Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage	WC Docket No. 18-155

<u>PETITION FOR RECONSIDERATION</u>

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TABLE OF CONTENTS

SUMMARY

Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon") files this Petition for Reconsideration of the FCC's September 27, 2019 *Arbitrage Elimination Order*. In the Order, the Commission adopted rules that it asserted were designed to eliminate access arbitrage, when those new rules did nothing of the sort. Rather than banning access stimulation traffic, the FCC allowed such unreasonable practices to continue and the deception to persist that such calls are "free". The FCC's new rules merely alter who pays for so-called "free" conference calls, requiring Aureon to bill access-stimulating local exchange carriers ("LECs") rather than the interexchange carriers ("IXCs") that benefit from Aureon's centralized equal access ("CEA") service. The FCC also partially amended Aureon's Section 214 authorization to allow terminating access stimulation traffic spread by the bypass of Aureon's network.

Aureon's CEA network has made it economical for AT&T's smaller IXC competitors to provide service to rural Iowa. By centralizing expensive features and functionalities, the CEA network has made advanced broadband services affordable and available in small towns and rural areas. The CEA network enables AT&T's smaller competitors to serve rural Iowa without incurring the substantial cost of building facilities to each of the 200 LECs subtending INS's central access tandem. Absent Aureon's network, hundreds of thousands of rural customers would struggle to receive the same modern service offerings and technologies available in urban areas, suffer the complete loss of long distance/toll calling service, and be negatively impacted by the loss of the CEA network. In addition, more than two-thirds of the rural communities in Iowa would be completely isolated from the rest of the nation because without CEA service, no IXCs would be able to reach those communities. The harm to the public interest would be devastating should the Commission's new rules in this proceeding cause the demise of Aureon's CEA network.

When the FCC decides to change long-standing policies, the FCC must rationally consider significant alternatives, especially those that are significant, obvious, and viable. Rational decision making also dictates that the agency simply cannot employ means that actually undercut its own purported goals. The *Arbitrage Elimination Order* fails to meet these standards, and should be reversed for several reasons.

First, Aureon's CEA service is not the root cause of the access arbitrage problem, yet the FCC found it necessary to partially amend Aureon's Section 214 authorization to allow partial bypass of Aureon's network. Such action will cause the removal of significant amounts of traffic from the CEA network. The FCC asserted that Aureon could file tariffs with higher rates if the *Arbitrage Elimination Order* significantly reduces the traffic volume on the CEA network. However, that premise is false because it does not take CLEC rate ceilings into account, and the *Arbitrage Elimination Order* is arbitrary and capricious because it does not allow Aureon over the long run to earn the authorized rate of return or to charge just and reasonable rates as required by Section 201(b) of the Communications Act.

Second, Aureon proposed two significant and viable alternatives to the FCC's rule requiring access-stimulating LECs to be responsible for paying for the access charges associated with access stimulation traffic: (1) a rule banning all access stimulation traffic, which would directly address the access arbitrage problem and the falsehood that "free" conferencing is actually "free"; and (2) a rule allowing IXCs to bill their customers for the access costs associated with using access stimulation services, which would send appropriate price signals to customers and significantly curtail the volume of access stimulation traffic. The FCC failed to explain why the adopted rules were less restrictive and less burdensome than Aureon's proposals.

Third, the FCC's new rules actually undercut its own policy goals. The FCC's adopted rules do not actually eliminate access stimulation traffic. Rather, it allows such traffic to continue through modifications to intercarrier compensation. Further, the FCC's rules undermine its existing policies designed to foster long distance competition and advanced telecommunications services in rural areas by failing to require all traffic to subtending LECs to be routed over Aureon's CEA network. The FCC had previously determined that it was in the public interest for Aureon to provide CEA service so that smaller IXCs could compete against AT&T. However this was only possible if all traffic was subject to a mandatory use rule for CEA service that ensures a minimum volume of traffic to maintain an affordable CEA tariff rate for small competitors. The FCC made no analysis regarding the *Arbitrage Elimination Order's* impact on competition and advanced telecommunications services in rural areas, and the Order is inconsistent with the FCC's policy goals.

Fourth, the *Arbitrage Elimination Order* is inconsistent with the FCC's goal of eliminating implicit subsidies. The FCC's decision requiring access-stimulating LECs rather than the IXCs that use CEA service to pay the tariff rates for CEA service does nothing to remove the implicit subsidy associated with access arbitrage. Previously, it was the IXCs' customers that subsidized the access costs incurred for a small subset of customers to use an access stimulating service. Rather than having millions of long distance customers subsidizing access stimulation service, the Commission now has only a few thousand rural customers paying for access stimulation services that they never use, as the LECs recover their costs from their rural end users.

Finally, the rules adopted by the FCC are more burdensome and less effective in achieving the Commission's stated goals than Aureon's proposals. The FCC's decision imposes additional restrictive and burdensome obligations on CEA providers that are not present in Aureon's proposals. Aureon will be required to maintain large and potentially unused capacity to accommodate potential "whipsawing" of traffic between networks. The FCC's rule requiring access-stimulating LECs to be billed by Aureon will also create an administrative nightmare for the company due to the large number of LECs (approximately 200) that subtend Aureon's CEA network. Aureon has no idea which of those LECs are or will become involved in access stimulation, and how much traffic might be sent to those LECs. Aureon will be required to modify its billing every time there is a traffic ratio that trips an access stimulation trigger and changes a LEC's status, and those changes could take place monthly. This presents an undue burden to Aureon's operations, and Aureon's proposals are far less restrictive and less burdensome solutions.

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PETITION FOR RECONSIDERATION

Iowa Network Services, Inc., d/b/a Aureon Network Services ("Aureon"), by its undersigned attorneys, and pursuant to Section 1.429 of the FCC's rules,[1] files this Petition for Reconsideration of the FCC's September 27, 2019 *Arbitrage Elimination Order* issued in the above-captioned proceeding.[2]

I. INTRODUCTION

As the Commission is aware, Aureon's centralized equal access ("CEA") network has made it economical for AT&T's smaller interexchange carrier ("IXC") competitors to provide service to rural Iowa. By centralizing expensive features and functionalities, the CEA network has made advanced broadband services affordable and available in small towns and rural areas. However, over the long run, the *Arbitrage Elimination Order* will force CEA service to operate at a loss as it precludes Aureon from charging IXCs a tariff rate that recovers Aureon's costs as access simulation traffic declines.

