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August 11, 2011

Hon. Eddie Roberson, Chairman
Tennessee Regulatory Authority
c/o Sharla Dillon, Docket & Records Manager
460 James Robertson Parkway
Nashville, TN 37243

RE: Complaint of TDS Telecom, et. al. v. Halo Wireless, Inc., et. al.
Docket No. 11-00108

Dear Chairman Roberson:

Attached for filing is a response to Transcom's Motion to Dismiss.

The co-defendant, Halo Wireless, Inc. ("Halo"), has filed for bankruptcy, but co-defendant Transcom Enhanced Services, Inc. ("Transcom"), has not filed for bankruptcy. While the automatic stay under the Bankruptcy Code applies to Halo, the automatic stay does not apply to Transcom which did not file bankruptcy.

Complainants vigorously dispute Halo's assertion in its *Suggestion of Bankruptcy* filed in this docket that the automatic stay also applies to the co-defendant, Transcom Enhanced Services, Inc. ("Transcom"), a non-party to Halo's bankruptcy.

This argument of Halo's (that the stay applies to a non-debtor) was rejected by the Georgia Public Service Commission ("GPSC") on August 8, 2011 in Docket No. 342149.

In the GPSC proceeding, TDS Telecom also filed a complaint against Halo and Transcom. In such GPSC docket, the GPSC held in abeyance the proceeding against Halo because of the stay, but allowed the proceeding against Transcom to continue. The Tennessee Regulatory Authority should also do the same in this docket: hold in abeyance action against Halo, but continue action against Transcom.

Sincerely,

H. LaDon Baltimore
Norman J. Kennard
Attorneys for Petitioners

cc: Paul S. Davidson
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Steven H. Thomas
Troy P. Majoue
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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS FILED BY TRANSCOM ENHANCED SERVICES, INC.

COMES NOW, Complainants, Concord Telephone Exchange, Inc., Humphreys County Telephone Company, Tellico Telephone Company and Tennessee Telephone Company; Crockett Telephone Company, Inc., Peoples Telephone Company, and West Tennessee Telephone Company, Inc.; Highland Telephone Cooperative, Inc.; and North Central Telephone Coop., Inc. (all collectively referred to as the "Rural Telephone Companies" or the "RLECs") in the above-styled docket, and file this Response in Opposition to the Motion to Dismiss filed by Respondent, Transcom Enhanced Services, Inc. ("Transcom"). On August 5, 2011, Transcom filed its Motion to Dismiss, contending that the Tennessee Regulatory Authority ("the TRA" or "the Authority") lacks jurisdiction to resolve the allegations asserted against it in the Complaint filed by Complainants in the above styled docket. In its Motion to Dismiss, Transcom only

makes conclusory statements as to the nature of its business, the nature of the calling traffic at issue and this Authority's jurisdiction over the claims contained in the Complaint. However, the issues raised by Complainants fall squarely within the TRA's jurisdiction, and the Motion to Dismiss must be denied.

A. INTRODUCTION

The RLECs' Complaint, on its face, raises issues that fall squarely within the jurisdiction of the Authority; namely Transcom's delivery of intrastate toll traffic to Complainants and its non-payment of tariffed intrastate access rates. These issues also include the absence of state authority for Transcom to act as carrier of intrastate toll traffic.

The Complainants provide both local exchange and intrastate exchange access service pursuant to the Authority's existing policies, rules, regulations and tariffs (Complaint at ¶¶ 1-15).

The Complaint, which also names Halo Wireless, Inc. ("Halo")[1] as a defendant, avers that Transcom is operating as an interexchange carrier (IXC) to deliver intrastate toll calls as part of its core "voice termination" service provided to other carriers under a scheme to avoid the payment of access charges (Complaint at ¶¶ 25, 26, 61, 66). Complainants, therefore, have made a *prima facie* showing of intrastate jurisdiction. Therefore, the Complaint should not be dismissed, and the Authority should proceed with its scheduled hearing thereon.

