BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
COMPLAINT OF CONCORD TELEPHONE EXCHANGE, INC., HUMPHREYS COUNTY TELEPHONE CO., TELLICO TELEPHONE COMPANY, TENNESSEE TELEPHONE COMPANY, CROCKETT TELEPHONE COMPANY, INC., PEOPLES TELEPHONE COMPANY, WEST TENNESSEE TELEPHONE COMPANY, INC., NORTH CENTRAL TELEPHONE COOP., INC. AND HIGHLAND TELEPHONE COOPERATIVE, INC. AGAINST HALO WIRELESS, LLC, TRANSCOM ENHANCED SERVICES, INC AND OTHER AFFILIATES FOR FAILURE TO PAY TERMINATING INTRASTATE ACCESS CHARGES FOR TRAFFIC AND OTHER RELIEF AND AUTHORITY TO CEASE TERMINATION OF TRAFFIC	)	**DOCKET NO. 11-00108**

ORDER DENYING MOTIONS TO DISMISS

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("TRA" or "Authority") at a Scheduling Conference held on December 12, 2011 on the Motions to Dismiss filed by respondents Halo Wireless, Inc. ("Halo") and Transcom Enhanced Services, Inc. ("Transcom"). This matter is on remand to the TRA from the United States District Court for the Middle District of Tennessee. For the reasons stated below, the Motions are DENIED and this matter is ready for further proceedings before the Authority to be set forth in a procedural schedule.

Travel of the Case

On July 7, 2011, a number of rural telephone companies (the "RLECs") filed a complaint in the TRA against Halo, Transcom, and "such other affiliated companies as are involved in the delivery of traffic" to the RLECs, alleging that respondents "have failed and refused to pay the

applicable intrastate access charges" due the RLECs. Halo and Transcom filed their Motions to Dismiss on August 5, 2011.[1] On August 10, 2011, Halo filed a Suggestion of Bankruptcy informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Texas (Sherman Division)."[2] Accordingly, Halo stated, "the automatic stay is now in place" and "prohibits further action against both [Halo] and Transcom in the instant proceeding."[3] By letter filed on August 16, 2011, the RLECs informed the TRA that because of the automatic stay they would not be filing a response to Halo's Motion to Dismiss. Also on August 16, 2011, the RLECs filed a response to Transcom's Motion to Dismiss, explaining by letter that the automatic stay applied only to Halo.

On August 19, 2011, counsel for Halo and Transcom filed a notice of removal to federal court, which references a separate notice of removal and states that this matter has been removed "to the United States District Court for the Middle District of Tennessee, Nashville Division . . . pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure."[4] Thus, this case was removed to the District Court because of the bankruptcy proceeding. On November 8, 2011, the TRA received the Order of the District Court remanding this case to the TRA, which was entered by the District Court on November 3, 2011. On November 10, 2011, the RLECs filed a letter informing the TRA that it may now hear this matter. The RLECs submitted copies of the District Court's order remanding this case to the TRA, the District Court's memorandum opinion, an order of the Bankruptcy Court granting a motion filed by TDS to determine that the automatic stay is not applicable to this complaint, and an order of the Bankruptcy Court denying Respondents motions for a stay pending their appeal of that order.

[1] *Complaint*, p. 2 (July 7, 2011).
[2] *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).
[3] *Id.*, at 2.
[4] *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).

The Bankruptcy Court's order, which is further discussed below, stated that this matter may go forward on a limited basis. The RLECs requested that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 "for appointing a Hearing Officer and other action as necessary."[5] The RLECs also requested an expedited hearing and proposed that the TRA require direct testimony to be filed by December 8, 2011, that rebuttal testimony be filed by December 15, 2011, that surrebuttal testimony be filed by December 22, 2011, and that a hearing be scheduled for January 9, 2012. On November 16, 2011, the RLECs filed a motion to amend their complaint.

On November 17, 2011, Halo filed a Motion to Abate, in which Halo requested that the TRA "abate" this proceeding until conclusion of Halo's appeal of the Bankruptcy Court's October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit. Also on November 17, 2011, Halo submitted a letter stating its objections to the procedural schedule proposed by the RLECs. TDS Telecom responded to this letter on November 18, 2011, and Halo replied to this response on November 21, 2011. On December 1, 2011, Halo filed its opposition to the RLECs motion to amend their complaint, and the RLECs filed their response to the motions to dismiss.

Consideration of This Matter During the November 21, 2011 Authority Conference

This matter came before the Authority at the regularly scheduled Authority Conference held on November 21, 2011. At that time, the Authority voted unanimously to deny the motion to abate and to convene a contested case in this matter and appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.

