV") or the fully

[29] *See* Brief for Amicus Curiae Federal Communications Commission at 25, *PAETEC v. MCI*, No. 11-2268 (3d. Cir. 2012) (filed Mar. 14, 2012) ("A CLEC tariff for interstate switched access services that includes rates in excess of the benchmark in Rule 61.26 is subject to mandatory detariffing. Under that regime, a carrier is *prohibited* from filing a tariff; any attempt to do so would violate the FCC's rules and render the prohibited tariff *void ab initio* if filed with the Commission." (emphasis original)).

distributed cost ("FDC") for the service provided to the Access Division.[30] AT&T further asserts that the FMV for the network facilities leased to the Access Division is the amount that CenturyLink would charge for a service "comparable" to Aureon's CEA service.[31] Aureon's CEA rate is in full compliance with the FCC's affiliate transaction rules, and AT&T's claim that CenturyLink's service is the same as Aureon's for FMV purposes is wrong. AT&T makes no attempt to rebut Aureon's arguments in its Rebuttal that CenturyLink's decentralized tandem service is not the same as Aureon's CEA service,[32] and Aureon's CEA rate is fully supported in any event.

As shown in Aureon's Rebuttal, CenturyLink is incapable of providing a service that bears any resemblance to CEA service because, unlike Aureon's CEA network, CenturyLink's network does not, among other things, concentrate traffic at a central location to enable interexchange carriers ("IXCs") to connect at a single point of interconnection ("POI") to gain access to Aureon's extensive network and all of its more than 200 subtending LECs; have failsafe redundant switches; or foster competition among IXCs by making it economically feasible for long-distance carriers to provide service to rural areas in Iowa.[33] Rather than having to build the infrastructure to connect to multiple individual tandem switches throughout Iowa like they would need to do to connect to CenturyLink's tandems, IXCs need only connect at a single POI on Aureon's network to gain access to Aureon's extensive network and all of its more

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[30] AT&T Surrebuttal at 55.

[31] *Id.*

[32] Aureon Rebuttal at 18-25.

[33] *Id.*

than 200 subtending LECs.[34] CenturyLink would need to overhaul and reconfigure its network to offer CEA service comparable to Aureon's, which would necessarily increase CenturyLink's rates dramatically and, in all likelihood, to levels that are substantially above Aureon's existing CEA rate.[35] AT&T does not dispute the showing in Aureon's Rebuttal that CenturyLink cannot provide a service comparable to CEA service, and there are no readily available rates for comparable service to develop a FMV rate for the network lease from the Network Division to the Access Division.

AT&T attempts to use the *NYNEX* decision as a basis for arguing that Section 32.27 prohibits a dominant carrier from using a different rate calculation, i.e., a comparison test, to determine whether a carrier's rates comply with the affiliate transaction rules.[36] The *NYNEX* decision actually supports Aureon's use of two alternative methodologies to show that because the Network Division's lease rate is less than its FDC, the lease rate complies with the affiliate transaction rules and therefore, is reasonable. This in turn, means that Aureon's CEA rate is also reasonable.

In *NYNEX*, the Commission recounted its affiliate transaction policies and rules, and stated, in relevant part, that:

> This policy, implemented through the ratemaking process, measured the reasonableness of prices on transactions between affiliates by reference to the prescribed rate of return of the regulated enterprise. That is, Western Electric's [the unregulated affiliate] prices on sales of equipment to the Bell operating companies [the regulated affiliate] were to be deemed unreasonable if they generated earnings that caused Western's rate of return on net investment to exceed AT&T's prescribed return on its allowable interstate rate base. Thus, as to

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[34] *Id.* at 19 (the diagram in Aureon's Rebuttal at 19 also shows the sharp differences between CenturyLink's decentralized network and Aureon's CEA network).

[35] *Id.* at 25.

[36] AT&T Surrebuttal at 54-55 (citing *New York Telephone Co.*, Order to Show Cause and Notice of Apparent Liability for Forfeitures, 5 FCC Rcd. 866 (1990) ("*NYNEX*")).

> profits on sales to the Bell operating companies, Western Electric was effectively limited to AT&T's prescribed rate of return. *This standard, linking the reasonableness of the nonregulated entity's prices and profits to the regulated affiliate's prescribed rate of return, served as the cornerstone of the Commission's policy governing affiliate transactions prior to the adoption of formal rules.*[37]

The FCC codified the "rate of return comparison test" described above in Section 32.27 of the Commission's rules. In the context of this tariff investigation proceeding, the network lease rate charged by the Network Division to the Access Division is reasonable as long as the Network Division's rate of return for the network lease is less than the authorized rate of return of the Access Division.

In Aureon's Direct Case, Aureon submitted two different methodologies to demonstrate that the lease expenses are less than the fully distributed cost of the underlying assets used to provide the service. The first methodology was the "Alternative Revenue Requirement Calculation" included as Attachment 2 to Brian Sullivan's Declaration in the Direct Case, and the second methodology was the "Additional Cost Justification Methodology" included as Attachment 4 to Mr. Sullivan's Declaration.[38] In both methodologies, **[[BEGIN CONFIDENTIAL]]** [redacted]

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[37] *NYNEX*, 5 FCC Rcd. at 867, ¶ 6.

[38] *See* Aureon Direct Case, Declaration of Brian Sullivan (Ex. D) at Attachments 2 and 4.

[redacted] **[[END CONFIDENTIAL]]** Accordingly, the Network Division's lease rate was less than its FDC, and less than the Access Division's authorized rate of return, and therefore, reasonable.

B. Aureon's Allocation Factor Was Reasonable and Consistent with NECA Guidelines.

AT&T asserts that **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**[39] In support of its contention, AT&T states that Section 64.901(c) of the Commission's rules requires the allocation of central office equipment and outside plant investment costs between regulated and nonregulated activities to be based on the relative regulated and nonregulated usage of the investment.[40] Aureon agrees that Section 64.901(c) requires equipment costs to be allocated between regulated and nonregulated activities, and this is precisely what Aureon did **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]**, by selectively quoting a passage from the FCC's *Video Cost Allocation NPRM*, and arguing that Aureon's allocation was faulty because the FCC stated in that proceeding that "an allocation factor based on the relative use of total circuit capacity would not yield results reflecting cost causation if costs are related to the number of circuits used, irrespective of the capacity of those

[39] AT&T Surrebuttal at 51.

[40] *Id.* at 52 (citing and quoting 47 C.F.R. § 64.901(c)).

circuits."[41] The FCC's comment in the *Video Cost Allocation NPRM* was not directed towards situations where dedicated voice circuits were involved, such as those at issue in the instant case. Rather, the FCC's discussion was in the context of comparing the differences between voice-grade and video transmission facilities, and how costs should be allocated if circuits providing both video and voice services were involved. Specifically, the FCC stated that:

> Voice-grade circuits typically leave the central office in cables transmitting numerous circuits that then branch into cables transmitting fewer and fewer circuits as they approach subscriber locations. Circuits transmitting video programming facilities, however, may transmit the same signal over a wide area, using a single video programming service circuit, similar to cable television facilities, to carry the same collection of video signals to each customer. *Under this scenario, compared to voice-grade facilities, video programming service facilities would require much less circuit capacity near the central office, but much more circuit capacity near subscriber locations.*
>
> . . .
>
> This distinction may be important because an allocation factor based on the relative use of total circuit capacity would not yield results reflecting cost causation if costs are related to the number of circuits used, irrespective of the capacity of those circuits.[42]

AT&T selective quotation of the last sentence of the passage above completely changes the meaning of the FCC's comment, and it does not stand for the proposition for which AT&T asserts, i.e., that any allocation factor based on relative use is prohibited. The FCC's statement that the use of an allocation factor based on the relative use of total circuit capacity may not yield cost causative results only applies to facilities that are shared with video transmission services, and is wholly inapplicable to this proceeding because dedicated voice circuits, rather than shared video transmission facilities, are used for CEA service.

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[41] AT&T Surrebuttal at 54 (quoting *Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, Notice of Proposed Rulemaking, 11 FCC Rcd. 17211, 17225, ¶ 32 (1996) (internal quotation marks omitted) ("*Video Cost Allocation NPRM*")).

[42] *Video Cost Allocation NPRM*, 11 FCC Rcd. at 17224-25, ¶¶ 31-32 (emphasis added).

Contrary to AT&T's contention, it is entirely appropriate to use the "Circuit Method" to allocate CWF costs, and Exhibit B of NECA Guideline 4.19 sets forth an example of the appropriate use of the Circuit Method for Cable and Wire Distribution, i.e., Cable and Wire Facilities ("CWF").[43] In its example, NECA shows various allocations percentages for a hypothetical network comprised of an OC3 fiber trunk connecting a host switch and an end office switch. In that example, NECA allocates only 0.2% of the costs to DS3 circuits, and 99.8% of the costs to DS1 circuits. **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** As further detailed below in the Section II.E, AT&T's use of the system method to allocate CWF costs is contrary to NECA Guideline 4.19, and NECA typically requires a consistent method to be employed for both COE and CWF costs.

C. The Cost and Demand Data Submitted by Aureon are Adequate.

AT&T has repeatedly asserted that Aureon has failed to provide sufficient cost and demand support information in connection with its tariff filing and subsequent investigation. This allegation is completely baseless as Aureon has, on numerous occasions, provided information fully documenting Aureon's tariff rate development. That information is as follows:

[[BEGIN CONFIDENTIAL]]

[redacted]

[43] *See* NECA Reporting Guideline 4.19, Section 4, p.7, attached as Exhibit G to Aureon's Rebuttal.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted][44] [redacted] **[[END CONFIDENTIAL]]**

D. Aureon's Lease Calculations are Fully Supported and Adequate.

In its Rebuttal, Aureon fully described its methodology to calculate the facility lease rate provided by the Network Division to the Access Division, and how the FCC's affiliate transaction rules required that rate to be the lower of the FMV or FDC for those facilities.[45]

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[44] AT&T Surrebuttal at 23-25.

[45] Aureon Rebuttal at Section E.1.

Aureon also demonstrated that while the affiliate transaction rules dictate the extent to which those charges may be used in ratemaking, the rules did not set the actual rate that could be charged to the Access Division. Rather, the affiliate transaction rules only govern the amount that can be booked by the Access Division, i.e., how much of the Network Division's lease charge can be included in the Access Division's revenue requirement.[46] **[[BEGIN CONFIDENTIAL]]** [redacted][47]

[redacted][48] [redacted][49] [redacted]

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[46] *Id.*

[47] Brian Sullivan Supplemental Surreply Declaration ¶ 2, attached hereto as Exhibit J ("Sullivan Surreply Declaration").