In its Motion to Dismiss, Transcom argues that Transcom's *putative status* as an ESP also precludes the payment of access charges. The Complainants dispute this defense. Complainants' traffic studies show that Transcom is *not* the originating carrier *on any* of the calls. The traffic delivered consists of traditional toll calling originated not by Transcom, but rather on other carriers' networks. Transcom is simply operating as a wholesale deliverer of intrastate toll traffic

[1] Halo has filed bankruptcy and thus an automatic stay prohibits Complainants from pursuing their action against Halo, including a response to Halo's Motion to Dismiss.

and is an interexchange carriers. Complainants will present testimony detailing the conduct and conclusions of these studies. The Complainants are also prepared to offer additional evidence regarding the operations and services of Transcom, which also refute its jurisdictional defense. The Complainants will demonstrate that Transcom is acting as a common carrier in the delivery of intrastate toll traffic and are acting as an interexchange carrier, but is not certificated to do so.

The matter should be heard by the Authority. Transcom seeks to raise issues of jurisdiction in the abstract. Yet, jurisdiction is a fact-based inquiry, and Transcom can not possibly win a jurisdictional argument without revealing the facts of its operation, facts which it claims are critical to the resolution of RLECs' Complaint. Transcom claims "ESP" status *without any* underlying description whatsoever of why it asserts this to be true or what it is doing to deserve this label. By uttering a few apparently magic regulatory words, with no need to support their applicability, Transcom expects to be able to continue to use Complainants' network for free.

Transcom blatantly asks the Authority to accept the representations at face value and as dispositive of the jurisdictional issues. As to Transcom, there is no such thing as an ESP certificate, and Transcom explains nothing to show that what it does meets the very specific and limited definition of an ESP (including being an end-user, which it is obviously not).

The Complainants' testimony will demonstrate that Transcom, by its own admission, provides "voice termination services" to other interexchange carriers, moving one *billion* minutes a month to terminating carriers. From its position of transporting traffic in the middle of a call, Transcom has no opportunity to offer enhanced services. Simply stated, Transcom is engaging in the delivery of toll traffic on behalf of a multitude of other carriers. While it

attempts to ascribe different labels to what it does, these do not fit the circumstances, and its unsupported claims to the contrary are transparently false.

Despite filing rebuttal testimony on the jurisdictional issue, Transcom offers no explanation other than to restate the same conclusory statements they chose to disclose in correspondence and pleadings. As explained in this Response, the failure of Transcom to support its affirmative defense of preemption through the Authority's fact finding process is a critical tactical error on their part. The Authority is fully empowered to hear this case and resolve the jurisdictional claims.

Moreover, the Transcom Motion misrepresents the law and fails to disclose the legal precedent that applies to defining ESP services and how that issue relates to intercarrier compensation and state jurisdiction. This label is inapplicable to it. Transcom's claim to be an ESP is patently absurd.

B. TRANSCOM'S CLAIMS DO NOT PRECLUDE ALL INQUIRY OR FORCLOSE ANY STATE JURISDICTION

1. Cases cited by Transcom are not relevant.

The instant complaint case is not at all like "the jurisdictional tussles over 'private radio service'" raised by Transcom in its (Motion, pp. 10-12, ¶ 16). None of the private radio service cases cited by Transcom has any application or relevance to the disposition of the instant matter, and Transcom's recitation of those cases represents nothing more than an attempt to obfuscate the jurisdictional issue. Those cases pertain to the regulation of radio carriers engaged in private land mobile service and in no way address or influence the issues raised by the instant complaint, which, as discussed *infra* in more detail, are clearly and rightfully within the jurisdiction of the Authority to address.