[5] Letter from H. LaDon Baltimore to Chairman Kenneth C. Hill, p. 1 (November 10, 2011).

November 21, 2011 Scheduling Conference and December 12, 2011 Status Conference

Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter, at the conclusion of which the Hearing Officer directed the parties to file responses to the pending motions and to reconvene for a status conference on December 12, 2011. This matter was reconvened before the Hearing Officer pursuant to notice on December 12, 2011, at which time the parties were heard on the pending motions. The following parties were represented on both occasions as follows:

> **For the Rural Local Exchange Carriers – H. LaDon Baltimore, Esq., Norman J. Kennard, Esq.,** Farris Mathews Bobango PLC, 618 Church Street, Suite 300, Nashville, TN 37219
>
> **For Halo Wireless, Inc. and Transcom Enhanced Services, Inc. – Paul S. Davidson, Esq.**, Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.,** McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201 and **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Higway, Bldg. 2-235, West Lake Hills, TX 78746.

The District Court's Memorandum

> In its November 3, 2011 Memorandum, the District Court stated:
>
> Recently the Bankruptcy Court held that the various state commission proceedings involving the Debtor (Defendant Halo Wireless) are excepted from the Bankruptcy Code's automatic stay, pursuant to 11 U.S.C. § 362(b)(4), so that the commissions can determine whether they have jurisdiction and, if so, whether there is a violation of state law. . . . The Bankruptcy Court held that the automatic stay does apply to prevent parties from bringing or continuing actions for money judgments or efforts to liquidate the amount of the complainants' claims.[6]

The District Court further stated:

> Plaintiffs argue that the regulatory proceeding against Defendants in the TRA is not removable to federal court because it is a regulatory investigation, not a lawsuit. . . . Defendants, on the other hand, contend that this action was properly removed under Section 1452(a) because the TRA proceeding is a "civil action" and the TRA does not have jurisdiction because the claims implicate federal questions. . . . Defendants also assert that the claims for relief fall within the Federal Communications Commission ("FCC") exclusive original jurisdiction.[7]

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[6] *Concord Telephone Exchange, Inc. v. Halo Wireless, Inc., et al.*, Case No. 3-11-0796, M.D. Tenn., *Memorandum*, p. 2 (November 3, 2011).
[7] *Id.* at 3.

The District Court noted that although "[f]ederal district courts have jurisdiction to review certain types of decisions by state commissions," including decisions under the 1996 Telecommunications Act, "[h]ere, however, . . . there is no state commission determination to review."[8] The District Court added:

> This action concerns tariffs which are enacted and approved by the TRA and required under Tennessee law. Tenn. Code Ann. § 65-5-101. Plaintiffs contend that Defendants are violating state law, specifically Tenn. Code Ann. §§ 65-4-201 and 65-35-102. . . . Plaintiffs state that it is *intrastate* charges which are at dispute herein. . . . Under Tennessee law, the TRA "shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of [the Act]." Tenn. Code Ann. § 65-5-110(a).[9]

On this basis, the District Court remanded the complaint to the TRA, noting that "[t]he Bankruptcy Court has held that the TRA action may proceed except to the extent the parties attempt to obtain and/or enforce a money judgment."[10]

The Bankruptcy Court's Orders

In its Order of October 26, 2011, the Bankruptcy Court ruled that "pursuant to 11 U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending TDS Proceedings." The Bankruptcy Court further stated that

> any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such matters may be rendered; provided however, that nothing herein shall permit, as part of such proceedings:
> A. liquidation of the amount of any claim against the Debtor; or
> B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor.[11]

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[8] *Id.* at 4.

[9] *Id.* The "Act" referred to here is the comprehensive telecommunications legislation enacted in 1995 by the Tennessee General Assembly, 1995 Pub. Ch. 408, and not the federal Telecommunications Act of 1996. The District Court further noted that despite their assertion that only FCC has "original exclusive jurisdiction," Respondents asked the District Court "to transfer the action to the U.S. Bankruptcy Court for the Eastern District of Texas, not to the FCC." *Id.* and n. 6.

[10] *Id.*

[11] *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of TDS to Determine That the Automatic Stay Is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement*, p. 2 (October 26, 2011).