[48] *Id.* ¶ 3.

[49] *Id.*

[redacted][50] [redacted][51] [redacted] **[[END CONFIDENTIAL]]**

1. Aureon's DS-1 Circuit Count and DS-0 Miles

AT&T has repeatedly taken issue with the number of DS-1 circuits that are included in the circuit cost calculation.[52] **[[BEGIN CONFIDENTIAL]]** [redacted][53] [redacted][54]

[redacted][55] [redacted]

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[50] *Id.*

[51] *Id.*

[52] AT&T Opposition at 50-52; AT&T Surrebuttal at 25-27.

[53] Aureon Direct Case at 36.

[54] Sullivan Surreply Declaration ¶ 4.

[55] Aureon Rebuttal at 41.

[redacted][56]

[redacted][57] [redacted][59] **[[END CONFIDENTIAL]]**

[redacted][60]

AT&T asserts that as minutes of use are projected to decline, that Aureon should experience a similar decline in DS-1/DS-0 facilities.[61] AT&T, as a provider of toll termination facilities via

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[56] *Id.* at 43 (citing Hilton Supplemental Declaration ¶ 7).

[57] *See* Aureon Direct Case, Annex 3, **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**.

[58] Sullivan Surreply Declaration ¶ 5.

[59] Aureon has been unable to transition CEA service to Ethernet or other more "efficient" technologies, largely due to the failure of AT&T to pay Aureon's access charges as billed. In essence, AT&T is alleging that Aureon is falsifying the circuit counts as provided to the FCC because Aureon's network should be more efficient. The circuits in use reflect the facilities actually deployed, and AT&T's view that Aureon should be providing service more efficiently is unfounded given that AT&T's failure to pay Aureon has largely contributed to the current state of Aureon's network. Aureon is willing to provide more details regarding its circuit inventory to the FCC if requested, and the FCC is certainly welcome to perform an audit or validation of Aureon's circuit list, and can certainly do so if unsatisfied with the information provided by Aureon.

[60] AT&T Surrebuttal at 29-30.

[61] *Id.*

DS-1 and DS-3 services across the country, is fully aware that these circuits – in particular when used to provision service to IXCs to route traffic to many small ILECs – are added and deleted in a "lumpy" nature.[62] As traffic volumes decrease, the total number of DS-1s and DS-0s in use normally lags behind the decrease in minutes.[63] It would be more costly for Aureon or any other LEC to remove DS-1s and reassign trunk groups rather than leaving them in service until a material update is required.[64] AT&T's suggestion that DS-1/DS-0 counts should be reduced contemporaneously with MOU decreases year-over-year does not comport with industry practices.[65]

2. Aureon's Decline in COE Costs

AT&T attempts to use Aureon's decline in COE expenses to show that Aureon's CEA rate calculation is invalid.[66] Specifically, **[[BEGIN CONFIDENTIAL]]** [redacted][67] [redacted][68] [redacted]

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[62] Sullivan Surreply Declaration ¶ 6.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] AT&T Surrebuttal at 27-28.

[67] *Id.* at 28.

[68] Sullivan Surreply Declaration ¶ 8.

[redacted][69] [redacted][70] [redacted][71] [redacted][72] **[[END CONFIDENTIAL]]** Regardless, for AT&T to take issue with OPEX <u>decreases</u> in Aureon's filing makes little sense as that results in a reduced CEA rate, and benefits AT&T and all other IXCs that use CEA service.[73]

E. Aureon Properly Allocated CWF Costs Used in its Lease Cost Calculation.

AT&T also takes issue with **[[BEGIN CONFIDENTIAL]]** [redacted][74] [redacted][75] [redacted][76] [redacted]

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* ¶ 9.

[73] *Id.*

[74] AT&T Surrebuttal at 30-37.

[75] AT&T Opposition at 51, and n.106.

[76] AT&T Surrebuttal at 30-37.

[redacted][77] [redacted][78] [redacted]

[redacted][79] [redacted][80] [redacted][81] [redacted][82] [redacted][83] [redacted]

[77] *Id.* at 31.

[78] *Id.* at 34.

[79] Aureon Rebuttal at Supplemental Declaration of Brian Sullivan (Ex. F) ¶ 11; Sullivan Surreply Declaration ¶ 11.

[80] Sullivan Surreply Declaration ¶ 11.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[redacted][84] [redacted][85]

[redacted][86] [redacted][87] [redacted]

[redacted]

ii. [redacted]

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[84] *Id. See also Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd. 17539, 17564-65 (1996) ("Our Part 64 cost allocation rules require local exchange carriers providing services in addition to local exchange service to use a cost allocation methodology based on fully distributed costs"); *id.* at 17566, n.139 ("A fully distributed costing system allocates all of the costs of a group of services among those services using direct assignment and allocation factors based on relative use or estimates of relative use. The assignments and allocations determine each service's share of total cost." (citing first *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982); and then citing *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, Report and Order, 2 FCC Rcd. 1298, 1312-14, ¶¶ 109-117 (1987))).

[85] Sullivan Surreply Declaration ¶ 11.

[86] AT&T Surrebuttal at Second Supplemental Rate Declaration of Daniel P. Rhinehart ¶ 30.

[87] *Id.*

[88] This chart is an excerpt from Exhibit B of NECA Reporting Guideline 4.19, Section 4, p.7. *See* NECA Reporting Guideline 4.19, attached as Exhibit G to Aureon's Rebuttal.

[redacted][89]

[redacted]

[redacted]

[redacted][90] [redacted][91] [redacted]

[89] Sullivan Surreply Declaration ¶ 12.

[90] Aureon Rebuttal at 47-48.

[91] Sullivan Surreply Declaration ¶ 13.

[redacted][92]

[redacted][93] [redacted][94] [redacted][95] [redacted][96] [redacted][97]

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[92] *Id.*

[93] *Id.* ¶ 14.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[redacted]

[redacted][98] [redacted][99] [redacted][100] **[[END CONFIDENTIAL]]**

[98] AT&T Opposition at 51, n.106.

[99] Sullivan Surreply Declaration ¶ 15.

[100] *Id.* (Also noting that that depending on network arrangements, the number of "Terms" and "Entrance Facilities" may vary, but regardless, the total charges will greatly exceed the lease fee.)

F. Aureon's Regulated Services do not Cross-Subsidize its Non-Regulated Services.

As discussed above, the Network Division's lease of network facilities to the Access Division for CEA service complies with the Commission's affiliate transaction rules, and those rules were specifically designed to prevent cross-subsidization between a carrier's regulated and non-regulated operations. Nonetheless, AT&T argues that Aureon must be cross-subsidizing its non-regulated services because **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** None of AT&T's arguments are valid given that Aureon complies with the affiliate transaction rules.

[[BEGIN CONFIDENTIAL]] [redacted][101] [redacted]

[101] AT&T Surrebuttal at 38-39.

[redacted][102] [redacted] **[[END CONFIDENTIAL]]** Aureon had every indication that carriers would embrace the transition to IP because, among other things, AT&T has been beating the proverbial IP transition drum and advocating for new rules to foster the transition to next generation services. For example, in 2012, AT&T filed a petition with the FCC asking the Commission to consider conducting trial runs of the transition to next generation services, including the retirement of TDM facilities and service offerings and their replacement with IP-based alternatives.[103] It is disingenuous for AT&T to assert that there was no interest in Aureon's IP-based services, or unwise to make IP technology investments in the CEA network, when AT&T itself has been at the forefront advocating for the speedy transition from TDM to IP-based technologies.

G. Aureon's Traffic Projections are Reasonable and Reliable, Particularly When Viewed in Connection with Aureon's Most Recent Traffic Data.

In its Surrebuttal, AT&T argues that Aureon's traffic demand forecast is unreliable, and contends that Aureon admits that **[[BEGIN CONFIDENTIAL]]** [redacted]

> [redacted]

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[102] Aureon Rebuttal at 51-52.

[103] *See* AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition, GN Docket No. 12-353 (filed Nov. 7, 2012).

[104] AT&T Surrebuttal at 40.

[redacted][105]

[redacted][106]

[redacted]

[redacted][107] [redacted]

[105] Aureon Rebuttal at 55.

[106] Jeff Schill Supplemental Surrebuttal Declaration ¶ 2, attached hereto as Exhibit K.

[107] *Id.*

[redacted][108]

[[END CONFIDENTIAL]] AT&T's claim that Aureon's demand forecast is unreliable, and that Aureon should take into account additional traffic that may or may not be forthcoming from Inteliquent, is without merit, particularly when Aureon's downward forecast is borne out by actual real-time data.

III. AT&T Repeats and Compounds its Erroneous Contentions Concerning the Relationship Between the CLEC Benchmark Rate and Cost Support.

A. AT&T Continues its Flawed Argument that Aureon Should only be Permitted to Bill a Rate Less than or Equal to the CenturyLink CLEC Rate Benchmark.

AT&T rehashes its groundless assertion that the FCC should require Aureon to bill rates less than or equal to AT&T's calculated CLEC rate benchmark. AT&T contends that Paragraph 26 of the *Liability Order* "makes it abundantly clear that Aureon is subject to both the Commission's cost-of-service regulations . . . and its rate cap and rate parity rules . . . ."[109] AT&T again alleges that these rules are "not inconsistent but rather 'complement each other'"[110] because: (1) Aureon "is, and has always been subject to, Section 61.38;"[111] and (2) beginning in 2011, "Aureon – 'like all LECs' – became subject to the 'additional obligations' in the rate cap and rate parity rules."[112] Accordingly, AT&T argues that, pursuant to the *Liability Order*, Aureon is subject to both the FCC's rate cap and cost-of-service regulations because "[a]ny other

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[108] *Id.*

[109] AT&T Surrebuttal at 56-57.

[110] *Id.* at 57 (emphasis added) (quoting *Liability Order*, 32 FCC Rcd. at 9690, ¶ 26).

[111] *Id.* (citing *Liability Order*, 32 FCC Rcd. at 9690, ¶ 26).

