**BEFORE THE TENNESSEE REGULATORY AUTHORITY**
**NASHVILLE, TENNESSEE**

| | | |
|---|---|---|
| IN RE: | : | |
| COMPLAINT OF | : | |
| CONCORD TELEPHONE EXCHANGE, INC., | : | |
| HUMPHREYS COUNTY TELEPHONE | : | |
| COMPANY, TELLICO TELEPHONE | : | |
| COMPANY, TENNESSEE TELEPHONE | : | |
| COMPANY, CROCKETT TELEPHONE | : | DOCKET NO.: 1100108 |
| COMPANY, INC. PEOPLES TELEPHONE | : | |
| COMPANY, WEST TENNESSEE | : | |
| TELEPHONE COMPANY, INC., NORTH | : | |
| CENTRAL TELEPHONE COOP., INC. AND | : | |
| HIGHLAND TELEPHONE COOPERATIVE, | : | |
| INC. AGAINST HALO WIRELESS, INC., | : | |
| 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 | : | |

## MOTION TO DISMISS

Transcom Enhanced Services, Inc. ("Transcom"), for the sole purpose of bringing to the attention of this tribunal that it completely lacks jurisdiction over the subject matter and over the person of Transcom, hereby provides its Motion to Dismiss. Transcom is not otherwise appearing, and is not in any manner submitting to or acknowledging this tribunal's jurisdiction or powers. As a result of this Motion, the Tennessee Regulatory Authority ("TRA") must suspend all consideration of the merits and any and all procedural orders pending its threshold decision on jurisdiction.

Nothing in this Motion to Dismiss is intended to address, and shall not be interpreted to address by way of admission or denial any of the complainants' factual contentions or contentions on the merits. The TRA cannot and should not reach any of these asserted facts or

contentions and cannot take up the substantive merits. No answer is or can be required. The TRA must find that its only allowed course of action is to dismiss for want of jurisdiction.

## A. INTRODUCTION.

1. The complainants request the TRA issue an order "finding that Transcom has violated T.C.A. § 65-35-102(2)." Complaint ¶ 90-92. The complainants allege that they "believe that Transcom has caused or assisted Halo Wireless in misrepresenting the traffic delivered to them for the purpose and effect of engaging in tariff arbitrage and the avoidance of lawful and effective tariffed rates contained in the Rural Telephone Companies' intrastate access tariffs." Complaint ¶ 91. And, therefore, that "Transcom is in violation of T.C.A. § 65-35-102(2) by causing another to avoid lawful payment for service and/or concealing or assisting another to conceal from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination for any telecommunication for the purpose of avoiding payment." Complaint ¶ 92. This request rests on the express propositions stated in ¶¶ 26-28 and 61-66, and the implicit claim that Transcom provides "intrastate" "telecommunications service." Even more specifically, the complaint alleges that Transcom is an "IXC" and provides "telephone toll," some of which is alleged to be intrastate.

2. Counts I (¶¶ 74-79) and III (¶¶ 80-86) assert that Halo owes access charges to the complainants for alleged "non CMRS" or "not non-access" traffic. Transcom is not referenced in those counts. Request for Relief 5, however, seeks an order requiring "Halo and/or Transcom" to pay all alleged outstanding intrastate access charges, along with interest and penalties. Request for Relief 5 in turn requests an order authorizing the complainants to block traffic from "Halo Wireless and Transcom" and ordering AT&T to "block" all traffic from "Halo Wireless and/or Transcom." Thus, the complainants are clearly asserting that Transcom occupies some kind of

as-yet-unknown relationship with regard to the petitioners that imposes financial obligations and duties, and that the TRA can sanction Transcom by ordering payment by Transcom, followed by blocking of any "Transcom" traffic if Transcom does not pay. The complaint does not provide any authority for the proposition that the TRA can require Transcom to post a bond, but even if there is such state authority it is preempted.

