

RLEC STATEMENT NO. 1.1

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	:	
COMPLAINT OF	:	
CONCORD TELEPHONE EXCHANGE, INC.,	:	
HUMPHREYS COUNTY TELEPHONE,	:	
COMPANY, TELlico TELEPHONE	:	DOCKET NO. 11-00108
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	:	

REBUTTAL TESTIMONY OF THOMAS M. MCCABE

SUBMITTED: January 20, 2012

1 **Q. Please state your name, occupation and business address for the record.**

2 A. My name is Thomas M. McCabe. I hold the position of Manager-State
3 Government Affairs for TDS Telecom and am responsible for managing regulatory,
4 legislative and industry relations for TDS Telecom in the states of Georgia, Florida and
5 Virginia. My business address is 107 West Franklin Street, Quincy, Florida 32351.

6
7 **Q. Are you the same Thomas M. McCabe that filed direct testimony in this**
8 **proceeding?**

9 A. Yes.

10
11 **Q. What is the purpose of your rebuttal testimony?**

12 A. The purpose of my rebuttal testimony is to respond to several issues raised in the
13 direct testimony of Halo Wireless's ("Halo") witness Mr. Russell Wiseman, and
14 Transcom Enhanced Services, Inc.'s ("Transcom") witness Mr. Robert Johnson.

15
16 **Q. On Page 11, lines 10-11 of Mr. Wiseman's direct testimony, he describes the**
17 **relationship between Halo and Transcom as "[o]ne of customer and vendor," do you**
18 **agree with that characterization?**

19 A. Absolutely not. Mr. Wiseman attempts to portray the Halo/Transcom relationship
20 as two independent companies that do an arm's length business with each other.
21 Transcom just so happens to purchase a service offered by Halo, and vice versa.
22 Furthermore, Mr. Wiseman seems to imply that Transcom represented to Halo that it is
23 an enhanced/information service provider and that Halo objectively reviewed that

1 information and independently agreed. He testifies on page 11 lines 16-18 that Transcom
2 provided Halo with four separate federal court decisions and that Halo relied on "our
3 customer's representation and those decisions..."

4 While Halo would like for the TRA to believe this is simply a customer/vendor
5 relationship, the facts in this case are that principals of Transcom created Halo and is
6 terminating nearly a half of a billion minutes a month of telecommunications traffic
7 through Halo in an attempt to avoid payment of access charges. Halo is dependent on
8 Transcom and has no independent existence. .

9
10 **Q. What facts do you have to support your contention that Halo and Transcom's**
11 **relationship is more than a vendor/customer relationship?**

12 A. As stated in my direct testimony Halo is owned by Robert S. Birdwell a/k/a Scott
13 Birdwell (50%), Timothy Terrell (40%), and Gary Shapiro (10%). The same Scott
14 Birdwell is the largest individual shareholder of Transcom, as well as its President and
15 CEO.

16
17 **Q. How did you connect Halo and Transcom?**

18 A. In 2007, I became heavily involved in investigating access arbitrage situations
19 encountered by TDS. The first action was a complaint filed before the Georgia Public
20 Service Commission ("GAPSC") against Global NAPs. After a successful ruling in
21 Georgia, we filed complaints against GNAPs in Vermont and New Hampshire. These
22 jurisdictions agreed that GNAPs was engaged in arbitrage and, in New Hampshire,
23 GNAPs was disconnected from the tandem. Throughout these cases, GNAPs alleged that

1 Transcom was sending a significant amount of wireline traffic through GNAPs for
2 termination. Thus, when I began investigating Halo and its claim that all of this traffic
3 delivered to the TDS companies was intraMTA CMRS, it seemed very similar in design
4 to the GNAP and CommPartners cases I had previously investigated. This led me to
5 begin investigating the possibility that Transcom was now delivering traffic through
6 Halo. At first I had no reason to believe that there was any relationship with Halo and
7 Transcom other than the possibility that Transcom was using Halo to terminate traffic.
8 After searching through the Texas Secretary of State public records I was able to begin
9 connecting the common ownership and officers of Halo and Transcom, which I describe
10 in my Direct Testimony.