Absent Aureon's network, 300,000 rural customers would struggle to receive the same modern service offerings and technologies available in urban areas, 180,000 customers would

[1] 47 C.F.R. § 1.429.

[2] *In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Report and Order and Modification of Section 214 Authorizations, WC Docket No. 18-155, FCC No. 19-94 (rel. Sept. 27, 2019) ("*Arbitrage Elimination Order*").

suffer the complete loss of long distance/toll calling service, and an additional 120,000 would also be negatively impacted by the loss of the CEA network. Approximately 460 out of 600 rural communities would be completely isolated from the rest of the nation because without CEA service, no IXCs would be able to reach those communities even through CenturyLink's network. Another 140 communities in Iowa similarly would be isolated from the national public switched telephone network, and residents living in those areas would only be able to place local calls to other nearby communities through extended area service arrangements. The harm to the public interest would be devastating should the Commission's new rules in this proceeding cause the demise of Aureon's CEA network. It is significant that in the NPRM, the Commission requested comment on whether there were other companies that could perform the traditional functions of CEA providers, including the same level of rural traffic concentration at a central access tandem, and traffic measurement and billing,[3] and no commenters asserted that there were other providers that could step into the shoes of the CEA providers.

In the comments and reply comments filed by Aureon in the proceeding leading to the adoption of the *Arbitrage Elimination Order*, Aureon proposed a clear and precise method for the FCC to eliminate, once and for all, the access arbitrage caused by high-volume calling services that is plaguing the industry: the adoption of rules that would impose a total ban on access simulated traffic. Aureon's proposal would have stopped all wasteful arbitrage behavior.

Rather than banning access stimulated traffic, the *Arbitrage Elimination Order* actually allows such activities to continue by upending over 30 years of prior FCC policy designed to foster long distance competition in rural areas. Although the purported goal of the FCC's proceeding

[3] *In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, 33 FCC Rcd. 5466 ¶ 17 (2018) ("NPRM").

was to eliminate access arbitrage, the *Arbitrage Elimination Order* does not actually do that. The Order flatly refused to eliminate access stimulated traffic, and instead, shifted the responsibility for payment to the local exchange carriers ("LECs") involved with such activities, which in turn, moved the burden of paying for access stimulated traffic from millions of long distance customers to just a few thousand customers located in rural areas. The FCC's new rules perpetrate deceit by allowing arbitrageurs to continue to falsely advertise their services as "free," when they impose substantial costs on Aureon and the public at large. Rather than furthering its previously stated goals of fostering and enabling competition in rural areas, the *Arbitrage Elimination Order* undercuts the FCC's own purported goals of eliminating access stimulated traffic and bringing competition and advanced services to rural areas.

Aureon now files its Petition for Reconsideration of the Commission's *Arbitrage Elimination Order*, requests that the FCC reverse its decision to permit access stimulated traffic to continue, reinstitute Aureon's original Section 214 certificate and the CEA mandatory use policy for all traffic types, allow Aureon to fully recover a cost-based rate for CEA service, and impose an outright ban on all access arbitrage.

II. STATEMENT OF PARTICULARITIES

Under the Commission's rules, a petition for reconsideration must state with particularity the respects in which the petitioner believes the action taken by the FCC should be changed.[4] The *Arbitrage Elimination Order* should be changed as follows:

- The FCC should reverse its decision to allow access stimulated traffic to continue, and adopt rules banning all access arbitrage.
- The FCC should reverse its decision to require access-stimulating LECs to be financially responsible for all tandem switching and transport services. The adoption

[4] 47 C.F.R. § 1.429(c).

of a rule imposing a total ban on access stimulated traffic would obviate the need for any change in the intercarrier compensation that IXCs pay for CEA service.

- The FCC should reverse its decision modifying the Section 214 authorizations for CEA providers and restore those authorizations and the CEA mandatory use rule to their original status.
- The FCC should allow CEA providers to charge cost-based rates, even though they may exceed a rate cap, to enable them to maintain the viability of CEA service over the long run.

III. STANDARD OF REVIEW

It is within the discretion of the Commission to grant reconsideration.[5] FCC precedent clearly establishes that reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.[6] Even if a petition is repetitious, the Commission can, in its discretion, consider it.[7] In considering Aureon's Petition, the FCC must be mindful of whether the change in policies in the underlying decision is arbitrary and capricious. Where the FCC changes its policies, the Commission must consider significant alternatives.[8] The FCC cannot undercut its own purported goals through its policy changes.[9]

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[5] *Id.* (citing 47 U.S.C. § 405)

[6] *See, e.g.*, *Petition for Reconsideration by Acadiana Cellular General Partnership,* Order on Reconsideration, 20 FCC Rcd. 8660, 8663, ¶ 8 (2006); *In re Universal Service Contribution Methodology Federal-State Joint Board on Universal Service*, Petitions for Reconsideration and Clarification of the InterCall Order, 27 FCC Rcd. 898, 901 (2012), rev. dismissed in part and denied in part, *Conference Grp., LLC v. FCC,* 720 F.3d 957, 958 (D.C. Cir. 2013).

[7] *Id.* *See also Application of Paging Systems Inc.*, 22 FCC Rcd 4602, 4604 n.23 (2007) (considering repetitious petition on the merits).

[8] *Motor Vehicle Manufactures Ass'n v. State Farm Mutual Auto. Ins. Co*, 463 U.S. 29, 46 (1984).

[9] *Office of Commc'n of the United Church of Christ v. FCC*, 779 F.3d 702, 707 (D.C. Cir. 1985) (citation omitted).