In an Order issued on November 1, 2011, the Bankruptcy Court denied Halo's motions for a stay pending an appeal of its October 26 Order. The Bankruptcy Court concluded that Halo had not "made a showing of irreparable injury absent a stay."[12] The Bankruptcy Court further stated:

> The harms alleged by the Debtor – *i.e.*, the cost of the proceeding before the state utility commissions and the potential for differing results amongst the commissions – are "part and parcel of cooperative federalism." *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010). On the other hand, the granting of a stay would substantially harm other parties by interfering with the state utility commissions' ability to regulate public utilities and by requiring creditors to continue providing services to the debtor in the future.[13]

The RLECs' Claims

The RLECs are incumbent local exchange carriers ("ILECs") operating in Tennessee pursuant to authority granted by the TRA or its predecessor, the Tennessee Public Service Commission. The RLECs allege that "Transcom's "'core service offering' is "voice termination services,'" which is "the intermediate routing of telephone calls between carriers for termination to the carrier serving the called party."[14] The RLECs allege that "Transcom accepts and re-delivers intrastate Tennessee telecommunications traffic to Halo Wireless for ultimate delivery to the Rural Telephone Companies."[15]

The RLECs further make the following key allegations:

> Halo Wireless employs the tariffed intrastate exchange access services of the Rural Telephone Companies.
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> Halo Wireless has failed and refused to pay the Rural Telephone Companies for terminating Halo Wireless' traffic to their end user customers, according to the rates, terms and conditions set forth in the RLEC's applicable tariffs.[16]

Based on these allegations and more detailed allegations set forth in the Complaint, the RLECs allege that Halo "has misrepresented the nature of its traffic by claiming it consists

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[12] *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy.E.D.Tex., *Order Denying Motions for Stay Pending Appeal*, p. 2 (November 1, 2011).
[13] *Id.*
[14] *Complaint*, p. 6 (July 7, 2011).
[15] *Id.*
[16] *Id.*, at 7.

entirely of its own intraMTA wireless originating calls in an effort to avoid liability for the payment of access charges" to the RLECs.[17] The RLECs further allege that "the traffic originated by Halo Wireless is predominately originated by unaffiliated, third party wireline carriers, including incumbent and competitive carriers, as well as cable companies."[18] Accordingly, "the RLECs believe that Halo Wireless and Transcom are operating, in concert, as interexchange carriers that terminate traffic to local exchange carriers, such as TDS Telecom on behalf of other carriers."[19]

Based on these allegations, the RLECs request from the TRA "a declaratory ruling . . . that intrastate wireline toll traffic and wireless interMTA traffic sent to them by Halo Wireless for termination to the RLEC's end users is subject to intrastate access charges"; "a Cease and Desist Order to prohibit Halo Wireless from providing telecommunications services in the State of Tennessee until such time as the TRA may hold a hearing on this matter"; "an Order directing Halo Wireless to pay all outstanding intrastate access charges including applicable interest"; "an Order finding that Halo Wireless has violated T.C.A. § 65-35-102(2)"; and "an Order finding that Transcom has violated T.C.A. § 65-35-102(2)."[20] The RLECs further request that the TRA "[o]pen an investigation concerning the actions cited in the Complaint" and "[c]ommence a contested case concerning these actions."[21]

Transcom's Motion to Dismiss

In its Motion to Dismiss, Transcom states that the TRA "completely lacks jurisdiction over the subject matter [of the Complaint] and over the person of Transcom."[22] Transcom states

[17] *Id.* at 11.
[18] *Id.*
[19] *Id.*
[20] *Id*, at 12-15.
[21] *Id.* at 16.
[22] *Motion to Dismiss*, p. 1 (August 5, 2011).

that the TRA "must suspend all consideration of the merits and any and all procedural orders pending its threshold decision on jurisdiction."[23] Transcom further states:

> The allegations, claims and requests for relief as against Transcom are purely and simply an attempted collateral and state-level attack on Transcom's federal regulatory classification. The complainants are necessarily asking the TRA to ignore express provisions in the Communications Act, and to act in the place of the FCC by finding that Transcom is not what it claims to be – i.e., an ESP as defined by the Communications Act and FCC rules – to the point that the TRA can impose state-level regulation and jurisdiction. The complainants then want the TRA to exercise such non-existent powers in a punitive and protective fashion.[24]

On this basis, Transcom asserts that:

> The TRA lacks jurisdiction over the subject matter and jurisdiction over Transcom's person, property and business. Only the FCC can resolve the threshold questions that could, possibly, then lead to the exercise of state-level jurisdiction and power. The complainants must take their complaint to the FCC, for the FCC has exclusive and primary original jurisdiction.[25]

Transcom bases this argument on the assertion that it has been granted certification, in essence, as an ESP:

