

**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 HALO
WIRELESS, LLC**

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") Complainants in the above-styled docket, and file this Response in Opposition to the Motion to Dismiss filed by Respondent, Halo Wireless, LLC ("Halo"). On August 5, 2011, Halo 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, Halo 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

Halo Wireless, Inc. ("Halo") and its affiliate Transcom Enhanced Services, Inc. ("Transcom") have been to Federal District Court in Nashville and Bankruptcy Court in Texas attempting to preclude the TRA from hearing this case which involves toll calling between points in Tennessee. Fortunately, the Federal Court has remanded the improvident "removal" back to the Authority and the Bankruptcy Court has ruled that the "automatic stay" provision of the Bankruptcy Code does not apply. The matter is now squarely before the TRA for resolution. Prompt resolution is immensely important to the RLEC Complainants as Halo continues every month to use approximately \$125,000 of the RLEC Complainants' intrastate access services while refusing to pay.

The RLECs' Complaint, on its face, raises a subject matter that falls squarely within the jurisdiction of the Authority; namely Halo's delivery of *intrastate* toll traffic (i.e., *both* originating and terminating in Tennessee) to the Complainants for termination. (Complaint at ¶¶ 39-45; Amended Complaint at ¶¶ 37-43) Similarly, Halo's refusal to pay intrastate access charges and its lack of certification to operate as an interexchange carrier ("IXC") handling intrastate toll traffic are issues that are clearly justiciable before the Authority. (Complaint at ¶¶ 37 & 38; Amended Complaint at ¶¶ 35 & 36). The Complaint also names Halo's affiliate, Transcom, as a defendant, and avers that Halo and Transcom are operating in concert as intrastate interexchange carriers 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 ¶¶ 61-68; Amended Complaint at ¶¶ 60-66).

Halo has raised, *as an affirmative defense* to the payment of RLEC Complainants' access bills, the *claim* that it is operating as a CMRS carrier and that all calls are originated by it on an intraMTA basis.¹ Halo further argues that any inquiry into its operations is impermissible. Also, it claims that Transcom's putative status as an ESP also precludes the payment of access charges. None of these assertions are accurate, either factually or legally.

Complainants' traffic analyses show that all of the calling at issue begins and ends in Tennessee and, further, that *neither* Halo nor Transcom are the originating carrier *on any* of the calls delivered.² The traffic delivered to the RLEC Complainants consists of toll calling originated on other carriers' networks; including ILEC, CLEC, cable companies, and *real* CMRS carriers. Transcom-Halo traffic flows are originated *exclusively* by other companies, mostly traditional wireline companies, including Verizon, Sprint, and AT&T, as well as the cable companies, including Comcast and Charter. Some measure of the calls is from well known CMRS carriers, such as AT&T Wireless, Verizon Wireless and Sprint/Nextel.³ These are the same types of companies to whom Transcom offers its "voice termination" service. In other words, both Transcom and Halo are simply operating as wholesale deliverers of intrastate toll traffic and, in this role, are both serving interexchange carriers.

¹ For wireless CMRS originated calls, the FCC uses Rand McNally's "Metropolitan Trading Areas" to define whether a CMRS -originated call is local. Hence, the terms for local and toll calling in the wireless industry are interMTA (toll and access) and intraMTA (local). *Implementation of the Local Competition Provisions of the Communications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, 16017 (1996).

² All facts alleged herein will be demonstrated in the RLEC Complainants' testimony. 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 both Transcom and Halo, which also refutes their jurisdictional defenses.

³ The RLEC Complainants are not saying that any of these originating carriers directly hand traffic off to Transcom. The transfer may occur well-down stream from the originating carrier.

The RLEC's testimony will show also that Halo and Transcom are engaged in a practice known in the industry as "access arbitrage" whereby carriers misrepresent traffic delivered to the terminating carrier in order to avoid paying lawfully billed access charges. The traffic transmitted by Halo through the AT&T tandem and delivered to the RLEC Complainants for termination is, for the most part, "toll" traffic and, for the intrastate portion of the traffic, is subject to the terminating switched access tariffs of the companies on file and approved by the TRA.