2. A State Authority may inquire in the facts surrounding a jurisdictional defense

Preemption does not occur because "I said so." If Transcom claims that the facts of its operation are such that it is removed from state regulation, it is required to demonstrate the facts to allow this Authority to make that determination. In appeals lodged by Global NAPs against state Authorities that applied intrastate access rates to ISP-bound traffic, federal courts consistently affirmed the states' right to investigate and to require a demonstration of preempted status:

> Global NAPS' argument ignores an important distinction. The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic.[2]

This view was also adopted by the Second Circuit Court of Appeals, again in a case ruling against Global NAPs' preemption theory.[3] The lesson of the FCC's ISP-Bound Orders is that it is a mistake to acquiesce this Authority's state authority and rules to spurious arguments that the FCC has impliedly preempted state compensation and now require the provisioning of free services.

Further, Transcom bears the burden to prove that toll traffic between two Tennessee points is preempted from intrastate access charges. In the *Global NAPs Docket*,[4] the Georgia

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[2] *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72-73 (1st Cir. 2006).

[3] *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006).

[4] *In re: Request for Expedited Declaratory Ruling As To the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*.; Docket No. 21905-U ("*Global NAPs Docket*").

Hearing Officer found that Global NAPs bore the burden of proof with respect to establishing the nature of its traffic and that is was, in fact, enhanced.[5] The Hearing Officer stated that the fundamental question was the character and classification of the traffic, and since Global NAPs controlled the evidence necessary to substantiate their claim, the burden was on Global NAPs to present such evidence.[6] The Georgia Commission fully agreed that preemption is an affirmative defense[7] and that the party pleading the defense has the burden of proof:

> Courts have found that the party raising the affirmative defense has the burden of proof. *Buist v. Time Domain Corporation,* 926 So. 2d 290, 296 (2005). Under this principle, GNAPs had the burden of proof to demonstrate the subject traffic was of such a nature as to preempt the Authority.[8]

Other states have ruled similarly on the issue of presenting the facts necessary to a preemption claim.[9]

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[5] *Id.*, Initial Decision filed April 8, 2008 ("*Global NAPs Initial Decision*") (citing O.G.C.A. § 24-4-1; *Fulton-DeKalb Hospital Authority v. Fanning*, 196 Ga.App. 556, 558, 396 S.E.2d 534, 535 (1990); *Pembrook Mgmt. v. Cossaboon*, 157 Ga.App. 675, 278 S.E.2d 100 (1981); and *Parsons v. Harrison*, 133 Ga.App. 280, 211 S.E.2d 128 (1974)).

[6] *See Global NAPs Initial Decision* at 2.

[7] *Global NAPs Docket*, Order Adopting in Part and Denying in Part the Hearing Officer's Initial Decision filed July 31, 2009 ("*Global NAPs Order*"), at 12 ("The Independent Companies alleged that they received traffic from GNAPs for termination, and asked that the Commission declare that they are entitled to access charges in connection with such traffic. GNAPs raised the affirmative defense of preemption in an effort to avoid making such payment.").

[8] *Id.* at 12; *see also id.* at 7 ("As will be addressed in more detail in Staffs recommendation on GNAPs's alleged error number 9, the Initial Decision properly determined that the burden of proof was on GNAPs to demonstrate that the Commission is preempted with regard to the subject traffic. *See Fifth Third Bank ex rel. Trust Officer* v. *CSX Corp.*, 415 F.3d 741, 745 (7th Cir. 2005)."); *id.* at 10 ("... preemption is an affirmative defense and the party raising it bears the burden of proof.").

[9] The Florida PSC ruled that PointOne, a carrier similar to Transcom, does not enhance long distance traffic and that "Sprint should not have to track down carriers of traffic that has been handed off several times before ultimately reaching Sprint's network." *Complaint Against KMC Telecom*, Flordia PSC Docket No. 041144-TP, Order No. PSC-05-1234-FOF-TP issued December 19, 2005. The Pennsylvania PUC also ruled that Global NAPs bore the burden to demonstrate its affirmative preemption defenses. *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, PA PUC Docket C-2009-2093336, Opinion and Order entered March 16, 2010 ("*Palmerton v. Global NAPs*").

