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

Halo Wireless, Inc. ("Halo"), 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 Halo, hereby provides its Motion to Dismiss. Halo 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 permissible course of action is to dismiss for want of jurisdiction.

A. INTRODUCTION.

1. The complainants request the TRA to issue a declaratory ruling that "intrastate wireline toll traffic and wireless interMTA traffic sent to them by Halo Wireless for termination to the RLECs' end users is subject to intrastate access charges." (Count I). They also seek a "Cease and Desist Order to prohibit Halo Wireless from providing telecommunications service in the State of Tennessee until such time as the TRA may hold a hearing on this matter." (Count II). The complainants further request an "order directing Halo Wireless to pay all outstanding intrastate access charges including applicable interest." (Count III). Then, the complainants request an order "finding that Halo Wireless has violated T.C.A. § 65-35-102 (2)." (Count IV). Finally, the "Requests for Relief" ask the TRA to "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."

2. These requests each rest on the proposition that Halo lacks authority to provide the services that give rise to the purported traffic, or that Halo's traffic is not "wireless" or "CMRS" because it is claimed to originate on other networks. They 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.*

3. The allegations, claims and requests for relief as against Halo are purely and simply an attempted collateral and state-level attack on Halo's federal authorizations. The complainants are necessarily asking the TRA to act in the place of the FCC and find exceptions to binding and exclusive federal rules that would give an opening for state-level regulation and jurisdiction, which they then of course ask the TRA to exercise in punitive and protective fashion.

4. The TRA, however, cannot entertain the complainants' plea for action. The TRA lacks jurisdiction over the subject matter and jurisdiction over Halo'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**. Therefore, the entire case must be dismissed.

B. HALO'S FEDERAL AUTHORIZATION.

5. 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").

6. Halo's services that involve end-points in Tennessee are supported by five separate base stations, only two of which are in Tennessee (Amherst and Gainesboro). The other base stations are in Cartersville, Georgia; Greenville, Mississippi; and, Graysville, Alabama. The complainants, therefore, seek an order that Halo "cease and desist" from using equipment located in other states that supports services that traverses a state line to communicate with an end-point in Tennessee. This is clearly beyond the TRA's power and authority.

7. Halo provides "interconnected" "telephone exchange service" (as defined at 47 U.S.C. § 153(47)) and "exchange access" (as defined at 47 U.S.C. § 153(16)). Halo also provides "personal wireless service" (as defined at 47 U.S.C. § 332(c)(7)(C)(i)), because Halo provides "commercial mobile services," "common carrier wireless exchange access services" and/or "unlicensed wireless services" (as defined in 47 U.S.C. § 332(c)(7)(C)(iii)). Halo is conducting all of its activities by virtue and as a result of its *federal* authorization to provide service under its RSA and also pursuant to the FCC's "blanket" permission to provide interstate service by wire or radio in 47 C.F.R. § 63.01(a).[1]

8. 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

[1] Authority for all domestic common carriers.

> (a) Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.

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.

9. Only the FCC can decide whether any particular traffic is or is not "interstate" and subject to its exclusive original jurisdiction. *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 certificates it has issued. *Id.* at 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987)[2] and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989).[3]

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.

10. Halo's operations that involve communications to or from end-points on the PSTN in Tennessee are being conducted pursuant to FCC authorizations. Halo does not have, is not required to have, cannot be compelled to seek or secure, and will not seek or secure, any state permissions for such services unless and until the FCC requires Halo to do so. The TRA completely lacks any jurisdiction and does not have the power to impose penalties, issue cease-and-desist orders, require a bond, demand that Halo secure a state-level certificate or in any way

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[2] "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."

[3] "[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."

interfere with Halo's federally-authorized activities. Nor can the TRA impose any obligations on Halo relating to operations or compensation, as the FCC has already occupied that field.

11. Halo's federal authorizations to provide wireless and jurisdictionally interstate "wired" or "wireless" service are nationwide in scope. The RSA is a single nationwide blanket authorization. The authorization pursuant to 47 C.F.R. § 63.01(a) is single, unitary and nationwide in scope. Halo is building a nationwide network and intends to provide service in every region.

12. If multiple state commissions took up these issues, it is highly likely several of them would render inconsistent and conflicting rulings on Halo's nationwide business model and characterization under the Communications Act. There is a distinct possibility that one state may rule that Halo can provide service in a certain fashion and under certain specific circumstances, while another state may hold that Halo cannot provide service at all, or must operate under materially different rules. If every state demands a million dollar bond, then Halo's barrier to entry *starts* at $50,000,000. The clear result would be a hodge-podge of potentially different and inconsistent regulatory requirements based on state-level interpretations of Halo's one wireless RSA and Halo's FCC-granted authority to provide interstate service. There is one nationwide CMRS license, 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. A federal license cannot lawfully lead to any obligation to pay a bond to a state commission as the price of exercising the federal right. This tribunal lacks subject matter jurisdiction, and it has no personal jurisdiction over Halo, or Halo's business or property.

13. The FCC has recognized that the possibility of multiple state proceedings – with potential conflicting or inconsistent results on a state-by-state basis – can be so significant that it

impedes investment, slows deployment and ultimately become a barrier to entry.[4] Halo insists that the present proceeding – like the eight others existing in at least three other states – very clearly presents this situation, and further insists that no state can take any action unless and until the FCC expressly rules the states may do so.