In its Motion to Dismiss, Halo claims that it is a CMRS provider and that this assertion alone precludes any inquiry by the TRA into its actual operations and whether it owes access fees to the RLEC Complainants. The Complainants dispute this defense on several grounds. First, Halo, as well as Transcom, seeks to raise issues of jurisdiction in the abstract. Yet, jurisdiction is a fact-based inquiry, and Halo can not possibly win a jurisdictional argument without revealing the facts of its operation, facts which it acknowledges are critical to the resolution of the RLECs' Complaint. Halo claims "CMRS" provider 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, Halo expects to be able to continue to use Complainants' network for free.

Fundamentally, there is no such thing as a CMRS certificate, and Halo explains nothing in its Motion to show that what it does meets the very specific and limited definition of a CMRS service. Halo points to its free spectrum license and two tower registration locations in Tennessee (Gainesboro and Amherst), and asserts that it therefore must be offering CMRS.

Halo has a simple license to use a very limited radio spectrum under which it *may*, but is not required to, provide CMRS. The 3650-3700 MHz spectrum can be used for any purpose,

including private (not commercial) and fixed (not mobile) service. In its position as the final, delivering carrier to the RLEC Complainants, Halo is not offering a mobile service to end-users.

As with Transcom, Halo is undertaking a simple delivery function, during which it may possibly be utilizing radio spectrum as “wireless-in-the-middle.” But this is not CMRS service. Simply stated, Transcom and Halo are engaging in the delivery of toll traffic on behalf of a multitude of other carriers. While they attempt to ascribe different labels to what they do, these do not fit the circumstances, and their unsupported claims to the contrary are transparently false.

Moreover, their Motions misrepresent the law and fail to disclose the legal precedent that applies to defining CMRS and ESP services and how that issue relates to intercarrier compensation and state jurisdiction.⁴ These labels are inapplicable to them and, in the case of CMRS, even if it were true does not supplant state jurisdiction to set intercarrier compensation for intrastate CMRS-originated traffic.

B. THE FCC HAS NOW RULED THAT HALO’S ATTEMPT TO JURISDICTIONALIZE ALL CALLS AS LOCAL IS A FICTION AND HAS REJECTED HALO’S ARGUMENT THAT ITS CMRS SERVICE IS EXCLUSIVELY FEDERAL

As Halo and Transcom have been seeking for over six months now to avoid the state complaints of the terminating local exchange carriers, it has repeatedly sought to convince state and federal courts that only the Federal Communication’s Commission (“FCC”) can interpret its operations and apply the law. They have made that same argument here – that only the FCC can determine whether access charges apply.⁵

⁴ The RLECs’ Response In Opposition To Motion To Dismiss Filed By Transcom Enhanced Services, Inc. is incorporated by reference.

⁵ Halo MTD at 7 (¶ 14) (“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

The FCC has now made that ruling and rejected Halo's claims that its operations exempt it from the traditional rules of compensation and that there are no intrastate toll calls in the traffic streams that it delivers to the RLEC Complainants for Transcom. The FCC has not created any new law in this regard; it has simply affirmed the existing rules that the RLEC Complainants have consistently cited. The FCC's Order of November 18, 2011 is very clear that Halo's traffic does not re-originate in the middle of a call when exchanged between Halo and Transcom customer using wireless spectrum.⁶ As the FCC describes:

First, one wireless service provider [Halo] claims that calls that it receives from other carriers, routes through its own base stations, and passes on to third-party carriers for termination have "originated" at its own base stations for purposes of applying the intraMTA rule. As explained below, we disagree.

We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that *a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules*. Thus, we agree with NECA that the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.⁷

collection action before the proper venue, prove that their tariffs do actually control and then prove up the damages amount.").

⁶ On September 22, 2011, representatives of TDS Telecom, the National Exchange Carrier Association, the National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Missouri Small Telephone Company Group met with FCC staff to discuss Halo and its claims that traffic wirelessly handed off by its affiliate Transcom in the middle of call and subsequently delivery as CMRS transport re-originate the call so that it should be rated as a local call (i.e., intraMTA) regardless of the actual point of origination. See Letter of Gregory W. Whiteaker to FCC dated September 23, 2011 and attachment, attached hereto as Exhibit "A."

⁷ *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, WT Docket No. 10-208, Report And Order And Further Notice Of Proposed Rulemaking released November 18, 2011 ("FCC November 18th Order") at ¶¶ 979 and 1006 (emphasis added).