> On four separate occasions, federal bankruptcy courts of competent jurisdiction have ruled, based on federal laws and regulations, that Transcom is an enhanced service provider and is not subject to payment of access charges. ESP status is a federal, national status. The TRA cannot even begin to assert any power over Transcom unless and until a federal forum with competent jurisdiction finds, after hearing, that Transcom is not an ESP. Any attempt by the TRA to attack Transcom's ESP status would be an attack on the jurisdiction of those federal tribunals, and would be an effort to change Transcom's federal status by a state ruling.[26]

Citing a decision of the United States Supreme Court which considered a certification by the Interstate Commerce Commission, Transcom states:

> State regulatory authorities do not have and may not assume the power to interpret the boundaries of federally authorized activities or to impose state level regulation on operations assertedly not within the federal authorization. See *Service Storage & Transfer Co. v. Virginia,* 359 U.S. 171, 178-79 (1959). The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the federal authorization to

[23] *Id* at 1
[24] *Id* at 3
[25] *Id* at 4.
[26] *Id* at 4.

> provide enhanced/information services. *Id* at 177; see also *Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989).[27]

Accordingly, Transcom concludes that "[n]o state commission has the jurisdiction to address this question or to interpret Transcom's federal regulatory status and then find some putative "exception" or "limitation" that is then used to subject Transcom to the kind of *quasi*-regulation the complainants ask the TRA to impose."[28]

On the issue of personal jurisdiction, Transcom essentially restates its argument on subject matter jurisdiction:

> The Tennessee legislature may have delegated jurisdiction and regulatory power over intrastate telecommunications services provided by common carriers. It did not, however, delegate jurisdiction and regulatory power over non-common carriers. The TRA does not have a shred of regulatory jurisdiction over end users that are not common carriers, and it most certainly has not been delegated any regulation or power over ESPs. Any assertion that Transcom is subject to the TRA's regulatory authority because Transcom is not an ESP and is an intrastate carrier could only be true if Transcom is not acting within and consistent with its federal authority to be a non-common carrier ESP, and to provide services that are not telecommunications and are not telecommunications service. The TRA lacks jurisdiction, power or authority to decide that question as shown above.[29]

Transcom adds that "[t]he jurisdiction of a tribunal is a threshold matter that must be determined at the outset of the proceeding." During the November 21, 2011 Scheduling Conference, counsel for the RLECs phrased Respondents' argument as "Does the TRA even have the jurisdiction to decide whether or not they have jurisdiction?"[30] Counsel for Respondents framed the issue in essentially the same terms.[31]

Halo's Motion to Dismiss

In its Motion to Dismiss, Halo states:

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[27] *Id* at 9-10.
[28] *Id* at 9.
[29] *Id* at 15.
[30] Transcript of Proceedings, p. 21 (November 21, 2011) (remarks of Mr. Kennard).
[31] *Id.* at 18 (remarks of Mr. Thomas).

> [The RLECs] implicitly ask the TRA to investigate the scope of Halo's federal authorization, interpret Halo's federal licenses in light of the complainants' alleged facts, and then conclude that Halo is somehow subject to state-level jurisdiction under *state law* because of perceived exceptions to binding and jurisdictional *federal law* that expressly prohibits state regulation of market entry and rates. The complainants assert that their *intrastate* tariffs apply to this traffic, and that Halo is somehow an intrastate access customer. To reach this conclusion, however, the complainants are necessarily asserting that the traffic is not "wireless" or "CMRS" and is *also* not "intraMTA" or otherwise *not* "non-access" traffic as defined by *FCC rules*.[32]

As proof of its alleged CMRS status, Halo offers the following:

> On January 27, 2009, the FCC issued Halo a *nationwide* license ("Radio Station Authorization" or "RSA"), a copy of which is attached hereto as **Exhibit 1**, to register and operate fixed and base stations in the 3650-3700 MHz band (a particular "slice" of FCC-controlled radio spectrum) and to support "mobile," "portable" and "fixed" subscriber stations throughout the domestic United States. Halo's service includes "broadband data" and Internet capabilities, but it also includes real-time, two-way switched voice service support that is interconnected with the public switched network. The "common carrier" RSA designation entitles Halo to "interconnect" with other carriers for the purpose of exchanging traffic. See 47 U.S.C. § 332(c)(1)(B); 47 C.F.R. § 20.3 (supplying definitions of "commercial mobile radio service," "interconnected," "interconnected service" and "public switched network").[33]

Halo then rehearses Transcom's theory of federal preemption, which the Respondents derive from *Service Storage*:

> The FCC has exclusive original jurisdiction to "authorize" the offering of purely or predominately interstate telecommunications service. 47 U.S.C. § 214(a)-(d). The FCC's rules implementing this part of section 214 give automatic and advance permission for a common carrier to provide interstate telecommunications service by wire or radio so long as the common carrier has the necessary authorization for any radio frequencies that it uses to do so. Unlike many states overseeing intrastate services, the FCC does not require prior application for or receipt of a "certificate." See 47 C.F.R. § 63.01(a). Therefore, even if and to the extent that any of Halo's services involve "wireline" communications (which Halo denies), Halo has *federal* authority to provide interstate "wireline" service, including telephone exchange service and exchange access service.[34]

[32] *Motion to Dismiss*, p. 2 (August 5, 2011).
[33] *Id* at 3.
[34] *Id.* at 4-5.