14. If any person – the complainants or this tribunal – has some reason to believe that Halo is providing a service that is not "permitted" by the FCC authorizations, that Halo should or should not render a service or provide that service in only a specific manner, then as a matter of law the sole venue for presentation of that question is the FCC itself. If the complainants believe they are entitled to access charges, then they must first obtain a ruling from the FCC to the effect that access charges are applicable here. Then, and only then, can they file a collection action before the proper venue, prove that their tariffs do actually control and then prove up the damages amount. The complainants cannot drag Halo before a state-level tribunal for litigation

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[4] *See, e.g.*, Declaratory Ruling, In *the Matter of Public Service Company of Oklahoma Request for Declaratory Ruling*, DA 88-544, ¶ 24, 3 FCC Rcd 2327, 2329 (rel. Apr. 1988) (finding that "inconsistent state regulation" "would impede development of a uniform system of regulation for Commission licensees."); Second Report and Order, *In the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services; In the Matter of the Applications of GLOBAL LAND MOBILE SAT-ELLITE, INC.; GLOBESAT EXPRESS; HUGHES COMMUNICATIONS MOBILE SATTELLITE, INC.; MCCA AMERICAN SATELLITE SERVICE CORPORATION; MCCAW SPACE TECHNOLOGIES, INC.; MOBILE SATELLITE CORPORATION; MOBILE SATELLITE SERVICE, INC.; NORTH AMERICAN MOBILE SATELLITE, INC.; OMNINET CORPORATION; SATELLITE MOBILE TELEPHONE CO.; SKY-LINK CORPORATION; WISMER & BECKER/TRANSMIT COMMUNICATIONS, INC.*, Gen. Docket No. 84-1234 RM-4247; File Nos. 1625-DSS-P/L-85 1626-DSS-P/L-85; File Nos. 1627-DSS-P/L-(50)-85 1628-DSS-P-(5)-85; File No. 1629-DSS-P/L-85; File Nos. 1630-DSS-P/L-85 1631-DSS-P-85; File No. 1632-DSS-P/L-85; File Nos. 1633-DSS-P/L-85 1634-DSS-P/L-85 1635-DSS-P/L-85; File Nos. 1636-DSS-P/L-85 1637-DSS-P/L-85 1638-DSS-P-85; File Nos. 1639-DSS-P/LA-85 1640-DSS-P-85; File Nos. 1641-DSS-P/L-85 1642-DSS-P/L-85 1643-DSS-P/L-85 1644-DSS-P/L-85 1645-DSS-P/L-85; File Nos. 1646-DSS-P/L-85 1647-DSS-P/L-85; File Nos. 1648-DSS-P/L-85 1649-DSS-P/L-85; File Nos. 1650-DSS-P/L-85 1651-DDS-P/L-85 1652-DSS-P-85, FCC 86-552, ¶ 40, 2 FCC Rcd 485, 491 (rel. Jan. 1987) (finding that "permitting states to impose their individual regulatory schemes over" an FCC licensee "would not only be impractical but would seriously jeopardize the operation of the system. Requiring the consortium to adhere to fifty potentially conflicting" standards "would render implementation" "virtually impossible."); Memorandum Opinion and Order, *In the Matter of Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, BC Docket No. 82-536, FCC 84-187, ¶ 20, 98 F.C.C.2d 792, 800 (rel. May 1984) (finding that individual state regulations over a wireless service can impede or create a barrier to entry when the network is regional or national, and that state regulations over a nationwide network would constitute a direct burden on interstate communications).

over the scope of Halo's federal permissions. No state commission has the jurisdiction to address this question or to interpret Halo's FCC authorizations and then find some putative "exception" or "limitation" that is then used to subject Halo to state licensing requirements, state-level entry regulation, state rate regulation or a state order to pay intrastate access charges.[5]

15. Nor can a state commission require Halo to develop some means by which to separate its operations between "interstate" and "interstate." "Service providers are not required to develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate." *Minn. PUC v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007). Finally, no state commission can require Halo to post a bond to secure payment of some as-yet unliquidated amount of putative access charge liability.

16. Every Count and the entirety of complainants' request for relief inescapably and completely raises questions and issues within (a) the FCC's exclusive original jurisdiction over market entry (licensing) of radio based services, (b) the FCC's exclusive original jurisdiction and power to prescribe rules relating to the process for and rules governing "interconnection" between radio service providers and local exchange carriers, (c) the FCC's exclusive original

[5] Although the complaint requests a declaration that the intrastate tariffs apply and an order that Halo pay them, the first-order question is whether this commission has the power to even consider the matter. Since the commission completely lacks jurisdiction over Halo, it cannot. The question whether the complainants' intrastate access tariffs can or could apply starts (but does not end) only if the absolute prohibition against access charges for non-access traffic in 47 C.F.R. § 20.11(d) does not apply. The TRA has no jurisdiction or power to interpret or apply 47 C.F.R. § 20.11 at all. The TRA most certainly lacks the power to find unstated exceptions or limitations to the FCC's holding and rules providing that if a call is processed by a base station in the same MTA as the terminating location then it is intraMTA and subject to § 251(b)(5) and not the access regime. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, ¶ 1044, 11 FCC Rcd 15499 ("*Local Competition Order*") (subsequent history omitted) ("...For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party."). The complainants' argument and position entirely depends on the proposition that these binding federal rules do not apply, based on some inherent or potential "exception" or "interpretation" that has not yet been articulated by the FCC. Their jurisdictional problem is that *only the FCC* can "find" this asserted exception.

