Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	Proceeding No. 17-56
	)	Bureau ID No. EB-17-MD-001
v.	)	
	)	
Iowa Network Services, Inc., d/b/a	)	
Aureon Network Services,	)	
	)	
Defendant.	)	

PETITION FOR RECONSIDERATION

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Dated: December 8, 2017

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SUMMARY

Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon") files this Petition for Reconsideration of the FCC's November 8, 2017 Memorandum Opinion and Order ("*November 2017 Order*") issued in this case. Aureon requests that the FCC reverse its decision to apply its ruling retroactively, and confirm that Aureon should prospectively charge the rate in its 2012 tariff. Furthermore, the Commission should confirm that the CLEC benchmark rate applicable to CEA service is the rate contained in the NECA tariff.

In the *November 2017 Order*, the Commission ruled that Aureon's 2013 tariff was void *ab initio* because Aureon's CEA rate exceeded the CLEC rate benchmark, and violated the rules for CLECs adopted in the *2011 USF/ICC Transformation Order*. If Aureon's 2013 tariff rate was void from when it was filed, then the 2013 tariff rate never went into effect, and the 2012 deemed lawful tariff rate was never cancelled. Accordingly, should the Commission void Aureon's 2013 tariff rate, there is no need to undertake a detailed accounting inquiry in the damages phase of this case because Aureon's 2012 tariff rate is the currently effective and lawful rate. The FCC should confirm that the 2012 deemed lawful tariff rate is the rate that Aureon should bill AT&T.

The Commission should not retroactively apply its new rule that Aureon is a dominant carrier subject to non-dominant CLEC benchmarking rules to void Aureon's 2013 tariff *ab initio*. Prior to the *November 2017 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. Now, for the first time, the FCC has classified Aureon as both a dominant carrier with rates subject to detailed accounting regulations and a CLEC in order to bring Aureon under the Section 61.26 non-dominant CLEC rate benchmark rules and the rules for CLECs adopted in the *2011 USF/ICC Transformation Order*.

Aureon did not have fair notice of the FCC's change in policy because its prior decisions did not provide notice that Aureon would be regulated as a dominant carrier that was also subject to non-dominant CLEC rate regulations. 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. The FCC has only adopted forbearance from the tariff requirements in the Act for non-dominant CLEC tariffs so that CLEC tariff rates in excess of CLEC rate benchmarks would be void *ab initio*. The FCC has never exercised forbearance for tariffs filed by dominant carriers, such as Aureon, and it has never adopted an explicit rule that would void ab initio a dominant carrier's tariff rate. Therefore, Aureon's 2013 dominant carrier tariff filing established the lawful rate and was not void *ab initio*. Aureon detrimentally relied on the Commission's past decisions regarding Aureon's prior conduct, and Aureon could not have identified with "ascertainable certainty" that the Commission would regulate Aureon as both a CLEC and a dominant carrier.

Furthermore, the Commission's decision that Aureon's 2013 tariff was void *ab initio* does not comport with its orders or court decisions regarding dominant carrier tariffs that are not subject to tariff forbearance and are deemed lawful pursuant to Section 204(a)(3) of the Act. Aureon filed its 2013 CEA tariff on 15 days' notice. AT&T did not file a petition to suspend the

tariff, and the FCC did not suspend or investigate the tariff. Accordingly, Aureon's dominant carrier tariff became a deemed lawful tariff 15 days after filing, and the FCC cannot later rule that the tariff was void *ab initio* and award damages retroactively. Refunds from lawful tariffs are impermissible as a form of retroactive ratemaking. Remedies against dominant carriers charging lawful rates later found unreasonable must be prospective only.

Finally, the FCC should confirm that an accounting inquiry is still unnecessary because, assuming that Aureon is a CLEC, the CLEC rate benchmark applicable to Aureon's CEA Service is the rate in NECA Tariff F.C.C. No. 5. Aureon meets the definition of a "rural CLEC" in the FCC's rules, and therefore, it qualifies for the rural exemption in Section 61.26(e) of the FCC's rules, and the Commission should confirm that the CLEC rate benchmark for Aureon's CEA service are the rates in the NECA tariff. Even if Aureon did not meet the definition of a rural CLEC and qualify for the rural CLEC exemption, the CLEC rate benchmark for Aureon's CEA service would still be the NECA tariff rates. Section 61.26(f) states that a CLEC's tariff rates may not exceed the rate charged by the competing ILEC. The competing ILEC is the ILEC that would provide interstate exchange access services to the extent those services were not provided by the CLEC. In this case, the applicable competing ILEC would be those ILECs that subtend Aureon's network. Nearly all of those ILECs participate in the NECA tariff, and the rates in NECA's tariff are the only practical benchmark for the rates of the 200 LECs subtending Aureon's CEA network.

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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 1.106 of the FCC's rules, files this Petition for Reconsideration of the FCC's November 8, 2017 Memorandum Opinion and Order ("*November 2017 Order*")[1] issued in the above-captioned proceeding. Aureon is a dominant carrier that has always calculated its tariff rate for centralized equal access ("CEA") service pursuant to Section 61.38 of the Commission's rules.[2] Furthermore, Aureon has always filed its CEA tariff as a dominant carrier that is not an incumbent local exchange carrier ("ILEC") or a competitive local exchange carrier ("CLEC").[3] Nonetheless, the Commission determined for the first time in its *November 2017 Order* that Aureon was both a dominant carrier and a CLEC, and therefore, Aureon should have complied with the CLEC rate cap and rate parity rules in the 2011 *USC/ICC*

[1] *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, Proceeding No. 17-56, Bureau ID No. EB-17-MD-001 (rel. Nov. 8, 2017).
[2] 47 C.F.R. § 61.38.
[3] Aureon's 2016 Tariff Filing (filed June 16, 2016), Description and Justification at 1 (INAD is not an ILEC, and it is not a CLEC because its rates are calculated pursuant to Section 61.38 (dominant carriers) rather than Section 61.26, which is contained in Subpart C of Part 61, entitled "General Rules for Nondominant Carriers").

Transformation Order.[4] The Commission further ruled that because Aureon's CEA rate did not comply with that order, its tariff was void *ab initio*.

Aureon now files its Petition for Reconsideration of the Commission's *November 2017 Order*, and requests that the FCC reverse its decision to apply its ruling retroactively and confirm that the rate Aureon should charge prospectively is the rate in Aureon's 2012 tariff. Furthermore, Aureon requests that the Commission confirm that the CLEC rate benchmark applicable to CEA service is the rate contained in the NECA tariff.