3. The complainants recognize that Transcom asserts it is an enhanced/information service provider under federal law. Complaint ¶¶ 61, 66; Exhibit A. They ultimately and effectively ask the TRA to take up the federal question, decide that Transcom is not an ESP and end user for access charge purposes, hold that Transcom instead provides telecommunications on a common carrier basis, decide that some or all of Transcom's traffic (and service) is a "telecommunications service" and more specifically is an intrastate telephone toll service, and then – apparently – rule that Transcom is in some fashion required to pay switched exchange access charges to the complainants.

4. Further, the "Request for Relief" asks that the TRA "issue an order requiring Halo Wireless and Transcom to issue a security bond in the amount of $1,000,000 pending the outcome of the TRA decision in this proceeding."

5. 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.

6. The TRA, however, cannot entertain the complainants' plea for action. 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**. The entire case must be dismissed.

## B. TRANSCOM'S REGULATORY STATUS IS DETERMINED EXCLUSIVELY BY FEDERAL LAW AND THE TRA CANNOT ASSERT JURISDICTION OVER TRANSCOM UNTIL THE FCC EXPRESSLY HOLDS THAT (1) TRANSCOM IS NOT AN ESP AND (2) CAN BE REQUIRED BY A STATE COMMISSION TO OPERATE ON A COMMON CARRIER BASIS.

7. There are three related but distinct problems with any state-level attempt to assert jurisdiction over Transcom. First, 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. As will be shown below, the TRA cannot even reach the question in this case because it lacks both subject matter and personal jurisdiction over Transcom. Second, and more important, a forum with competent, federal jurisdiction would have to find—contrary to Transcom's prior, federal rulings—that Transcom provides "telecommunications" on a "common carrier" basis with the result that Transcom provides "telecommunications service." In other words, the forum would have to find that Transcom has held out as a common carrier or can be compelled to act as a common carrier with regard to the "telecommunications" Transcom

allegedly provides. Third, and finally, to be within the TRA's jurisdiction the "telecommunications service" would have to be jurisdictionally intrastate, despite the fact that Transcom's services have been ruled by federal tribunals to be jurisdictionally interstate. The TRA completely lacks jurisdiction to take up any of these federal questions.

8. ESPs were "created" by the FCC long ago, as part of what is known as the "Computer Inquiry" series of decisions.[1] They are purely creatures of federal law. ESPs are *not* common carriers. ESP services rely on and have a "telecommunications" component, but by definition do not *constitute* "telecommunications" or a "telecommunications service." As part of the 1996 amendments to the Communications Act, Congress essentially ratified the FCC's "basic/enhanced" dichotomy, albeit in different terms. "Enhanced service" is now "information service." But it is still *not* telecommunications service, it is still *not* common carrier and it is still not "telephone toll." More important, it is *not subject to state regulatory command at all.* States cannot implicitly or explicitly impose common carrier obligations on ESPs. States cannot require ESPs (which are end users for access charge purposes) to pay intrastate exchange access amounts based on a state's decision to overrule the FCC's finding that all ESP traffic is inseverably interstate. States most certainly cannot issue an order authorizing blocking of jurisdictionally interstate ESP traffic if the ESP does not pay the intrastate charges. States cannot require an ESP to pay a bond payable to some as-yet-unknown entity.

9. ESPs are not subject to state regulatory orders and are not amenable to suit or a state commission's regulatory command that they submit to state regulations in any capacity

---

[1] The case that started it all was Notice of Inquiry, *In re Regulatory & Policy Problems Presented by the Interdependence of Computer and Communication Services & Facilities*, 7 FCC 2d 11, ¶ 25 (1966). There have been too many decisions since them to list here. Some seminal ones, however, are: *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828 77 F.C.C.2d 384, ¶¶ 121 - 123 (rel. May 1980); *Computer and Communications Industry Association v. Federal Communications Commission*, 693 F.2d 198 (D.C. Cir. 1982); Report and Order, Amendment of Sections 64.702 of the Comm'n's Rules and Regs., 104 F.C.C.2d 958 (1986) ("*Computer III Report and Order*").

other than as an "end user" customer. No state can summon an entity claiming to be an ESP and require that it "prove" its exemption from regulation, after paying an interim bond. No state-certificated LEC can sue an ESP before a state commission, seek a declaration of "non-ESP" status and then try to force the ESP to "prove" it is an ESP to avoid state action. The TRA completely lacks personal jurisdiction over Transcom unless and until *the FCC* holds that Transcom is subject to the state's regulatory powers. Transcom does not voluntarily submit to the TRA's jurisdiction and has not sought the TRA's exercise of jurisdiction. Transcom will not appear in any capacity in this case other than by way of special appearance to contest jurisdiction.