[112] *Id.* (quoting *Liability Order*, 32 FCC Rcd. at 9690, ¶ 26).

reading would violate the plain text of the Commission's regulations, and clear statements in the *Liability Order*."[113]

AT&T provides no additional insight into how Paragraph 26 of the *Liability Order* supports its position that the FCC must require Aureon to bill rates less than or equal to AT&T's calculated CLEC rate benchmark of $0.00312. Instead, AT&T again mistakenly places a singular reliance upon the phrase "complement each other" to support its flawed reasoning.[114] In doing so, AT&T once more ignores the fact that in Paragraph 26 of the *Liability Order*, the FCC stated that "Aureon must comply with the rate cap and rate parity rules, which apply '[n]otwithstanding any other provision of the Commission's rules.'"[115] A more accurate reading of this language, however, would be that Aureon must comply with the default transitional rate notwithstanding any preceding FCC decision or rule – including Sections 51.905 and 51.911(c).[116] Any other reading of that passage would render the entire *Liability Order* meaningless as the FCC otherwise held in the order that the $0.00819 default transitional rate applied to Aureon as of July 1, 2013.[117]

Rather, it is clear that the FCC intended in the *Liability Order* for the $0.00819 default transitional rate to continue to apply to Aureon for two reasons:

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[113] *Id.*

[114] *See id.*

[115] *Liability Order*, 32 FCC Rcd. at 9690, ¶ 26 (emphasis added) (quoting 47 C.F.R. § 51.905).

[116] *Compare id.* at 9688, ¶ 23 ("Rule 51.905(b) caps interstate tariff rates [at] no higher than the default transitional rate, i.e., the interstate rates effective December 31, 2011. In addition . . . rates [must] be brought to parity . . . by July 2013. Specifically . . . Rule 51.911 [] requires a [CLEC] . . . beginning on July 1, 2013, to reduce its . . . rates to those of the competing ILEC, which would be at parity at such time." (internal citations and quotations omitted), *with id.* at 9689, ¶ 24 ("We do not reach the issue of whether Aureon's rates violate Rule 51.911(c) because we do not have an adequate record to determine the pertinent benchmark rate.").

[117] *See id.* at 9689, ¶ 24.

i. The FCC would have concluded in the *Liability Order* that Aureon did not violate the "rate cap and rate parity rules" if the FCC intended those rules to refer to the CLEC rate benchmark (*i.e.*, the NECA rates) – rather than the default transitional rate;[118] and

ii. In the *Liability Order*, the FCC ordered Aureon to "comply with [Section] 61.38 [] to support its rates at or below the cap"[119] – although CLECs are not required to submit cost studies to demonstrate compliance with the CLEC rate benchmark.

Therefore, it is appropriate to infer that the FCC intended in Paragraph 26 of the *Liability Order* to imply the relationship between cost studies and the default transitional rate – not the CLEC rate benchmark. Otherwise, compliance with AT&T's proposed $0.00312 CLEC rate benchmark would render Aureon's rate unjust and unreasonable by forcing Aureon to set a rate far below its actual costs – contrary to the FCC's ratemaking regulations,[120] and in violation of the Communications Act.[121]

B. Aureon Should be Permitted to Set a Rate that is Less than or Equal to the Default Transitional Rate.

Instead, the FCC should allow Aureon to bill a CEA tariff rate that is less than or equal to the $0.00819 default transitional rate – in conformance with all other LECs that bill their default transitional rates without cost support. Consequently, the Commission should only subject Aureon to the default transitional rate without imposing either a CLEC rate benchmark or a cost support requirement for four reasons:

[118] This is especially true considering the fact that Aureon's interstate tariff rate at the time of the *Liability Order* was well below the NECA tariff rate. *Cf. Liability Order*, 32 FCC Rcd. at 9689, ¶ 24 ("We find that Aureon violated the interstate rate cap requirement when, in June 2013, it raised its interstate switched access rate [] to $0.00896 . . . above its $0.00819 rate cap.").

[119] *Id.* at 9690, ¶ 26.

[120] *See* 47 C.F.R. Parts 32, 36, 64, 65, and 69.

[121] *See* 47 U.S.C. §§ 201(b), 204(a)(l), and 205(a).

i. The rate ceiling established by the default transitional rate would serve no purpose if the FCC also imposes the CLEC rate benchmark as a rate ceiling on Aureon;[122]

ii. The CLEC rate benchmark is inapplicable to Aureon as it does not provide its CEA service to end users;[123]

iii. Other CLECs are not required to submit cost studies as the purpose of the CLEC rate benchmark is to avoid cost-based factors in determining just and reasonable rates;[124] and

iv. The CLEC rate benchmark cannot lawfully reduce Aureon's rate below the just and reasonable level established by cost studies that fully comply with the FCC's accounting rules and maximum authorized rate of return.[125]

In light of these reasons, so long as Aureon's tariff rate is less than or equal to the $0.00819 default transitional rate, Aureon should be treated like all other LECs that are not required to recalculate rates based on changes to their revenue requirements. Doing so would be in line with the purpose and benefit of the default transitional rate.[126]

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[122] *See Liability Order*, 32 FCC Rcd. at 9688, ¶ 23 ("Rule 51.905(b) caps interstate 'tariff rates [at] no higher than the default transitional rate . . . .'" (quoting 47 C.F.R. § 51.905(b)); *Technology Transitions*, 31 FCC Rcd. at 8292, ¶ 27 (default transitional rate already "prevents . . . LECs from charging IXCs excessive rates for switched access").

[123] *See* Aureon Direct Case at Section II.A.2.

[124] *See Petition of Westelcom Network, Inc. for Limited, Expedited Waiver of Section 61.26(a)(6) of the Commission's Rules*, Order, 32 FCC Rcd. 3693, 3694, ¶¶ 3-4 (2017) ("Rather than regulating the costs or revenues of [CLECs], the [FCC] established market-based safe harbor benchmarks above which [CLECs] are prohibited from tariffing . . . ." (citing *Seventh Report and Order*, 16 FCC Rcd. at 9925, ¶ 3); *Connect America Order*, 26 FCC Rcd. at 17966, ¶ 866 ("The benchmarking rule was designed as a tool to constrain [CLECs'] access rates to just and reasonable levels without the need for . . . evaluation of [CLECs'] costs.").

[125] *See* Aureon Direct Case at Section I.

[126] *See USF/ICC Transformation Order*, 26 FCC Rcd. at 17669, ¶ 9 (stating that the purpose of the default transitional rate is "to provide more certainty and predictability regarding revenues to enable carriers to invest in modern, IP networks"); *id.* at 17939, ¶ 812, and 17945-46, ¶ 828. (requiring tariffs to contain default transitional rates, while permitting carriers "to enter into negotiated agreements that differ from the default rates"); *id.* at 17957-58, ¶ 851, and 17983-84, ¶ 900 (stating that to provide "carriers with the benefit of any cost savings and efficiencies they can achieve," LECs are no longer required to recalculate their rates based on their revenue

Aureon needs predictable revenue recovery to ensure that Aureon can maintain and enhance its network, and to provide rural broadband service in Iowa. So long as Aureon bills a CEA tariff rate that is less than or equal to the $0.00819 default transitional rate, Aureon should not be required to reduce its rates further based on cost studies or a CLEC rate benchmark. Instead, as is the case with all other LECs, Aureon should be permitted to retain all cost savings and efficiencies achieved through compliance with a $0.00819 price cap. Doing so would not, as AT&T alleges, "result in a massive, implicit subsidy for Aureon,"[127] as Aureon would be compelled to reinvest such cost savings and efficiencies into its network to support the CEA service's core purposes of: (1) providing enhanced telephone service to rural communities; (2) increasing competition among long distance carriers in those communities; and (3) enabling improved information services to reach rural communities.[128] Ultimately, the FCC should only subject Aureon to the $0.00819 default transitional rate – without consideration of a CLEC rate benchmark or cost support.

C. If the FCC Does not Subject Aureon to the Default Transitional Rate, then the FCC Should Permit Aureon to Charge a Cost-Supported Rate.

If the FCC prefers to treat Aureon differently than all other LECs by not setting Aureon's default transitional rate as its price cap, the FCC should then allow Aureon to charge a cost-supported rate while considering other equitable factors. Doing so would comport with the "end result standard" promulgated by the D.C. Circuit in *Jersey Central Power & Light Co. v.*

requirements and rate of return, but now can charge the default transitional rates and "retain revenues even if their switched access costs decline").

[127] AT&T Surrebuttal at 7.

[128] *See* Aureon Rebuttal at 13.

FERC.[129] Additionally, the FCC "must factor overriding equitable considerations"[130] in considering the lawfulness of Aureon's rate, by determining whether Aureon's $0.00576 tariff rate provides sufficient revenue if AT&T continues <u>not</u> to pay Aureon's tariff rates.[131] An examination of both cost studies and equitable factors would ensure that the FCC prescribes a just and reasonable rate for Aureon – irrespective of any CLEC rate benchmark.

1. AT&T Mistakenly Reasserts that Aureon must Charge a Cost-Supported Rate Below the CLEC Rate Benchmark.

AT&T mischaracterizes Aureon's contention that complying with both the cost study requirement and the CLEC rate benchmark would cause Aureon to implement a rate "'far below its actual costs'" as "entirely lacking in merit."[132] AT&T alleges that neither the application of Section 61.38's cost-of-service principles, nor the FCC's benchmark rules, would result in Aureon adopting confiscatory rates.[133] Furthermore, AT&T argues that Aureon cannot establish that compliance with both Section 61.38 and the CLEC rate benchmark would result in unconstitutionally confiscatory rates for Aureon because "no other CEA provider has been charging AT&T a per-minute rate on access stimulation traffic anywhere near as high as

[129] 810 F.2d 1168, 1177 (D.C. Cir. 1987) (finding that a rate is just and reasonable if it "may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed"). *See also MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (finding that just and reasonable rates may be determined on the "basis of cost" pursuant to the end result standard).

[130] *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1240 (D.C. Cir. 1993).

[131] Such an examination would require the FCC to consider both Aureon's cost studies and AT&T's debt to Aureon of more than $70 million (not including late penalties) resulting from AT&T's underpayment of Aureon's invoices since September 2013. *See* Aureon Direct Case at Section I.

[132] AT&T Surrebuttal at 57 (quoting Aureon Rebuttal at 62).

[133] *Id.*

Aureon's current CEA rate."[134] Therefore, AT&T concludes, "Aureon . . . is not operating efficiently."[135] For these reasons, AT&T again erroneously asserts that Aureon must be required to continue submitting cost studies <u>and</u> bill a rate lower that the CLEC rate benchmark.

2. AT&T Again Ignores the *Liability Order's* Clear Description of the Relationship between Cost Studies and the Default Transitional Rate.