I. STATEMENT OF PARTICULARITIES AND FORM OF RELIEF SOUGHT

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; state specifically the form of relief sought; cite the findings and/or conclusions which petitioner believes to be erroneous, and state with particularity the respects in which such findings and/or conclusions should be changed.[5] Aureon now provides its statement of particularities and the requested forms of relief sought as required by the Commission's rules.

A. Section 1.106(d)(1) – Statement of Particularity Regarding the Respects in Which the Action Taken by the Commission in the November 8, 2017 Order Should be Changed, and Form of Relief Sought.

In the *November 2017 Order*, the Commission determined that Aureon was both a dominant carrier and a CLEC. Because the FCC classified Aureon as a CLEC, the Commission ruled that Aureon's CEA rate did not comply with the *2011 USF/ICC Transformation Order*, and therefore, Aureon's CEA tariff was void *ab initio*. The Commission further determined that it would not decide the CEA rate that should have been charged to AT&T. Rather the

[4] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) ("*2011 USF/ICC Transformation Order*").
[5] 47 C.F.R. § 1.106(d)(1) & (2).

Commission determined that it would wait until the damages phase to "conduct a detailed review of Aureon's rates to determine what the appropriate tariff rates should have been.[6] The *November 2017 Order* should be changed as follows:

- The Commission should not apply its decision retroactively.
- The Commission should rule that Aureon's CEA tariff was not void *ab initio*, but rather, that the tariff was deemed lawful under Section 204(a)(3) of the Communications Act ("Act").
- If the Commission determines that there was no error in ruling that Aureon's tariff was void *ab initio*, the FCC should confirm that Aureon's 2012 tariff was not cancelled by the 2013 tariff filing, and that the CEA rate applicable to the traffic billed by Aureon to AT&T was the deemed lawful rate contained in the 2012 tariff.
- As the 2012 tariff rate was deemed lawful, lower than the default transitional rate, and not void *ab initio*, the Commission should confirm that the rate Aureon should charge prospectively is the rate in Aureon's 2012 tariff.
- The Commission should rule that with regard to the rates that Aureon bills to AT&T going forward, that the CLEC rate benchmark applicable to CEA service is the rate contained in NECA Tariff F.C.C. No. 5.

The form of relief sought by Aureon is the issuance of an order on reconsideration by the Commission granting Aureon's Petition, and adopting the changes set forth above.

B. Section 1.106(d)(2) – Findings or Conclusions that Petitioner Believes to be Erroneous, Statement of Particularity Regarding the Findings or Conclusions that Should be Changed.

As required by Section 1.106(d)(2), Aureon sets forth and cites the formal findings of fact and conclusions of law that Aureon believes to be erroneous, and states with particularity the respects in which Aureon believes such finds and/or conclusions should be changed.

- The Commission ruled that it would not reach the issue of whether Aureon's rates violated Section 51.911(c) because the Commission did not have an adequate record to determine the pertinent CLEC benchmark rate.[7] The Commission should change its decision, and rule that the rate that Aureon may charge AT&T is the rate contained in Aureon's 2012 tariff because it was not superseded by Aureon's 2013 void *ab initio* tariff filing.

[6] *November 2017 Order* at 18.
[7] *Id*. at 13, ¶ 24.

- It was erroneous for the Commission to retroactively apply its new interpretation of the law that a dominant carrier that must calculate its rates on the basis of cost studies pursuant to Section 61.38 is also subject to non-dominant carrier rate benchmarks as a CLEC. The Commission should change that conclusion by applying it prospectively.
- The Commission found that the rates contained in Aureon's 2013 federal tariff filing and in its intrastate tariff to be unlawful.[8] The Commissions should change that conclusion, and find that Aureon's federal tariff was deemed lawful pursuant to Section 204(a)(3) of the Act, and that its intrastate tariff was also lawful.
- The Commission found that as of December 29, 2011, Aureon's interstate switched access rates should not have exceeded $0.00819 per minute.[9] The Commission concluded that Aureon's 2013 federal tariff filing raising its interstate rate above that level, as well as subsequent tariff filings keeping the rates above $0.00819 per minute, were therefore unlawful when filed and void *ab initio* as a CLEC tariff subject to forbearance from the tariff filing requirements in the Act. The FCC should change its decision that Aureon's tariff filings were CLEC tariffs subject to forbearance and void *ab initio*, and, consistent with established precedent for dominant carriers, rule that Aureon's deemed lawful rates can only be revised by the Commission prospectively.
- The FCC should determine that the competing ILEC rates for purposes of the CLEC benchmark rate for CEA service are the rates contained in NECA Tariff F.C.C. No. 5.

II. ARGUMENT

A. The Commission Should Confirm that the Rate That Applies is the Rate in Aureon's 2012 Tariff Filing.

As an initial matter, if the Commission does not reconsider its decision to void Aureon's 2013 tariff filing, then the FCC should confirm that the currently effective tariff rate is the rate contained in Aureon's 2012 tariff. The Commission ruled that the Aureon 2013 tariff filing "was unlawful when filed and void *ab initio*."[10] The term "void *ab initio*" is defined as null from the beginning.[11] If Aureon's 2013 tariff rate was void from when it was filed, then the 2013 tariff

[8] *November 2017 Order* at 13, ¶ 24.
[9] *Id.* at 16, ¶ 29.
[10] *November 2017 Order* at 16, ¶ 29.
[11] Black's Law Dictionary (10th ed. 2014) (defining "void *ab initio*" as "[n]ull from the beginning, as from the first moment when a contract is entered into."). *See also*, *Conlin v. Mortg. Elec. Registration Sys., Inc.*, 714 F.3d 355, 361 n.6 (6th Cir. 2013) ("Void *ab initio* is defined as null from the beginning") (internal quotation marks omitted).

rate never went into effect, and the 2012 tariff rate was never cancelled. In a relevant case where the Commission "set aside" an action that it took to suspend a carrier's tariff for one day, the U.S. Court of Appeals ruled that the effect of the FCC's action was to "annul" its suspension order, i.e., "that it ought not to have been made in the first place."[12]

The setting aside of the FCC's prior order in *V.I Telco* "restored the tariff to its legal *status quo ante.*"[13] By ruling in the *November 2017 Order* that Aureon's 2013 tariff filing was void *ab initio*, that too has the effect of setting aside the 2013 tariff filing, and restoring the 2012 tariff rate to its legal *status quo ante*. The legal *status quo ante* of Aureon's 2012 tariff rate is that it is deemed lawful under Section 204(a)(3) of the Act and not subject to retroactive refunds. Aureon's 2012 tariff rate is below the transitional default rate established by the *2011 USF/ICC Transformation Order*. Accordingly, should the Commission void Aureon's 2013 tariff rate, there is no need to undertake a detailed accounting inquiry in the damages phase because Aureon's 2012 tariff rate is the lawful and currently effective rate, and the FCC should confirm that the 2012 deemed lawful tariff rate is the rate that Aureon should have billed AT&T. Notwithstanding the foregoing, as further discussed below, Aureon submits that the Commission should not retroactively apply its new rule that Aureon is a dominant carrier subject to non-dominant CLEC benchmarking rules that void Aureon's 2013 tariff *ab initio*.