In the *Global NAPs Docket*, the Georgia Hearing Officer further found the burden is to "clearly" show preemption:

> As a matter of law, GNAPs must show that the preemption it claims exists must be clear. *Global Naps, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 at 73, *citing Hillsborough County v. Automated Med. Labs, Inc.* 471 U.S. 707 (1985) *("Hillsborough County").* Moreover, since the Authority has engaged in the regulation of intrastate access arrangements for almost the last 16 years, the United Stated Supreme Court has stated that, "[w]here ... the field that Congress is said to have pre-empted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Hillsborough County,* 471 U.S. at 715, *citing Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).[10]

This too was affirmed by the full Georgia Commission:

> It is well-established that there cannot be a finding that the historic police powers of the state are preempted, unless it is the clear and manifest purpose of Congress. *Altria Group, Inc. v. Good,* 129 S. Ct. 538, 543 (2008).[11]

As with the Georgia Global NAPs proceeding, the Authority can and should hear the facts regarding the operations of Transcom, first to determine jurisdiction and then, if not preempted, to apply the appropriate remedy. There is no reason these two inquiries can not occur concurrently, and judicial economy warrants it. Transcom does not want any fact hearings and, thus far, has done everything to prevent any inquiry that would allow the facts to be developed. It prefers, instead, to raise and argue jurisdictional issues based upon its own unsworn and untested conclusions. There is simply no reason that the Authority should be forced to accept the mere contentions stated in the Transcom Motion as proven fact.

B. TRANSCOM'S CLAIM TO BE AN ESP IS UNPROVEN AND IRRELEVANT

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[10] *Global NAPs Initial Decision* at 10

[11] *Global NAPs Order* at 9.

Transcom claims ESP status and, then, argues federal preemption from that conclusory self-judgment (Motion, p. 4, ¶ 7). Transcom claims that Transcom is an ESP with not one shred of factual support or any acknowledgement that this too is a carefully crafted definition into which Transcom must demonstrate that it fits.

Complainants maintain that Transcom is not an ESP. While Complainants admit that Transcom *claims* to be an Enhanced Service Provider (Motion, p. 4, ¶ 7), they dispute this claim. They question whether Transcom is an ESP and how an entity can be an ESP that offers no enhanced services to end use customers, but which instead offers "voice termination" services to other interexchange carriers.

Complainants do not seek to turn Transcom into a common carrier (Motion, p. 3, ¶ 3). It is one. Transcom is a operating as a common carrier right now in its delivery of "voice termination" toll traffic destined for carriers like Complainants.

While admitting that its "operations *may* involve communication with end-points on the PSTN in Tennessee," Transcom continues on to claim that "[t]hese operations, however, are being conducted pursuant to federal law (Motion, p. 8, ¶ 12)." Specifically, Transcom asserts that it has "federal authority" to be an ESP, which specifically excludes state regulation (Motion, pp. 9-10, ¶ 15). This is, of course, complete fiction. There is no "ESP license." There is no deference owed to Transcom's claim to be one.

Transcom does not explain how Transcom comes even close to being an ESP. Transcom claims that all of the long distance traffic delivered to Complainants is "enhanced" and, therefore, is exempt from terminating access charges. According to this argument, the voice traffic originated by ILEC, CLEC, Cable, Wireless and other companies that otherwise pay terminating access is excused when it is laundered and delivered through Transcom. There is no

such thing as "ESP-in-the middle." Nor can Transcom point to any precedent for one. The whole arrangement is absurd and unsupportable both factually and legally.