AT&T again misses the point made by the FCC in Paragraph 26 of the *Liability Order* that cost studies "complement" the $0.00819 <u>default transitional rate</u> – <u>not</u> the CLEC rate benchmark. If Aureon was subject to the CLEC rate benchmark, there would be no need for: (1) Aureon to perform cost studies to support its rates at or below the CLEC rate benchmark – because the FCC <u>conclusively</u> presumes such rates to be just and reasonable;[136] and (2) the FCC to investigate the applicable CLEC rate benchmark in this proceeding. Furthermore, AT&T again ignores the fact that requiring Aureon to comply with both the CLEC rate benchmark and the cost support requirement would be contrary to established FCC practice of generally focusing on a "carrier-specific review of the costs of providing service"[137] in determining just and reasonable rates for a particular carrier. Therefore, AT&T's argument that Aureon must be operating inefficiently due to its inability to comply simultaneously with both the cost-of-service

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[134] *Id.* at 58.

[135] *Id.* at 59.

[136] *Cf. Seventh Report and Order*, 16 FCC Rcd. at 9938, ¶ 40 (stating that CLEC's access rates would be <u>conclusively</u> presumed to be just and reasonable if the rates were at or below the established benchmark).

[137] *See Sprint Communications Co., L.P. v. MGC Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 14027, 14029, ¶ 6 (2000) ("review of the reasonableness of a CLEC's rates depends on a carrier-specific review of the costs of providing service . . . ." (emphasis added)). *See also IT&E Overseas, Inc. v. Micronesian Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 16058, 16062-64, ¶¶ 6-8 (1998) (declining to find that a price cap carrier's rates were unreasonable for being higher than those of a rate of return carrier because the carriers were not "similarly situated").

regulations and the CLEC rate benchmark is a non-sequitur (and patently false as discussed *infra*) in light of fact that cost studies actually complement the default transitional rate – not the CLEC rate benchmark.

3. AT&T Fails to Consider that the CLEC Rate Benchmark can Serve as a Rate Floor.

AT&T attempts to admonish Aureon for supposed operational inefficiencies resulting in Aureon's inability to comply simultaneously with Section 61.38 and the CLEC rate benchmark.[138] In doing so, AT&T again overlooks the fact that the CLEC rate benchmark could serve as a rate floor for Aureon. AT&T's allegations of Aureon's operational inefficiencies cannot be further from the truth of the matter.

i. The CLEC Rate Benchmark can Serve as a Rate Floor in Establishing Just and Reasonable Rates for Aureon.

The FCC is bound by both Section 201(b) of the Communications Act and a long line of court decisions[139] to set a rate for Aureon that is just and reasonable – even if that rate is above the CLEC rate benchmark. The Commission must permit Aureon to charge a cost-supported tariff rate above the CLEC rate benchmark if the tariff rate has been calculated in compliance with: (1) the FCC's accounting regulations; (2) the FCC's authorized rate of return; and

[138] *See* AT&T Surrebuttal at 58-59.

[139] *See, e.g.*, *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944) (stating that just and reasonable involves "a balancing of the investor and the consumer interests"); *id.* (stating that a carrier's return "should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital"); *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968) ("[T]here can be no constitutional objection if [an agency], in its calculation of rates, takes fully into account the various interests which Congress has required it to reconcile . . . [are] determined in conformity with the [agency's enabling act], and [are] intended to balance the investor and the consumer interests."); *id.* at 767 (stating that so long as the "total effect of a rate" was not unjust and unreasonable, a rate was constitutionally permissible).

(3) *Jersey Central Power & Light Co.*'s end result standard.[140] Such a tariff rate would be just and reasonable, and therefore, lawful.

Imposing a CLEC rate benchmark that requires Aureon to charge less than its cost-supported rate would cause Aureon to maintain an unlawfully unjust and unreasonable rate. Instead, a rate higher than the CLEC rate benchmark would be justified if Aureon's cost studies demonstrate that such a rate is just and reasonable, and therefore, lawful. Furthermore, application of the CLEC rate benchmark as a price floor would reduce the FCC's burden in reviewing Aureon's cost studies. In doing so, the Commission could deem a rate set by Aureon between the CLEC rate benchmark (the price floor) and the $0.00819 default transitional rate (the price ceiling) as a rate within a "zone of reasonableness" – i.e., a presumptively reasonable rate not requiring cost support.[141] Allowing Aureon to set a rate between such a price floor and price ceiling would subject Aureon to price-focused rate regulation – similar to all other LECs. Consequently, AT&T's allegations that Aureon's inability to set a cost-based rate below the CLEC rate benchmark is a result of Aureon's operational inefficiencies is inconsequential to establishing a just and reasonable rate for Aureon.

ii. AT&T's Argument that Aureon's Inability to Maintain a Cost-Supported Rate Below the CLEC Rate Benchmark is a Result of its Operational Inefficiencies is Factually Baseless.

AT&T previously argued that permitting Aureon to use the CLEC rate benchmark as a rate floor would enable "Aureon to raise its rates to levels higher than the rates it was authorized

[140] *See Jersey Cent. Power & Light Co.*, 810 F.2d at 1176.

[141] *See Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, 6786-89, ¶¶ 3, 5-20 (1990) (stating that price cap regulation requires the FCC to set a rate within a "zone of reasonableness" by focusing on prices rather than costs or earnings).

to charge thirty years ago, in 1988."[142] AT&T further asserted that "[b]ecause CEA providers like Aureon should be reducing costs, interpreting the CLEC benchmark rule as a floor makes no sense . . . and runs directly counter to the purposes of the CLEC benchmark rules."[143] Following these arguments, AT&T now attempts to characterize Aureon's inability to comply simultaneously with Section 61.38 and the CLEC rate benchmark as a result of Aureon's operational inefficiencies.[144]

Again, AT&T cannot be further from the truth. First, even if the CLEC rate benchmark served as a rate floor, Aureon would still be bound by the *Liability Order* to set a rate below the $0.00819 default transitional rate – a rate cap set far below Aureon's 1988 tariff rate of $0.0161.[145] Second, AT&T ignores the fact that establishing a zone of reasonableness balances the need to keep CEA service costs low, while enabling Aureon to cover its costs and further invest in its network.[146] Accordingly, it is patently disingenuous for AT&T to contend that Aureon operates inefficiently when Aureon has demonstratively reduced its tariff rate over the past thirty years by introducing operational efficiencies into its network. Furthermore, AT&T's assertion that establishing the CLEC rate benchmark as Aureon's rate floor would allow Aureon to continue operating inefficiently overlooks the fact that Aureon would need to continue to find ways to cut costs in order to ensure that its rates remain within an FCC-mandated zone of reasonableness. Therefore, it is clear from AT&T's distortion of facts that its goal here is to

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[142] AT&T Opposition at 85.

[143] *Id.* at 85-86.

[144] *See* AT&T Surrebuttal at 58.

[145] *See* Aureon Answer at Ex. 8 (discussing changes between 1988 and 1989 tariff rates).

[146] *See Hope Nat. Gas*, 320 U.S. at 603 (stating that determining a just and reasonable rate involves "a balancing of investor and consumer interests").

return to its 1988 monopolistic position by driving Aureon out of business – to the detriment of Iowa consumers.

4. AT&T Again Disingenuously Claims that Waiver of Sections 51.911(c) and 61.26 is not in the Public Interest.

By baselessly alleging that Aureon's supposed operational efficiencies prevent Aureon from simultaneous compliance with both Section 61.38 and the CLEC rate benchmark, AT&T again attempts to assert that Aureon does not provide justification for a waiver of Sections 51.911(c) and 61.26 of the Commission's rules.[147] AT&T claims that grant of Aureon's request for waiver "is simply not in the public interest, and [that] Aureon has not met the 'good cause' standard for waiver" because "Aureon alone is currently responsible for billing about *12 percent* of AT&T's nationwide terminating switched access expense" – although Aureon serves "far less than a million end users."[148] Therefore, according to AT&T, grant of Aureon's waiver would enable Aureon to continue "charg[ing] a grossly excessive CEA rate," due to Aureon's "massively disproportionate share of the nation's terminating switched access charges . . . ."[149]

Whether Aureon may be responsible for billing 12% of AT&T's nationwide terminating switched access expenses has no bearing on whether or not: (1) there is good cause to grant Aureon's waiver request; and (2) doing so is in the public interest. AT&T again fails to address the fact that capping Aureon's rates at AT&T's calculated CLEC rate benchmark of $0.00312 would prevent Aureon from recovering its costs, thereby forcing Aureon to shut-down its CEA

[147] *See supra* Section III.B.

[148] AT&T Surrebuttal at 59 (citing Aureon Rebuttal at 4; and then citing AT&T Formal Complaint ¶ 8).

[149] *Id.*

network to the detriment of thousands of rural ratepayers. In reality, the ultimate outcome of AT&T's proposed below-cost rates for Aureon is less competition with AT&T, and reduced consumer choice in rural areas of Iowa – essentially turning the clock back to the monopolistic market of 1988 in which AT&T reigned supreme.

Furthermore, AT&T alleges that Aureon "relies on entirely unsupported statements . . . that, if Aureon must comply with the CLEC benchmark rules, 'Aureon will not be able to recover its costs and will [be] forced to shut down its CEA network,'" and cautions the FCC not to "place any weight on such *ipse dixit* assertions."[150] Essentially, AT&T here is demanding that Aureon prove a negative – i.e., provide conclusive evidence that it would be impossible for Aureon to comply with both the FCC's cost-support regulations and the CLEC rate benchmark. Aureon, however, has already provided the requisite evidence of its costs and revenues necessary for the FCC to determine Aureon's constitutionally-required return.[151] Based on this evidence, it is clear that compliance with both the FCC's cost-study requirements and AT&T's calculated CLEC rate benchmark would render Aureon's CEA service economically unviable, and therefore, unconstitutional. In other words, the cessation of Aureon's CEA service caused by

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[150] AT&T Surrebuttal at 58 (quoting Aureon Rebuttal at 72).

[151] *See USF/ICC Transformation Order*, 26 FCC Rcd. at 17997, at ¶ 925 ("To show that the standard recovery mechanism is legally insufficient, a carrier would . . . need to demonstrate that the regime 'threatens [the carrier's'] integrity or otherwise impedes [its] ability to attract capital.'" (emphasis added) (quoting *Ill. Bell Tel. Co. v. FCC*, 988 F.2d 1254, 1263 (D.C. Cir. 1993))); *id.* at 17998, ¶ 926 (stating that, in determining a just and reasonable rate, the FCC "will consider the totality of circumstances," and "[a]s a result of this analysis of costs and revenues, the Commission will be able to determine the constitutionally required return" (emphasis added) (citations omitted)). *See also Jersey Cent. Power & Light Co.*, 810 F.2d at 1177 ("[T]he return ought to be 'sufficient to ensure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital . . . .'" (emphasis added) (quoting *Hope Nat. Gas*, 320 US. at 603)).

compliance with these diametrically opposed rate regulations would lead to higher costs for Iowa consumers created by AT&T's singular presence in the marketplace.[152]

IV. AT&T's Persistent Attempt to Benchmark Aureons Integrated CEA Service to Centurylink's Standalone Tandem Switches does not Withstand Scrutiny.