jurisdiction over market entry to provide interstate communications services by wire and/or radio, and/or (d) the FCC's exclusive original jurisdiction to prescribe "compensation" terms governed by sections 201, 251(b)(5) and 251(g). *See* § 251(d)(1)[6] and § 251(g).[7]

17. The FCC has exclusive original jurisdiction over communications by wire or radio that are interstate. *See* 47 U.S.C. § 152. Additionally, under section 152 (also called "Section 2 of the Act"), the FCC has exclusive original jurisdiction over the authorization to communicate by radio on an interstate or intrastate basis and then the exclusive jurisdiction over regulation of radio communications themselves. *See, e.g.*, 47 U.S.C. §§ 152(a), 201, 202, 203, 214, 332.

18. Section 152(b) originally reserved rights to the states to regulate intrastate communication service by wire or radio. Section 332(c)(3) (passed in 1993) expressly preempted state regulation over market entry and the rates charged by mobile service providers. Section 332(c)(7) allows state and local governments to retain some zoning authority over "siting" of "personal wireless service facilities," but section 332(c)(7)(B)(i)(II) expressly denies any state or local government the power to take any action that prohibits or has the effect of prohibiting the provision of personal wireless services. Halo provides personal wireless services, and thus, no

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[6] IMPLEMENTATION.--(1) IN GENERAL.--Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

[7] CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.--On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, **until such restrictions and obligations are explicitly superseded by regulations *prescribed by the Commission*** after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as ***regulations of the Commission***. (emphasis added).

state or local government may prohibit, or take action that has the effect of prohibiting, Halo's provision of its service. The complainants are each contending that Halo lacks authority to provide its personal wireless service (CMRS), and they are seeking or intend to seek a *state regulatory authority* order that Halo "cease and desist" from using its already-installed facilities to provide its personal wireless services. Therefore, the complainants are requesting that a state prohibit, or take action having the effect of prohibiting, Halo's personal wireless service.

19. States have no authority, and have never had the authority, to authorize or regulate the use of radio spectrum. The FCC has exclusive original jurisdiction over radio matters, including whether to authorize the use of radio spectrum and the purposes and ends for which any spectrum is used. If a party contends that a spectrum licensee is acting in a manner inconsistent with the scope of its radio station authorization, then the sole and exclusive venue to resolve and address that contention is the FCC. The complainants, however, contend in various ways that Halo lacks authority to use spectrum under its federal license, or that its license does not contemplate or authorize the services Halo is providing. The complainants are requesting that the TRA "interpret" the scope of Halo's federal rights to use radio spectrum and/or provide jurisdictionally interstate service in a limiting fashion so as to exclude the activities they complain of, and then impose state-level regulations and orders on that activity, including a "cease and desist" requirement pending state certification. The TRA completely lacks this power.

20. State regulatory authorities do not have and 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. *See Service Storage & Transfer Co. v. Virginia, supra* 359 U.S. at 178-79. The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, certificates it has issued. *Id.* at 177; *Gray Lines Tour, Co. v.*

Interstate Commerce Com., supra 824 F.2d at 815; *Middlewest Motor Freight Bureau v. ICC, supra* 867 F.2d at 459.

21. A person may bring an action complaining of a violation of the Communications Act pursuant to section 206. The petitioner has a choice of whether to bring the action in *federal court* under section 207, or before the *FCC* under section 208. The complaint is ultimately, and essentially an assertion that Halo is violating the Communications Act, exceeding the scope of its federal authorizations and conducting activity that incurs an access charge because of claimed "exceptions" or "interpretations" of the Communications Act and FCC rules. The complaint is dressed up using state law claims, but it is in fact, and must be construed to be, a section 206 complaint because if Halo's activities *do* fall under its authorizations and *do not* incur an access charge under *federal* law, then no contrary state laws or rules can lawfully be enforced. There is, however, no provision and no authority, that would allow a party to file a case with a state regulatory authority alleging a violation of the Communications Act or FCC rules, or seeking a declaratory ruling involving questions about the Communications Act or FCC rules.

22. State commissions have some residual jurisdiction over purely intrastate communications under section 152(b). That authority, however, was considerably reduced by the passage of the 1993 amendments to the Communications Act which expressly preempted state-level regulation of or restriction of market entry and state-level regulation of wireless service rates. Further, the 1996 amendments to the Act even further circumscribed state commission authority, even for purely intrastate activity. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, n. 6 (1999).[8] Congress delegated only certain duties and powers to state commissions as part

[8] "JUSTICE BREYER appeals to our cases which say that there is a "'presumption against the pre-emption of state police power regulations,'" post, at 10, *quoting from Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and that there must be "'clear and manifest' showing of congressional intent to supplant traditional state police powers," *post*, at 10, *quoting from Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218,

of the 1996 amendments, and then required that when states are exercising these limited duties they limit the activity to implementing the FCC's rules.[9] The complaint does not claim to be founded on section 252 of the Communications Act, and thus, the TRA completely lacks jurisdiction because all of the issues raised are FCC-exclusive issues that do not fall within the states' remaining residual power or their delegated authority. In any event, the complainants are essentially and ultimately requesting that the TRA *ignore* and effectively *overturn* the FCC's rules and specific parts of the Communications Act. The TRA lacks the power and the jurisdiction to accept the complaint because it cannot even begin to consider whether it should do what the complainants request.