11
12 **Q. What other information is the bases for you conclusion that Halo and Transcom is**
13 **not simply a customer/vendor relationship?**

14 A. Having connected the common ownership and company officers I continued
15 researching companies associated with both "Robert S. Birdwell" (Halo) and "Scott
16 Birdwell" (Transcom) of which I found many. As part of Halo's bankruptcy filing, it is
17 required to file a monthly financial operating report. On September 19, 2011, a meeting
18 of creditors was held in the bankruptcy proceeding in which Halo's officers Wiseman and
19 Miller were cross-examined on Halo's operations and the August financial operating
20 report. The testimony confirmed that Robert S. Birdwell and Scott Birdwell are, in fact,
21 the same person. Interesting to TDS and the other creditors was that a significant amount
22 of Halo's expenses were paid out to its affiliate companies that all appear to be under the
23 common ownership and direction of Robert S. Birdwell aka Scott Birdwell. For example,

1 Halo's August operating expenses showed payments to the following affiliates all with
2 common ownership in Mr. Birdwell: Transcom; SatNET; Source Communications of
3 America; Source Communications; and North Star NOC. According to the August 2011
4 operating and financial report, for the year Halo had approximately \$9.1 million in
5 revenue year to date, yet in August had only approximately \$300,000 in the bank. The
6 majority of the difference appears to have been paid to these affiliated companies.

7
8 **Q. Page 11, line 15-18, of Mr. Wiseman's direct testimony represents that Halo had**
9 **every right to rely on four court rulings that indicate Transcom is an ESP, that**
10 **Transcom was an end user customer, and that access does not apply to traffic**
11 **delivered by Transcom for termination, do you agree?**

12 A. No. Remarkably Mr. Wiseman goes into great detail of his understanding of the
13 Hale Opinion and even included a copy as an exhibit in which I assume he hopes has
14 significant value to the TRA. After sharing his understanding of the Hale Opinion he
15 finally acknowledges that the Order was *vacated* on appeal. Next he relies on two
16 additional orders which were non-published, and another involving DataVon. While I am
17 not an attorney, it is my understanding that there is no presently effective and binding
18 decision which holds that Transcom is an "Enhanced Service Provider" ("ESP") or that
19 Transcom is exempt from access charges. Transcom argues that TDS "refuse[s] to
20 recognize that Transcom is an ESP even though it has four decisions by two separate
21 courts expressly holding that Transcom is an ESP, is not a carrier and is exempt from
22 exchange access."¹ To the contrary, the "four decisions" that Transcom refers to are

¹ See Letter from Transcom to FCC dated October 17, 2011, at p. 2.

1 either wholly vacated decisions, or unpublished orders (or both) in which Transcom's
2 ESP classification was not contested. I am advised by counsel that neither vacated
3 decisions nor unpublished decisions have precedential value and, therefore, should
4 generally not be cited.

5
6 **Q. On page 8 lines 15-23, of Mr. Wiseman's direct testimony he seems to imply that**
7 **Halo's business model targets small towns underserved by the incumbents which**
8 **allows them to use common infrastructure to serve two markets; their high volume**
9 **market and their consumer market. Based on your review of the markets in which**
10 **Halo has established base stations, what is your opinion of their business model?**

11 **A.** Mr. Wiseman testified on January 5, 2012 in a bankruptcy proceeding that all of
12 Halo's markets were operational during the fourth quarter of 2010. Despite Mr.
13 Wiseman's claim to having spent a few hundred thousand dollars on marketing, they
14 have managed to acquire 35 end user customers, only one of which is located in
15 Tennessee (Brentwood). Mr. Wiseman would like to blame Halo's lack of success on the
16 ILECs for having filed complaints against Halo for failure to pay lawfully billed access
17 charges or for violations of ICAs. Based on findings in the bankruptcy proceeding,
18 however, it is certainly reasonable to question whether or not Halo has any real interest in
19 the consumer market. In its Summary of Schedules filed in the bankruptcy proceeding,
20 it indicated that Halo had 140 consumer units, of which 30 were assigned to beta
21 customers and 11 of the units assigned to Halo staff. RLEC Exhibit TMM-7.