IV. ARGUMENT

A. CEA Providers are not the Root Cause of Access Arbitrage, and the FCC did not Justify the Requirement that Aureon Charge a Rate That Does not Reflect its Costs as a Result of the Modification to Aureon's Section 214 Authorization.

In the *Arbitrage Elimination Order*, the FCC concluded that CEA providers were not causing the access stimulation problem, and that if "a LEC engaged in access stimulation fails to notify the intermediate access provider . . . for whatever reason[], an IXC's recourse is against the LEC, not the intermediate access provider."[10] Even though Aureon is not involved in access stimulation, and the FCC has previously determined that Aureon's CEA service was in the public interest because it would foster competition and advanced services in rural areas that would not otherwise enjoy those benefits without the CEA network, the FCC nonetheless deemed it necessary to modify Aureon's Section 214 authorization to permit traffic terminating at access-stimulating LECs to bypass Aureon's CEA network.[11] The FCC opined that the Section 214 modification to allow bypass for access stimulation traffic was justified because it would be more efficient and cost-effective. The FCC's decision to modify Aureon's Section 214 authorization is arbitrary and capricious, and should be reversed for several reasons.

First, rational decision making requires the FCC to avoid employing means that undercut its own purported goals,[12] and to consider less restrictive and less burdensome measures to achieve its stated objectives.[13] The *FCC 214 Order* authorized the mandatory use policy to foster competition and to bring advanced services to rural areas. All traffic terminating to Aureon's subtending LECs was to be routed over the CEA network to ensure that Aureon's per minute rates

[10] *Arbitrage Elimination Order* ¶ 86.

[11] *Id.* ¶ 106.

[12] *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

[13] *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).

remained affordable for AT&T's smaller competitors. In partially amending the mandatory use policy, the FCC undercut the FCC's policy goals regarding competition in rural areas and making economical advanced telecommunications services available for rural subscribers.

The Commission did not analyze the impact its decision would have on competition and the FCC's goals in that regard for rural areas. The Commission also did not consider whether Aureon's proposal to prohibit all access stimulation traffic was less restrictive and less burdensome than the FCC's approach. All evidence points to Aureon's proposed rule as satisfying both the FCC's existing policy by ensuring affordable CEA rates for all IXCs (because higher traffic volumes mean lower CEA rates), and being less restrictive and burdensome because no sea-change would be required with regard to how Aureon, the subtending LECs, and the telecommunications industry operated before the adoption of the FCC's new access arbitrage rules. The FCC acknowledged that "evidence in the record shows that much of the access-stimulation traffic is currently bypassing Aureon[] and SDN's networks."[14] Removing additional traffic from Aureon's CEA network without permitting Aureon to charge IXCs a tariff rate that recovers Aureon's costs will lead to the discontinuance of CEA service and significant harm to competition in rural areas and the lives of rural consumers.

Second, the FCC's decision to partially amend the CEA mandatory use policy violates the requirement that the FCC "specially justify any rate differential that does not reflect cost."[15] The Commission stated that "[i]f access-stimulating LECs decide to move their traffic off of a CEA network and the CEA provider has significantly less traffic on its network, the CEA provider may file tariffs with higher rates provided that such tariff revisions are consistent with our rules

[14] *Arbitrage Elimination Order* ¶ 109.

[15] *Competitive Telecommc'ns Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) (citing *ALLTel Corp. v. FCC*, 838 F.2d 551, 556-558 (D.C. Cir. 1988)).

applicable to CEA providers."[16] However, the FCC neglected to recognize that in the investigation of Aureon's CEA tariff,[17] the FCC applied its decision in the *November 2017 Referral Order* subjecting Aureon to both dominant carrier cost-based rate regulation and non-dominant carrier rate caps.[18]

The FCC's new accounting directive for CEA service, which will preclude Aureon from earning the minimum rate of return prescribed by the Commission, is not in the public interest, and arbitrary and capricious because it provides no means for Aureon to recover under-earnings when its cost-based rate is above the CLEC benchmark rate.[19] Unlike competitive LECs, the FCC prohibited Aureon from charging the CLEC benchmark rate when its cost-based rate is below that rate ceiling.[20] The FCC also prohibited Aureon from charging a cost-based rate (calculated in full compliance with the FCC's accounting rules) if such a just and reasonable rate exceeds either a $0.005634 or $0.00819 arbitrary rate ceiling.[21] The rate caps ensure that Aureon over time "will earn less than the rate of return the Commission deems adequate and necessary to attract investors."[22] Thus, the FCC's statement that Aureon "may file tariffs with higher rates" if there is "significantly less traffic on its network" is not only disingenuous because it does not take the

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[16] *Arbitrage Elimination Order* ¶ 109.

[17] *Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 33 FCC Rcd. 7517 (2018).

[18] *AT&T v. Iowa Network Services, Inc., d/b/a Aureon Network Services*, Memorandum Opinion and Order, 32 FCC Rcd. 9677 (2017) ("*November 2017 Referral Order*"). The *November 2017 Referral Order* is currently under appeal before the D.C. Circuit. *See AT&T Corp v. FCC*, Case Nos. 18-1007, 18-1257, 19-1013 (D.C. Cir.)

[19] *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987); *see also, La. Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 364-65 (1986).

[20] *November 2017 Referral Order* ¶ 26.

[21] *Id.*

[22] *Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864, 873 (6th Cir. 1991).

CLEC rate ceilings into account, the *Arbitrage Elimination Order* is also arbitrary and capricious because it does not allow Aureon to earn the authorized rate of return or to charge just and reasonable rates as required by Section 201(b) of the Communications Act.

Finally, the FCC's decision to overturn longstanding policies for CEA service is arbitrary and capricious given the serious reliance interests involved. "[A]n agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[23] In reliance on the Commission's grant of Aureon's Section 214 certificate, Aureon constructed a more than 2,700 mile fiber optic network to provide CEA service to IXCs. For more than 30 years, smaller IXCs have relied upon the CEA network to compete with AT&T in rural Iowa and the public has relied upon the modern telecommunications and information services made possible by CEA service. Mandating that LECs, rather than IXCs, pay for CEA service necessitates significant changes to the compensation arrangements for CEA service, which would render it financially infeasible for the CEA network to remain operational. In light of the serious reliance interests at stake, the Commission should not alter its longstanding compensation policies for CEA service, reverse its decision in the *Arbitrage Elimination Order*, and stop wasteful arbitrage by prohibiting the practice or by recovering from the users of access stimulating service the access costs they cause.