The ESP exemption is very specific. Under FCC case law dating back to the AT&T divestiture, *customers of telecommunications services* offering dial-up data services, such as WestLaw and Compuserve, were granted "the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access tariffs used by [interexchange, long distance carriers]."[12] A current example is dial-up traffic received by an internet service provider and destined for the Internet (*i.e.*, ISP-bound traffic). The ISP receives telecommunication service from a local carrier and then uses the call to access the Internet. As noted by the FCC, "information service providers have used this exemption to their advantage by choosing to pay local business rates, rather than the tariffed interstate access charges that other users of interstate access are required to pay."[13] Transcom is not subscribing, as an end-user, to Complainants' local services. Obviously a huge volume, wholesale toll carrier, Transcom has no need to buy local service.

Another basic flaw in the Transcom attempt to apply this customer exemption to Transcom is that *the ESP exemption applies only to calls coming into the ESP and not out-bound traffic*, as we have in this case. Here, Transcom delivers voice traffic *to* Complainants.

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[12] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 (1988) ("*ESP Exemption Order*"). "Thus, ISPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices." *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68 (Declaratory Ruling and Notice of Proposed Rulemaking released February 26, 1999) ("*ISP Declaratory Ruling*") at ¶ 5. The ESP exemption means that the ESP itself can obtain standard business service from the local exchange carrier, rather than having to obtain access service.

[13] *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Report and Order released April 27, 2001 ("*ISP Remand Order*") at ¶ 27.

Transcom is not subscribing to Complainants' local service in lieu of paying access rates. As the FCC stated in the *First Local Competition Order*: "[E]nhanced service providers that do not also provide domestic or international telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under Section 251."[14]

The FCC has established a bright-line rule that the "enhanced" service designation also does *not* apply to services that merely "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service."[15] As the FCC has explained, even where a service "may fall within the literal reading of the enhanced service definition,"[16] it can be "incidental to the underlying service offered to the [end user]."[17] Where that is the case - where the enhancement does not, from the end user's perspective, "alter the fundamental character" of the telephone service - the service remains a "telecommunications service," regardless of whether the technical definition of an "enhanced" service can be stretched to fit the service in question.[18] The FCC concluded that a service is an enhanced service if the information provided is "not incidental" to telecommunications service, but rather is "the essential service provided."[19]

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[14] *First Local Competition Order*, *supra*, at ¶ 995 (1996).

[15] *See, e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation of Prepaid Calling Card Services*, WC Docket No. 03-133 and WC Docket No. 05-68, Order and Notice of Proposed Rulemaking (released February 23, 2005) ("*AT&T Calling Card Decision*"). at ¶ 107; *Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, 21958, ¶ 107 (1996).

[16] *Non-Accounting Safeguards Order,* 11 FCC Rcd at 21958, ¶ 107.

[17] *AT&T Calling Card Decision*, ¶ 16.

[18] *Id.*

[19] *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, File No. ENF-88-05, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3431, para. 20 (CCB 1989) (emphasis added).

In the *AT&T IP-in-the-Middle* proceeding, AT&T argued that the insertion of enhancement of protocol conversion in the middle of a call exempted it from access charges.[20] The FCC rejected the claim on the basis of both lack of a change recognized by the customer and the similarity of the burden on the terminating company.

> End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuits switched long-distance network. Customers of AT&T's specific service receive no enhanced functionality by using the service... AT&T's specific service imposes the same burdens on the local exchange as do circuit-switched interexchange calls. Under section 69.5(b) of the Authority's rules, "carrier [access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."[21]

The FCC saw "no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules"[22] and explained that its approach was necessary to ensure that AT&T was not "place[d]...at a competitive disadvantage."[23] The FCC further stated that since its ruling of access charge applicability would apply "regardless of whether only one interexchange carrier uses [the enhanced service of] IP transport or instead multiple service providers are involved in providing IP transport, [it is] adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers may be paying access charges for these services while others are not."[24]

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[20] *See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, WC Docket No. 02-361, FCC 04-97 (released April 21, 2004) ("*AT&T IP in the Middle Decision*").

[21] *AT&T IP in the Middle Decision* at ¶ 1 (citing 47 C.F.R. § 69.5(b)).