1 **Q. Do the base stations deployed by Halo in TN provide broadband and voice to areas**
2 **underserved by incumbent providers?**

3 **A.** No. Based on the deployment of the base stations, Halo's network appears to be
4 designed to terminate significant levels of Transcom traffic, not to bring broadband and
5 voice to underserved areas. Halo claims to provide CMRS service in Tennessee through
6 base stations located in: Gainesboro, Tennessee which serves the Nashville MTA;
7 Amherst, Tennessee which serves the Knoxville MTA; and in Cartersville, Georgia which
8 serves the Atlanta MTA which includes Chattanooga. RLEC Exhibit TMM-8 is a map
9 showing the tower locations at which Halo has the base stations it claims serve
10 Tennessee. Mr. Wiseman previously testified in the AT&T proceeding that the Halo
11 equipment has a maximum range of 20 kilometers with line of sight and considerably less
12 with obstructed view. The circles identified on the map represent the maximum line of
13 sight range of 20 kilometers claimed by Halo. As you can see in the exhibit, consumers
14 in Tennessee are not able to access the Cartersville tower. The other circles represent the
15 20 kilometer radius for the tower located in Amherst and Gainesboro. Interestingly, Halo
16 claims to be providing CMRS service to a consumer located in Brentwood TN which my
17 understanding would be served out of the Gainesboro tower. However, the map clearly
18 shows that the Gainesboro tower is nowhere close to being within 20 kilometers of
19 Brentwood.

20
21 **Q. Are these areas underserved?**

22 **A.** No. RLEC Exhibit TMM-9 shows the download speeds for the areas in which
23 Halo's base stations are located. The Amherst tower located near Knoxville is consists of

1 areas classified as Tier 9 or Tier 10. Tier 9 areas have download speeds between 50mbps
2 < 100 mbps, and Tier 10 areas have download speeds of 100 mbps and 1 Gbps. Within
3 the 20 kilometers of the Gainesboro tower, consumers have access to download speeds
4 ranging from Tier 6 (6mbps > 10mbps) to Tier 8 (25mbps > 50mbps). Finally RLEC
5 Exhibit TMM-10 shows DSL availability with advertised download speeds of 3mbps
6 throughout the entire areas of the towers in Gainesboro and Amherst. These are not
7 unserved or even underserved areas.

8
9 **Q. On page 6, line 8 Mr. Johnson states that Transcom holds itself out as an ESP, do**
10 **you agree?**

11 **A.** No. I will agree that Transcom claims the moniker of ESP in regulatory and court
12 proceedings in an effort to avoid the payment of access charges on toll traffic that it
13 delivers on behalf of IXC's, Cable, CLECs, and wireless providers. Transcom's website
14 identifies its products and services which touts its "core service" as offering voice
15 termination service with a footprint covering over 70% of the US population. In
16 reviewing Transcom's website I do not see anywhere that Transcom holds itself out as an
17 ESP.

18
19 **Q. Do you have any other evidence that disputes Mr. Johnson's claim?**

20 **A.** Yes. Transcom has been and continues to actively market toll call termination
21 services to originating carriers. On December 2, 2011, Tommy Davis, Director of Sales
22 for Transcom Enhanced Services, sent an unsolicited email to TDS Telecom's generic

1 carrier relations email box entitled "Transcom/Best pricing U.S. Termination." The
2 substance of the email is as follows:

3
4 Hello TDS,

5
6 Transcom Enhanced Services is one of the **largest terminators of calls** in
7 the United States. We have a variety of clients which include, Comcast,
8 Cablevision, Vonage, Cox Communications, Sprint, etc.

9 The reason we have customers such as these is that we provide them with
10 some of the best pricing in the nation, an outstanding network, great QOS,
11 and top notch customer support.