B. The FCC Failed to Consider and Adopt a Reasonable Alternative That was Consistent with its Stated Policy Goal of Eliminating Access Arbitrage.

When the FCC decides to change long-standing policies, the FCC must rationally consider significant alternatives,[24] especially those that are significant, obvious, and viable.[25] "It is well

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[23] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016).

[24] *United Church of Christ v. FCC*, 770 F.2d at 707 (citation omitted).

[25] *City of Brookings Mun. Tel. Co.*, 822 F.2d at 1169-70.

settled that an agency has 'a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.'"[26] Rational decision making also dictates that the agency simply cannot employ means that actually undercut its own purported goals."[27] In this case, the FCC *Arbitrage Elimination Order* failed to meet those standards for several reasons.

First, Aureon presented two significant and viable alternatives to the FCC's rule requiring access-stimulating LECs to be responsible for paying for the access charges associated with access stimulation traffic. Although the FCC has attempted to address the access arbitrage problem through the intercarrier compensation regime, those efforts have failed. Indeed, the FCC acknowledged in the NPRM that "[d]espite the Commission's adoption of a national, default bill-and-keep framework as the ultimate end state for the exchange of telecommunications traffic and its efforts to reduce wasteful arbitrage, a variety of arbitrage schemes continue to evolve and once again flourish".[28]

The FCC's predictive judgment that changes to intercarrier compensation would reduce wasteful arbitrage was incorrect. It is contrary to the public interest, and arbitrary and capricious for the Commission to continue along that path given that years of experience have shown that the intercarrier compensation approach simply does not work. In light of the inability to curb access arbitrage through intercarrier compensation rules, a different approach is required. Aureon made two proposals. Aureon proposed to define "High Call Volume Service" narrowly to only include calling services that are falsely marketed as free where the calling party is not charged a fee, along

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[26] *Id.* at 1169 (citing *Farmers Union Cent. Exch., Inc. v. FERC.*, 734 F.2d 1486, 1511 (D.C. Cir. 1984)).

[27] *Id.*

[28] *NPRM*, 33 FCC Rcd. 5466 ¶ 1.

with a rebuttable trigger of 100,000 minutes per month to a single telephone number whereby calls to that number would be prohibited.[29] Aureon also proposed that end users pay for the access costs caused by the calls they make to access simulation services.[30] Passing through the access costs to users of access stimulation services sends the correct price signal to callers that there is a cost associated with those services, and it ends the deceit where consumers are misled that access stimulating services are "free" to society. Aureon's proposal also reduces wasteful arbitrage by causing arbitrage traffic to decline significantly when the end user is charged the access costs associated with placing access stimulating calls. Aureon's proposals were significant, obvious, and viable alternatives to the FCC's proposal, which the FCC should have considered before adopting a purported solution that will not achieve the Commission's goals.

Second, contrary to the requirement to "rationally consider significant alternatives," the FCC failed to consider the merits of Aureon's proposals at all. Rather than analyzing Aureon's proposals, which would have been less burdensome and disruptive to the industry, the FCC's discussion of those proposals were dismissive and conclusory. The FCC did not discuss or analyze the advantages or disadvantages of Aureon's proposed rules, gave no reasons as to why Aureon's proposals to ban access simulation traffic or charge access stimulation service users for the access costs would be overbroad, less burdensome or disruptive to the industry, or why the FCC's adopted solution would be better in advancing the FCC's separate goals of eliminating access arbitrage and its previously established policy of fostering long distance competition in rural areas. The FCC merely stated that it was "unwilling to adopt an outright ban on access stimulation . . . . [because] "prohibiting access stimulation in its entirety or finding that revenue sharing is a *per se* violation

[29] Aureon Comments at 8.

[30] Aureon May 23, 2019 Ex Parte Letter at 1-3.

of section 201 of the Act would be an overbroad solution 'and no party has suggested a way to overcome this shortcoming.'"[31] However, the FCC has, in analogous contexts, determined that it was *not* overly broad to prohibit certain types of behaviors.[32]

Contrary to the FCC's contention, Aureon did, in fact, detail why its proposal to ban access stimulation would not be overly broad. Aureon explained that its proposed definition of "high call volume service" recognized that traffic stimulation arbitrage depended upon callers paying little to nothing for that service, and that its proposed rebuttable threshold of 100,000 minutes-of-use terminating traffic volume to a single telephone number would serve to identify access stimulation activities.[33] Aureon's proposal would eliminate wasteful arbitrage while avoiding unwarranted costs to the industry and consumers associated with direct trunking, and prevent arbitrageurs from engaging in new arbitrage schemes through other regulatory loopholes.[34]

It is important to note that the FCC did not rely on any current information to support its position that a ban on access stimulation "would be an overbroad solution." In support of that premise, the FCC cited the *USF/ICC Transformation Order* issued eight years ago in 2011.[35] In the *USF/ICC Transformation Order*, the context in which the FCC was considering a total ban

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[31] *Id.* ¶ 39 (citing and quoting *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 17879 ¶ 672 (2011) ("*USF/ICC Transformation Order*") (emphasis added).

[32] *See, e.g.*, Section 64.201(b) (prohibiting indecent communications); Section 64.705(a)(3) (prohibiting "call splashing"); Section 64.1504 (prohibiting charges for toll-free numbers); Section 64.1505 (prohibiting transmission and billing of certain types of pay-per-call services); Section 64.1514 (prohibiting the use of signaling tones to complete a call to a pay-per-call service); Section 64.2010 (prohibiting the disclosure of customer proprietary network information).

[33] Aureon Comments at 8-9.