B. The FCC Should Grant Aureon's Petition Because the FCC Did Not Provide Aureon with Fair Notice of the Commission's New Rules and Policies Prior to Retroactive Enforcement Against Aureon.

1. The Fair Notice Doctrine

The Fair Notice Doctrine prohibits agencies from penalizing regulated entities for failing to comply with agency interpretations of regulations for which they had no fair warning. In *FCC*

[12] *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 671-72 (D.C. Cir. 2006) ("*V.I. Telco*").
[13] *Id.* at 673.

v. Fox, the U.S. Supreme Court observed that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[14] The Due Process Clause of the Fifth Amendment of the U.S. Constitution "limits the Government's authority to retroactively alter the legal consequences of an entity's or person's past conduct."[15] This means that "[a]n agency cannot enforce a rule against a party . . . if the party did not otherwise have fair notice of the rule."[16] In other words, in order to satisfy the Due Process Clause, agencies must, at a minimum, "provide regulated parties 'fair warning of the conduct' [a regulation] prohibits or requires.'"[17] As such, "[d]ue process requires that parties receive fair notice before being deprived of property . . . ."[18]

Although "agencies are authorized to make policy choices through adjudication,"[19] agencies still must ensure that their decisions comport with the Fair Notice Doctrine. This is especially true if their decisions "impose 'new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements' or in a case involving 'fines or damages.'"[20] The U.S. Supreme Court rulings in *Fox* and *Christopher* make clear that agency adjudications promulgating new interpretations of regulations must provide fair notice before rendering a decision with economic consequences for a regulated party affected by the decision.

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[14] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (quotation marks omitted).
[15] *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 462 (D.C. Cir. 2017).
[16] *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 360 (D.C. Cir. 2017) (citation omitted).
[17] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (modification original)).
[18] *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998).
[19] *NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D.C. Cir. 2008).
[20] *Christopher*, 567 U.S. at 156-57 (modification original, quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)).

When an agency's interpretation is announced in an adjudication, the Fair Notice Doctrine acts to provide a party involved in the proceeding with protection from the effects of the new interpretation by requiring the agency to provide not just prior notice of the new rule, but also to provide the party with the opportunity to comply.[21]

> As a general matter, when an adjudicating agency retroactively applies a new legal standard that significantly alters the rules of the game, the agency is obligated to give litigants proper notice and a meaningful opportunity to adjust. By the same token, an agency cannot depart significantly from prior precedent without explicitly recognizing that it is doing so and explaining why.[22]

Regulated entities are not provided with fair notice of an agency's new interpretation of its regulations if they detrimentally relied upon a previous agency interpretation of its regulation.[23] Furthermore, the fair notice inquiry focuses on the ability of the regulated entity to predict the agency's new interpretation at the time of the conduct.[24] Specifically, it is necessary to determine whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform . . . ."[25]

Prior to the *November 2017 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. Now, for the first time, the FCC has classified Aureon as both a dominant carrier with rates subject to detailed accounting regulations and a CLEC in order to bring Aureon under the Section 61.26 non-dominant CLEC rate benchmark rules and the rules adopted in the *2011 USF/ICC*

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[21] *See, e.g.*, *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329-34 (D.C. Cir. 1995).
[22] *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir.1994), *cert. denied*, 513 U.S. 1148 (1995) (quotation marks and citations omitted).
[23] *See, e.g.*, *Gen Elec. Co.*, 53 F.3d at 1330 (lack of fair notice where agency's "interpretation [was] so far from a reasonable person's understanding of the regulations that they could not have fairly informed [regulated parties] of the agency's perspective").
[24] *See Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000).
[25] *Gen. Elec. Co.*, 53 F.3d at 1329.

Transformation Order. As further discussed below, Aureon did not have fair notice of the FCC's change in policy, detrimentally relied on the Commission's past decisions regarding Aureon's prior conduct, and could not have identified with "ascertainable certainty" that the Commission would regulate Aureon as both a CLEC and a dominant carrier.

2. The FCC's Prior Decisions did not Provide Fair Notice that the Commission Would Classify Aureon as a CLEC for Purposes of Determining Aureon's CEA Rate.

Although the FCC confirmed in the *November 2017 Order* that Aureon is a dominant carrier that must calculate its tariff rates on the basis of cost studies and detailed accounting regulations, the Commission determined for the first time 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 *2011 USF/ICC Transformation Order*. The FCC's classification of Aureon as both a dominant carrier and a CLEC is a significant 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. Because the Commission did not provide fair notice prior to the *November 2017 Order* that the FCC would be classifying Aureon as a CLEC, and requiring Aureon to comply with both the cost support tariff filing requirements for dominant carriers, and the access charge benchmarks applicable to CLECs, the Commission cannot retroactively apply that classification to impose damages on Aureon for having exceeded the CLEC benchmark rate or charging the rates calculated in compliance with the Section 61.38 dominant carrier rules.