The FCC's ruling expressly acknowledges all of the same claims that Halo now repeats to this Authority, specifically that Transcom is an ESP and the connection between Halo and Transcom transforms all the calls into CMRS. The FCC, nevertheless, concludes that the calls do not re-originate with Halo and that the traditional rules of call rating apply.⁸

As to the proper rating of a call (i.e., local or intra/interstate toll), the FCC's Order also reaffirms that billing of non-access (local) and access (toll) charges will continue to be based upon the called and calling numbers.⁹ The basic rules on determining calling jurisdiction and the proper rate for one carrier to pay another have been established for 25 years.¹⁰ The FCC directed, in 1996, that this same methodology be used for wireless traffic where it explained that the initial cell site or perhaps the mobile switching center could be used to determine the location of the wireless customer call origination.¹¹ Although the FCC has now directed that the level of charges will be reduced, the rules of applying the rates, insofar as they are germane to this case, are unchanged by the FCC's Order, and that, at least for the foreseeable future, intrastate access tariffs will continue to apply and be enforced by the state commissions.¹²

⁸ *FCC November 18th Order* at ¶ 1005. ("We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers 'Common Carrier wireless exchange services to ESP and enterprise Customers' in which the customer 'connects wirelessly to Halo base stations in each MTA.' It further asserts that its 'high volume' service is CMRS because 'the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion.' Halo argues that, for purposes of applying the intraMTA rule, '[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly.'")

⁹ *FCC November 18th Order* at 707. ("Service providers need to know certain information for each call to bill for and receive intercarrier payments for traffic that terminates on their networks. Specifically, to know what intercarrier compensation charges apply, a terminating provider must be able to identify the appropriate upstream service provider and the geographic location of the caller (or a proxy for the caller's location)").

¹⁰ *MCI Telecommunications Corporation; Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, FCC 85-145, 1985 FCC LEXIS 3500 (1985); *recon. denied*, FCC 85-595, 1985 FCC LEXIS 2320 (1985). In cases where the origin is not readily available, the FCC has directed that carriers must utilize an auditable methodology that enables them to determine such jurisdiction with relative accuracy based, for example upon a traffic study.

¹¹ *Implementation of the Local Competition Provisions of the Communications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16017 (1996) ("First Local Competition Order").

¹² *FCC November 18th Order* at ¶ 813.

The steps of call rating and billing are relatively simple and straightforward. First, determine where the call originated and, second, establish who delivered it. If the call is from another local number, then local compensation rules apply. If the call is rated as toll or long distance, then there is further inquiry into whether the originating number is out-of-state or in-state. Depending, then either interstate or intrastate access charges apply. The carrier delivering the call, in this case Halo, is obligated to pay the carrier serving the called customer.

The telephone numbers determine the originating and terminating point of the call. The FCC ordered that compensation continues to be based on the telephone number in 2002¹³ and again in 2003.¹⁴ Emphasizing the continuing importance of the calling party number, the FCC's most recent Order strengthens the call signaling rules and extends them to intrastate calling.¹⁵

It is under these rules that the RLEC Complainants billed Halo and it is these rules that Halo and Transcom flout now.

C. HALO'S FEDERAL SPECTRUM LICENSE DOES NOT PRECLUDE ALL INQUIRY OR FORCLOSE ANY STATE JURISDICTION

1. Halo's radio spectrum is a right to use and not a regulatory classification.

Halo describes the Complaint as "impermissibly" seeking to regulate federal radio spectrum. It argues that "[t]he FCC is the exclusive 'first decider' and must be the one to

¹³ *In the Matter of Petition of WorldCom, Inc. et al Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket Nos. 00-218, 00-249 and 00-251, Memorandum Opinion And Order, released July 17, 2002 at ¶¶ 286 and 301 ("The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.").

¹⁴ *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19 (Memorandum Opinion and Order released November 7, 2003) at ¶¶ 16 - 17 (intercarrier compensation to be on the basis of the telephone number NPA-NXX).

¹⁵ *FCC November 18th Order* at ¶ 710.

interpret, in the first instance, whether a particular activity falls within the certificates it has issued.”¹⁶

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

3650-3700 MHz service can be used to provide CMRS, but is not required to be used in this manner. As a result, holding a license in this spectrum does not necessarily mean that the holder is a CMRS provider. The FCC licenses 3650-3700 MHz service on a nationwide non-exclusive basis. After obtaining a 3650-3700 MHz license (which is free), a licensee may begin operations upon simple registration of the individual transmission locations.