10. Regulatory classification as an ESP *vel non* and the question whether Transcom does or can be compelled to hold out as a common carrier are based exclusively on *federal* law. Therefore, the question of whether Transcom is – or is not – an ESP, and whether Transcom is a common carrier or can be compelled to assume common carrier obligations (such as paying exchange access charges), can only be resolved by the FCC. The FCC has expressly refused to impose common carrier obligations on enhanced service providers.[2] No state has the right or

---

[2] *See In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, 77 F.C.C.2d 384, ¶¶ 121 - 123 (rel. May 1980) (emphasis added):

> 121. Because enhanced service was not explicitly contemplated in the Communications Act of 1934, there is no more a requirement to confront it with a specific traditional regulatory mechanism than there was, for example, in the case of cable television, which has formal elements of common carriage and broadcast television, or of specialized mobile radio services, which bears many formal similarities to radio common carriage. Precedent teaches that the Act is not so intractable as to require us to routinely bring new services within the provision of our Title II and III jurisdiction even though they may involve a component that is within our subject matter jurisdiction. In fact, in *GTE Service Corp. v. FCC*, 474 F.2d 724 (2nd Cir. 1973), the court substantially affirmed a Commission decision the underlying premise of which was that **not all services involving the electronic transmission of information are communications services subject to regulation under Title II of the act.**
>
> 122. Precedent teaches us, also, that **all those who provide some form of transmission services are not necessarily common carriers.** See, e.g., *AT&T v. FCC*, 572 F.2d 1725 (2d Cir. 1978) (sharing of communications services and facilities not common carriage and not subject to Title

power to decide the FCC was wrong. No state can overrule the FCC's express holding that ESPs are not, and cannot and should not be compelled to operate on a common carrier basis – by anyone. No state can or should overrule four federal court decisions finding that Transcom *is* an ESP, *does not* provide telecommunications, *is not* a common carrier, and *is exempt from access charges.*

11. The FCC has preempted state commission authority over ESPs and ESP services, which necessarily means that a state commission cannot hale an ESP before the regulator and require the ESP to defend its ESP status. Under binding FCC rules and the Communications Act, enhanced/information services are by definition not "common carrier" services, nor are they

---

II); *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I") (SMRS); *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1976) (CATV); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966). (FCC not required to treat cable television systems as common carriers nor to employ Title II regulatory tools.) Although the term itself is difficult to define with any precision, a distinguishing characteristic is the quasi public undertaking to "carry for all people indifferently." *NARUC I*, 525 F.2d at 641; *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (1976) ("NARUC II") citing *Seamon v. Royal Indemity Co.*, 279 F.2d 737, 739 (5th Cir. 1960) and cases cited therein. While one may be a common carrier even though the nature of the service offered is of use to only a segment of the population, *NARUC I*, 525 F.2d at 641, ". . . a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal." *Id.* At the same time, we recognize certain inadequacies of any definition of common carriage which is dependent entirely on the intentions of a service provider. Instead, as the Court's opinion in *NARUC I* acknowledges, **an element which must also be considered is any agency determination to impose a legal compulsion to serve indifferently.** *NARUC I*, 525 F.2d at 642. **We have specifically imposed no such obligation with respect to enhanced service providers.**

123. **Even this definition of common carriage cannot be readily applied to vendors of enhanced services.** Inherent in the offering of enhanced services is the ability of service providers to custom tailor their offerings to the particularized needs of their individual customers. Thus, such services can vary from customer to customer as "individualized decisions" are made as to how best to accommodate the processing needs of their various subscribers. **Admittedly, vendors of enhanced services also have the ability, if they so desire, to provide these services on an indiscriminate basis. Presumably, some do. But "this is not a sufficient basis for imposing the burdens that go with common carrier status."** *NARUC I* at 644. We cannot conclude that under the common law providers of these services are common carriers or that Congress intended that these services be regulated under our Title II of the Act. **Indeed, to subject enhanced services to a common carrier scheme of regulation because of the presence of an indiscriminate offering to the public would negate the dynamics of computer technology in this area.** It would substantially affect not only the manner in which enhanced services are offered but also the ability of a vendor to more fully tailor the service to a given consumer's information processing needs.