23. Unlike many other commercial radio networks, Halo's network is all "Internet Protocol" ("IP") based, which means that it incorporates the most modern technology. The network supports both "voice" service and "broadband" Internet or private IP network based services. The network uses what is known as "Wi-MAX," which is one of the two competing "Fourth Generation" ("4G") IP-based radio based services (the other being "LTE"). Complaint ¶ 70.

230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. The appeals by both JUSTICE THOMAS and JUSTICE BREYER to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts -- but it is hard to spark a passionate "States' rights" debate over that detail." (emphasis added)

[9] Halo acknowledges there are a few instances where state-level rules can be applied as part of a § 252 arbitration or in a "post-ICA dispute." But those rules cannot be inconsistent with FCC regulations, and they cannot serve to override any provision in the Communications Act. In any event, the complaint is not founded on § 252 and it does not purport to be a § 252(b) arbitration petition or a post-ICA dispute.

24. Because Halo has deployed and is seeking to use the kind of "new technologies and services" addressed by 47 U.S.C. § 157, which are presumptively in the public interest, the FCC is the sole entity that can resolve any questions about whether Halo has the "authority" to provide services using this technology. Under section 157(a), "[a]ny person or party (other than the [FCC]) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest." 47 U.S.C. § 157(a). The FCC (to the exclusion of the states) has exclusive original jurisdiction to "determine whether any new technology or service proposed in a petition or application is in the public interest within one year after such petition or application is filed." *Id.* at § 157(b). The complaint effectively requests that this state tribunal hold that Halo's new technology services should not be allowed, unless Halo submits to multiple state-level "public interest" determinations and complies with each individual state's "conditions." The Communications Act does not countenance or allow this kind of state-level proceeding. The states have been preempted and have no regulatory role.

25. Further, Halo's new technology also supports "broadband" information service. The FCC has declared that wireless-based broadband information services are jurisdictionally interstate and subject to the FCC's exclusive original jurisdiction, to the exclusion of the states.[10]

26. Under the FCC's rules, when carriers are indirectly interconnected, all "non-access" traffic is subject to a "no compensation" regime unless and until the indirectly interconnected carriers enter into a written ICA.[11] The FCC has promulgated a rule allowing

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[10] Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT 07-53, 22 FCC Rcd 5901, 5911, ¶ 28 (2007).

[11] *See* Declaratory Ruling and Report and Order, *In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket 01-92, FCC 05-42, note 57 20 FCC Rcd 4855 (2005) ("*T-Mobile Order*"). ("Under the amended rules,

ILECs to send a written "request for interconnection" that "invoke[s] the negotiation and arbitration procedures contained in § 252 of the Act" to a CMRS provider. *See* 47 CFR § 20.11(e). At that point, the carriers must negotiate terms implementing their respective duties under section 251(a), (b) and, if applicable, (c). If the parties are unable to resolve all issues through negotiation, the incumbent may request that the CMRS provider "submit to arbitration by the state commission." *See* 47 C.F.R. § 20.11(e).

27. The ILEC complainants have not implemented this FCC-prescribed remedy, and they do not base any part of their complaint on an assertion that Halo and the complainants are operating within the section 252 context. The complaint is not based on the TRA's arbitral powers under section 252(b) or its power to approve interconnection agreements under § 252(e). This is not a "section 252" proceeding, and therefore, the TRA cannot assert or find jurisdiction based on section 252.

28. The FCC has promulgated a rule (47 C.F.R. § 20.11(d)) that prohibits local exchange carriers from imposing access charges pursuant to tariff on "non access" traffic. In the order promulgating the rule, the FCC also reiterated its definitions of "access" and "non-access."[12] Further, under the Communications Act, "exchange access" charges apply only to "telephone toll service" and the FCC's rules and rulings have specifically set out the limited circumstances under which a CMRS provider will be providing "telephone toll service," and

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however, in the absence of a request for an interconnection agreement, no compensation is owed for termination.")

[12] *See T-Mobile Order*, note 6 (FCC 2005) ("the term "non-access traffic" refers to traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act and ISP-bound traffic.")

thus, potentially subject to access charges.[13] If the complainants want to secure a change to the FCC's rules, they must apply to the FCC.[14]

29. The complainants deny that Halo is "wireless" and/or "CMRS" and they also at least implicitly assert that the traffic is not "non-access" traffic, and therefore, not subject to the prohibition on access billings in 47 C.F.R. § 20.11(d). The states do not have any authority to interpret, apply, enforce or construe section 47 C.F.R. § 20.11, because it derives from the FCC's exclusive authority under section 201 and section 332. Therefore, the complainants' attempt to submit this issue to a venue other than the FCC and have a state commission ignore, reject or amend the FCC's rules is improper because it necessarily rests on state level jurisdiction over these questions when there is no such jurisdiction.