When the FCC first implemented benchmark rates 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.'"[26] The FCC stated in the *Seventh Report and Order* that it was "especially 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."[27]

The Commission made clear in the *Seventh Report and Order* that CLECs would not be required to file detailed cost support with their tariffs.[28] 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*.[29] In 2007, the FCC issued a Notice of Proposed Rulemaking ("NPRM") in which it considered the adoption of new rules governing the tariffing of traffic-sensitive switched access services by LECs.[30] In the NPRM, the Commission discussed the background of the tariff regime for ILECs and CLECs, and, consistent with the *Seventh Report and Order*, stated that "[c]ompetitive LECs are considered *nondominant* carriers and are thus subject to minimal rate regulation. Section 61.26 allows competitive LECs to tariff interstate access charges if the charges are no higher than the rate charged for such services by the competing incumbent LEC (the benchmarking rule)."[31] The *2011 USF/ICC Transformation Order* adopted Section 51.911(c), which incorporated the Section 61.26 non-dominant carrier rate regulations as the rate cap for CLECs. It is important to

[26] *In re Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd. 9923, 9939 ¶ 41 (2001) ("*Seventh Report and Order*").
[27] *Id*. and n.93.
[28] *Id.*
[29] *Id.* at 9925, ¶ 3.
[30] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd. 17989 (2007) ("*2007 Just and Reasonable Rates NPRM*").
[31] *Id.* at 17994, ¶ 10 (emphasis added).

note that, although Aureon is a dominant carrier, Section 61.26 is contained in Subpart C of Part 61 of the Commission's rules, and is entitled "General Rules for Nondominant Carriers."

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.[32]

The Commission affirmed that Section 61.38 carriers were required to continue to set their rates based on projected costs and traffic. This confirmed that rate benchmarks did not apply to Aureon – a Section 61.38 carrier.

As explained in Aureon's Legal Analysis filed in response to AT&T's Complaint, Aureon has always filed cost and traffic studies as a dominant carrier in accordance with Section 61.38, and the FCC has always required Aureon to file such materials in support of Aureon's CEA tariff rate.[33] Aureon developed the cost support for its CEA tariff rates consistent with the procedures for ILECs in order to help the Commission follow the methodology used to calculate the tariff rate for CEA service.[34] Unlike CLECs subject to rate benchmarking, forbearance from the tariff filing requirements, and the detariffing regime established in the *Seventh Report and Order*, Aureon was required to continue to perform cost and traffic studies in compliance with the FCC's accounting and jurisdictional separation rules to ensure that its CEA tariff rate was

[32] *Id*.
[33] Aureon Legal Analysis at 9 (explaining that FCC staff requested that Aureon provide the cost and traffic studies required by Section 61.38 for its 1988 tariff filing).
[34] *Id*. at 37 (citing Aureon's 2016, 2014, and 2013 Tariff Filings).

just and reasonable. This is in stark contrast to "nondominant CLECs" that are "subject to minimal rate regulation" described in the *2007 Just and Reasonable Rates NPRM*.

It is "a clear tenet of administrative law that if the [FCC] wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction."[35] "[A]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored".[36] In this case, nowhere in the *2011 USF/ICC Transformation Order* did the Commission indicate that it intended to depart from its prior CLEC benchmark decisions that CLECs are non-dominant carriers. The *2011 USF/ICC Transformation Order* does not state that a CLEC could ever be required to calculate its tariff rates pursuant to the cost studies required by Section 81.38 or the full panoply of accounting, separations, and cost allocation rules adopted for ILECs. The order also made no mention at all that the FCC intended to subject dominant carriers, such as Aureon, to the CLEC benchmark rates or forbearance from the Act's tariff filing requirements.

The FCC cannot depart from its own prior precedent "without explicitly recognizing that it is doing so and explaining why."[37] The FCC has a "duty to explain its departure from prior norms . . . . Whatever the grounds for departure from prior norms, however, it must be clearly set forth so that [a] reviewing court may understand the basis of the agency's action and may so judge the consistency of that action with the agency's mandate".[38] In order to enact the Commission's newly announced policy that Aureon is a dominant carrier subject to non-dominant CLEC benchmarking rules, but at the same time, that Aureon cannot benefit from the

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[35] *Nat'l Black Media Coal. v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) (citations omitted).
[36] *Id.* (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923 (1971)).
[37] *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989).
[38] *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 808-09 (1973).

"minimal rate regulations" afforded to CLECs, the Commission was required to specifically acknowledge the change in policy and explain why it was doing so. Neither the *2011 USF/ICC Transformation Order* nor the *November 2017 Order* acknowledged or explained the Commission's deviation from its prior decisions that CLECs are non-dominant carriers that do not file cost support to support their tariff rates.

Moreover, as recently as April 2017, a meeting with FCC's staff confirmed that Aureon was not a LEC, which confirmed the FCC's prior decisions that CLEC rate regulations did not apply to dominant carriers such as Aureon. Specifically, on April 25, 2017, Aureon met with members of the FCC's Wireline Competition Bureau to discuss issues raised by Aureon's contract tariff filings, and by AT&T's Petition for Forbearance from enforcement of certain switched access stimulation rules.[39] During that meeting, FCC staff stated that Aureon was not a LEC.[40] This left Aureon with the impression that because FCC staff was of the opinion that Aureon was not a LEC, that meant that Aureon was not an ILEC or a CLEC. With respect to Aureon's contract tariff filing, the FCC's staff stated that Aureon could not establish its rates by contract.[41] This statement was inconsistent with the permissive tariff filing rules for CLECs, which permit contract rates to be negotiated above the CLEC rate benchmark.[42] Given FCC staff's opinion expressed at the meeting, it was reasonable for Aureon to continue to operate under its current rate regulatory regime, i.e., that Aureon was a dominant carrier required to file

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[39] Declaration of Frank Hilton ¶ 2, attached hereto as Exhibit A (F. Hilton Decl.); *see also* Aureon Ex Parte Letter, WC Docket No. 16-363 (filed Apr. 26, 2017).
[40] F. Hilton Decl. ¶ 2.
[41] *Id.*
[42] *Seventh Report and Order*, 16 FCC Rcd. at 9965, ¶ 82 ("[[A] CLEC must negotiate with an IXC to reach a[n agreement] before it can charge that IXC access rates above the benchmark.")

cost studies in support of its tariff rate, and that non-dominant CLEC regulations were not applicable to Aureon.