12 We would like to opportunity to prove ourselves to you.

13 I am attaching a short presentation about Transcom.

14 I'll look forward to hearing from you.

15
16 Regards,

17 Tommy Harris

18 Director of Sales

19 Transcom Enhanced Services

20 Office: 817-338-3737

21 Mobile: 972-567-7633
22

23 The email and the attachment are marked and included with my testimony as RLEC
24 Exhibit TMM-11. While the attachment to the email is marked as "Proprietary and
25 Confidential," the documents were unsolicited and we had no agreement limiting the use
26 of the document. Nor is there anything in the document which would appear to be of a
27 confidential nature. Contrary to Mr. Johnson's claim, nowhere in this Transcom
28 presentation does it hold itself out as an ESP. The attachment is a marketing presentation
29 offering its toll termination service to other telecommunication providers at the "best
30 price."
31

1 **Q. Do you agree with Mr. Wiseman's assertion that Transcom's claim to be an ESP**
2 **exempts the traffic delivered by Halo for termination from access charges?**

3 **A.** No. Despite Transcom's claim of ESP status, there is no regulatory certification
4 as an ESP. The ESP exemption, if applicable, is dependent on the service provided,
5 meaning even if Transcom provides ESP type service to customers, its does not render all
6 of Transcom's services to be enhanced. The traffic that Halo is terminating to the RLECs
7 on behalf of its *affiliate* Transcom is voice traffic, identical to the traffic terminated to the
8 RLECs by other IXC's. By virtue of its interconnection agreement with ATT, Halo
9 provides its customers access to the Public Switched Telephone Network ("PSTN").
10 Without such interconnection, Halo could not complete voice originated calls on behalf
11 of its *affiliate* Transcom which actively markets its voice termination service to IXC's,
12 Cable providers, CLECs and Wireless Providers. In this capacity, Halo is a
13 telecommunications carrier providing telecommunication service similar to the type
14 addressed by the FCC in its Time Warner Order ("TWC Order"). In its TWC Order, the
15 FCC recognized that payment to the ILECs for the termination of traffic by the wholesale
16 telecommunications carrier was an explicit condition to the rights of obtaining
17 interconnection.²

18
19 **Q. Do you agree with Mr. Wiseman's claim that Transcom is an end user and that**
20 **Transcom buys "telephone exchange service" from Halo?**

21 **A.** No. On page 14 of Mr. Wiseman's direct testimony, he contends that Transcom's
22 has represented to its *affiliate*, I assume on the advice of the same counsel that represents

² *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*, 22 F.C.C.R. 3513 (2007).

1 both Halo and Transcom, that the relevant facts regarding Transcom's operations or
2 services has not changed which were used as the basis for Transcom's claim that Hale
3 and Felsenthal bestowed ESP status on Transcom. Again, the only relevant fact Mr.
4 Wiseman fails to recognize is that the Hale Order was vacated.

5 As to whether Transcom is an end-user purchasing telephone exchange service
6 from Halo, I would acknowledge that's possible just like any other business customer
7 may be willing to purchase Halo's retail service offering. However, in the context of the
8 traffic Transcom delivers to Halo for termination by virtue of using Halo's "high-
9 volume" wholesale service, Transcom is not an end user and is not an originator of the
10 calls that they have contractually agreed to terminate for Transcom's customer whether
11 its Sprint, Comcast, Cablevision, Vonage or any other communications provider that
12 purchases Transcom's voice termination service. The end user in all these calls delivered
13 by Halo to the RLECs is the customer who originated the toll call for termination in the
14 first place by dialing a called party, not Transcom. The end user originating these calls
15 has no relationship or is even aware that Transcom is involved in the call path. The only
16 thing the customer originating the call is attempting to do is place a voice call to the
17 called party. Whatever Transcom does in the middle of a call is irrelevant to rating the
18 call for intercarrier compensation purposes.