[22] *Id.* at ¶ 17.

[23] *Id.* at ¶ 19.

[24] *Id.*

The FCC applied this same body of case law precedent most recently in its *AT&T Calling Card Decision,* which held, in reliance on a consistent line of precedent dating back two decades, that "the provision of [an] advertising message" to certain long-distance calls "d[id] not in any way alter the fundamental character of" those calls and thus did not transform those calls into "enhanced" services.[25] Following its rationale in the *AT&T IP in the Middle Decision*, the FCC rejected the notion that toll services which offered access to stored information (in this instance, calling card calling) provided via IP-transport is exempt from access charges. The enhancement needs to be both known and providing a useful capability.

> [W]ithout the advance knowledge or consent of the customer, there is no 'offer' to the customer of anything other than telephone service, nor is the customer provided with the 'capability' to do anything other than make a telephone call.[26]

Transcom claims to have been found to be an ESP by four different bankruptcy courts, but cites none of them (Motion, p. 4, ¶ 7). Complainants are aware of only one, a Texas bankruptcy matter,[27] in which Transcom bought the assets of DataVoN, which, in another Texas bankruptcy proceeding, was found to be providing ESP services, in part because the DataVoN/AT&T interconnection agreement expressly identified DataVon as "an ESP."[28] Transcom asserted that, because it had bought an ESP, whatever operations it had also became ESP. The bankruptcy court undertook no more than cursory review of the FCC cases and, based upon its own in-court precedent, affirmed. A bankruptcy court has no telecommunications

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[25] *AT&T Calling Card Decision* at ¶ 16, n.28 (where the fundamental nature of the service offered to the end user is telephone service, the service is not an "enhanced" service).

[26] *AT&T Calling Card Decision* at ¶ 15.

[27] *Transcom Enhanced Services, LLC,* Case No. 05-31929-HDH-11, U.S. Bankruptcy Court, Northern District of Texas, Dallas Division (Memorandum Opinion, signed April 28, 2005) ("*Transcom Bankruptcy*"). The bankruptcy court ruled that Transcom did not owe AT&T access for traffic it delivered to the RLEC. The court made no determination as to whether a delivering IXC, like Halo, would owe access payments.

[28] *Id.* at 2-3.

regulatory expertise and is motivated to discharge the debtor from bankruptcy. The Texas bankruptcy case has no precedential value, is not binding on the Authority, and is contrary to the FCC cases cited above.

In the Pennsylvania complaint case, Global NAPs presented a Texas A&M associate professor who testified about Transcom's enhancements having interviewed the company's personnel. He identified four Transcom improvements: packet loss concealment, "short codes," the removal of background noise, and the injection of "comfort noise." The PA PUC rejected the notion that Transcom was enhancing anything:

> In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above [*AT&T VoIP-in-the-Middle* and *AT&T Calling Card*], we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges. Also, the Commission is not persuaded by the decision of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, finding Transcom to be an 'enhanced services provider' on the basis that Transcom indicated in that proceeding that it provided 'data communications services over *private* IP networks (VoIP).' *In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11 (Bkrptcy. N.D.Tex., April 28, 2005) at 2 (emphasis added).[29]

Moreover, unless Transcom provides end user services, the enhancements the witness described are of no value. Global NAPs' witness conceded that, in the role of Transcom as a traffic forwarder, "there would be no point in Transcom being in the path at all."[30]

Nor would it legally matter if Transcom were enhancing the traffic under the precedent of the *Time Warner Declaratory Ruling*.[31] The fact that the content may be enhanced by someone

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

[30] *Id.* at Tr. 989.

else does not change the telecommunication nature of the delivery. The transiting carrier is providing a telecommunications service even if the call was part of an information service. It is entitled to interconnection and must also pay access.