"telecommunications" or a "telecommunications service." The FCC long ago decided that enhanced services should not be regulated by either the FCC under Title II of the Communications Act or by the states in any respect. The TRA completely lacks jurisdiction to take up the question of whether Transcom "should" or "can" be implicitly regulated as a common carrier IXC for intrastate purposes. Only the FCC can decide whether Transcom "is" or "is not" an ESP. Finally, ESPs' services are jurisdictionally interstate, and therefore there can not be any "intrastate" communications subject to intrastate switched exchange access charges in any event until the FCC says that is a legal possibility. The TRA completely lacks jurisdiction.

## C. STATE REGULATORY AUTHORITIES HAVE NO JURISDICTION AND NO POWER TO CONSTRUE OR INTERPRET THE BOUNDARIES OF FEDERALLY ISSUED CERTIFICATES OR TO IMPOSE SANCTIONS FOR OPERATIONS CLAIMED TO NOT BE "AUTHORIZED" BY THE FEDERAL CERTIFICATE.

12. Transcom's operations may involve communication with end-points on the PSTN in Tennessee. These operations, however, are being conducted pursuant to federal law. Transcom does not have, is not required to have, cannot be compelled to seek or secure, and will not seek or secure, any state permissions to provide its services unless and until so ordered by a federal tribunal. The TRA completely lacks any jurisdiction and does not have the power to require Transcom to pay a bond, require Transcom to pay intrastate switched exchange access charges or in any way interfere with Transcom's federally-authorized activities.

13. If multiple state commissions took up these issues it is highly likely several of them would render inconsistent and conflicting rulings on Transcom's nationwide business operations and characterization under the Communications Act. There is a distinct possibility that one state may rule that Transcom can provide service in a certain fashion and under certain specific circumstances, while another state may hold that Transcom cannot provide service at all, or must operate under materially different rules. Some states may hold access applies, in whole

or in part, while others might rule no intrastate exchange access charges apply. The clear result would be a hodge-podge of potentially different and inconsistent regulatory requirements based on state-level interpretations of Transcom's federal authority to provide non-regulated enhanced/information services. There is one nationwide federal authorization, and therefore it cannot simultaneously mean several different and inconsistent things, nor can it possibly grant different rights or duties depending on separate and inconsistent rulings by state commissions. This tribunal lacks subject matter jurisdiction, and it has no personal jurisdiction over Transcom, or Transcom's business or property.

14. If any person – the complainants or this tribunal – have some reason to believe that Transcom is providing a service that is not "enhanced" or "information" as a matter of law the sole venue for presentation of that question is the FCC itself. If the complainants or the TRA believe that Transcom is subject to state-level regulation and orders, then the absolute first requirement is that the FCC say that is a legal possibility. The complainants cannot drag Transcom before a state-level tribunal for litigation over the scope of Transcom's federal regulatory status. No 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.

15. 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 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)[3] and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989).[4] The complainants' *state commission* filing seeks extraordinary relief based on their interpretations of Transcom's *federal* authorizations. The entire matter is subject to the exclusive original jurisdiction of the FCC, and the state completely lacks jurisdiction.