19
20 **Q. Mr. Johnson claims that there is no case in which Transcom was a party that held**
21 **Transcom not to be an ESP, do you agree?**

22 **A.** There is a case rejecting the notion that Transcom is an ESP in which Transcom
23 had the opportunity to appear but declined to do so. In a Pennsylvania on-the-record

1 complaint case, Global NAPs presented a Texas A&M associate professor who testified
2 about Transcom's enhancements based upon his interviewing of Transcom personnel.
3 Four Transcom improvements were identified: packet loss concealment; "short codes;"
4 the removal of background noise; and the injection of "comfort noise." The PA PUC
5 rejected the notion that Transcom was enhancing anything:

6 ... we find that Transcom does not supply GNAPs with "enhanced" traffic
7 under applicable federal rules. Consequently, such traffic cannot be
8 exempted from the application of appropriate jurisdictional carrier access
9 charges. Also, the Commission is not persuaded by the decision of the
10 United States Bankruptcy Court for the Northern District of Texas, Dallas
11 Division, finding Transcom to be an 'enhanced services provider' on the
12 basis that Transcom indicated in that proceeding that it provided 'data
13 communications services over *private* IP networks (VoIP).'³
14
15

16 **Q. Are there other States that have addressed similar claims that traffic delivered for**
17 **termination to end users was exempt from access charges because the carrier**
18 **sending the call to the tandem claims that the traffic was delivered by an ESP?**

19 A. Yes. Both the Georgia and California Commissions issued orders rejecting
20 arguments put forth by GNAPs that traffic it delivered for termination was not owed
21 access for traffic. GNAPs claimed that it was delivering "information" traffic, in the
22 same way that Halo does now. GNAPs argued that the FCC ISP-bound remand order
23 essentially exempt GNAPs from having to pay access charges on traffic they deliver for
24 termination by carriers claiming to be an ESP (which included Transcom). In rejecting
25 GNAPs claim, the California PUC ruled that GNAPs misread applicable law:

³ *Palmerton v. Global NAPs*, *supra*, Order at 37-38. Palmerton, the RLEC bringing the complaint argued that "the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled [if they occur at all] are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony." *Id.* at 36.

1 The only relevant exemption from the access charge regime under Federal
2 law is for ISP-bound traffic rather than ISP-originated traffic, a conclusion
3 we reached in our recent AT&T-MCImetro decision involving facts very
4 similar to those in this case. (See Decision 07-01-004 Before the Public
5 Utilities Commission of the State of California, CoxCalifornia Telecom,
6 LLC (U-5684-C), Complainant, vs. GNAPs California, Inc. (U-6449-C),
7 Defendant, Case 06-04-026, January 11, 2007, ("*California PUC Order*").
8

9 **Q. Does this conclude your rebuttal?**

10 **A. Yes.**

RLEC EXHIBIT TMM-7

SCHEDULE B – PERSONAL PROPERTY
(Continuation Sheet - Page 4 of 4)