[34] *Id.*; Aureon Reply Comments at 7-19.

[35] *Arbitrage Elimination Order* ¶ 39, n.108 (citing *USF/ICC Transformation Order*, 26 FCC Rcd. at 17879 ¶ 672).

was for revenue sharing, not access stimulation.[36] With respect to revenue sharing arrangements, the FCC said that "[a] ban on revenue sharing arrangements *could be overly broad*".[37] The FCC's observation was logical with regard to revenue sharing because the revenues for 8YY calls that were shared were generated by customers that were "typically universities and hotels."[38] As the FCC acknowledged in its *Eighth Report and Order*, those arrangements were akin to commissions, and they do not resemble the large scale access charge arbitrage schemes perpetrated by arbitrageurs such as HD Tandem. The FCC has, without explanation or support, transformed a potential outcome applicable only to 8YY revenue sharing arrangements, i.e., "could," into one that is all but certain with respect to access stimulation, i.e., "would." Not only is this a *non sequitur* because 8YY revenue sharing arrangements are not the same as the arbitrage schemes that are the subject of the *Arbitrage Elimination Order*, there are clearly other significant, obvious, and viable solutions, such as the ones proposed by Aureon, that would actually achieve the FCC's stated goal of eliminating access arbitrage while preserving its previous policy of fostering long distance competition in rural areas.

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[36] *USF/ICC Transformation Order*, 26 FCC Rcd. at 17879 ¶ 672. ("Many commenters, on the other hand, assert that revenue sharing is a common business practice that has been endorsed in some situations by the Commission. As proposed in the *USF/ICC Transformation NPRM*, we do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A *ban on all revenue sharing arrangements could be overly broad*, and no party has suggested a way to overcome this shortcoming." (emphasis added)).

[37] *Id*.

[38] *Id.*, citing *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9142-43 ¶ 70 (2004) ("*Eighth Report and Order*"). With respect to the revenue sharing arrangements referenced in the *USF/ICC Transformation Order*, those agreements involved the sharing of revenues for 8YY calls generated by customers that were "typically universities and hotels".

Third, the FCC's Order is not rational decision making because the rules adopted would undercut, rather than advance, its own purported goals.[39] In the NPRM, the FCC stated that its goal was "to stop economically wasteful arbitrage activity and the damage it causes to telecommunications markets."[40] Rather than eliminating access arbitrage – which is the captioned title of this proceeding – the FCC acknowledged that it merely "adopt[ed] rules aimed at eliminating the financial incentives to engage in access arbitrage created by [its] current [intercarrier compensation] system."[41] In other words, the FCC did not, in fact, eliminate access arbitrage, but rather, it attempted to dissuade arbitrageurs from engaging in high-volume traffic schemes by making it harder, but not impossible, to make money by gaming the intercarrier compensation system. Indeed, Aureon explained how shifting payment responsibilities from IXCs to LECs would not stop arbitrage, but actually cause it to increase.[42] For example, large IXCs, such as AT&T, could engage in arbitrage with respect to wholesale IXC transport and transit service when they do not have to pay access service by charging other carriers for transit and tandem access service to route traffic to LECs,[43] and access stimulators would simply move their arbitrage schemes to other parts of the PSTN that remain subject to intercarrier compensation

[39] *See City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d at 1169.

[40] NPRM, 33 FCC Rcd. at 5478 ¶ 36.

[41] *Arbitrage Elimination Order* ¶ 14.

[42] Aureon Reply Comments at 14-18.

[43] *Id*. at 14. The FCC contends that there is no merit to arguments that IXCs will be able to seize new arbitrage opportunities as a result of the FCC's new rules, and states that Aureon did not explain how IXCs would accomplish such a task. *Arbitrage Elimination Order* ¶ 33. That is incorrect. Aureon explained how this could occur at page 14 of its Reply Comments, and also in its May 23, 2019 Ex Parte Letter. ("With CenturyLink's control over a majority of the transit facilities and direct connects in rural Iowa, CenturyLink is attempting to persuade the Commission to support an increase in the use of those direct connects for wasteful arbitrage traffic." Aureon May 23, 2019 Ex Parte Letter at 5.)

payments.[44] The only way to achieve the Commission's stated goal, to eliminate access arbitrage, is to prohibit access stimulation traffic in the first instance.

C. The FCC's Order Also Undermines its Prior Policy of Fostering Competition in Rural Areas.

As discussed above, the FCC cannot take actions that actually undercut its own purported goals.[45] The FCC must also consider less restrictive and less burdensome measures to achieve its stated objectives.[46] The Commission determined that in order to "facilitate the implementation of the rules" adopted by the *Arbitrage Elimination Order*, Aureon's Section 214 authorization should be modified to "enable IXCs to use whatever intermediate access provider an access-stimulating LEC that otherwise subtends Aureon . . . chooses."[47] The FCC asserted that this would "allow IXCs to directly connect to access-stimulating LECs where such connections are mutually negotiated and where doing so would be more efficient and cost-effective."[48] However, the FCC did not consider how its actions would undermine its previous policy determinations regarding the need for CEA service to foster competition and advanced communications in rural Iowa, nor did the FCC consider less restrictive measures to achieve its goals of eliminating access arbitrage.

[44] Aureon Reply Comments at 17-18. Another arbitrage scheme that could arise as a result of the FCC's refusal to ban access stimulation traffic would involve many more LECs than are currently participating in high-volume traffic activities. Such a scheme would involve the LECs gradually increasing their traffic volume over time, but just under the FCC's 100% traffic growth trigger. This type of arbitrage would be even easier to implement using newly formed competitive LECs because "[a] competitive LEC that was not in business the previous year would not qualify [as an access stimulating LEC] because the absence of any monthly demand in the prior year renders this comparison inapposite, and the requisite calculation to satisfy the trigger cannot be performed." *Arbitrage Elimination Order* ¶ 61.

[45] Aureon Reply Comment at 17-18.

[46] *Cincinnati Bell Tel. Co.*, 69 F.3d at 761.