16. This dispute is quite similar to the jurisdictional tussles over "private radio service" that raged from 1974 to 1989 and even thereafter. Congress preempted state-level entry and rate regulation over CMRS as part of the 1993 amendments. Before 1993, however, the FCC in 1974,[5] and then Congress in 1982, pre-empted state-level regulation over private radio. Section 331(c)(3) as enacted in 1982 provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that

---

[3] "State regulatory authorities may not assume the power to interpret the boundaries of federally issued certificates or to impose sanctions upon operations assertedly unauthorized by the federal certificate. *Service Storage & Transfer Co. v. Virginia, 359 U.S. 171, 178-79, 3 L. Ed. 2d 717, 79 S. Ct. 714 (1959).* The [federal issuing agency] is entitled to interpret, in the first instance, certificates it has issued. *Service Storage*, 359 U.S. at 177."

[4] "[I]interpretations of federal certificates [which on their faces cover the operations] should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action."

[5] *See e.g., National Assoc. of Regulatory Utility Comm'rs v. Federal Communications Com.,* 525 F.2d 630, 634-635 (D.C. Cir. 1976):

> Second, 30 MHz (806-821 MHz and 851-866 MHz) is allocated to private services, to be licensed to operators in the Public Safety, Industrial and Land Transportation areas, as authorized under 47 C.F.R. §§ 89, 91, 93. Thus, under existing regulations, this allocation makes available additional spectrum for eligible applicants who wish to obtain a license to operate a station, either for their own private purposes, or, with several other eligibles, on a non-profit, cost-sharing basis. In addition, the Orders would create a new category of private mobile operators, eligible for licensing on the 30 MHz presently being allocated. This new category of operators, known as Specialized Mobile Radio Systems (SMRS), would operate on a commercial basis to provide service to third parties. Licensing is to be on a first-come, first-served basis, with SMRS applications treated no differently than those of other private applicants. Because it seeks to utilize a profit motive to speed development and refinement of mobile radio technologies, the Commission concludes that SMRS should not be subject to the common carrier regulations of Title II of the Communications Act, and that state certification of SMRS should be preempted.

nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service." Even after the courts had repeatedly affirmed the FCC's prior preemption and Congress then ratified it,[6] many Radio Common Carriers ("RCCs") did not like that they were subject to state-level regulation, but other entities could compete against them that were not subject to state-level regulation. Like the complainants in this case, these RCCs on occasion went to state commissions and tried to convince the state commission to "find" the private service providers were not "really" private service providers, and therefore, were subject to state regulation notwithstanding the preemption. Mississippi took a shot, and was brought to heel by the federal courts. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm.*, 648 F.2d 1350 (5th Cir. 1981).[7] Pennsylvania tried it, the FCC on three separate occasions held it could not do so, and Pennsylvania ultimately decided to give up the effort.[8] Louisiana took up the cause and issued a "cease and desist order" to a provider. The FCC ruled that Louisiana's action was "without force and effect" and the provider was free "to continue to operate irrespective of any ruling to the contrary at the state level."[9] In

---

[6] *See, e.g., Telocator Network of America v. FCC*, 761 F.2d 763 (D.C. Cir. 1985) ("*Millicom case*").

[7] "This Court, having considered the arguments of the parties, views the Mississippi Public Service Commission's application of Miss.Code § 77-3-3 (1972) to plaintiff Motorola as an illegal attempt to usurp jurisdiction to regulate communication activity that is preempted by the Federal Communications Commission. ... The FCC has exclusive jurisdiction to 'classify radio stations ... prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class ... encourage the larger and more efficient use of radio in the public interest ... (and) make such rules and regulations and prescribe such restrictions and conditions ... as may be necessary to carry out the provisions of this Act....' 47 U.S.C. § 303(a), (b), (g), (r) (1970)."

[8] In the *Matter of Paul Kelley d/b/a American Teltronix*, 3 FCC Rcd 1091 (1988) (Delegated Authority); Memorandum Opinion and Order, *Paul Kelley d/b/a American Teltronix Licensee of Station WNHM552*, 3 FCC Rcd 5347 (1988) (On Review); *Second Memorandum Opinion and Order*, 5 FCC Rcd 1955 (1990) (On reconsideration); *Mobilfone of Northeastern Pennsylvania, Inc. v. Paul Kelley, d/b/a American Teltronix*, C-871182 and C-871578, 1989 Pa. PUC LEXIS 135, 70 Pa. PUC 302 (Penn PUC, 1989).

all of these instances, the allegation at the state commission was that the private service provider was acting outside of the federal authorization, or had violated that authorization, with the effect that the private service provider was no longer protected from state regulation. In each instance, the FCC or the courts squarely held that *only* the FCC could decide whether the state could act. In each instance the FCC or the courts held that the entity was not subject to common carrier regulation and no state could assert that it was a common carrier or subject to regulation as such, at the state level.