The RLECs' Response

In their response to the Motions to Dismiss, the RLECs attack the basis on which Respondents claim that further TRA action is federally preempted. First, as to Halo's alleged status as a CMRS, they state:

> Fundamentally, there is no such thing as a CMRS certificate, and Halo explains nothing in its Motion to show that what it does meets the very specific and limited definition of a CMRS service. Halo points to its free spectrum license and two tower registration locations in Tennessee (Gainesboro and Amherst), and asserts that it therefore must be offering CMRS.
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> . . .
>
> Halo has a simple license to use a very limited radio spectrum under which it *may*, but is not required to, provide CMRS. The 3650-3700 MHz spectrum can be used for any purpose, including private (not commercial) and fixed (not mobile) service.[35]

The RLECs state that "Halo and Transcom . . . have sought to convince state and federal courts that only the [FCC] can interpret its operations and apply the law," and [t]hey have made that same argument here."[36] However, the RLECs state, "[t]he FCC has now made that ruling and rejected Halo's claims that its operations exempt it from the traditional rules of compensation and that there are no intrastate toll calls in the traffic streams that it delivers to the RLEC Complainants for Transcom."[37] The RLECs report that:

> The FCC's Order of November 18, 2011 is very clear that Halo's traffic does not re-originate in the middle of a call when exchanged between Halo and Transcom customer using wireless spectrum. As the FCC describes:
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> > First, one wireless service provider [Halo] claims that calls that it receives from other carriers, routes through its own base stations, and passes on to third-party carriers for termination have "originated" at its own base stations for purposes of applying the intraMTA rule. As explained below, we disagree.
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> > ***
> >
> > We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the calls has done so through a CMRS provider. Where a

[35] *Response in Opposition to Motion to Dismiss Filed by Halo Wireless, LLC*, pp. 4-5 (December 1, 2011).
[36] *Id.* at 5.
[37] *Id.* at 6.

> provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.[38]

The RLECs conclude that the FCC has rejected the argument Respondents seek to make on the basis of Halo's possession of a spectrum license and alleged status as a CMRS:

> The FCC's ruling expressly acknowledges all of the same claims that Halo now repeats to this Authority, specifically that Transcom is an ESP and the connection between Halo and Transcom transforms all the calls into CMRS. The FCC, nevertheless, concludes that the calls do not re-originate with Halo and that the traditional rules of call rating apply.[39]

The RLECs summarize Respondents' argument as follows: "Halo describes the Complaint as 'impermissibly' seeking to regulate federal radio spectrum. It argues that "[t]he FCC is the exclusive 'first decider' and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued."[40] However, the RLECs state,

> Halo misconstrues this proceeding, RLEC Complainants are *not* asking the TRA to determine whether or not Halo's use of federal spectrum is permitted, although it has attempted to determine how it is used (if at all) so as to apply the proper regulatory classification. The RLEC complainants are *not* asking the TRA to determine whether Halo has violated the terms of its federal spectrum license. The complaint does *not* seek to regulate Halo's entry into the CMRS market (if it has) or the rates it charges end users (if it has any). RLEC complainants have *no* objection to Halo's physical network operation (whatever it may be) and do *not* seek compensation for any intraMTA traffic originated by Halo (if any). But these are *not* issues raised in this proceeding as there is no Halo-originated traffic in the traffic delivered to the RLEC complainants.[41]

The RLECs explain:

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[38] *Response*, p. 6, quoting *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform-Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report and Order And Further Notice Of Proposed Rulemaking released November 18, 2011 ("FCC November 18th Order") at ¶¶ 979 and 1006.

[39] *Response*, p. 7.

[40] *Id.* at 8-9.

[41] *Id.* at 9.