[47] *Arbitrage Elimination Order* ¶ 106.

[48] *Id.*

The *Arbitrage Elimination Order* undermines the FCC's prior policy determination that CEA service is in the public interest because CEA service would foster competition in rural areas. Aureon has reminded the Commission in this and other proceedings that CEA service was established by the Commission to enable small IXCs to compete with large, entrenched IXCs, such as AT&T, in rural areas.[49] The FCC found that the CEA network would serve the public interest, convenience and necessity by creating competition with AT&T in small rural communities, which is an important Commission goal.[50] A critical aspect of the *FCC 214 Order* authorizing Aureon's CEA service was implementation of the "mandatory use policy" for CEA service, which requires all IXCs to use Aureon's CEA network to route their terminating traffic to the LECs connected to the CEA network.[51] The mandatory use policy ensured that the tariff rate for CEA service would remain affordable for AT&T's smaller IXC competitors.[52] This is because as CEA traffic volume decreases, the CEA per-minute-rate increases; and as CEA traffic volume increases, the CEA per-minute-rate decreases.[53] The FCC's decision is at odds with its policy of fostering competition in rural areas, and inconsistent with its prior regulatory regime to ensure affordable CEA service rates for all IXCs.

The FCC made no effort to consider the impact that the amendment to the mandatory use rule for traffic that Aureon routes to access-stimulating LECs would have on its policy of fostering

[49] *See, e.g.,* Aureon Comments at 2.

[50] *Id.* (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 Faculties to Provide Access Service to Interexchange Carriers in the State of Iowa*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd. 1468 ¶ 4, 1471 ¶¶ 21, 22 (1988) ("*FCC 214 Order*"); *aff'd on recon.*, 4 FCC Rcd. 2201 (1989) ("*FCC 214 Recon. Order*").

[51] Aureon Comments at 11-12.

[52] *Id.* at 9.

[53] *Id.* n.18.

local and long distance competition and the availability of affordable IP-based service in rural areas. The only consideration that the FCC made with respect to the mandatory use issue was whether allowing bypass of Aureon's CEA network would be "more efficient and cost-effective," and the Commission found that "[t]he record supports the efficiency of direct interconnection at access-stimulation levels of traffic, at least in some circumstances."[54] The decision to partially amend the mandatory use rule based on economics and efficiency is directly contrary to the public interest policy established in the *FCC 214 Order*.

When the FCC first granted Aureon Section 214 authority to provide CEA service, the Commission understood that CEA "may not necessarily be the most economical" solution to enable IXCs to connect to rural LECs,[55] and that Aureon's "plan, of course [would] generate additional costs, but on the whole, [the FCC] f[ound] it w[ould]serve the public convenience and necessity" even though AT&T and CenturyLink already provided interstate and intrastate access service, respectively, to rural LECs in Iowa.[56] The *Arbitrage Elimination Order* left the FCC's policy determinations in the *FCC 214 Order* undisturbed, i.e., CEA service is in the public interest because it would foster competition in rural areas even though CEA service was not the most efficient or the least expensive solution. As discussed above, the mandatory use policy was critical to the success of the CEA network in enabling small IXCs to afford to provide service in rural areas. With the many CLECs and CMRS carriers that rely on the use of Aureon's network to reach rural consumers, rural competition for local service and wireless service will also be adversely impacted by the demise of Aureon's network. The Commission's decision to partially amend the

[54] *Arbitrage Elimination Order* at 46, n.329.

[55] *FCC 214 Order* 3 FCC Rcd. at 1470 ¶ 15.

[56] *Id.* at 1472 ¶ 24.

mandatory use policy for economic and efficiency reasons undercuts the *FCC 214 Order*, which determined that those reasons did not warrant allowing carriers to bypass the Aureon's CEA network. Because the Commission did not consider the impact of amending Aureon's Section 214 certificate on the FCC's goal of fostering competition and advanced services in rural areas, the Order is arbitrary and capricious and should be reversed.

D. The *Arbitrage Elimination Order* is Inconsistent with the FCC's Goal of Eliminating Implicit Subsidies, and does not Enable Correct Price Signals to be Sent to Consumers.

The Commission has previously stated that "we prefer to rely on the market rather than regulation to identify implicit support because we are more confident of the market's ability to do so accurately."[57] However, the FCC's decision requiring access-stimulating LECs rather than the IXCs that use CEA service to pay the tariff rates for CEA service does nothing to remove the implicit subsidy associated with access arbitrage. Previously, it was the IXCs' customers that subsidized the access costs incurred for a small subset of customers to use an access stimulating service. The FCC explicitly acknowledged this situation, and it "found that, because access stimulation increased access minutes-of-use and access payments . . . it also increased the average cost of long-distance calling. The Commission explained that 'all customers of these long-distance providers bear these costs, even though many of them do not use the access stimulator's services, and in essence, ultimately support businesses designed to take advantage of . . . above-cost intercarrier compensation rates.'"[58]

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[57] *In re Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 15987 ¶ 9 (1997); *see also Arbitrage Elimination Order* ¶¶ 25-26 (Implicit subsidies for access stimulated services are paid for by the more than 455 million subscribers of voice services across the United States, most of whom do not use those services. "These implicit subsidies are precisely what the Commission sought to eliminate in the *USF/ICC Transformation Order*, as directed by Congress in the 1996 Act." (citing *USF/ICC Transformation Order*, 26 FCC Rcd. at 17909 ¶ 747)).

[58] *Arbitrage Elimination Order* ¶ 7 (citations omitted).

The FCC's new rule requiring access-stimulating LECs to pay for high-volume traffic turns this paradigm on its head. Rather than having millions of long distance customers subsidizing access stimulation service, the Commission now has only a few thousand rural customers paying for access stimulation services that they never use, as the LECs recover their costs from their rural end users. The higher resulting end user rates for local service in rural areas in order to subsidize urban callers to access stimulation services violates Section 254 of the Act,[59] which requires services and rates in rural areas to be comparable to those in urban areas. If the FCC had adopted a rule to ban, and therefore, eliminate access arbitrage, this absurd result would not occur. Further, if the FCC had adopted a rule to allow customers to be charged the access costs associated with using access stimulation services, this would have also curtailed the use of such services, and reduced wasteful arbitrage.