17. The situation is much the same with Transcom. ESPs are not subject to state-level regulation at either the state or federal level as a result of binding federal law. States have been preempted. No state has the power or jurisdiction to "interpret" the federal status in an ill-advised effort to find some "violation" or "exception" within the federal law that could then be used to assert state-level regulation. States purely and simply cannot act or assert jurisdiction unless and until the FCC says state action is permissible. The TRA completely lacks jurisdiction, and the best and only available course of action is to dismiss.

## D. THE TRA'S JURISDICTION UNDER STATE LAW.

18. The TRA is a state regulatory agency organized pursuant to the laws of Tennessee.[10] As a state agency, the TRA is wholly a creature of statute.[11] Its jurisdiction is

---

[9] Declaratory Ruling, *In the Matter of Data Com, Inc.; and American Welding Supply, Inc., Licensee of Station KNBP-212 in the Business Radio Service*, FCC 86-315, 104 F.C.C.2d 1311 (rel. Jul. 1986).

[10] *See* Tenn. Code Ann. § 65-4-104.

[11] *See Tennessee Pub. Serv. Comm'n v. S. Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977) (holding "[a]ny authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power"); *see also Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992) (affirming "the Commission's powers remain rooted in its enabling legislation, and so its actions must be harmonious and consistent with its statutory authority") (internal citations omitted); and *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 680 (Tenn. Ct. App. 1997) (affirming "it [The Commission] has no authority or power except that found in the statutes").

limited to the specific persons and issues identified in its enabling legislation.[12] Although the TRA's authority and jurisdiction can be modified by judicial interpretations of the enabling legislation, the TRA may not expand its jurisdiction unilaterally or address matters or parties beyond the jurisdiction afforded to it by its enabling legislation and judicial interpretations thereof.[13]

19. In other words, a TRA cannot adjudicate a dispute when it lacks statutory authority to support the assertion of jurisdiction over the specific persons who are involved in the dispute and over the specific subject matter raised by the dispute. Under Tennessee law, *in personam* jurisdiction over a party generally can be waived.[14] In order for a party to avoid waiver of *in personam* jurisdiction, objections to the tribunal's assertion of such jurisdiction must be raised by the relevant party early enough in the case to allow the tribunal to rule on that issue prior to any substantive actions being taken.[15] Once such an objection has been raised, the tribunal must determine the relevant jurisdictional facts and make a determination as to its jurisdiction before continuing with the proceeding.[16] The scope of any tribunal's jurisdiction is

---

[12] *See Williams v. Am. Plan Corp.*, 216 Tenn. 435, 443, 392 S.W.2d 920, 924 (1965) (holding "it is the general rule that no intent may be imputed to the legislature in the enactment of a statute other than such as supported by the face of the statute within itself"); *see also Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 282 (Tenn. Ct. App. 1988) (holding the authority vested in any such administrative agency "must have its source in the language of the statutes themselves").

[13] *See Tennessee Cable Television Ass'n.*, 844 S.W.2d at 163 (holding that the court "may vacate an agency's decision in a contested case when the agency's procedure violates statutory provisions or is otherwise unlawful"); *see also* Tenn. Code Ann. § 4–5–322(h)(1)-(h)(3).

[14] *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994) (affirming that under Tennessee law, personal jurisdiction, unlike subject matter jurisdiction, may be waived).

[15] *Id.* at 676 ("Waiver occurs only if there is no objection to personal jurisdiction in the first filing, either a Rule 12 motion or an answer.").