A. AT&T Disregards Governing Law and Its Own Prior Arguments in Erroneously Continuing To Argue that CenturyLink Is the Competing ILEC to Aureon.

Aureon previously established that unambiguous statutory and regulatory language precludes CenturyLink as a matter of law from being deemed the "competing ILEC" with respect to the area that Aureon serves because CenturyLink was not the carrier that provided telephone exchange service with respect to the vast majority of that area on February 8, 1996.[153] Specifically, there are nearly 160 other ILECs that operate in unique areas in Iowa in addition to CenturyLink, and CenturyLink cannot be the "ILEC" in those areas.[154]

Despite the preclusive governing language, AT&T now argues that the identity of the "competing ILEC" to a CLEC is determined not by applying the objective and fixed geographic and date restrictions in the statute and regulation but by considering the types of services that carriers currently offer and engaging in subjective speculation regarding the carrier that hypothetically might step into Aureon's shoes if Aureon did not exist.[155] AT&T's argument, however, not only flies in the face of the applicable statute and regulation but also contradicts

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[152] *Cf. Jersey Cent. Power & Light Co.*, 810 F.2d at 1177-78 (stating that determining a just and reasonable rate pursuant to the end result standard "constitutes a reasonable balancing . . . of the investor interest[s] . . . and the consumer interest[s] . . . ." (emphasis added)).

[153] *See* Aureon Rebuttal at 17-18.

[154] *See* Aureon Direct Case, Declaration of Frank Hilton ¶ 18 ("Hilton Declaration").

[155] *See* AT&T Surrebuttal at 8-9.

AT&T's own prior position it took in the proceeding adopting the current definition of "competing ILEC."

As Aureon demonstrated,[156] the governing statute itself includes unambiguous restrictions that disqualify CenturyLink from being deemed the "competing ILEC" to Aureon and thus refute AT&T's position. The statute, in pertinent part, defines an ILEC as "with respect to an area, the local exchange carrier that . . . on February 8, 1996, provided telephone exchange service in such area."[157] Successors and assigns of such carriers similarly fall within the scope of the definition.[158] As the operative language makes clear, only the single LEC that provided telephone exchange service in a particular geographic area on February 8, 1996 qualifies as the ILEC with respect to that area. The *Great Lakes Comnet, Inc. v. FCC* decision makes this clear in describing the history of the term "ILEC":

> a single LEC provided local exchange service for a given region pursuant to a monopoly franchise granted by the state. These carriers . . . are now called incumbent local exchange carriers or ILECs.[159]

The definition thus is objective and fixed with respect to an area and mandates that one – and only one – LEC is the ILEC with respect to particular end users in a geographic area – the LEC that provided local exchange service in that area on February 8, 1996. CenturyLink's predecessor did not provide local exchange service "with respect to" the vast majority of the rural areas that Aureon served on February 8, 1996, so CenturyLink cannot be the ILEC "with respect to" those areas.

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[156] *See* Aureon Rebuttal at 17-18.

[157] 47 U.S.C. § 251(h) (emphasis added).

[158] *Id.*

[159] *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1000 (D.C. Cir. 2016) (emphasis added).

The regulatory definition of "Competing ILEC" similarly includes these geographic and date restrictions by expressly incorporating the Section 251(h) definition of "ILEC":

> Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.[160]

In the very proceeding where the current definition of "competing ILEC" was adopted, AT&T itself agreed that there could be one – and only one – "competing ILEC" for phone calls made to and from particular end users "with respect to an area." Specifically, AT&T asserted that "for any particular end user customer of the CLEC, there is only one "competing ILEC" and only one "competing ILEC rate." If the CLEC's service area covers more than one ILEC service area, therefore, the CLEC must charge no more for access service to a particular end user than the access rate that would have been charged for access to that end user by the ILEC in whose service area the end user resides."[161] In other words, the sole ILEC that could be the "competing ILEC" with respect to phone calls made to end users in a particular service area was the sole ILEC holding the monopoly for providing telephone service in that area on February 8, 1996. The FCC expressly affirmed AT&T's argument.[162]

AT&T's current position cannot be squared with either the operative statutory and regulatory language or its own prior position. As an initial matter, AT&T does not even mention

[160] 47 C.F.R. § 61.26(a)(2).

[161] Opposition of AT&T Corp. to Petitions for Reconsideration or Clarification, CC Docket No. 96-262, at 16 (filed July 23, 2001) (relevant excerpts attached as Exhibit L hereto).

[162] *See Access Charge Reform*, Eighth Report and Order, 19 FCC Rcd. 9108, 9131, ¶ 47 (2004) ("*Eighth Report and Order*") ("[A]s AT&T correctly observes, there is only one 'competing ILEC' and one 'competing ILEC rate' for each particular end-user. Accordingly, competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides." (footnotes omitted)).

– much less attempt to address – the February 8, 1996 date restriction, and it reads out of the statute the geographic restriction. Instead, AT&T replaces the statutorily mandated "service offered with respect to an area on February 8, 1996" restriction with a "current service offered" standard found nowhere in the statute. Specifically, AT&T suggests that the "competing ILEC" with respect to a service area may be any LEC that qualifies as an ILEC with respect to any area so long as an interested party is able to persuade the Commission, based upon a hypothetical and subjective inquiry, that that LEC would be most likely to step into the shoes of a CLEC and provide service if that CLEC did not exist.

But the determination of who is an ILEC with respect to a service area – and thus the "competing ILEC" for that area – has nothing to do with the services that a carrier currently offers. Rather, it hinges on the single carrier that provided telephone exchange service on February 8, 1996 to the end users in the particular service area or areas at issue. On that date, CenturyLink's predecessor, Northwestern Bell, was an ILEC only with respect to its own service area – it was not the ILEC for the vast majority of the area that Aureon serves, and AT&T does not even attempt to argue that it was. Thus, its successor, CenturyLink, cannot be the "competing ILEC" in that area. As noted above, AT&T itself acknowledged this point in successfully asserting that there is only a single "competing ILEC" with respect to phone calls originating or terminating in a particular service area.[163] Moreover, neither CenturyLink nor any of its predecessors provided CEA service to anyone on February 8, 1996 – Aureon did. Therefore, AT&T's position is wrong as a matter of law and inconsistent with its own prior position.

[163] *See supra* p. 45.

The meritless nature of AT&T's position is illustrated by the verbal acrobatics that AT&T is forced to perform in characterizing the regulatory definition of "Competing ILEC" in its Surrebuttal. Specifically, it uses no fewer than three separate quoted snippets of that definition, selectively excising the express incorporation of the Section 251(h) definition of an "ILEC" into the regulation.[164] But the Section 251(h) definition of an "ILEC" – including the "with respect to an area" and the February 8, 1996 limiting language – is a core component of the definition of "Competing ILEC," and AT&T cannot simply erase those limitations from the definition.

AT&T also argues that "[n]o aspect of Section 61.26(a)(2) requires a competing ILEC to have existing connections with another entity,"[165] but that is not the point. Section 61.26(a)(2), by its incorporation of 47 U.S.C. § 251(h), <u>does</u> require an entity to have had the connections necessary to provide local exchange service in a particular area as of February 8, 1996 to be the sole "ILEC" in that area. CenturyLink's predecessor did not have such connections on that date with respect to the vast majority of areas served by Aureon and thus cannot be the "competing ILEC" for Aureon.

The absurdity of AT&T's position is further revealed by the results that would flow if AT&T's position were taken to its logical conclusion. Under AT&T's argument, any LEC that is deemed an "ILEC" with respect to any service area in the United States could be deemed the "competing ILEC" to Aureon if AT&T were able to persuade the Commission that this entity

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[164] *Compare* 47 C.F.R. § 61.26(a)(2) ("*Competing ILEC* shall mean the incumbent local exchange carrier, <u>**as defined in 47 U.S.C. 251(h)**</u>, that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC." (emphasis added)), *with* AT&T Surrebuttal at 13 (paraphrasing definition as "the ILEC that 'would provide' access services, 'to the extent' those services 'were not' being provided by the CLEC" (citation omitted)).

[165] AT&T Surrebuttal at 13.

would be most likely to step into Aureon's shoes if Aureon did not offer CEA service. Moreover, there could be multiple competing ILECs for the same phone calls originating or terminating in the same service area – the ILEC that provided local exchange service to end users in that area on February 8, 1996 and another ILEC that might be deemed most likely to provide certain services offered by a CLEC if the CLEC did not exist. But these results defy the very concept of an "ILEC," which is a term used to denote the sole monopoly LEC that provided telephone service on February 8, 1996 before competition from CLECs was introduced into the market.

In sum, the governing definitions preclude CenturyLink from being the competing ILEC with respect to call traffic that <u>other</u> ILECs operating in their own unique geographic areas exchange with Aureon. AT&T is wrong to suggest otherwise.

B. Contrary to AT&T's Claim, CenturyLink's Isolated Tandem Switches Must Provide – But Do Not – "the Same Access Services" as Aureon's CEA Service To Be Eligible To Serve as a Benchmark for Aureon.

Apart from CenturyLink's failure to satisfy the statutory and regulatory requirements to qualify as the competing ILEC to Aureon with respect to the vast majority of areas that Aureon serves, it does not offer a service that is remotely comparable to Aureon's CEA service that would make its rates a comparable benchmark. While AT&T argues that (a) CenturyLink's standalone switches need not be comparable to Aureon's CEA service to serve as a benchmark and (b) CenturyLink's service is, in fact, comparable,[166] both arguments are wrong.

AT&T first asserts that "the competing ILEC does not need to offer CEA service comparable to Aureon" to serve as a benchmark for Aureon's service.[167] But the very regulation

[166] AT&T Surrebuttal at 9-10, 14.