The FCC determined that under its new rules, "customers will be provided with more-accurate pricing signals for high-volume calling services."[60] However, there is simply no support for that finding because the *Arbitrage Elimination Order* permits arbitrageurs to continue to falsely advertise their access stimulation services as "free." Without any direct indications to customers of the cost of those calls, there is no way that they would receive any pricing signals at all for using such services. Given that the Commission adopted rules to continue to allow access arbitrage, the FCC should have considered and adopted Aureon's proposal to allow IXCs to flow through access costs by billing a line-item charge to the IXC's customers that choose to use and pay for access stimulation services. Under Aureon's proposal, consumers would be told the truth and no longer misled into thinking their calls are "free".

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[59] 47 U.S.C. § 254.

[60] *Id.* ¶ 32.

The Commission has recognized that a policy that "ensures that the customer who chooses a network pays the network for the services the subscriber receives . . . brings market discipline to intercarrier compensation."[61] It is certainly not in the public interest for the FCC to hide the truth from callers and allow the deceptive notion that access stimulation services are "free" to persist when there is a significant cost to Aureon, the industry, and our nation associated with such services. Customers that use access simulation services, such as "free" conference calling services, are under the false impression that such services are truly free because the customers are not billed the access costs associated with using them. Accordingly, allowing callers to use access stimulation services without paying for the access costs they cause sends incorrect price signals to the market that such services are free, when they are not.

Aureon noted that allowing IXCs to pass through access costs to customers for using access stimulation services will also change the behavior of customers so as to successfully reduce access arbitrage. Aureon provided, as an example, T-Mobile's One-Cent Policy, whereby T-Mobile charged one cent per minute to customers that chose to place calls to access stimulating services operated by HD Tandem/Free Conferencing.[62] Free Conferencing admitted that T-Mobile's policy of charging customers to use access stimulating services drastically curtailed the use of its service, and so much so that nearly 70% of the access stimulation traffic from T-Mobile customers disappeared after only one month.[63] The FCC declined to adopt Aureon's proposal because "[t]here is no evidence that access- stimulating calls currently cost a penny per minute, so the

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[61] *USF/ICC Transformation Order* 26 FCC Rcd. at 17905 ¶ 742.

[62] Aureon Ex Parte at 2.

[63] *Id.* (citing Petition to Deny of CarrierX, LLC at 16-17, *In the Matter of Applications of T-Mobile US, Inc. and Sprint Corp. for Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 18-197 (Aug. 27, 2018)).

proposal would simply trade one form of inefficiency for another" and the proposal is allegedly overbroad.[64] The Commission's criticism misses the point of Aureon's proposal, which is not to charge customers a specific price for the call, such as a penny. Rather, it is to send the appropriate pricing signals to customers by flowing through access costs and charging them something other than zero for a call that has been falsely represented in the past as being "free."

Allowing carriers to charge customers specific line-items to recover a portion of the access costs is not unusual, and the FCC has permitted this practice in other contexts without causing customer confusion. For example, when the FCC reformed its intercarrier compensation regime to move certain services to bill-and-keep, the Commission permitted carries to recover a portion of their access costs from end users through the Access Recovery Charge ("ARC").[65] Another example is when the FCC established a system of tariffed access charges for the recovery by LECs of most of their common line costs from end users. In that case, the FCC adopted rules under which LECs would recover interstate non-traffic-sensitive costs incurred to provide access service partly from subscribers and partly from IXCs.[66] The FCC required LECs to levy a flat monthly subscriber line charge ("SLC") directly on end users.[67] Finally, soon after the Universal Service Fund ("USF") was established to recover certain costs that had previously been access costs, the Commission concluded that IXCs should be allowed "to decide for themselves whether, how, and

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[64] *Arbitrage Elimination Order* ¶ 38.

[65] *USF/ICC Transformation Order*, 26 FCC Rcd. 17663 ¶¶ 849-52.

[66] *In re Petitions for Waiver of Various Sections of Part 69 of the Commission's Rules,* Memorandum Opinion and Order, 104 FCC 2d 1132, 1136 (1986).

[67] *Id.*

how much of their universal service contributions to recover from their customers."[68] As a result, many IXCs chose to pass through their USF contributions via a separate line-item charge on their end users' bills.[69]

Clearly, the FCC could have allowed IXCs to bill a line-item charge to recover access costs from their end users using access stimulating services.[70] The record evidence shows that such action does in fact curtail access arbitrage and sends the correct price signals to end users that access stimulation services are not free. Billing the access costs to the end user that calls the access stimulation service is also consistent with bill-and-keep, which relies upon recovering costs from end users instead of from other carriers, such as subtending LECs. As the FCC failed to consider this less restrictive and less burdensome alternative, it should reconsider the *Arbitrage Elimination Order* and implement Aureon's proposals.

E. The FCC Failed to Consider Less Restrictive and Less Burdensome Means to Eliminate Access Arbitrage.

The rules adopted by the FCC are more burdensome and less effective in achieving the Commission's stated goals than Aureon's proposals. "The FCC is required to give an explanation when it declines to adopt less restrictive measures in promulgating its rules."[71] The FCC's decision

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[68] *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24958 ¶ 10 (2002) (citing *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, 9211 ¶ 853 (1997)).

[69] *Federal-State Joint Board on Universal Service*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9892, 9894, ¶ 4 (2001).

[70] *See also* Aureon May 23, 2019 Ex Parte Letter 3 (setting forth reasons why the requirement to geographic average rates for telecommunications services in 47 U.S.C. § 254(g) does not preclude charging a price to the access stimulating service caller that recovers the access costs of completing the call to the access stimulating service).

[71] *Cincinnati Bell Tel. Co.*, 69 F.3d at 761 (citing *City of Brookings Municipal Tel. Co.*, 822 F.2d at 1169).

imposes additional restrictive and burdensome obligations on CEA providers that are not present in Aureon's proposals.