30. The complainants' *state regulatory authority* filing seeks extraordinary relief based on their interpretations of Halo's *federal* authorizations and Halo's insistence that the

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[13] *See Local Competition Order* ¶ 1043 and note 2485:

1043. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges.

Note 2485: "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is 'roaming' in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier' carrier ['access'] charges is defined by § 69.5(b) of our rules." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275, 1284-85 n.3 (1986).*See also Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Service*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98 (1994) (concluding that there should be no distinction between incumbent LECs' interconnection arrangements with cellular carriers and those with other CMRS providers).

[14] *See, e.g.*, Order on Remand and Report and Order, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151, 9171–72, para. 82 (2001) (*ISP Remand Order*), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002) (stating "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.")

complainants honor the *federal* rules. The entire matter is subject to the exclusive original jurisdiction of the FCC, and the state completely lacks jurisdiction.

D. STATES HAVE NO JURISDICTION TO DECIDE IF A CUSTOMER IS OR IS NOT AN ESP OR IF ACCESS IS DUE FOR TRAFFIC TO OR FROM AN ENTITY THAT CLAIMS ESP STATUS.

31. Complainants imply that Halo cannot serve nor has no authority to serve ESPs, such as the alleged customer Transcom, and that Halo's service is "illegal." Thus, the complaint effectively asserts that Halo is not authorized to provide service to an ESP and seeks a state commission order that Halo "cease and desist" from operating its business. Complaint ¶¶ 58-61, 64; 74-79. The complainants have also effectively raised the issue by claiming that the majority of Halo's traffic is subject to access charges. Complaint ¶¶ 58-60, 64-73, and 81-86.

32. This specific issue is within the FCC's exclusive original jurisdiction because the complainants are raising the issue in connection with one alleged Halo customer that even the complainants admit claims to be an Enhanced Service Provider. ESPs' services to their customers have been held to be jurisdictionally interstate, and not subject to state regulation.[15]

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[15] The complainants admit that this alleged customer claims ESP status. ESP traffic is jurisdictionally interstate because it melds a traditional circuit-switched local telephone call over the PSTN and Halo's and its ESP customer's packet switched IP-based Internet communication. *See e.g.,* Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 99-38, ¶ 18, 14 FCC Rcd 3689, 3702 (1999) vacated and remanded other grounds, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); Order on Remand, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 01-131, ¶ 52, 16 FCC Rcd 9151, 9175, remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002). Even though the D.C. Circuit reversed these early FCC orders, it has consistently accepted that "Internet" communications are wholly and exclusively interstate. See *WorldCom*, 288 F.3d at 431; *Bell Atlantic*, 206 F.3d at 5 ("There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate.") The D.C. Circuit clearly adopted and approved the FCC's jurisdictional finding in *Core Communications v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010). In other contexts, the FCC has likewise found that services that offer access to the Internet are jurisdictionally interstate services. In 1998, for example, the FCC found that ADSL service is jurisdictionally interstate. *See* Memorandum Opinion and Order, *GTE Tel. Operating Cos.*, CC Docket No. 98-79, 13 FCC Rcd 22466, 22481, ¶ 28 (1998) (finding that GTE's ADSL service is subject to federal jurisdiction and is an interstate service); Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, 17 FCC Rcd 4798, 4832, ¶. 59 (2002) (finding that, "on an end-to-end analysis," "cable modem service is an interstate information service"); *Wireline Broadband Internet Access Order*, 20 FCC Rcd 14853 at 14914,

33. Regulatory classification as an ESP *vel non* is based exclusively on *federal law*, and therefore, the question of whether this alleged customer is – or is not – an ESP can only be resolved by the FCC. In the same way the TRA cannot interpret the scope of Halo's federal rights, the TRA lacks jurisdiction or authority to determine this alleged customer's regulatory classification under *federal law.* The FCC has preempted state commission authority over ESPs and ESP services, which necessarily means that a state commission cannot undertake to decide in the first instance that an entity "is not" an "ESP" except in certain narrow circumstances not present here.

34. Under binding FCC rules and the Communications Act, enhanced/information services are by definition not "common carrier" services, nor are they "telecommunications" or a "telecommunications service." The TRA completely lacks jurisdiction to take up the questions of whether Halo's purported ESP customer "should" or "can" be treated as "not ESP" and instead deemed to be "IXC." The TRA cannot determine whether Halo has "authority" to serve an ESP, or whether intrastate access "should" or "can" be applied to any traffic associated with a putative ESP. Only the FCC can decide (a) whether this alleged entity "is" or "is not" an ESP, and (b) whether exchange access charges can be applied to this traffic. Finally, ESPs' services are jurisdictionally interstate, and therefore, there cannot be any "intrastate communications service" in any event until the FCC says that is a legal possibility. The TRA completely lacks jurisdiction over the entire question.

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para. 110 (2005), *aff'd by Brand X*, 545 U.S. 967; Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT 07-53, 22 FCC Rcd 5901, 5911, ¶ 28 (2007); Memorandum Opinion and Order, *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC 06-10, 21 FCC Rcd 13281, 13288, ¶ 11 (2006). The FCC likewise held that VoIP services are jurisdictionally interstate, employing the same end-to-end analysis reflected in those other orders. *Vonage Order*, 19 FCC Rcd at 22413–14, ¶¶ 17–18.