A licensee may not operate at any location until it has been registered. The FCC’s web site indicates that Halo holds an FCC license in the 3650-3700 MHz spectrum originally with tower registrations in Texas.¹⁷ The FCC’s website also indicates that, on April 15, 2011, Halo

¹⁶ Halo MTD at 5 (¶ 9) and 19 (¶ 20).

¹⁷ <http://wireless2.fcc.gov/UlsApp/UlsSearch/licenseLocSum.jsp?licKey=3074072>.

received authority for additional tower locations using this spectrum, including two limited locations in Tennessee (Gainesboro and Amherst).¹⁸

3650-3700 MHz spectrum is inadequate to handle large volumes of traffic such as Halo is delivering. The RLECs' witnesses will testify that this spectrum is of limited band width and is non-exclusive, as the FCC does not limit the number of licensees. There is no obligation to actually use the spectrum, it is available on an as-available basis and, if there are too many licensees operating locally in that spectrum, the quality of the transmission is degraded. These factors result in a level of service quality that would be questionable for a high volume customer.

The FCC has made clear that 3650-3700 MHz licensees may choose to provide private or common carrier radio services. The FCC's rule provides:

§ 90.1309 Regulatory status.

Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. A licensee may render any kind of communications service consistent with the regulatory status in its license and with the Commission's rules applicable to that service.¹⁹

In adopting this rule, the FCC stated that the type of service *actually* provided will determine the regulatory classification and obligations of the licensee:

Licensees in the 3650 MHz band may provide services on a common carrier or non-common carrier basis and will have flexibility to designate their regulatory status based on any services they choose to provide. Such an approach will provide them with the greatest flexibility to use the spectrum for service applications that are best suited for their needs. In other words, wireless licensees in the 3650 MHz band will be able to provide all allowable services anywhere within their service area at any time, consistent with whatever regulatory status they choose.

* * *

While wireless licensees in the 3650 MHz band will be subject to specific licensing and operating provisions adopted in this order, other rules may also apply to these licensees depending on the type of the service they provide. For

¹⁸ <http://wireless2.fcc.gov/UlsApp/ApplicationSearch/appMain.jsp?applID=4741944>.

¹⁹ 47 CFR § 90.1309.

instance, if a wireless licensee provides Commercial Mobile Radio Services (CMRS), which makes the licensee a common carrier, other obligations attach as a result of that decision under Title II of the Communications Act or the Commission's rules (e.g., universal service, CALEA).²⁰

As the foregoing language makes clear, Halo may, in fact, use its free 3650-3700 MHz license to provide CMRS service, but such use is not required. The corollary to the FCC's licensing flexibility decision is that the nature of the service *actually* provided by Halo, rather than Halo's characterization of that service, will determine whether or not it qualifies as CMRS.

Thus, Halo's primary case citations,²¹ under which much of its arguments that the TRA cannot "interpret" critically depend, are simply not relevant. Those cases relate to state interpretation of federal motor carrier certificates issued by the Interstate Commerce Commission ("ICC") and are inapposite here, where there is no CMRS or ESP certificate to interpret. In *Service Storage & Transfer*, the Supreme Court ruled that Virginia could not fine a motor carrier where the shipments were *routed to an out-of-state facility*, without first seeking an interpretation of the motor carrier's interstate certificate from the ICC.²² *Gray Lines Tour* involved excursions to the Hoover Dam operated by Nevada-based carriers that *traveled to points in out-of-state* Arizona, as well as Nevada, which the Ninth Circuit held should be ruled upon initially by the ICC.²³ Similarly, in *Middlewest Motor Freight*, the Eighth Circuit

²⁰ *In the Matter of Wireless Operations in the 3650-3700 MHz Band; Rules for Wireless Broadband Services in the 3650-3700 MHz Band; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band; Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band*, Report and Order and Memorandum Opinion and Order, 20 FCC Rcd 6502 (2005) at ¶¶ 36-37 (citations omitted).

²¹ Halo MTD at 5 (¶ 9), 10 (¶20) and 22 (¶44) (citing *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959), *Gray Lines Tour, Co. of S. Nevada v. Interstate Commerce Com.*, 824 F.2d 811 (9th Cir. 1987), and *Middlewest Motor Freight Bureau v. Interstate Commerce Com.*, 867 F.2d 458 (8th Cir. 1989)). Transcom employs the same irrelevant case citations to support its own "exclusively federal" claim. See Transcom MTD at 9-10 (¶15) and RLECs' Response In Opposition.