> 3650-3700 MHz service can be used to provide CMRS, but is not required to be used in this manner. As a result, holding a license in this spectrum does not necessarily mean that the holder is a CMRS provider.
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> . . .
>
> The FCC has made clear that 3650-3700 MHz licensees may choose to provide private or common carrier radio services. The FCC's rule provides:
>
> > § 90.1309 Regulatory status.
> >
> > Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. A licensee may render any kind of communication service consistent with the regulatory status in its license and with the Commission's rules applicable to that service.
>
> In adopting this rule, the FCC stated that the type of service *actually* provided will determine the regulatory classification and obligation of the licensee:
>
> > Licensees in the 3650 MHz band may provide services on a common carrier or non-common carrier basis and will have flexibility to designate their regulatory status based on any services they choose to provide.[42]

Accordingly, the RLECs contend:

> As the foregoing language makes clear, Halo may, in fact, use its free 3650-3700 MHz license to provide CMRS service, but such use is not required. The corollary to the FCC's licensing flexibility decision is that the nature of the service *actually* provided by Halo, rather than Halo's characterization of that service, will determine whether or not it qualifies as CMRS.
>
> Thus, Halo's primary case citations, under which much of its arguments that the TRA cannot "interpret" critically depend, are simply not relevant. Those cases relate to state interpretation of federal motor carrier certificates issued by the Interstate Commerce Commission ("ICC") and are inapposite here, where there is no CMRS or ESP certificate to interpret.[43]

As to Respondents' claims that Transcom has been certified as an ESP, the RLECs state that they "do not suggest that Halo is not entitled to serve an ESP. [They] simply maintain[ ] that Transcom is not one."[44] To this extent, the RLECs argument is based on the nature of the disputed traffic as they perceive it. The RLECs state:

> RLEC Complainants question whether Transcom is an ESP and how an entity can be an ESP that offers no enhanced services to end use customers, but which instead offers "voice termination" services to other interexchange carriers. These claims are further addressed in the RLEC Complainants' Response In Opposition, which is incorporated herein by reference.

[42] *Id.* at 9-10.
[43] *Id.* at 11.
[44] *Id.* at 18.

> Nor would it legally matter if Transcom were enhancing the traffic under the precedent of the *Time Warner Declaratory Ruling*. The fact that the content may be enhanced by someone else does not change the telecommunication nature of Halo's delivery. The transiting carrier is providing a telecommunications service even if the call was part of an information service. It is entitled to interconnection and must also pay access.
>
> In the *Time Warner Declaratory Ruling,* the FCC ruled upon whether MCI and Sprint were entitled to interconnection on traffic that could be considered an information service (cable VoIP service). It held that, irrespective of the originating technology, the deliverer of such traffic would be providing a "telecommunications service."
>
> > We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251…The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act.[45]

In addition, during the December 12, 2011 Status Conference, the RLECs questioned the purported basis of Transcom's designation as an ESP, namely, a 2005 bankruptcy case.[46] The RLECs noted that the bankruptcy court's decision was "based upon facts that are not disclosed in that order that apply to whatever was happening in Texas in 2005."[47]

Discussion

"The sole purpose of a Tenn.R.Civ.P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint."[48] "[W]hen a complaint is tested by a Tenn.R.Civ.P. 12.02(6) motion to dismiss, [the tribunal] must take all the well-pleaded, material factual allegations as true, and [it] must construe the complaint liberally in the plaintiff's favor."[49] Ordinarily, in applying this standard, the TRA considers the facts alleged in the complaint. The parties may

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[45] *Id.* at 19, quoting *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, released March 1, 2007, at ¶ 2.

[46] Transcript of Proceedings, pp. 24-25 (December 12, 2011) (remarks of Mr. Kennard).

[47] *Id.* at 27.

[48] *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).

[49] *Id.*

introduce additional facts, although doing so, as a legal technicality, converts a motion to dismiss into a motion for summary judgment. Halo and Transcom submit that jurisdiction, both over the person and over the subject matter, is the threshold issue before the TRA.[50] Taking "all the well-pleaded, material factual allegations" in the complaint "as true," the complaint raises claims that are squarely within the TRA's jurisdiction. The complaint seeks interpretation of tariffs approved and administered by the TRA under authority granted concurrently by Tennessee and federal law.

In this case, however, Halo and Transcom seek to interject an additional threshold. Respondents' argument, it seems, is that the TRA must first determine whether it has jurisdiction to make any further rulings, including whether it may even conduct the customary factual inquiry to determine whether the complaint is one over which it has personal and subject matter jurisdiction. And, Respondents claim, the TRA is so fundamentally lacking in jurisdiction that it must dismiss the complaint before it proceeds any further, and it should certainly not examine the factual allegations as part of its jurisdictional analysis.