[16] *See Brown v. Brown*, 198 Tenn. 600, 623 (Tenn. 1955) (recognizing well-established rule that jurisdiction over a party must be established before a tribunal can enter any ruling binding the party or the ruling is declared null and

governed first by the United States Constitution.[17] However, a tribunal's jurisdiction may be further governed by state legislation and judicial interpretation.[18]

20. As noted above, in the context of a state agency, the scope of its jurisdiction is limited by the agency's enabling legislation.[19] Thus, the state agency may assert *in personam* jurisdiction only over the specific classes of persons or entities that are identified by statute, as may be interpreted by the courts.[20] Because an agency's *in personam* jurisdiction is limited by statute, the mere fact that a person has routine contact with an agency is irrelevant to whether that person falls within the class prescribed by statute over which the agency can assert *in personam* jurisdiction.

21. Unlike *in personam* jurisdiction, subject matter jurisdiction cannot be waived by consent of the parties.[21] Subject matter jurisdiction relates to the authority of the tribunal to address the particular issues raised by the dispute.[22] Any party or the tribunal may raise the issue of subject matter jurisdiction at any time.[23] When subject matter jurisdiction is brought into

---

void).

[17] U.S. CONST. amend. XIV, § 1.

[18] *See, e.g., Deaderick Paging Co., Inc. v. Tennessee Pub. Serv. Comm'n,* 867 S.W.2d 729, 731 (Tenn. Ct. App. 1993) (stating "[T]he powers of the Commission must be found in the statutes. If they are not there, they are non-existent").

[19] *See* note 27, *supra.*

[20] *See id.*

[21] *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 1237 ("subject-matter jurisdiction, because it involves court's power to hear case, can never be forfeited or waived..."); *Meighan v. U.S. Sprint Comm'ns Co.*, 924 S.W.2d 632, 639 ("[s]ubject matter jurisdiction...cannot be waived...").

[22] *See Landers*, 872 S.W.2d at 675.

[23] *Gillespie v. State*, 619 S.W.2d 128, 129 (Tenn. Ct. App. 1981) (stating that "under Rule 12.08, Tennessee Rules of Civil Procedure, the lack of subject matter jurisdiction may be raised at any time by the court or by the parties.").

question, the tribunal *must assure itself of its subject matter jurisdiction before it addresses any other matters in the proceeding*, and if the tribunal finds that it does not have subject matter jurisdiction, then the only authority possessed by the tribunal is that authority necessary to immediately dismiss the action.[24]

22. 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.

23. The TRA lacks subject matter jurisdiction. The TRA lacks personal jurisdiction over Transcom and over Transcom's business and property. The case must be dismissed.

---

[24] *Wilson v. Sentence Info. Services*, 2001 WL 422966 (Tenn. Ct. App. Apr. 26, 2001) (holding that "[w]hen a court lacks subject matter jurisdiction over the case, it must dismiss the case without reaching the merits of the complaint").

## E. THE TRA DOES NOT HAVE JURISDICTION OVER ALLEGATIONS AN END USER VIOLATED TCA 65-35-102(2)

24. Count V (¶¶ 90-92) asserts that Transcom violated TCA 65-35-102(2).[25] The complainants appear to be accusing Transcom of "caus[ing] another to avoid payment" or "assist[ing] another to conceal from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication." While the specifics of this allegedly fraudulent scheme the complainants complain about are not clear with regard to Transcom, it seems that the complainants believe the offense was done by somehow "misrepresenting the traffic delivered" to the complainants. Transcom is not, of course, at this point providing an answer and neither admits or denies any of the averments.

25. The TRA has absolutely no jurisdiction to hear cases alleging a violation of Chapter 65, Chapter 35 of the Tennessee Code. The Legislature clearly contemplated that the Tennessee courts – not this agency – would hear any claims. Even the complainants would not be so bold as to suggest that the TCA has any power to sit as a criminal tribunal and preside over the proceedings contemplated by TCA 65-35-105. That leaves only a possibility of the alternative civil damages authorized by TCA 65-35-104. That part of the statute, however, clearly also contemplates that an actual court – not an administrative agency – will handle the proceedings and decide if "actual, compensatory, incidental and punitive damages" are appropriate. This agency cannot award civil damages. That is inherently a judicial function, as is any action alleging "fraud" or "fraudulent intent." Further, the TRA does not have the power to