35. The service that a common carrier (such as Halo) provides to an ESP has also been held to be jurisdictionally interstate. *See, e.g., Core Communs., Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010). Thus, Halo's service to this purported customer that (according to the complainants) claims ESP status is jurisdictionally interstate and is not subject to state review or regulation. As a result, no state can lawfully prohibit or restrict Halo's market entry to provide service to ESPs by imposing a state certification requirement or imposing state-level regulations, requirements or restrictions. A state commission completely lacks any jurisdiction or power to order a carrier to "cease and desist" from providing a jurisdictionally interstate service, particularly when it is being provided pursuant to an FCC license or blanket permission.

36. The FCC has expressly ruled in several cases that CMRS providers may support "ISP" traffic,[16] and the FCC has made special provisions in its rules that expressly allow CMRS providers to serve ESPs by being a "numbering partner" for them. Indeed, the FCC required LECs like the complainants to "port" numbers in to a CMRS provider, upon request, when the CMRS provider is serving the ESP, and the FCC made special provisions within its "porting" rules to account for CMRS telephone exchange service to ESPs.[17] The complainants' attempts to obtain contrary and inconsistent rulings at the state level unlawfully intrude on the FCC's exclusive original jurisdiction and constitute an impermissible collateral attack.

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[16] *See T-Mobile Order*, n. 6 (defining "non-access traffic" as including "ISP-bound" traffic).

[17] *See* Report and Order, *Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, WC Docket No. 07-243; CC Docket Nos. 95-116, 99-200; WC Docket Nos. 04-36, 07-244, FCC 07-188, ¶¶ 34-35, 22 FCC Rcd 19531, 19549-19550 (2007); Small Entity Compliance Guide, Local Number Portability (LNP), CC Docket Nos. 95-116, 99-200, WC Docket Nos. 07-243, 07-244, 04-36, DA 08-1317, ¶¶ 3-4 (2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-1317A1.pdf. *See also* 47 C.F.R. §§ 52.23(h)(1), (2), 52.31, 52.34.

37. Complainants assert access charges are due because Halo is transmitting traffic from an entity claiming ESP status whose traffic may include calls that "actually" originate from another location and when viewed "end-to-end" the traffic is "interexchange." They then say *some* of the traffic is intrastate. Complaint ¶ 83. However, the Act makes clear that traffic to and from ESPs is exempt from access charges notwithstanding any "interexchange" characteristic. The reason is that ESPs provide "information service" which is not a telecommunications service and as a consequence cannot be "telephone toll" which as a matter of law is the only kind of traffic subject to access charges. Further, the FCC has exercised its exclusive § 201 jurisdiction to promulgate rules addressing the "appropriate" intercarrier compensation as between two common carriers that collaborate to support a call to or from an ESP. The TRA has no jurisdictional basis to address whether the FCC's rules apply or do not apply, since one can only begin to start addressing the "access" question *after* one decides the FCC's "wireless" rules and the so-called "ESP Exemption" do not apply. These, however, are FCC-exclusive issues, and the TRA lacks jurisdiction over them, and it also lacks personal jurisdiction over Halo.

38. The foregoing is particularly so given that Halo asserts it is providing a federally-authorized "wireless" "CMRS" service to the putative ESP. Even if, however, Halo's service to the ESP is wrongly considered to be "wireline," it is still "interstate" wireline until the FCC says it is not, given that Halo has automatic and advance permission to serve ESPs under 47 C.F.R. § 63.01(a). Complainants' assertion that Halo "lacks authority" to serve ESPs unless and until Halo obtains a state-level certificate, and their attempts to obtain a state commission ruling that this is so, therefore, unlawfully intrudes on and frustrates Halo's *interstate* authorization from the FCC and by extension the FCC's exclusive original jurisdiction over this dispute. The

complainants' request for a state commission "cease and desist" order is plainly a request that the state prohibit a personal wireless service, in violation of § 332(c)(7).

E. STATE COMMISSIONS LACK JURISDICTION TO CONTEMPLATE WHETHER TO ORDER OR AUTHORIZE BLOCKING OF CMRS OR INTERSTATE TRAFFIC.

39. The complainants, in the "request for relief," request an "order" by the TRA authorizing them to block Halo traffic. Request for Relief ¶ 6. They are asking the TRA to approve blocking of jurisdictionally interstate service, and they seek to deny Halo the benefits of its *federal* right to interconnection as a CMRS provider. Any state order would be void. Further, any action by the complainants in reliance on such order would result in damages to Halo.

40. Blocking is an unjust and unreasonable practice under section 201(b). The complainants seek state-level permission to violate section 201(b) of the Communications Act by engaging in the unjust and unreasonable practice of blocking interstate traffic or CMRS traffic without advance permission by the FCC. This is obviously not something a state can or should do. The FCC has ruled that carriers cannot block interstate traffic absent specific FCC authorization and doing so is an unjust and unreasonable practice that violates section 201(b). *See, e.g.*, Declaratory Ruling and Order, *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC Docket No. 07-135, DA 07-2863, ¶¶ 5-6, 22 FCC Rcd 11629 (rel. June 28, 2007);[18] Memorandum Opinion and Order, *Telecommunications Research and Action Center and Consumer Action v. Central Corporation et al.*, File Nos. E-88-104, E-88-105, E-88-106, E-88-107, E-88-108, DA 89-237, ¶¶ 12, 15, 4

[18] "...call blocking is an unjust and unreasonable practice under section 201(b) of the Act...Specifically, Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way."