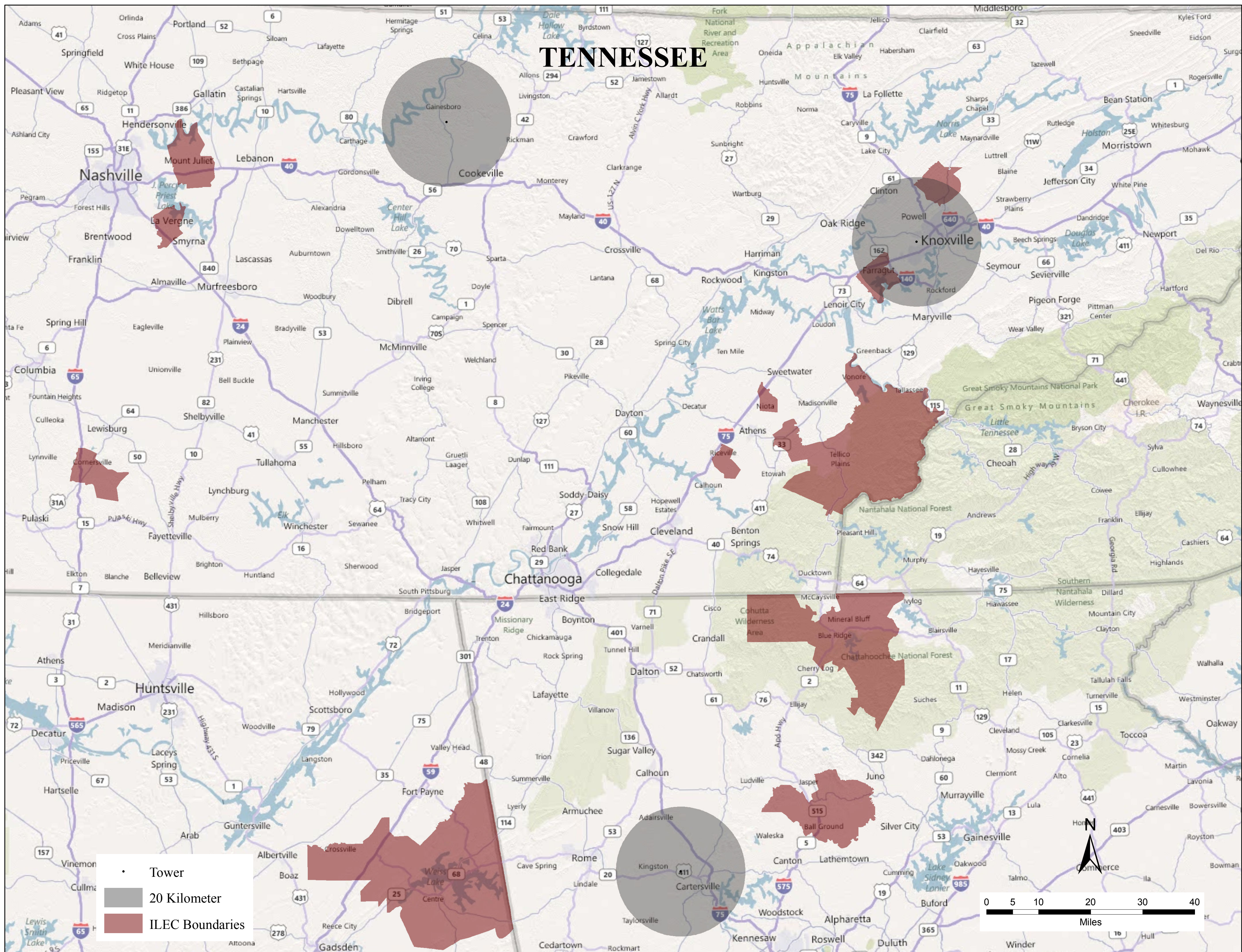
TYPE OF PROPERTY	N O N E	DESCRIPTION AND LOCATION OF PROPERTY	H W J C	CURRENT VALUE OF DEBTOR'S INTEREST IN PROPERTY, WITHOUT DEDUCTING ANY SECURED CLAIM OR EXEMPTION
26. Boats, motors, and accessories.	X			
27. Aircraft and accessories.	X			
28. Office equipment, furnishings, and supplies.		Office furniture, laptops, color printer, laser printer, phone system and phones, fax/analog server, refrigerator, microwave located at 2351 West Northwest Highway, Suite 1204, Dallas, Texas 75220.		\$20,602.00
29. Machinery, fixtures, equipment, and supplies used in business.		Network Equipment/ See Exhibit B29 which identifies equipment by location. *To the extent the equipment lease with SATNet is determined to be an unperfected financing agreement, then the equipment subject thereto shall be included herein also		\$72,966.00
30. Inventory.		40 Interface Data Units (MiMAX Easy with Voice WiMAX 802.16c Indoor Gateway CPE RG211); 30 IDUs assigned to beta customers, 10 are located in Debtor's corporate office.		\$11,920.00
		100 USBs (Airspan MiMAX-USB - Q-Series); 11 assigned to Halo staff, 89 are located in Debtor's corporate office.		\$19,900.00
31. Animals.	X			
32. Crops - growing or harvested. Give particulars.	X			
33. Farming equipment and implements.	X			
34. Farm supplies, chemicals, and feed.	X			
35. Other personal property of any kind not already listed. Itemize.		Other Personal Property / Prepaid Services. See Exhibit B33.		\$106,072.88
Report total also on Summary of Schedules			Total »	\$1,963,415.70