In light of the FCC's rules and prior orders stating that: (1) the CLEC rate benchmarking rules only apply to non-dominant carriers; (2) dominant carriers are required to file cost studies to support their tariff rates but CLECs are relieved of those requirements; and (3) FCC staff's statement that Aureon was not a LEC and could not negotiate contract rates, it was impossible for Aureon to determine with "ascertainable certainty" that the FCC expected Aureon to comply with CLEC rate regulations. Furthermore, it was reasonable for Aureon to calculate its tariff rate in accordance with cost studies and Section 61.38 dominant carrier regulations as Aureon has always done.[43] If the *2011 USF/ICC Transformation Order* had been intended to apply to Aureon, then all of the CLEC rules adopted in that order would apply to Aureon, including relief from conducting cost studies. However, the *November 2017 Order* ruled that Aureon was required to comply with the CLEC rate benchmark, and unlike CLECs – which are non-dominant – also file tariff cost support materials to calculate Aureon's tariff rate.[44]

As a result of the *November 2017 Order*, Aureon is the only entity in the entire country that is classified as a <u>dominant</u> CLEC that is required to file cost studies in order to support its tariff rate. Before the Commission may regulate Aureon in that manner, the FCC is required to provide fair notice so that that Aureon is afforded "a meaningful opportunity to adjust" its rates to comply with the new regulatory regime. Because the FCC did not provide such notice and

[43] *See, Gen. Elec. Co.*, 53 F.3d at 1334 (no fair warning if regulated party's interpretation of agency regulation is reasonable).
[44] *Id.* at 19, ¶ 38 ("Aureon is directed to file a revised interstate tariff . . . *and must include required cost support*.") (emphasis added).

allow Aureon the opportunity to comply with the CLEC rate benchmark, albeit with dominant carrier cost support, the FCC cannot retroactively enforce CLEC rate regulations against Aureon.

3. The FCC Cannot Retroactively Apply a New Rule Against Aureon to Void Aureon's 2013 Tariff Rate.

Courts have refused "to enforce administrative orders when . . . the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests."[45] The following factors are considered: (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[46] All of the foregoing *Retail v. NLRB* factors favor Aureon, and militate against retroactive application of the Commission's new dominant/non-dominant carrier rate regulation to void Aureon's 2013 CEA tariff rate.[47]

a. Whether the Particular Case is One of First Impression

The FCC has never ruled that access charges for dominant carriers that are subject to detailed accounting requirements are also governed by CLEC benchmark rules. The FCC's rules and orders consistently treat CLECs as non-dominant carriers that are not required to submit cost studies in support of their rates.[48] Nonetheless, the *November 2017 Order* held for the first time that Aureon was a dominant carrier and a CLEC subject to the CLEC rate benchmark, and that

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[45] *Id.* (citations omitted).
[46] *Id.*
[47] *See Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("*Retail v. NLRB*").
[48] *See*, e.g., *2007 Just and Reasonable Rates NPRM* at 17994, ¶ 10 (CLECs are non-dominant carriers); Section 61.26 (found in the section "General Rules for Nondominant Carriers.").

Aureon was required to file cost studies to support its tariff rate even though all other CLECs are exempt from that requirement. Aureon is the only carrier in the entire nation that is subject to both dominant carrier cost study and CLEC rate benchmark requirements.

Furthermore, 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."[49] 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 of tariff requirements in the Act only for non-dominant CLEC tariffs so that CLEC tariff rates in excess of CLEC rate benchmarks would be void *ab initio*.[50] The Commission has never adopted forbearance from the Act's tariff requirements for dominant carriers like Aureon.

The two cases cited by the Commission in support of its decision that Aureon's 2013 tariff filing was void *ab initio* do not involve dominant carrier tariffs subject to mandatory detariffing.[51] Rather the *Global NAPs*[52] and *Great Lakes Comnet*[53] decisions involved CLEC tariffs subject to mandatory detariffing. In *Global NAPS v. FCC*, GNAPs filed a non-dominant

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[49] *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).
[50] *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)).
[51] *November 2017 Order* at 16, ¶ 29.
[52] *Global NAPs, Inc. v. FCC*, 247 F.3d 252 (D.C. Cir. 2001).
[53] *AT&T v. Great Lakes Comnet, Inc.*, 30 FCC Rcd. 2586 (2015) ("*AT&T v. Great Lakes*"), *remanded in part, aff'd in part*, *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016) ("*Great Lakes Comnet v. FCC*").

carrier tariff, which took effect on only one day's notice,[54] i.e., the tariff was not filed pursuant to Section 204(a)(3) to become a lawful tariff. GNAPs attempted to tariff a charge on Internet-bound calls, even though "the Commission expected carriers to enter into interconnection agreements" for the compensation of Internet-bound traffic.[55] In contrast, Aureon's 2013 tariff filing involved a dominant carrier tariff filed on 15 days' notice pursuant to the Section 204(a)(3) deemed lawful procedures, and did not involve a service that was not permitted to be tariffed.

The Commission's reliance on the *AT&T v. Great Lakes* is similarly unavailing.[56] That case is inapposite because it involved the tariff of a non-dominant carrier subject to mandatory detariffing, rather than a dominant carrier tariff. Furthermore, like the tariff at issue in *GNAPs v. FCC*, Great Lakes' tariff was only filed on one days' notice,[57] and therefore the statutory 15-day deemed lawful mechanism in Section 204(a)(3) was not involved. In determining that Great Lakes' tariff was void *ab initio*, the FCC stated that "[a] CLEC tariff for interstate switched access services that includes rates in excess of the applicable benchmark in Section 61.26 is subject to mandatory detariffing", and CLECs must negotiate an agreement with IXCs to charge a higher rate.[58] Section 61.26 is only applicable to non-dominant carriers. Aureon, however, is a dominant carrier, and it cannot charge for CEA service by contract, and must do so by tariff.

[54] *Global NAPs v. FCC*, 247 F.3d at 393.
[55] *Id*. at 397-98.
[56] *November 2017 Order* at 16, ¶ 29 n.163 (citing *AT&T v. Great Lakes*, 30 FCC Rcd. at 2595, ¶¶ 28-29).
[57] *AT&T v. Great Lakes*, 30 FCC Rcd. at 2589, ¶ 11 n.37 ("GLC filed its tariff on one-day's notice.").
[58] *Id* at 2595, ¶ 28 (citing *Seventh Report and Order*, 16 FCC Rcd at 9956, ¶ 82 ("[A] CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark . . . . we adopt mandatory detariffing for access rates in excess of the benchmark.")).

Contrary to the CLEC tariff regime, the *November 2017 Order* specifically directed Aureon to file a reduction to its tariff rate with cost support required of only dominant carriers.