Respondents' motions boil down to an argument based on the 1959 decision of the United States Supreme Court in *Service Storage & Transfer Co. v. Commonwealth of Virginia*.[51] In that case, the Court considered a conflict between the Virginia State Corporation Commission's attempted exercise of jurisdiction over the intrastate truck traffic of a motor carrier and the fact that the carrier involved had been granted an interstate license by the Interstate Commerce Commission ("ICC"). In holding that the Virginia Commission's decision conflicted with the exclusive jurisdiction conferred by statute on and defended by the ICC, the Court reviewed its earlier decision on the Motor Carrier Act in *Castle v. Hayes Freight Lines*:

[50] [Transcom's] *Motion to Dismiss*, p. 1 (August 5, 2011).
[51] *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959). The ICC was terminated in 1995 and thus itself predates both the 1995 Tennessee and 1996 federal telecommunications legislation that is relevant to this action.

> In *Castle v. Hayes Freight Lines*, 1954, 348 U.S. 61, 63-64, 75 S.Ct. 191, 192, 99 L.Ed. 68, we observed that 'Congress in the Motor Carrier Act adopted a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce.' We pointed out that 49 U.S.C. s 312, 49 U.S.C.A. s 312, provides 'that all certificates, permits or licenses issued by the Commission 'shall remain in effect until suspended or terminated as herein provided'. * * * Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate.' To uphold the criminal fines here assessed would be tantamount to a partial suspension of petitioner's federally granted certificate.[52]

Based on this precedent, the Court stated: "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. *The Commission has long taken this position.*"[53]

Relying on *Service Storage*,[54] Respondents argue that because Halo has been granted a spectrum license by the FCC and Transcom has been termed an ESP in certain bankruptcy court decisions, the TRA cannot proceed further without defying federal preemption. The TRA or the RLECs, they claim, must first seek a determination from the FCC as to any interpretation of Halo's or Transcom's status that would work to confer jurisdiction on the TRA. Respondents' reliance on Service Storage is misplaced, for two reasons.

First, the ICC-related trucking cases upon which Respondents rely, which deal with licenses granted by the ICC, are simply inapplicable to complaints brought between telecommunications providers, and not simply because those cases are about trucks instead of telephones. In *Service Storage*, the Court determined that the ICC was administering "a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce."[55] The ICC itself had "long taken [the] position" that it was to have priority in

[52] *Service Storage*, 359 U.S. at 176.
[53] *Id.* at 177 (Emphasis added.).
[54] Respondents also rely on two similar decisions from the federal appellate courts, both of which deal with the ICC.
[55] *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 176 (1959).

administering this plan.[56] In contrast, the FCC and the TRA operate under a scheme of federal and state cooperation, a system of shared and largely delegated jurisdiction. The FCC has left the administration of local telephone company tariffs to the state commissions; this refusal to preempt state law necessarily carries with it the understanding that state commissions will be the ones to determine whether particular traffic is subject to access charges. This system is made necessary by the basic nature of telephone traffic, which involves almost innumerable intrastate *and* interstate calls, all of which terminate to a state-regulated provider of local telephone service like one of the RLECs.[57]

The FCC has defined the law for the state commissions to apply in determining whether access charges are owed, but the FCC has obviously left it to the state commissions to make the associated factual findings and otherwise administer the tariffs under which access charges arise. This regime is in no way comparable to the one examined in *Service Storage*. That case did not involve a state-administered tariff that was automatically invoked by the activities of the party claiming federal preemption. It did not involve determinations that the federal agency has left to state regulators on a permanent basis. And *Service Storage* involved an actual federal license with which a state licensing requirement could conflict; that is not the case here.

In *Service Storage*, the Supreme Court found that federal preemption as to the licensing matter at issue was clearly intended in the Motor Carrier Act and noted that the ICC itself "has long taken this position."[58] Respondents' theory, therefore, depends on clear federal preemption that is being defended by the relevant federal agency. The exact opposite is the case here. In

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[56] *Id.* at 177.

[57] Unlike the trucking and tour bus companies before the courts in the ICC-related cases Respondents cite, a provider of local telephone service cannot possibly choose to terminate only intrastate traffic. As its traffic is a blend of massive amounts of both intrastate and interstate traffic, a local exchange carrier is always both intrastate and interstate in the sense involved in *Service Storage*, and the question of whether a company has improperly jumped from one status—interstate or intrastate—to the other just never comes up. Moreover, those who interconnect with a local exchange carrier are automatically involved in the same mix of traffic and the same system of regulation.