CONFIDENTIAL
FILED
IN
SEPARATE
ENVELOPE

RLEC EXHIBIT TMM-11

RLEC EXHIBIT TMM-8

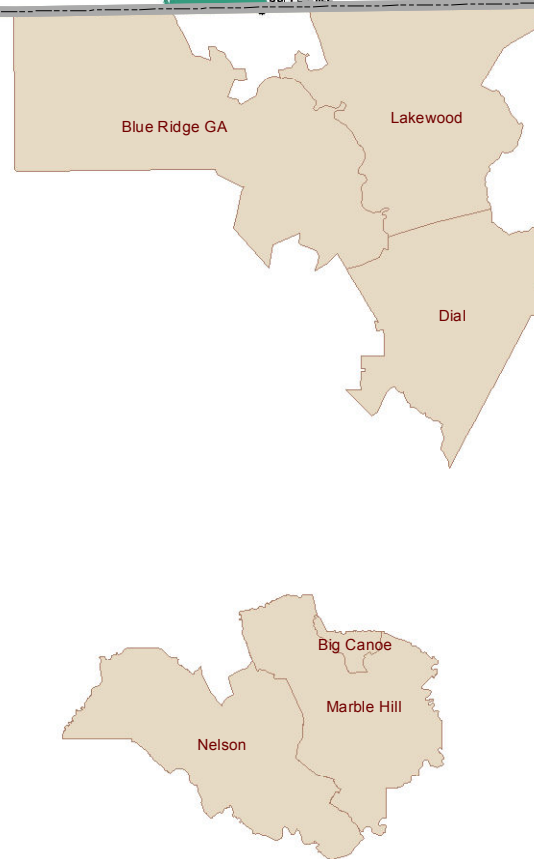
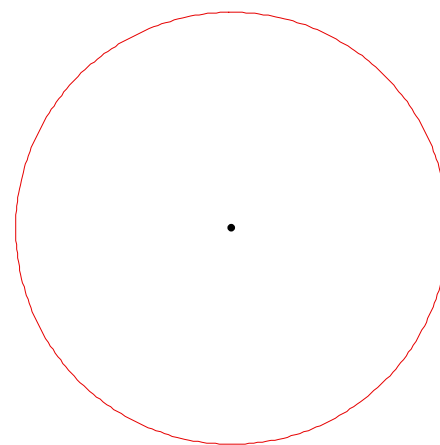
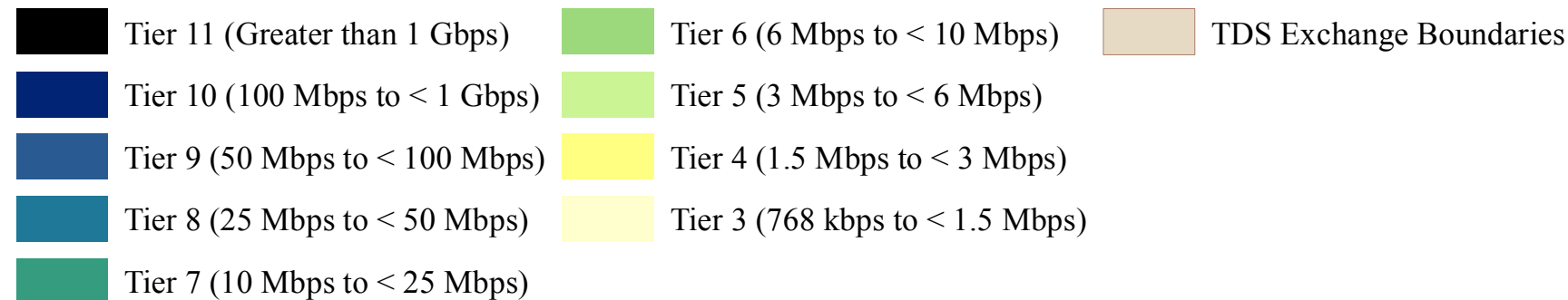
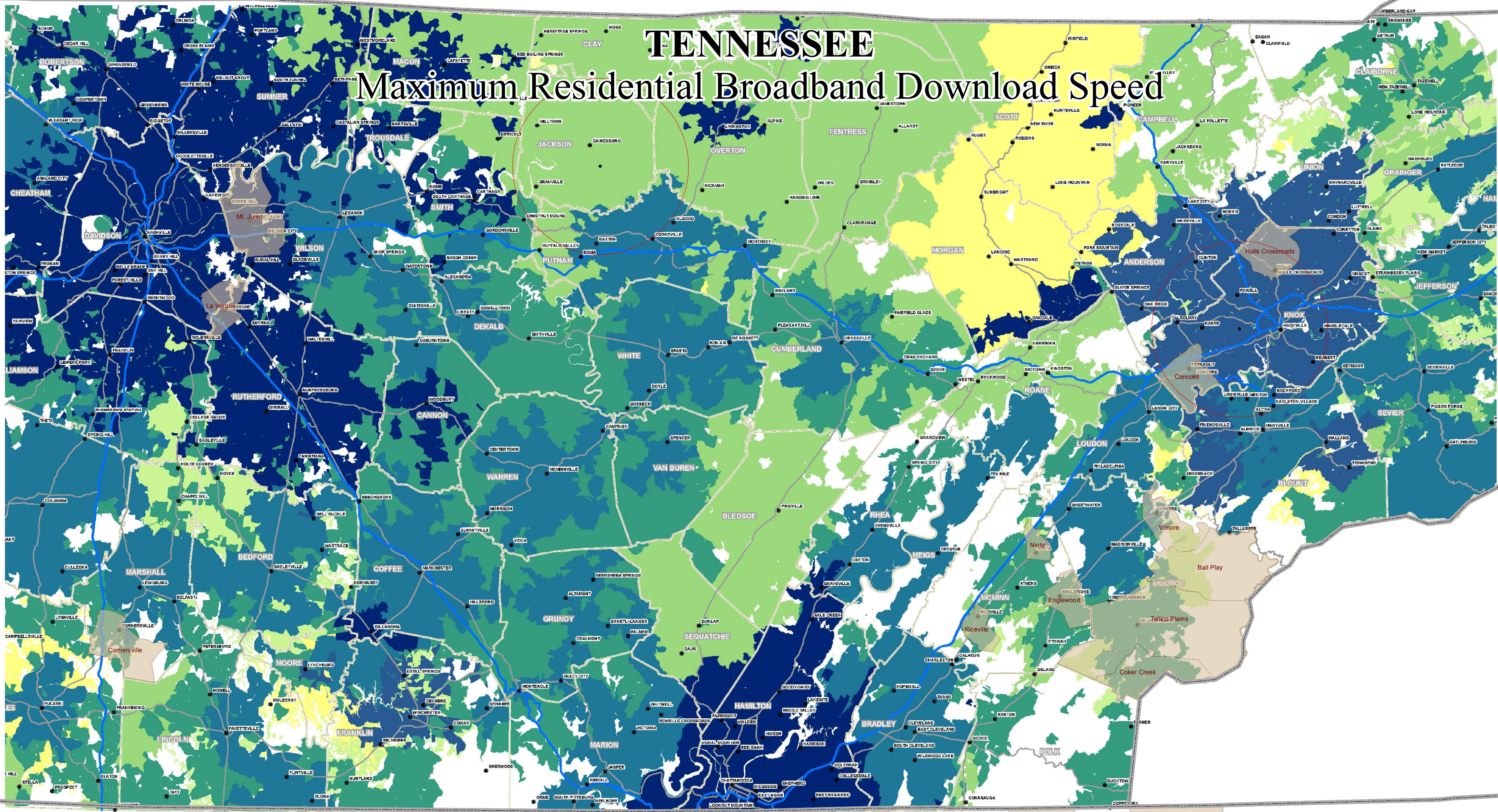
TENNESSEE



RLEC EXHIBIT TMM-9

TENNESSEE

Maximum Residential Broadband Download Speed



Updated April 1, 2011



RLEC EXHIBIT TMM-10

TENNESSEE

Broadband Service Inventory for the State of Tennessee

Advertised Speeds of at Least 3 Mbps Downstream and 768 kbps Upstream