FCC Rcd 2157, 2159 (1989) (Common Carrier Bureau).[19] Simarly, no state can grant permission for a LEC to not interconnect (or to disconnect interconnection) that exists pursuant to section 332(c)(1)(B). A LECs' disconnection of a CMRS provider would violate section 201, because section 332(c)(1)(B) rests on and incorporates section 201.

41. Any block would also violate section 201(b) for a separate and different reason. As explained elsewhere, complainants assert that some of the traffic is "wireline originated" "toll" traffic. They claim the right to block passage of this traffic based on state law. The cited state rules and laws do not apply to this set of circumstances, but even if they did, they would be pre-empted given that the traffic is interstate,[20] given that even according to the complainants the traffic is VoIP traffic coming from one of Halo's customers for whom Halo serves as a "numbering partner." The complainants would end up blocking what they acknowledge to be VoIP traffic, and that is a violation of section 201(b).[21]

42. Blocking in this situation without advance FCC permission is also a violation of the FCC's rules implementing section 214 of the Communications Act (47 C.F.R. §§

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[19] "After consideration of the arguments and evidence advanced by the parties to this proceeding, we are persuaded that the practice of call blocking, coupled with a failure to provide adequate consumer information, is unjust and unreasonable in violation of Section 201(b) of the Act...We find that call blocking of telephones presubscribed to the defendant AOS providers or other carriers is an unlawful practice. Accordingly, we order the complainants to discontinue this practice immediately. The complainants must amend their contracts with call aggregators to prohibit call blocking by the call aggregator within thirty days of the effective date of this Order."

[20] Halo is not at this point answering or raising any potential defenses or affirmative defenses. Halo is asserting lack of jurisdiction to decide whether the traffic is "not" interstate. Thus, Halo does not bear any burden of proof. Nor, strictly speaking, can the complainants be given the burden or opportunity to "prove" in this proceeding that the traffic is intrastate. The commission simply cannot consider any of this, for it lacks jurisdiction over the entire question of whether the traffic is "not interstate." In any event, even the complainants acknowledge in ¶ 68 that under their own theory at least some of the traffic is interstate. This commission cannot authorize blocking of interstate and/or CMRS traffic.

[21] *See* Order, *In the Matter of Madison River Communications, LLC and affiliated companies*, File No. EB-05-IH-0110; Acct. No. 200532080126; FRN: 0004334082, DA 05-543, 20 FCC Rcd 4295, 4296 (2005) (Enforcement Bureau) (Investigation and consent order regarding violation of § 201(b) with respect to the "blocking of Voice over Internet Protocol ("VoIP") applications, thereby affecting customers' ability to use VoIP through one or more VoIP service providers.")

63.60(b)(5), 63.62(b) and (e) and 63.501). Part 63 rules address a carrier's desire to cease the interchange of traffic with another carrier, and that is precisely what would occur here. Under FCC rules, a carrier that wants to cease interchanging traffic must seek advance permission from the FCC to do so, and there are specific showings that must be made. *See, e.g.*, 47 C.F.R. § 63.60(b)(5), § 63.62(b) and (e), § 63.501. In this regard, the applicant must state whether any other carriers consent (§ 63.501(p)).[22] Halo does not so consent.

43. Any decision by the complainants to proceed with blocking under the auspices of a void state order would be a clear violation of these rules. The FCC would probably be interested in knowing what the state commission thinks about the topic, but a void state commission "order" could not possibly immunize the carrier from damages.

44. The state does not have jurisdiction over section 214 or the FCC's rules relating to the interchange of interstate and/or CMRS traffic. Any state order purporting to authorize the blocking of interstate and/or traffic would be void, and provide no basis for immunity if the complainants then proceed to block. While the FCC may consider a state commission's opinion, it has no binding effect. *Gray Lines Tour, supra* 824 F.2d at 815;[23] *Motorola Communications &*

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[22] The applicant must also give notice to the involved state commission. 47 C.F.R. § 63.71(a). The state commission can presumably become a party to the FCC proceeding and comment on the application. These rules do not contemplate an applicant seeking a state regulator's permission to cease interchange of interstate traffic in the first instance.

[23] "The question, however, is not whether deference should be accorded a decision of the Nevada Commission. The question is one of jurisdiction. The issue which the ICC was called upon to decide was whether the Hoover Dam tours, as conducted by the interstate carriers, were within the scope of the operating authority the carriers held under their ICC certificates. The resolution of that question is within the jurisdiction of the ICC. HN5State 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 ICC is entitled to interpret, in the first instance, certificates it has issued. *Service Storage*, 359 U.S. at 177; *see also E.E.O.C. v. Children's Hospital Medical Center of Northern California*, 719 F.2d 1426, 1429 (9th Cir. 1983) ('the question of jurisdiction is, in the first instance, for the agency and not the courts'). The ICC correctly determined that it had jurisdiction to determine whether the Hoover Dam tours as conducted by ACT, Interstate and Happy Time were valid interstate operations within the scope of their ICC-issued certificates. The determination by the ICC that these interstate carriers were operating within the scope of their ICC certificates, notwithstanding the decision of the Nevada Commission, did not

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).[24] The TRA has no jurisdiction over the request to "order" blocking and the matter must be dismissed.