The FCC has never exercised forbearance for tariffs filed by dominant carriers, such as Aureon, and it has never adopted an explicit rule that would void *ab initio* a dominant carrier's tariff rate. Therefore, Aureon's 2013 dominant carrier tariff filing established the deemed lawful rate and was not void *ab initio*. To void Aureon's dominant carrier tariff rate without first forbearing from the Act's tariff filing requirement for dominant carriers is a case of first impression.

b. Whether the New Rule Represents an Abrupt Departure From Well-Established Practice or Merely Attempts to Fill a Void

The FCC established the CLEC rate benchmark in 2001 so that CLECs, which are non-dominant carriers, had a bright line rule to determine if their rates were just and reasonable.[59] CLEC rates above the CLEC rate benchmark are subject to forbearance from the Act's tariff requirements, mandatorily detariffed, and void *ab initio*. Dominant carriers are required to conduct cost studies to establish their tariff rates in accordance with Section 61.38, and none of the FCC's prior decisions, including the *2011 USF/ICC Transformation Order* and the *November 2017 Order*, change that requirement. Indeed, as discussed above, FCC staff recently confirmed that Aureon was not a LEC and could not establish rates by contract, which confirmed that Aureon was not subject to the CLEC rate benchmark or forbearance from the Act's tariff requirements. The FCC continues to regulate Aureon as a dominant carrier, and requires Aureon to file cost studies to support its CEA tariff rate. However, the *November 2017 Order* established an entirely brand new regulatory framework that is only applicable to Aureon, requires Aureon to file cost support to justify its rates, to cap its rates at the CLEC rate

[59] *Seventh Report and Order*, 16 FCC Rcd. at 9939, ¶ 41.

benchmark without the benefit of being relieved from cost study requirements, and imposes forbearance to the filing of Aureon's dominant carrier tariff in order to void Aureon's 2013 tariff filing retroactively. The *November 2017 Order* is a radical departure from the Commission's prior policies and rules that Aureon file cost studies to support its CEA rate, while relieving CLECs from burdensome legacy regulation. The *November 2017 Order* is also an abrupt departure from the FCC's prior orders, which apply forbearance and mandatory detariffing to only non-dominant carrier tariff rates. Accordingly, the second factor favors Aureon.

c. The Extent to Which the Party Against Whom the New Rule is Applied Relied on the Former Rule

The third factor favors Aureon because Aureon has relied on Section 61.38 to perform the necessary cost studies, and to bill its IXC customers for CEA service. From the time that Aureon has filed its initial tariff with the FCC, Aureon has calculated it rates in accordance with Parts 32, 36, 64, and 69 of the FCC's rules. Aureon also relied upon the former rule, which did not apply forbearance from the Act's tariff requirements and mandatory detariffing to dominant carrier tariffs. In the absence of such forbearance, Aureon's tariff rate cannot be void *ab initio*.

Had the Commission provided Aureon with the required fair notice that Aureon would also be subject to non-dominant carrier CLEC rate regulations, Aureon would have been able to adjust its CEA rates accordingly. However, now that the Commission has, for the first time, ruled that Aureon is subject to CLEC rate regulations, Aureon cannot go back and adjust its historic rates. The company now faces the potential of losing millions of dollars in the damages portion of the AT&T complaint proceeding, and other carriers could seize upon this opportunity to file similar complaints making retroactive claims. Aureon has reasonably relied on the FCC's prior dominant carrier tariff rate regime, and the *November 2017 Order* retroactively changes the rules, thus exposing Aureon to potential massive liability. Such a result would work a manifest injustice against Aureon.[60]

d. The Degree of the Burden the Retroactive Order Imposes

The fourth factor strongly favors Aureon because the retroactive application of CLEC rate regulations and tariff forbearance to Aureon would expose the company to a potential multimillion dollar loss, with additional potential liability to other IXCs. Moreover, Aureon would be saddled with dominant carrier tariff regulations that require the company to maintain structural and accounting separations, and perform burdensome cost and traffic studies in order to support its CEA rate, without any of the benefits of being classified as a CLEC. By treating Aureon as a CLEC, the CLEC rate regulations prevent Aureon from earning its authorized rate of return as a dominant carrier,[61] but do not relieve Aureon from legacy dominant carrier regulations. The retroactive application of the FCC's new CLEC classification on Aureon would be extremely burdensome and inequitable, particularly since the FCC did not provide any notice that Aureon would be regulated as a CLEC, and that Aureon's 2013 tariff filing would be subject to forbearance from the Act's tariff requirements, mandatorily detariffed, and void retroactively.

e. The Statutory Interest in Applying a New Rule Despite the Reliance of A Party on the Old Standard

The final *Retail v. NLRB* factor also favors Aureon. The FCC's CLEC rate benchmark was adopted in order to ensure that CLEC access charges were just and reasonable.[62] The FCC achieved this by applying forbearance from the Act's tariff requirements to void rates above the

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[60] The FCC's *November 2017 Order* is a decision that substitutes new law for old law that was reasonable clear, and it is not merely a new application, clarification, or addition to existing law. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C.Cir.2001). To the extent that the order falls into the latter category of decisions, retroactivity would still not apply because it works a manifest injustice against Aureon. *See AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006).
[61] *See* Aureon Legal Analysis at 9-10, 34-35, 37 (discussing large negative rates of return).
[62] *Seventh Report and Order*, 16 FCC Rcd. at 9925, ¶ 2.

CLEC rate benchmark. There is no statutory interest in applying the CLEC rate benchmark and forbearance to Aureon's tariff rate because the Section 61.38 regulatory regime already ensures that Aureon's tariff rates are just and reasonable.

C. The Commission's Decision that Aureon's 2013 Tariff was Void *Ab Initio* is Contrary to FCC and Court Decisions.

The FCC's decision that Aureon's 2013 tariff rate was void *ab initio* does not comport with its orders or court decisions regarding dominant carrier tariffs that are not subject to tariff forbearance and are deemed lawful pursuant to Section 204(a)(3) of the Act.[63] In *V.I. Telco*, the U.S. Court of Appeals for the D.C. Circuit explained the distinction between "legal" and "lawful" tariffs, and the operation of the streamlined tariffing procedures under Section 204(a)(3) for a tariff to become "deemed lawful".