In the *Time Warner Declaratory Ruling,* the FCC ruled upon whether MCI and Sprint were entitled to interconnection on traffic that could be considered an information service (cable VoIP service – the FCC has not determined that fixed VoIP is an information service).[32] It held that, irrespective of the originating technology, the deliverer of such traffic would be providing a "telecommunications service."

> We further conclude that the statutory classification of the end-user service, and the classification of VoIP specifically, is not dispositive of the wholesale carrier's rights under section 251... The Act defines "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Finally, any provider of telecommunications services is a "telecommunications carrier" by definition under the Act.[33]

It made no difference to the FCC that the traffic delivered was "enhanced" by protocol conversion. The carrier delivering such calls is a telecommunication carrier.

As the FCC further ruled in its *Time Warner Decision*, payments are due regardless of any upstream enhancements (in that case, the originating technology):

> ... the *wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic* under a section 251 arrangement between those two parties. *We make such an arrangement an*

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

[32] "TWC purchases wholesale telecommunications services from certain telecommunications carriers, including MCI WorldCom Network Services Inc. (MCI) and Sprint Communications Company, L.P. (Sprint), to connect TWC's VoIP service customers with the public switched telephone network (PSTN). MCI and Sprint provide transport for the origination and termination on the PSTN through their interconnection agreements with incumbent LECs." *Time Warner Declaratory Ruling* at ¶ 2.

[33] *Time Warner Declaratory Ruling* at ¶ 9-10.

explicit condition to the section 251 rights provided herein. *See, e.g.*, Verizon Comments at 2 (stating that one of the wholesale services it provides to Time Warner Cable is "administration, payment, and collection of intercarrier compensation"); Sprint Nextel Comments at 5 (offering to provide for its wholesale customers "intercarrier compensation, *including exchange access* and reciprocal compensation").[34]

These principles were acknowledged and applied by the Georgia PSC in the *Global NAPs Docket*. The Presiding Officer found and the Georgia PSC concurred that:

> While the factual record in this case demonstrates that the traffic is not ESP traffic, Commission jurisdiction over the subject matter is not altered as a result of whether the traffic delivered for termination to the PSTN by GNAPs is or is not ESP traffic delivered to the PSTN for termination or Internet Protocol-enabled ("IP-enabled") traffic. Although the FCC may, in the future, determine that some alternative regulatory framework should apply to these types of traffic, for now it has not. Thus, the FCC's framework, which recognizes this Commission's jurisdiction over intrastate traffic, continues unabated and must and should be applied.[35]

Thus, Transcom's claim of an ESP exemption is both factually incorrect and legally irrelevant. In view of the established FCC precedent described above, it cannot seriously be argued that Transcom's "voice delivery service" has an ESP component that launders ordinary long distance telephone calls into enhanced service rendered them exempt from access charges.

D. THE TRA HAS THE STATE AUTHORITY TO HEAR THIS CASE

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[34] *Time Warner Decision* at ¶ 17 (emphasis added).

[35] *Global NAPs Initial Decision* at 3; *Global NAPs Order* at 4; *see also Global NAPs Initial Decision* at 9 ("...the FCC has also already determined that the carrier (which would in this case be GNAPs) that delivers traffic for termination to the PSTN is the party with the financial responsibility for the intercarrier compensation (in this case intrastate access charges) associated with that traffic. *See In the Matter of Time Warner Cable Request...*"); *id.* ("These SS7 records demonstrate that the traffic at issue is voice traffic. In their most basic form, the SS7 records demonstrate that purportedly ESP traffic is delivered to the PSTN by a traditional wireline or wireless carrier and is terminated over the PSTN as traditional wireline or wireless traffic. At best, therefore, the traffic is the same type of IP-in-the-Middle traffic that the FCC has decided is subject to access charges. *See In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charge, Order,* WC Docket No. 02-361, FCC 04-97, released April 21, 2004 (the *"AT&T Decision")* at 1 and n.61. These same conclusions are reached regarding the Commission jurisdiction even if GNAPs had demonstrated that the traffic it delivered to the Independent Companies for termination was ESP or ISP traffic.").