[25] The provision in issue provides that "it shall be unlawful for a person to ... (2) Obtain or attempt to obtain, by the use of any fraudulent scheme, device, means or method, telephone or telegraph service or the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities with intent to avoid payment of the lawful price, charge or toll therefor, or for any person to cause another to avoid such payment for such service, or for any person for the purpose of avoiding payment, to conceal or to assist another to conceal from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication, or for any person to assist another in avoiding payment for such service, either through the making of multiple applications for service at one (1) address, or otherwise."

award attorneys fees. Subsection (b) requires that there first have been a criminal case and that has not happened here. Subsections (c) and (d) each specifically require that the action be brought in court. TCA 65-35-107 expressly states that Chapter 35 does not expand the TRA's regulatory authority.

26. The TRA completely lacks subject matter jurisdiction over Count V and this part of the complaint must be dismissed.

## CONCLUSION

27. The jurisdiction of a tribunal is a threshold matter that must be determined at the outset of the proceeding.[26] Even the Supreme Court of the United States must determine its own jurisdiction before it can proceed with a matter, and the rule is the same in Tennessee.[27] By filing this Motion, Transcom asserts its objections to the TRA's assertion of either subject matter or personal jurisdiction over Transcom and Transcom's business and property as a threshold matter. This requires that the TRA investigate its jurisdiction prior to taking any substantive action in this matter. No hearing can be held "on the merits" unless and until the TRA has expressly found it does have subject matter jurisdiction over the action and personal jurisdiction over Transcom. As demonstrated by the foregoing, however, the TRA does not have either subject matter jurisdiction or personal jurisdiction over Transcom or Transcom's business or property. Thus, the TRA can take only one action: dismiss.

---

[26] *See id*; *see also Deselm v. Tennessee Peace Officers Standing and Training Comm'n*, 2010 WL 3959627 (Tenn. 2010).

[27] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998).

Respectfully submitted,

**W. SCOTT MCCOLLOUGH**
Texas State Bar No. 13434100
*pro hac vice* motion filed concurrently herewith
**McCollough|Henry PC**
1250 S. Capital of Texas Hwy., Bldg. 2-235
West Lake Hills, TX 78746
Phone: 512.888.1112
Fax: 512.692.2522

**STEVEN H. THOMAS**
Texas State Bar No. 19868890
*pro hac vice* motion filed concurrently herewith
**TROY P. MAJOUE**
Texas State Bar No. 24067738
*pro hac vice* motion filed concurrently herewith
**JENNIFER M. LARSON**
Texas State Bar No. 24071167
*pro hac vice* motion filed concurrently herewith
**McGUIRE, CRADDOCK**
**& STROTHER, P.C.**
2501 N. Harwood, Suite 1800
Dallas TX 75201
Phone: 214.954.6800
Fax: 214.954.6850

**PAUL S. DAVIDSON**
Tennessee Bar No. 011789
**JAMES M. WEAVER**
Tennessee Bar No. 013451
WALLER LANSDEN DORTCH & DAVIS, LLP
511 Union Street, Suite 2700
Nashville, TN 37219
Direct: 615-850-8942
Fax: 615-244-6804

***Attorneys for Transcom Enhanced Services, Inc.***

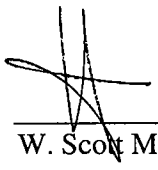
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Dismiss* was served via regular mail and/or certified mail, return receipt requested, on the following counsel of record and designated contact individuals on this the 5th day of August, 2011:

**ATTORNEYS FOR CONCORD TELEPHONE EXCHANGE, INC., HUMPHREYS COUNTY TELEPHONE COMPANY, 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.:**

H. LaDon Baltimore
FARRAR & BATES
211 7th Ave., N.
Suite 500
Nashville, TN 37219

Norman J. Kennard
THOMAS, LONG, NIESEN & KENNARD
212 Locust Street
Suite 500
Harrisburg, PA 17108-9500



W. Scott McCollough