F. THE TRA'S JURISDICTION UNDER STATE LAW.

45. The TRA is a state regulatory agency organized pursuant to the laws of Tennessee.[25] As a state agency, the TRA is wholly a creature of statute.[26] Its jurisdiction is limited to the specific persons and issues identified in its enabling legislation.[27] 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

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violate the policy statements contained within 49 U.S.C. § 10101."

[24] "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)."

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

[26] *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").

[27] *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").

beyond the jurisdiction afforded to it by its enabling legislation and judicial interpretations thereof.[28]

46. 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.[29] 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.[30] 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.[31] The scope of any tribunal's jurisdiction is governed first by the United States Constitution.[32] However, a tribunal's jurisdiction may be further governed by state legislation and judicial interpretation.[33]

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[28] *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).

[29] *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).

[30] *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.").

[31] *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 void).

[32] U.S. CONST. amend. XIV, § 1.

[33] *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").

47. As noted above, in the context of a state agency, the scope of its jurisdiction is limited by the agency's enabling legislation.[34] 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.[35] 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.

48. Unlike *in personam* jurisdiction, subject matter jurisdiction cannot be waived by consent of the parties.[36] Subject matter jurisdiction relates to the authority of the tribunal to address the particular issues raised by the dispute.[37] Any party or the tribunal may raise the issue of subject matter jurisdiction at any time.[38] When subject matter jurisdiction is brought into 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.[39]

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

[35] *See id.*

[36] *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...").

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

[38] *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.").

[39] *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").

49. The complainants ultimately contend that Halo is not acting pursuant to any federal authorization and is "merely" the complainants' "customer." The Tennessee legislature did not see fit to turn the TRA into a court, or to allow it to award damages payable from a customer to a regulated entity. The TRA does not have state-level jurisdiction over complaints filed by LECs against their "mere" customers. The TRA cannot entertain a collection action against a customer not subject to its regulatory authority, and it cannot order a non-regulated entity to post a bond, or pay a disputed bill.

50. The complaint attempts to get around this problem by asserting that Halo is subject to the TRA's regulatory authority. But that can only be the case if Halo is not acting within and consistent with its *federal* authority. And, as noted above, the TRA lacks jurisdiction, power or authority to decide that question.

51. The TRA lacks subject matter jurisdiction. The TRA lacks personal jurisdiction over Halo and over Halo's business and property. Therefore, the case must be dismissed.

G. THE TRA DOES NOT HAVE JURISDICTION OVER TCA 65-35-102(2)

52. Count IV (¶¶ 88-89) asserts that Halo violated TCA 65-35-102(2).[40] The complainants accuse Halo of "Obtain[ing] or attempt[ing] 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 therefore." The

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[40] 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."

complainants believe the offense was committed because Halo allegedly "misrepresented the traffic delivered" to the complainants. Halo is not, of course, at this point providing an answer and neither admits or denies any of the averments.

53. 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 TRA 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 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.

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

CONCLUSION

55. The jurisdiction of a tribunal is a threshold matter that must be determined at the outset of the proceeding.[41] Even the Supreme Court of the United States must determine its own

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

jurisdiction before it can proceed with a matter, and the rule is the same in Tennessee.[42] By filing this Motion, Halo asserts its objections to the TRA's assertion of either subject matter or personal jurisdiction over Halo and Halo'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 Halo. As demonstrated by the foregoing, however, the TRA does not have either subject matter jurisdiction or personal jurisdiction over Halo or Halo's business or property. Thus the TRA can take only one action: dismiss.

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[42] *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,

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Attorneys for Halo Wireless, 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.:

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

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

W. Scott McCollough

EXHIBIT 1

Federal Communications Commission

Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSEE: HALO WIRELESS

ATTN: NATHAN NELSON
HALO WIRELESS
307 WEST 7TH STREET SUITE 1600
FORT WORTH, TX 76102-5114

Call Sign	File Number
WQJW781	0003681223
Radio Service NN - 3650-3700 MHz	
Regulatory Status Common Carrier	

FCC Registration Number (FRN): 0018359711

Grant Date	Effective Date	Expiration Date	Print Date
01-27-2009	01-27-2009	11-30-2018	01-27-2009

Market Name: Nationwide

Channel Block: 003650.00000000 - 003700.00000000 MHz

Waivers/Conditions:

This nationwide, non-exclusive license qualifies the licensee to register individual fixed and base stations for wireless operations in the 3650-3700 MHz band. This license does not authorize any operation of a fixed or base station that is not posted by the FCC as a registered fixed or base station on ULS and mobile and portable stations are authorized to operate only if they can positively receive and decode an enabling signal transmitted by a registered base station. To register individual fixed and base stations the licensee must file FCC Form 601 and Schedule M with the FCC. See Public Notice DA 07-4605 (rel November 15, 2007)

Conditions:
Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.