[167] *Id.* at 14 (quotation marks and citation omitted).

that states that CLECs providing intermediate access services must benchmark to competing ILEC rates mandates that the benchmark must be to "the rate charged by the competing ILEC for the same access services."[168] Indeed, that is the only way that a rate benchmark will work – if it is not for the same service, then it would provide a useless apples-to-oranges comparison that does not properly account for each of the elements of value and cost of the service to be benchmarked.[169]

While AT&T relies on statements made in the Commission's Seventh and Eighth Reports and Orders in the access charge reform proceeding to support its claim that a competing ILEC's service need not be comparable to the CLEC's service to serve as a benchmark,[170] that reliance is misplaced. The paragraph that AT&T cites in the *Seventh Report and Order* merely states that CLECs may structure their rates flexibly; it does not endorse the notion that the services themselves offered by a competing ILEC may be materially different from those offered by a CLEC and yet still serve as a rate benchmark.[171] Similarly, as AT&T itself acknowledges, the Eighth Report and Order makes clear that the competing ILEC's service must be "for the same functions" to provide a useful benchmark.[172] CenturyLink's isolated switches do not provide the

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[168] 47 C.F.R. § 61.26(f) (emphasis added).

[169] *Cf. United States v. BMI (In re Application of Music Choice)*, 426 F.3d 91, 95 (2d Cir. 2005) ("In choosing a benchmark and determining how it should be adjusted, a rate court must determine the degree of comparability of the negotiating parties to the parties contending in the rate proceeding, the comparability of the rights in question, and the similarity of the economic circumstances affecting the earlier negotiators and the current litigants . . . .").

[170] AT&T Surrebuttal at 10 (citing first *Seventh Report and Order*, 16 FCC Rcd. at 9946, ¶ 55; and then citing *Eighth Report and Order*, 19 FCC Rcd. at 9108, ¶ 9).

[171] *See Seventh Report and Order*, 16 FCC Rcd. at 9946, ¶ 55 ("We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, . . . our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure . . . ." (emphasis added)).

[172] *See Eighth Report and Order*, 19 FCC Rcd. at 9112, ¶ 9.

same functions as Aureon's CEA service; otherwise, the FCC and the Iowa Utilities Board ("IUB") would have had no reason to authorize Aureon to construct its extensive CEA network to begin with to provide the connectivity and long-distance competition that the isolated switches operated by CenturyLink's predecessor did not. In short, nothing in either of these orders permits a competing ILEC's rate benchmark to be one for a non-comparable service, as CenturyLink's is to Aureon's, and AT&T's contrary claim is wrong.

AT&T's next resorts to arguing – as it must – that CenturyLink's service is functionally equivalent to Aureon's,[173] but that claim could not be further from the truth. As discussed below and in Aureon's Rebuttal,[174] the respective services do not remotely offer the same functionality.

Aureon's integrated CEA network enables any IXC to connect to a single point within Aureon's extensive network and gain access to more than 200 LECs operating throughout all of Iowa. It also facilitates broadband connectivity. CenturyLink's switches, by contrast, do not provide this integration at all; rather, each switch operates as its own standalone island, connecting only those IXCs and those LECs that are specifically connected to it. Unlike Aureon's network, the use of CenturyLink's switches to connect IXCs with LECs would require each of the fifteen originating and seventeen terminating IXCs to connect to each of CenturyLink's eight switches and each LEC to connect to at least one of those eight switches. CenturyLink thus would place the burden of connection on each of the IXCs rather than undertaking to provide that connectivity itself, as Aureon has done. Moreover, as Aureon's Vice President of Business Consulting, Frank Hilton, has testified, "CenturyLink does not operate switched access transport facilities that directly connect to the incumbent local exchange carrier

[173] *See* AT&T Surrebuttal at 10.

[174] *See* Aureon Rebuttal Part II.B.2.

("ILEC") end offices for most small, independent ILECs in Iowa where Aureon provides CEA service."[175] In light of these severe connectivity deficiencies, replacement of Aureon's CEA service would immediately strand most IXCs from connecting to massive parts of Iowa and also would strand the subtending LECs not connected to CenturyLink.

AT&T asserts that CenturyLink could step into Aureon's shoes because it operates tandem switches in the vicinity of each of Aureon's active POIs connecting to its network.[176] But this argument ignores that CenturyLink's switches are not interconnected with one another but instead are isolated islands that do not function similarly to Aureon's POIs. For example, for an IXC to route a call to LEC near Spencer, under Aureon's network, it could hand off the call to Aureon at any of Aureon's POIs. Using the CenturyLink tandems, by contrast, that IXC would be required to hand off that call specifically at CenturyLink's Spencer switch, and nowhere else, as only that switch is in a position to access LECs operating within that area. In addition, the LEC serving the end user would need to have established a connection with CenturyLink's switch in Spencer. This stark disparity in functionality is a significant difference between the integrated CEA service provided by Aureon and the handoff service that AT&T envisions that CenturyLink would provide.[177] Thus, CenturyLink's mere presence near Aureon's POIs says nothing about its ability to offer service that is similar to Aureon's.

AT&T's response to Aureon's observation that CenturyLink would violate its tariff if it were to provide service comparable to Aureon's CEA service because it would transport traffic out of its LATA similarly highlights the stark differences between the two services.[178] While not

[175] Supplemental Declaration of Frank Hilton ¶ 2.

[176] AT&T Surrebuttal at 9.

[177] Hilton Declaration ¶ 12.

[178] AT&T Surrebuttal at 15 n.33.

challenging Aureon's statement that CenturyLink is barred from providing service outside of its LATA, AT&T argues that CenturyLink would not need to transport outside of its LATA because it would merely hand off traffic between IXCs and LECs without transporting it.[179] But that is not CEA service. Rather, it is an array of isolated handoff points that would require each IXC and each LEC to connect to each of CenturyLink's eight tandems across Iowa in order to provide the connectivity offered by Aureon's CEA service.

AT&T alternatively argues that CenturyLink could transport traffic to LECs' end offices and that such transport would "not involve any <u>significant</u> interLATA services."[180] But by definition, any traffic transported by CenturyLink to each of the 200 LECs currently connected to the CEA network necessarily would involve interLATA service as CenturyLink would be required to transport traffic outside of its own LATA and into the LATA for each of those 200 LECs. AT&T's view of the operation of CenturyLink's switches thus either envisions a very different service from CEA service or is inconsistent with CenturyLink's own tariff.

Incredibly, AT&T even claims that CenturyLink offers <u>superior</u> service because it is cheaper.[181] But as anyone who has ridden a skateboard and a jet plane can attest, "cheaper" does not always mean "superior." While both such modes of transportation are able to carry a person from Washington, DC to Los Angeles, for example, those forms of transportation are not remotely equivalent, nor is transportation by a skateboard "superior" merely because it is cheaper than flying via jet. While AT&T may argue that CenturyLink's service is cheaper, it is far inferior to Aureon's because it does not provide the connectivity offered by Aureon. Rather, it

[179] *Id.* (emphasis added).

[180] *Id.*

[181] *Id.* at 12.

merely would operate as a series of isolated "handoff" points and place the burden of transporting those calls to and from each of those handoff points on the IXCs and LECs themselves.

AT&T also takes issue with Aureon's observation that CenturyLink would need to overhaul its isolated switches to function in the same manner as Aureon's CEA service, asserting that its current connectivity is irrelevant and that because CenturyLink has switches near each of Aureon's primary POIs, "any network changes needed to hand off traffic between CenturyLink and the subtending ILECs would not be extensive."[182] While AT&T is correct that CenturyLink's current connectivity is irrelevant to identifying the "competing ILEC" – rather, the statutory and regulatory requirements discussed above are (which CenturyLink does not satisfy for most of Aureon's service area) – that assertion misses the point. Aureon's point was that the significant investment necessary to overhaul CenturyLink's switches to provide CEA service is not currently accounted for in CenturyLink's pricing as it would need to be in order for CenturyLink to provide a service that is sufficiently equivalent to Aureon's CEA service to provide a meaningful benchmark.

Moreover, AT&T is wrong that no massive overhaul of CenturyLink's switches would be necessary for those switches to function equivalently to Aureon's CEA service. While AT&T focuses on what it characterizes as a minor cost for subtending LECs to connect to the nearest CenturyLink switch,[183] it disregards the much more significant connectivity problem that CenturyLink's switches are faced vis-à-vis the many IXCs that provide service in Iowa. Specifically, CenturyLink would need to either (a) invest significantly to connect each of its

[182] *Id.* at 12-14.

[183] *Id.* at 14 (claiming that "any network changes needed to hand off traffic between CenturyLink and the subtending ILECs would not be extensive").

switches with the other switches, or (b) impose the significant connectivity costs on each and every current and future IXC seeking to serve Iowa by requiring them to establish not one connection to one CenturyLink switch but connections to all eight. No matter how AT&T may describe it, CenturyLink's switches are wholly dissimilar to Aureon's network.

C. AT&T's Argument that CEA Service Is No Longer Necessary Reveals AT&T's True Colors in Seeking To Eradicate Aureon's CEA Service Despite the Strong Continuing Need for Such Service.

A lynchpin to AT&T's argument that CenturyLink's existing array of isolated tandem switches provide an adequate substitute for Aureon's CEA service is its assertion that times have changed since the FCC authorized Aureon's CEA service and that there is no longer a need for such service.[184] AT&T's argument is meritless – Aureon's CEA service continues to provide a valuable public service, and its termination would result in severe adverse consequences to rural Iowans with respect to both their phone service and their broadband connectivity.

As Aureon discussed in its Rebuttal, prior to Aureon's construction of its CEA network, AT&T was the monopoly provider of long-distance service. To encourage long-distance competition and increase telecommunications connectivity, the FCC and IUB authorized Aureon to construct a CEA network and rejected CenturyLink's predecessor's claim that its existing array of disconnected tandem switches was adequate to serve the needs of rural Iowans.[185] Since that time, Aureon has been fulfilling, and continues to fulfill, its purposes of providing connectivity and competition to rural Iowa. Instead of only a single monopoly provider of long-distance service, Iowans now may choose from fully fifteen IXCs who provide originating services, and fully seventeen IXCs provide terminating service, thus offering consumers

[184] *Id.* at 3, 11, 17.

[185] Aureon Rebuttal at 21-24.

precisely the wide array of choices in long-distance providers that the FCC and IUB envisioned.[186] This increased competition is a direct result of the traffic concentration and connectivity that Aureon's has introduced to rural Iowa, which has made it far more cost-efficient for new IXCs to enter the market.