> Courts adjudicating ratemaking cases have long drawn a distinction between "legal" and "lawful" tariffs. A legal tariff is a tariff that is procedurally valid – it has been filed with the Commission, the Commission has allowed it to take effect, and it contains the published rates the carrier is permitted to charge. A lawful tariff is a tariff that is not only legal, but also contains rates that are "just and reasonable" within the meaning of § 201(b). There are two ways for a merely legal tariff to become substantively lawful. The tariff can be so adjudged in a hearing before the Commission, or it can be "deemed lawful" if it is filed in a "streamlined" manner pursuant to 47 U.S.C. § 204(a)(3). A streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect.[64]

"Section 204(a)(3) provides, in pertinent part, that a tariff filed [in a streamlined manner pursuant to Section 204(a)(3)] '*shall be deemed lawful* and shall be effective 7 days [for a rate decrease] or 15 days [for a rate increase] after the date on which it is filed with the Commission unless the Commission takes action . . . before the end of that 7-day or 15-day period."[65]

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[63] 47 U.S.C. § 204(a)(3).
[64] *V.I. Telco*, 444 F.3d at 669 (citations, internal quotation marks, and modifications omitted).
[65] *Id*. n.2 (citing 47 U.S.C. § 204(a)(3)) (emphasis and modifications original).

In the FCC's *Streamlined Tariff Order*, the Commission interpreted the "deemed lawful" provision in Section 204(a)(3) as "establish[ing] a conclusive presumption of reasonableness."[66] Specifically, the Commission stated as follows:

> [A] streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect.[67]

Therefore, "a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect."[68] Indeed, the U.S. Court of Appeals for the D.C. Circuit has ruled that, consistent with the FCC's reasoning in the *Streamlined Tariff Order,* rates in a deemed lawful tariff are *per se* reasonable.[69] "A carrier charging rates under a lawful tariff . . . is immunized from refund liability, even if that tariff is found unlawful in a later complaint or rate prescription proceeding."[70] The U.S. Supreme Court has held that once a tariff becomes effective, any nullification of that tariff can only act prospectively.[71] Under the Supreme Court's filed rate doctrine decisions, even tariffs that contain substantively unlawful rates must be enforced.[72]

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[66] *Streamlined Tariff Order*, 12 FCC Rcd. at 2181-82, ¶ 19.
[67] *Id* at 2182.
[68] *Id.* at 2182, ¶ 19.
[69] *ACS of Anchorage*, 290 F.3d at 411-13.
[70] *V.I. Telco*, 444 F.3d at 669.
[71] *ICC v. Am. Trucking Ass'ns, Inc.*, 467 U.S. 354 (1984).
[72] *Sec. Servs. v. Kmart Corp.*, 511 U.S. 431, 455 (1994). *See also, e.g., Davis v. Portland Seed Co.*, 264 U.S. 403 (1924) (tariff enforceable despite unlawful rates); *Berwind-White Coal Mining Co. v. Chicago & E. R.R.*, 235 U.S. 371 (1914) (tariff enforceable despite nonconformity to page format requirements); *Genstar Chem. Ltd. v. ICC*, 665 F.2d 1304 (D.C. Cir. 1981) (tariff enforceable despite insufficient notice prior to effective date), *cert. denied,* 456 U.S. 905 (1982).

Aureon filed its 2013 CEA tariff on 15 days' notice.[73] AT&T did not file a petition to suspend the tariff,[74] and the FCC did not suspend or investigate the tariff.[75] Accordingly, Aureon's tariff became a deemed lawful tariff 15 days after filing, and the FCC cannot later rule that such a dominant carrier tariff was void *ab initio* and award damages retroactively. Refunds from lawful tariffs are "impermissible as a form of retroactive ratemaking."[76] Remedies against dominant carriers charging lawful rates later found unreasonable must be prospective only.[77] The Commission's statement that "Aureon's Tariff was not 'deemed lawful' when filed"[78] misses the point of the Section 204(a)(3) tariff filing process established by Congress. A tariff filed on 15 days' notice is not deemed lawful when filed. Rather, the 15-day period provides the Commission with the opportunity to suspend or investigate the proposed rate increase, and for petitions to suspend to be filed by the public. It was not until the 15th day after filing that Aureon's dominant carrier tariff was granted "deemed lawful" status pursuant to Section 204(a)(3). If the Commission can retroactively void a dominant carrier tariff that is not subject to forbearance and that the Commission did not suspend or investigate within the 7 or 15 day period established by Congress, that would render the deemed lawful provisions in Section 204(a)(3) impotent and meaningless.

D. The CLEC Rate Benchmark Applicable to Aureon's CEA Service is the NECA Rate.

1. Assuming that Aureon is a CLEC, Aureon Meets the Definition of a "Rural CLEC," and Qualifies for the Rural Exemption in Section 61.26(e).

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[73] Joint Statement at 8, Proceeding Number 17-56, Bureau ID Number EB-17-MD-001 (filed July 20, 2017), Stipulated Facts 62 and 63.
[74] Joint Statement at 8, Stipulated Fact 64.
[75] Joint Statement at 8, Stipulated Fact 65.
[76] *ACS of Anchorage*, 290 F.3d at 411.
[77] *See id.*; *Streamlined Tariff Order*, 12 FCC Rcd. at 2182-83.
[78] *November 2017 Order* at 16, ¶ 29.

If the FCC ultimately determines that Aureon will be regulated as a CLEC that is subject to the CLEC benchmarking rules, Aureon would meet the definition of a rural CLEC, and Aureon requests that the Commission reconsider its decision to not specify the CLEC rate benchmark that it intends to apply to Aureon's tariff rates.[79] There is an adequate record showing that the CLEC rate benchmark for Aureon's CEA tariff rates are the rates set forth in NECA Tariff F.C.C. No. 5. Furthermore, as the definition in the Commission's rules of a "rural CLEC" defines the CLEC benchmark for Aureon as a matter of law, no further factual inquiry is necessary.

The Commission's regulations define a rural CLEC as "a CLEC that does not serve (i.e., terminate traffic to or originate traffic from any end users located in either" an incorporated place with more than 50,000 residents, or an urbanized area.[80] In the underlying FCC order leading to the U.S. Court of Appeals decision in *Great Lakes v. FCC*, the Commission ruled that Great Lakes did not meet the definition of a rural CLEC because Great Lakes had "transport facilities in urban areas, including Chicago, Illinois."[81] The U.S. Court of Appeals disagreed because Section 61.26(a)(6) defines a rural CLEC as a carrier that "serve[s] . . . any end users" in an urban area, not if it has 'transport facilities' in an urban area."[82] Like Great Lakes, Aureon only has tandem switching and transport facilities, and, as recognized by the Commission, Aureon does not serve any end users.[83] Because Aureon does not serve any end users, it is by definition a rural CLEC.