Under the FCC's new access arbitrage regime, access-stimulating LECs will be required to bear financial responsibility for all terminating CEA service.[72] Specifically, the rules treat access-stimulating LECs as the customers of CEA service, even though the CEA network was constructed for the benefit of IXCs who have been customers of CEA service for more than 30 years. CEA providers must now charge the access-stimulating LEC, not the IXC that orders CEA service and delivers the traffic to Aureon for termination.[73] The FCC's rule requiring Aureon to charge LECs rather than IXCs that ordered service from Aureon is overly restrictive and burdensome for several reasons.

First, the FCC's rule is overly restrictive and burdensome because Aureon will be required to maintain large and potentially unused capacity to accommodate potential "whipsawing" of traffic between networks. Access stimulation traffic can be easily moved to different LECs and different end offices almost at will. This concern led the FCC not to adopt "Prong 2" proposed in the NPRM regarding direct connections:

> [E]ven where establishing a direct connection may initially appear cost-effective, the ease with which access stimulation traffic may be shifted from one carrier to another undermines the value of making the investment. After a direct connection premised on high traffic volume has been established at an access-stimulating LEC's original end office, the access-stimulating LEC or providers of access-stimulating services could move traffic to a different and more distant end office, thus stranding the financial investment to build that direct connection with minuscule traffic volume after the access stimulation activity has shifted locations.[74]

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[72] *Arbitrage Elimination Order* ¶ 42.

[73] *Id.*

[74] *Id.* ¶ 41.

Access simulators and IXCs can shift arbitrage traffic back and forth between the CEA network, direct connects, and other networks. To avoid rural call completion problems, Aureon is required to engineer its network to carry the largest volume of traffic it can expect from IXCs, which is difficult to forecast.[75] Aureon's proposal would have eliminated the IXCs and access stimulators' incentive to shift large volumes of traffic back and forth between networks. The FCC's proposal unduly burdens Aureon by requiring Aureon to maintain excess capacity that may not be used, and incur substantial costs that may not be paid for by any customer.

Second, the FCC's rule requiring access-stimulating LECs to be billed by Aureon will create an administrative nightmare for the company. Aureon's billing system is currently only configured to bill IXCs for CEA service because, as discussed above, CEA service was designed for the benefit of IXCs, and not LECs. There are approximately 200 LECs that subtend Aureon's CEA network. Aureon has no idea which of those LECs are or will become involved in access stimulation, and how much traffic might be sent to those LECs. Although the new rules require access-stimulating LECs to notify affected IXCs and intermediate access providers of their status as access stimulators, Aureon will be required to make changes to its billing every time there is a change in a LEC's status, and those changes could take place monthly. The traffic ratio triggers could be met in one month, requiring Aureon to bill the subtending LEC, but may not be met during the following month, requiring Aureon to bill the IXC. The potential for billing disputes when 200 LECs are connected to the CEA network, while payment responsibilities constantly shift between multiple IXCs and numerous LEC, is immense. Requiring Aureon to bill LECs instead of IXCs for CEA service creates an undue burden for Aureon's operations, and Aureon's proposal to ban access stimulation traffic is a far less restrictive and less burdensome solution.

[75] *In re Iowa Network Access Division Tariff F.C.C. No. 1*, 33 FCC Rcd. 7517, 7561 ¶ 110 (2018).

Finally, the FCC's requirement that the access-stimulating LEC pay Aureon for all terminating CEA service is overly broad. There will be some mix of traditional traffic and access stimulation traffic sent to an access-stimulating LEC. The Commission's amendment to Aureon's Section 214 certificate requires access stimulating LECs to pay Aureon for not just terminating access stimulation traffic, but for all terminating traffic. Even worse, the LEC's end-user customers would not only be required to pay the access costs for standard long distance traffic, they would also bear the brunt of the access costs associated with access stimulation traffic. The *FCC 214 Order* determined that Aureon's CEA network would "serve as in integral link in originating and terminating the interstate traffic of IXCs."[76] As such, the FCC found that requiring IXCs to pay for CEA service was reasonable and necessary to keep both originating and terminating CEA rates attractive for smaller IXCs.[77] The FCC's decision to require LECs rather than IXCs to pay for CEA service is contrary to that conclusion, and such an overbroad proposal disproportionately affects subscribers living in rural areas that can ill afford to pay for the use of so-called "free" services by the employees of large corporations and urban residents.

V. <u>CONCLUSION</u>

The rules adopted by the *Arbitrage Elimination Order* do not accomplish the FCC's stated goal of eliminating access stimulation traffic. Access arbitrage can continue under the FCC's revised intercarrier compensation scheme, and past history has proven that changes to intercarrier compensation breed new forms of access arbitrage and are ineffective in eliminating such practices. For many years, changes to intercarrier compensation have not worked to reduce access stimulation traffic and they are not a solution that is any better today.

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[76] *FCC 214 Order*, 3 FCC Rcd. 1468, 1469 ¶ 4.

[77] *Id.* at 1473 ¶ 33.

The FCC was required to rationally consider significant alternatives when it changed its policies. However, the FCC's new rules actually undermine its policies for rural areas and the public interest benefits of CEA service, and undercut its own purported goal of eliminating access arbitrage. Moreover, the Commission's decision to amend Aureon's Section 214 authorization was not only unnecessary, it was arbitrary and capricious. The FCC's decision to require access-stimulating LECs to pay for CEA service will ensure the removal of significant traffic volumes from Aureon's CEA network, and CLEC rate caps will preclude Aureon from recovering its costs, causing Aureon to lose money over time as traffic volume on the CEA network declines.

Wherefore, for the foregoing reasons, the FCC should grant Aureon's Petition, and issue an order reversing the Commission's *Arbitrage Elimination Order* as requested above. However, because the *November 2017 Referral Order* is currently under appeal, the Commission may want to take into consideration the D.C. Circuit's ruling on appeal before deciding the instant Petition.

Respectfully submitted,

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