If Aureon's CEA service were discontinued, some 180,000 Iowans would immediately lose service, and an additional 120,000 Iowans would be negatively impacted.[187] Moreover, some 460 rural communities that "are rural 'islands' whereby the only means of routing long distance calls to and from those areas is through the CEA network" would suffer the complete loss of service, and an additional 140 communities would be negatively impacted.[188] All in all, "over 300,000 Iowa customers in 633 rural communities would be adversely impacted if the CEA network were to cease operations."[189]

AT&T argues that the proportion of originating versus terminating traffic carried over Aureon's network has increasingly favored terminating traffic resulting from access stimulation, and that this undermines the reason for Aureon's existence.[190] This argument, however, ignores the FCC's recent decision finding that (a) Aureon was not engaged in access stimulation, (b) "Aureon has acted lawfully and consistently with its Tariff in transporting access stimulation traffic" and (c) "Aureon properly billed for [those] services under the terms of the Tariff."[191]

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[186] Hilton Declaration ¶ 2.

[187] *Id.* ¶ 4.

[188] *Id.* ¶¶ 4-5.

[189] *Id.* ¶ 5.

[190] AT&T Surrebuttal at 11-12.

[191] *Liability Order*, 32 FCC Rcd. at 9686-88, ¶¶ 19-21.

The proper solution to access simulation is to adopt a new rule that prohibits that practice, not to punish a provider who was already found not to be engaged in that practice.

In short, Aureon's CEA service is fulfilling precisely the purpose for which it was created and continues to benefit rural Iowans in providing connectivity for both telecommunications and broadband service. AT&T's contrary claims indicate that its true aim in this proceeding apparently is to force rates on Aureon that are so low as to put Aureon's CEA service out of business, leaving the Iowa telecommunications market to AT&T and its allies. The Commission should reject AT&T's gambit and instead continue to recognize the value of Aureon's service to rural Iowans by holding that Aureon's tariff rate is just and reasonable.

D. Contrary to AT&T's Claim, the *Great Lakes Comnet* Decision Makes Clear that It Is the LEC that Hands Off Traffic to the Intermediate Carrier that Determines the Identity of the "Competing ILEC" for that Traffic – Which Are Aureon's Subtending ILECs in this Case.

AT&T also continues to invoke the decision in *Great Lakes Comnet, Inc. v. FCC*[192] as erroneous support for its argument that CenturyLink is the sole competing ILEC to Aureon.[193] But as Aureon demonstrated in its Rebuttal, that decision actually confirms that the ILECs that hand off traffic to Aureon would be deemed the "competing ILECs" to Aureon.[194]

As Aureon previously discussed, *Great Lakes Comnet* involved an access stimulation scheme whereby wireless 8YY calls from around the country were:

(a) aggregated;

(b) routed to LEC-MI, a CLEC operating in Southfield, Michigan;

(c) handed off by LEC-MI to Great Lakes Comnet ("GLC"), an intermediate carrier;

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[192] 823 F.3d 998 (D.C. Cir. 2016).

[193] AT&T Surrebuttal at 14-15.

[194] Aureon Rebuttal at 26-28.

(c) transported by GLC to Westphalia, Michigan; and

(d) handed off by GLC to an IXC (AT&T) for completion.[195]

Notably, because wireless calls were at issue, the originating callers did not use a LEC at all to originate the calls; rather, the calls were reoriginated as wireline calls with CLEC LEC-MI, which was the carrier that handed off the calls to GLC.

Both the FCC and the U.S. Court of Appeals for the D.C. Circuit looked to the LEC performing the handoff to the intermediate carrier as the relevant carrier for purposes of identifying the "competing ILEC" to Great Lakes Comnet.[196] Because that carrier was a CLEC and thus could not qualify as the "competing ILEC" to GLC, both the FCC and the court determined that the ILEC operating in the same area as that CLEC was the "competing ILEC."[197]

Applying that analysis to this case, it is Aureon's subtending LECs who hand off call traffic to Aureon who are analogous to LEC-MI, the LEC performing that hand off in *Great Lakes Comnet*. It is therefore these LECs who must be considered the "competing ILEC" under the *Great Lakes Comnet* analysis. Unlike *Great Lakes Comnet*, some 158 of these 206 LECs already are ILECs,[198] so the extra step of analysis performed in *Great Lakes Comnet – i.e.*, identifying the ILEC operating in the same area as the CLEC performing the handoff – is unnecessary as to those ILECs. Rather, those ILECs are the competing ILECs because they would be the ILECs who would have handled the handoffs to IXCs if Aureon were not in the call

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[195] *Id.* at 26-27.

[196] *AT&T Services Inc. v. Great Lakes Comnet, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd. 2586, 2590, ¶14, 2591, ¶ 17, and 2594, ¶ 25 (2015), *aff'd in part and rev'd in part*, *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016); *Great Lakes Comnet*, 823 F.3d at 1005.

[197] *Great Lakes Comnet*, 30 FCC Rcd. at 2594, ¶ 25; *Great Lakes Comnet*, 823 F.3d at 1005.

[198] Hilton Declaration ¶ 18.

path. And like *Great Lakes Comnet*, where a CLEC hands off calls to Aureon, the ILEC operating in the same service area as that CLEC is the "competing ILEC."

AT&T, however, argues that in that case, "the Commission rejected the claim that the small ILEC subtending the CLEC provider of intermediate tandem and transport service could be the 'competing ILEC'" and that this shows that Aureon's subtending ILECs cannot be the competing ILEC.[199] AT&T is wrong. The entity (Westphalia Telephone Company ("WTC")) that the Commission refused to find was the "competing ILEC" was an ILEC that played no role at all in the call traffic routing but rather only operated as GLC's <u>billing agent</u> in that case.[200] Because the relevant handoff that the FCC considered was the handoff between the LEC (LEC-MI) and the intermediate carrier, the FCC refused to find that WTC – which operated in Westphalia, Michigan and had nothing to do with the LEC-intermediate carrier handoff that occurred elsewhere – could have been the "competing ILEC" "because doing so would have required it to provide and bill for services outside its LATA boundaries in violation of its tariff."[201] Here, by contrast, Aureon's subtending ILECs are the very LECs who hand off calls to Aureon that originate or terminate within their respective service areas. It is these ILECs that are the "competing ILECs" to Aureon within their respective service areas, not a wholly unrelated entity from a different service area that did not render CEA service on February 8, 1996.

AT&T also relies on *Great Lakes Comnet* for the proposition that "the ILEC in the area where the CLEC exchanged the calls at issue" with the intermediate access service provider

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[199] AT&T Surrebuttal at 14.

[200] *Great Lakes Comnet*, 30 FCC Rcd. at 2587, ¶ 6, and 2590, ¶¶ 14, 16.

[201] *Id.* at 2594, ¶ 25.

should be deemed the "competing ILEC."[202] But in Aureon's case, and as noted above, it is the ILECs connected to the CEA network who perform this exchange in their respective service areas in most cases, so no further analysis is necessary. (When CLECs perform the exchange, the ILEC who provides services in those CLECs' service areas would be the "competing ILEC.").

Moreover, history itself shows that these ILECs would not agree to have another unrelated ILEC inject itself into the call path to route the calls. When these very ILECs previously considered how to exchange calls with IXCs, they did not resort to an unrelated service provider but rather banded together to form Aureon. That action indicates that if Aureon did not exist, these ILECs would act the same way again by handling the exchange themselves instead of farming out that function to an unrelated third party.

In short, *Great Lakes Comnet* shows that Aureon's subtending ILECs – which perform the handoff to Aureon, the intermediate carrier – are the "competing ILECs" under 47 C.F.R. § 61.26(a)(2) with respect to their respective service areas.

E. AT&T's Continued Reliance on Inapposite Mileage Calculations Associated with CenturyLink Exposes Why CenturyLink's Isolated Tandem Switches Are Not Comparable to Aureon's Integrated CEA Service And Do Not Provide a Meaningful Benchmark.

AT&T's continued argument that twenty-two (22) – or even zero (0) – miles is the appropriate number to use to calculate a benchmark for Aureon's CEA service is based on the false premise that CenturyLink's isolated tandem switches offer the "same services" as Aureon's CEA service such that they provide a reliable benchmark for Aureon's service. But as

[202] AT&T Surrebuttal at 15.

demonstrated in Aureon's Rebuttal case[203] and above,[204] CenturyLink's tandem switches do not provide connectivity that is remotely comparable to CEA service, and AT&T's mileage calculations associated with those switches do not remotely measure the appropriate mileage associated with calls routed by CEA service.

To illustrate why AT&T's mileage calculations are inapposite, consider an IXC connected only to Aureon's network at Sioux City that needs to route a call to Mason City. Using Aureon's CEA service, that IXC would hand off the call at Aureon's POI in Sioux City. Aureon would first route that call to its central switch in Des Moines (156 airline miles) and then transport it to its POI in Mason City (110 airline miles), where it would hand off the call to the LEC serving the terminating end user. Aureon's mileage calculation for this call would not account for the airline distance of 266 miles to traverse these three cities but rather only for the lower point-to-point airline distance between Sioux City and Mason City – 169 miles.

If that same IXC desired to route that same call using CenturyLink, by contrast, it would not be able to do so at all. CenturyLink's tandem switch in Sioux City is not connected to any other CenturyLink switches but rather is an isolated island. Thus, CenturyLink would be unable to route the call from its Sioux City switch to Mason City and then to the end office switch of the terminating LEC.[205]

[203] *See* Aureon's Rebuttal Part II.B.2.

[204] *See supra* Part I.B.

[205] AT&T has no response to this connectivity dilemma of smaller IXCs other than to suggest blithely that these IXCs could purchase such service from a third party. AT&T Surrebuttal at 21. But those IXCs would then be at the mercy of those third parties and the prices that they would charge, which could well increase from the increased demand. Such a regime threatens to place these smaller IXCs at a significant competitive disadvantage to better connected larger IXCs that would not need to purchase such service, thus reverting Iowa to the days of pre-CEA service before the advent of CEA service leveled the playing field.

Given this significant limitation of CenturyLink's switches illustrated above, the <u>only</u> types of calls reflected in AT&T's mileage calculations are calls that an IXC exchanges directly with CenturyLink at, for example, CenturyLink's Sioux City tandem switch that originate or terminate in that immediate area, as CenturyLink's switches cannot provide routing among switches. AT&T's mileage calculations associated with CenturyLink's tandem switches thus improperly presume a counterfactual world where each IXC, to compete in Iowa, would need to (a) construct connections with <u>all</u> of CenturyLink's eight tandem switches in Iowa and (b) shoulder the burden of transporting those calls all the way to or from the tandem switch closest to the call's origination or termination point in order to serve that state. Moreover, each LEC also would need to establish a connection with CenturyLink's closest tandem switch to exchange calls. While the mileages associated with such calls are necessarily lower than Aureon's mileage calculation (and zero if one assumes that the LECs would transport calls from CenturyLink's switch to their end offices), those calculations do not reflect CEA service at all and do not provide a meaningful benchmark for Aureon's CEA service.