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[79] *Id*. at 13, ¶ 24.
[80] 47 C.F.R. § 61.26(a)(6).
[81] *Great Lakes Comnet v. FCC*, 823 F.3d at 1004.
[82] *Id*.
[83] *November 2017 Order* at 3, ¶ 6 (citing Joint Statement at 4, Stipulated Fact 26).

Section 61.26(e) allows rural CLECs to charge rates above the benchmark rate.[84] That section provides that a rural CLEC competing against a non-rural ILEC may charge rates for access service up to the rate in NECA Tariff F.C.C. No. 5, assuming the highest rate band for local switching. Because Aureon meets the definition of a rural CLEC, and it qualifies for the rural exemption in Section 61.26(e), the Commission should confirm that the CLEC rate benchmark for Aureon's CEA service are the rates in the NECA tariff.

2. The NECA Rates Also Apply Because Aureon Provides Service to Rural Areas.

Even if, *arguendo*, Aureon did not meet the definition of a rural CLEC and qualify for the rural CLEC exemption, the CLEC rate benchmark for Aureon's CEA service would be the NECA tariff rates. Section 61.26(f) states that a CLEC's tariff rates "may not exceed the rate charged by the competing ILEC."[85] The competing ILEC is the ILEC "that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC."[86] In this case, the applicable competing ILEC would be those ILECs that subtend Aureon's network.

As the Commission is aware, Aureon was created by rural ILECs to solve the problem of how to achieve competition in small rural communities.[87] Aureon's CEA service does not provide service to any end users. Rather, CEA service enables IXCs to complete their customers' long distance telephone calls, without building their own networks, by connecting the IXC's facilities to the ILECs' networks.[88] The ILECs that would provide interstate exchange access service to the extent such services are not provided by Aureon are the rural ILECs

[84] 47 C.F.R. § 61.26(e).
[85] 47 C.F.R. § 61.26(f).
[86] 47 C.F.R. § 61.26(a), (f)
[87] Aureon Legal Analysis at 2.
[88] Joint Statement at 4, Stipulated Fact No. 21.

subtending Aureon's network because they are the ILECs that serve the end user customers. It is Aureon's understanding that nearly all of the subtending ILECs are participants in NECA Tariff F.C.C. No. 5.

The rates in NECA's tariff are the only practical benchmark for the rates of the 200 LECs subtending Aureon's CEA network. Aureon does not currently track the rates of each subtending LEC, and its software is only designed to bill its IXC customers for CEA service at Aureon's filed rate.[89] It would be extremely expensive and burdensome for Aureon to acquire and implement the necessary infrastructure and software to track the rates for hundreds of subtending LECs, and then bill a different rate to IXCs depending upon the exchange where a call originates or terminates.[90] Accordingly, because the ILECs subtending Aureon's network are the competing ILECs for purposes of Section 61.26(f), the FCC should confirm that the CLEC rate benchmark for Aureon's CEA service are the rates in the NECA tariff.

III. CONCLUSION

Wherefore, for the foregoing reasons, the FCC should grant Aureon's Petition, and issue an order reversing the Commission's *November 2017 Order* in part as requested above.

Respectfully submitted,

/s/ James U. Troup

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d/b/a/ Aureon Network Services

Dated: December 8, 2017

89 F. Hilton Decl. ¶ 3.
90 *Id*.

EXHIBIT A

Declaration of Frank Hilton

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	Proceeding No. 17-56
	)	Bureau ID No. EB-17-MD-001
v.	)	
	)	
Iowa Network Services, Inc., d/b/a	)	
Aureon Network Services,	)	
	)	
Defendant.	)	

DECLARATION OF FRANK HILTON

I, FRANK HILTON, hereby declare as follows:

1. I am the Vice President of Business Consulting for Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon"). I make this declaration voluntarily in support of Aureon's Petition for Reconsideration of the FCC's November 8, 2017 Memorandum Opinion and Order issued in the above-captioned proceeding. I have more than forty years' experience in the IT and telecommunications industries, and have worked for Aureon for approximately twenty years. My responsibilities at Aureon include overseeing Aureon's systems related to collecting network usage data, ensuring that information collected by the network regarding traffic routed over Aureon's network is coordinated with the preparation and issuance of invoices to carriers that use Aureon's centralized equal access ("CEA") service provided though Aureon's network, and maintaining call detail records and related information that may be needed for disputes from other carriers regarding bills issued by Aureon for CEA service. The information provided herein is based on my personal knowledge.

2. On April 25, 2017, Aureon's representatives met with members of the FCC's Wirelines Competition Bureau to discuss issues raised by Aureon's contract tariff filing, and by AT&T's Petition for Forbearance from enforcement of certain switched access stimulation rules. Aureon's representatives in attendance were Justyn Miller and me from Aureon Network Services, James U. Troup of Fletcher, Heald, and Hildreth, and John Kuykendall and Valerie Wimer of JSI. During that meeting, we discussed Aureon's provision and tariffing of CEA service. It was during that discussion that one of the FCC staff members stated that Aureon was different from a LEC, and that Aureon could not negotiate a contract to establish its rates, but instead must file all rates in Aureon's tariff.

3. It is my understanding that one of the issues raised in the Petition for Reconsideration is the burden to Aureon if the company's rates were subject to different rate caps depending upon the rates billed by each local exchange carrier ("LEC") that subtends Aureon's network. Aureon does not currently track the rates of each subtending LEC, and its software is only designed to bill its IXC customers for CEA service at Aureon's filed tariff rate. It would be extremely expensive and burdensome for Aureon to acquire and implement the necessary infrastructure and software to track the rates for hundreds of subtending LECs, and then bill a different rate to the IXCs depending on the exchange where the call originates or terminates. As most of the ILECs subtending Aureon's CEA network participate in the NECA tariff, a CLEC rate benchmark based on the NECA tariff rates would be more feasible for Aureon to implement.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2017.

Frank Hilton

Frank Hilton

NOTARIAL SEAL IOWA
KAYLYNN COULTER
Commission Number 803152
My Commission Expires
March 7, 2020

12/7/17 Kaylynn Coulter

CERTIFICATE OF SERVICE

I, Monica Gibson-Moore, do hereby certify that on this 8th day of December 2017, copies of the foregoing Petition for Reconsideration of Iowa Network Services, Inc. d/b/a Aureon Network Services were sent to the following:

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/s/ Monica Gibson-Moore
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