1. TRA's Statutory Authority

Tennessee law establishing the TRA's subject matter jurisdiction over the issues in this docket is clear. Under Tenn. Code Ann. § 65-4-117(a)(1), the Authority has the power to investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as defined in Tenn. Code Ann. § 65-4-101. Additionally, under Tenn. Code Ann. § 65-4-117(a)(3), the Authority has power to fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility. The TRA's jurisdiction is to be liberally construed in favor of the TRA under Tenn. Code Ann. § 65-4-106[36] The TRA has a broad grant of authority under Tennessee law over regulated utilities within its jurisdiction. *Tennessee Cable Television Association v. Tennessee Public Service Commission,* 844 S.W. 2d 151, 159 (Tenn.Ct.App.1992). The TRA has the jurisdiction to investigate the issues and facts alleged. An investigation will show that Transcom is a public utility within the regulation of the TRA.

2. The Standard of Review for Granting Tenn. R. Civ. P. 12.02(6) Motions

The authority of the TRA to adjudicate a motion to dismiss is derived from the Tennessee Rules of Civil Procedure through the Uniform Administrative Procedures Act ("UAPA"). Under Tennessee law, a "motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof."[37] A

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[36] The statute provides:

> This chapter shall not be construed as being a derogation of the common law, but shall be given liberal construction, and any doubt as to the existence of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

[37] *Doe v. Sundquist,* 2 S.W.3d 919, 922 (Tenn. 1999(; *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsberg, P.A.,* 986 S.W.2d 550, 554 (Tenn.1999)

motion to dismiss "admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law."[38] Essentially, the truths set forth are admitted on all relevant and material factual allegations in the complaint. Unless there is no cause of action that results from those facts, the motion to dismiss should be denied. Further, in reviewing a motion to dismiss, the complaint must be construed liberally in favor of the plaintiff by taking all factual allegations in the complaint as true and giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts.[39] A dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief or when the complaint is totally lacking in clarity and specificity.[40] Here, the alleged facts entitle Complainants to relief.

3. TRA Can Investigate Alleged Violations of T.C.A. § 65-35-102(2)

The TRA has jurisdiction to investigate violations of T.C.A. § 65-35-102(2). The Authority may "[i]nvestigate...any matter concerning any public utility... ." T.C.A. § 65-4-117(a)(1), emphasis added. "Any matter" includes violations of T.C.A. § 65-35-102(2) which, while mentioning civil and criminal actions and liabilities, does not prohibit the TRA from investigating such allegations and take action, including, but not limited to, fixing just and reasonable standards, practices or services, including prohibiting violations of T.C.A. § 65-35-102(2). T.C.A. § 65-4-117(3). The TRA can impose penalties for violating any of its orders, findings, rules or requirements. T.C.A. § 65-4-120.

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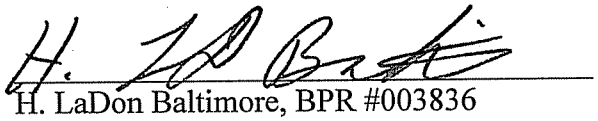
[38] *Winchester v. Little*, 996 S.W.2d 818, 821-22 (Tenn.Ct.App.1998); *Smith v. First Union Nat'l Bank*, 958 S.W.2d 113, 115 (Tenn.Ct.App.1997).
[39] *Id.*
[40] *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn.Ct.App.1992).

CONCLUSION

Since the Authority plainly has jurisdiction to hear the merits of this Complaint, the Motion to Dismiss filed by Transcom must be denied.

This 15th day of August, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing RESPONSE upon the following persons by causing electronic copies of the same to be transmitted to each interested party that has supplied a valid email address, and all other parties to be served via first class mail with adequate postage affixed thereon and deposited in the United States Mail addressed as follows:

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