AT&T, however, claims that these differences do not matter and continues to press its own calculations of twenty-two – and even zero – miles as the appropriate measure against which to benchmark Aureon's service.[206] AT&T's position is meritless.

First, CenturyLink's isolated switches simply do not provide the "same services" as Aureon, which is the core prerequisite of the FCC's benchmarking regulation, as discussed above.[207] CEA service does not merely provide a "handoff" service among IXCs and LECs. It undertakes the burden of transporting calls throughout Iowa to enable IXCs to access the entire

[206] AT&T Surrebuttal at 15-22.

[207] *See supra* Part I.B.

Iowa telecommunications grid with a single point of interconnection. CenturyLink does not; thus, mileage associated with its service is not a comparable benchmark for Aureon.

Second, AT&T's even more aggressive suggestion that "zero" is the appropriate mileage benchmark[208] reveals just how preposterous AT&T's attempt to benchmark Aureon to CenturyLink is. While zero miles may well reflect the operation of CenturyLink's isolated switches – as CenturyLink likely would force both IXCs and LECs to come to it and simply perform a handoff function (as those LECs already transport calls from Aureon's POIs to their end offices), that arrangement bears no resemblance to Aureon's CEA service. The absurdity of AT&T's attempt to equate these two disparate services perhaps explains why AT&T unsurprisingly relegates this argument to a footnote in both its Opposition and its Surrebuttal.[209]

In any event, AT&T's zero mileage assertion does not mean that the transport would not occur or that some other entity would charge for that transport. Rather, it simply reallocates the cost and burden of the transport by placing it on other entities, with the IXCs responsible for transporting calls to each of the CenturyLink tandem switches and the LECs responsible for transporting those calls between those switches and their end users. In short, using zero mileage simply does not represent the essential attribute of Aureon's CEA network – which was constructed precisely because the switch system operated by CenturyLink that AT&T proposes to use was deemed inadequate – and illustrates why CenturyLink's switches should be rejected as a benchmark for Aureon's CEA service.

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[208] *Id.* at 16 n.37 (acknowledging that "if CenturyLink, like Aureon today, were not billing for transport between its tandem switches and the subtending LECs' end offices, then the benchmark rate would be" calculated using transport mileage of zero); *see also* AT&T Opposition at 26 n.37.

[209] AT&T Opposition at 26 n.37; AT&T Surrebuttal at 16 n.37.

AT&T also attempts to poke holes in Aureon's own mileage calculation, but its attacks are without merit. Tellingly, AT&T does <u>not</u> argue that Aureon's weighted average mileage analysis – submitted at the FCC's request and demonstrating that Aureon's actual weighted point-to-point airline transport mileage was 112 in 2016 and 104 in 2017[210] – was somehow inaccurate. Instead, it invents an imaginary world in which it assumes that IXCs would establish connections with each of Aureon's POIs and then exchange calls at the POI nearest the end user, which AT&T argues would lower Aureon's average mileage.[211] In other words, AT&T's hypothetical construct would revert Aureon's CEA network to the pre-CEA world of an array of isolated switches akin to CenturyLink's, where the CEA aspect of Aureon's service is rarely, if ever, used. AT&T's counterfactual position is not premised on reality and should be rejected.

As previously noted, there is not a single IXC – including AT&T – that connects to all of Aureon's POIs.[212] Moreover, the largest IXCs – i.e., AT&T, Sprint, and MCI (now Verizon) <u>only</u> ever connected to <u>seven</u> of Aureon's POIs; the other 12-14 IXCs never established these connections at all, and the majority of the POIs were never activated by any IXC request.[213] Even AT&T currently is only connected to two of Aureon's POIs.[214] It is sheer speculation on AT&T's part to assume that each IXC would construct connections with each of Aureon's POIs under different circumstances, and such guesswork cannot form a basis for calculating Aureon's transport mileage. Moreover, AT&T's argument falsely presumes that it is improper for Aureon

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[210] *See* Letter from J. Troup to M. Dortch and accompanying attachment, *In re Iowa Network Access Division Tariff F.C.C. No.1*, WC Docket No. 18-60, Transmittal No. 36 (May 25, 2018).

[211] AT&T Surrebuttal at 19-20.

[212] Supplemental Surreply Declaration of Frank Hilton ¶ 2, attached hereto as Exhibit M.

[213] *Id.*

[214] *Id.*

to bill at a mileage insensitive composite rate when Aureon was explicitly authorized to bill a non-distance-sensitive transport rate, as even AT&T itself acknowledges.[215]

AT&T's reliance on speculation and hypothetical scenarios is also seen in its invocation of Sprint's 20-mile calculation that it claims Aureon billed it for intrastate service as a data point supporting a lower mileage calculation for Aureon than Aureon's actual transport mileage.[216] Aureon demonstrated in its Rebuttal why that number did not remotely approach its actual transport mileage for interstate CEA service because:

(1) Aureon transported – but did not bill for – call traffic to Des Moines and back even when an IXC handed off calls at the POI closest to the subtending LEC serving the end user for the call; and

(2) Sprint, as one of the largest IXCs in Iowa, was far better connected than the vast majority of IXCs operating in the state.[217]

AT&T's claim that Aureon's actual mileage should be ignored in favor of its self-serving belief regarding what Aureon's transport mileage might be in a hypothetical market including one of the largest and most connected IXCs in Iowa should be rejected for the same reasons as its other speculative and meritless claims.

In short, there simply is no reason for Aureon's mileage to be calculated based on isolated tandem switches providing hand-off transport only – whether that system is premised on CenturyLink's switches or on AT&T's self-serving dream world of how it wishes that IXCs connecting to Aureon's network would operate. AT&T's attempts to argue otherwise should be rejected.

[215] *See* AT&T Surrebuttal at 20 (admitting that "Aureon is free to use a composite rate under the Commission's rules").

[216] AT&T Surrebuttal at 21-22.

[217] Aureon Rebuttal at 33-35.

CONCLUSION

Wherefore, for the foregoing reasons, and for those in Aureon's Direct Case and Rebuttal, the Commission should find that Aureon's tariff rate is just and reasonable, and therefore, lawful. The FCC should not depart from its prior established precedent of regulating dominant and non-dominant carriers under separate regulatory regimes, and not apply the CLEC rate benchmark to Aureon's dominant carrier CEA service. If necessary, the Commission should waive application of Sections 51.911(c) and 61.26 of the Commission's rules to Aureon, as the CLEC rate benchmark is incompatible with rate of return, cost based regulation, and, to the extent that the Commission decides to regulate Aureon as a CLEC, the rate ceiling already established by the $0.00819 default transitional rate. Waiver of Sections 51.911(c) and 61.26 would promote and protect the public interest by ensuring that Iowa's rural consumers have access to affordable advanced telecommunications services through the preservation of a cost-efficient and financially-sustainable CEA network.

Respectfully submitted,

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Dated: July 16, 2018

Exhibit J

Supplemental Surreply Declaration of Brian Sullivan

Exhibit K

Supplemental Surreply Declaration of Jeff Schill

Exhibit L

Excerpts from the Opposition of AT&T Corp. to Petitions for Reconsideration or Clarification, CC Docket No. 96-262 (filed July 23, 2001)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	))	

OPPOSITION OF AT&T CORP. TO PETITIONS FOR RECONSIDERATION OR CLARIFICATION

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Reform Order, U.S. TelePacific ("TelePacific") petitions the Commission for clarification as to which competing ILEC rate should be applied when a CLEC's local service area includes areas served by more than one ILEC. TelePacific Petition at 1, 3. Contrary to TelePacific's petition, however, there is no ambiguity about which ILEC rate apply, and thus no need for clarification.

In its *CLEC Access Charge Reform Order*, the Commission concluded that, following an initial three-year transition period, the maximum benchmark rate for all CLEC access charges will be the "competing ILEC rate." *CLEC Access Charge Reform Order* at ¶ 45. The term "competing ILEC" is defined in the Commission's rules as the ILEC "that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC." 47 C.F.R. § 61.26(a)(2). Thus, for any particular end user customer of the CLEC, there is only one "competing ILEC" and only one "competing ILEC rate." If the CLEC's service area covers more than one ILEC service area, therefore, the CLEC must charge no more for access service to a particular end user than the access rate that would have been charged for access to that end user by the ILEC in whose service area the end user resides.

TelePacific further complains that its existing billing systems do not distinguish its customers on the basis of the ILEC service area within which the end user resides. *See* TelePacific Petition at 5-6. The answer to that problem is that TelePacific and other CLECs have been given a three-year transition period to adjust their existing billing systems to the Commission's new CLEC access charge system, and the record shows that charging different access rates in different areas would not be significantly burdensome for CLECs.[22] Another

[22] As the Minnesota CLEC Consortium states, "tariffing different access rates for different areas is not a significant burden." Minnesota CLEC Consortium Petition at 7. *See also* RICA Petition at 10-11 ("the increase in complexity" for a CLEC to charge different rates for different areas "would not be significant"). Indeed, as discussed above, both RICA and the Minnesota CLEC Consortium specifically request the Commission to permit CLECs to charge different access

the IXC must retain the ability to decline to accept traffic from the CLEC unless and until the CLEC provides the necessary end-user billing information to the IXC. Accordingly, to the extent that any clarification is deemed appropriate, the Commission should make clear that, regardless of the access rate tariffed by the ILEC, an IXC is not required under Section 201(a) to accept traffic from a CLEC that fails to provide the IXC with sufficient information to bill the CLEC's end user customer for long distance calls carried over the IXC's network.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration or clarification of the *CLEC Access Charge Reform Order* except that, to the extent that clarification is deemed necessary or appropriate, the Commission should make clear that (1) CLECs may charge the competing ILEC rate only for access services that the CLEC actually provides, and (2) an IXC is not required to accept traffic from a CLEC that fails to provide the IXC with sufficient information to enable the IXC bill the CLEC's end-user customer for long distance calls carried over the IXC's network.

Respectfully submitted,

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Exhibit M

Supplemental Surreply Declaration of Frank Hilton

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CERTIFICATE OF SERVICE

I, Tony S. Lee, hereby certify that on this 16th day of July 2018, copies of the foregoing document were sent to the following:

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