[58] 359 U.S. at 177.

considering a similar complaint to the one before the TRA, the United States Court of Appeals for the First Circuit observed that "A matter may be *subject to* FCC jurisdiction, without the FCC having exercised that jurisdiction and preempted state regulation."[59] The Court further stated: "In this context, the law requires a clear indication that an agency intends to preempt state regulation."[60] In addition, the Court stated:

> The requirement of a clear indication of the agency's intent to preempt is especially important in the context of the TCA,[61] which "divide[d] authority among the FCC and the state commissions in an unusual regime of 'cooperative federalism,' with the intended effect of leaving state commissions free, where warranted, to reflect the policy choices made by their states." As we noted in *Global Naps II,* "[t]he goal of preserving a role for the state regulatory commissions is reflected in a number of provisions in the TCA." *Id.* at 46-47.[62]

As to the access charge issue before it, the Court stated:

> Regardless of which approach is used, the *ISP Remand Order* does not clearly preempt state authority to impose access charges for interexchange VNXX ISP-bound traffic; it is, at best, ambiguous on the question, and ambiguity is not enough to preempt state regulation here.[63]

The Court concluded that the plaintiff could not carry its burden of showing federal preemption under the 1996 Telecommunications Act.[64] The Court also noted that the FCC itself, which had been invited by the Court to provide comments, had stated that it believed that the Telecommunications Act did not preempt state regulation.[65]

These statements are fatal to Halo and Transcom's *Service Storage* theory and require denial of their motions to dismiss independently of any of facts alleged in opposition. The fact that they have relied on a case that deals specifically with licensing rather than jurisdiction over a particular activity does not change this conclusion. For the TRA to conclude based on *Service*

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[59] *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 71 (1st Cir. 2006).
[60] *Id.*
[61] The Federal Telecommunications Act of 1996.
[62] *Id.* at 72 (Citations omitted.).
[63] *Id.*
[64] *Id.* at 73.
[65] *Id.* at 74. It should be noted that the District Court is in agreement with this view of the federal-state distribution of jurisdiction, in that the Court indicated that while *removal* of a matter from the TRA to the Court was suspect, an *appeal* of a TRA order might not be.

Storage that it could not take jurisdiction over this matter, which raises issues squarely within the TRA's jurisdiction, would require a clear and strong showing that the Congress and the FCC have intended to reserve this area to the federal government. Under the regime described by the First Circuit, that is simply impossible, and Respondents' theory must fail.

Second, as the RLECs point out, Respondents' representations as to regulatory status do not hold up. The FCC does not grant a CMRS "license," and a spectrum license does not confer final and exclusive CMRS status. And, as the RLECs remind us, the FCC has concluded that sometime activity as a CMRS provider does not render specific traffic exempt from access charges unless it actually originates as wireless traffic. Further, although a company may be treated as an ESP for purposes of a particular bankruptcy proceeding, that one-time treatment does not carry over and convert the company to an ESP once and for all. It certainly does not serve as an FCC ESP "license."[66]

Service Storage simply does not apply as a matter of fact, therefore, if for no other reason than that there is no federal license to invoke its holding. A spectrum license does not qualify as a CMRS "license." Denomination as an ESP by one, four, or fifty bankruptcy courts does not qualify as an FCC ESP "license." On the other hand, an October 26, 2011 bankruptcy court decision in a directly related docket does expressly send Halo and Transcom back to the TRA, notwithstanding any prior decisions by other bankruptcy courts. Further, the District Court, having heard the argument Respondents raise here about federal preemption, nevertheless remanded this matter to the TRA. The federal courts, therefore, far from aggressively asserting federal jurisdiction, have expressed confidence in the TRA's authority and ability to consider the complaint and have delivered this matter to us with instructions to do so.

[66] On this point, Respondents should get their arguments straight. They rely on the bankruptcy courts' designation of Transcom as an ESP, yet they state, inconsistently and unhelpfully, that "[o]nly the FCC can decide whether Transcom 'is' or 'is not' an ESP." [Transcom's] *Motion to Dismiss*, p. 8 (August 5, 2011).

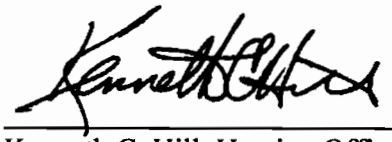
Accordingly, the Hearing Officer denies the Motions to Dismiss filed by Halo and Transcom and will prepare to set this action for further proceedings.

IT IS THEREFORE ORDERED THAT:

1. The Motions to Dismiss filed by Halo Wireless, Inc. and Transcom Enhanced Services, Inc. are denied.

2. This matter shall proceed in accordance with the procedural schedule that shall be issued by the Hearing Officer.

IT IS SO ORDERED.



Kenneth C. Hill, Hearing Officer