²² *Service Storage & Transfer*, 359 U.S. at 177 ("...interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action.").

²³ *Gray Lines Tour*, 824 F.2d at 815 ("State regulatory authorities may not assume the power to interpret boundaries of federally issued certificates or to impose sanctions upon operations assertedly unauthorized by the federal certificate.").

concluded that the initial issue of whether *shipments originating out-of-state* that were routed by an intrastate carrier were interstate in nature.²⁴

The three cases cited above are inapposite to and distinguishable from the facts at issue in the instant proceeding and should not be afforded any weight. First, each case pertains only to motor carrier transportation, not telecommunications traffic as is the case here. FCC cases should be cited, but none are.²⁵ Second, these cases raise the question of interpreting a federal certificate or license. The present matter, however, requires no such interpretation as there is no federal certificate/license issued for which interpretation is sought. As discussed above, Halo has misconstrued the purpose of this proceeding. RLEC Complainants are *not* seeking an interpretation of Halo's 3650-3700 MHz federal spectrum license, *not* alleging a violation thereof, and *not* challenging Halo's authority hereunder. Neither Halo nor Transcom hold any FCC certificates or authorizations (CMRS, ESP, or otherwise) that would require an interpretation. Ultimately, Halo and Transcom have mistakenly relied upon and improperly applied these ICC cases in support of their motions in an attempt to shift jurisdiction away from the TRA to the FCC.

2. The CMRS regulatory classification is fact specific

Commercial Mobile Radio Service is specifically and carefully defined under the Communications Act as "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible

²⁴ *Middlewest Motor Freight*, 867 F.2d 458 at 459-460.

²⁵ It is interesting that Halo and Transcom rely on ICC, and not FCC, cases to support their arguments that jurisdiction lies with the FCC. This should come as no surprise, however, because such FCC cases do not exist. The interplay between interstate and intrastate telecommunications traffic is a much different dynamic than motor carrier transportation. As discussed *infra*, the controlling case law has made it expressly clear that the state commissions maintain jurisdiction to determine jurisdiction and that they need not ask the FCC to rule on each and every preemption claim before ruling upon them and acting.

users as to be effectively available to a substantial portion of the public.”²⁶ Section 3(27) of the Act further defines a “mobile service,” as “radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves.”²⁷ Section 3(28) of the Communications Act, in turn, defines a “mobile station” as “a radio-communication station capable of being moved and which ordinarily does move.”²⁸

Therefore, CMRS service must:

- 1) be provided for profit;
- 2) be made available to the public or a substantial portion thereof;
- 3) interconnect with the PSTN;
- 4) utilize radio communications;
- 5) be a mobile service.

Halo fails these tests on several accounts.

Halo’s services are not commercially available. Halo is an in-house and captive creation of Transcom. The principal of Transcom, Robert S. Birdwell (aka Scott Birdwell), subsequently created Halo Wireless, Inc. after the demise of Global NAPs, for the purpose of delivering third party-originated landline and wireless toll calls to the AT&T tandems and the carriers subtending those tandems, such as the RLEC Complainants. Transcom is the sole source off all of Halo’s traffic. Halo has acknowledged in its pending bankruptcy proceeding that Transcom is its *only* customer.²⁹

Moreover, the service connection between Halo and Transcom is not mobile. A mobile handset is not involved (“station capable of being moved and *which ordinarily does move*”). The

²⁶ 47 USC § 332(d).

²⁷ 47 USC § 3(27).

²⁸ 47 USC § 3(28).

²⁹ Halo has claimed before the Bankruptcy Court that it also provides some retail service free of charge as a “beta” project, but conceded that its *sole* source of revenue is from Transcom-delivered traffic.

service is much more likely fixed. The RLEC witnesses will explain that Halo and Transcom would not flow million of minutes using a mobile unit.

More plausibly, there is no use of Halo's wireless spectrum at all in its traffic exchange with Transcom. The RLECs' witnesses will explain that it is even doubtful that *any* wireless transfer in the 3650-3700 MHz spectrum is used to forward large volume of toll traffic from Transcom because of the severe operating limitations of this publicly available (free), non-exclusive (open to everyone's use) spectrum.

Nor does it matter. Halo here is delivering traditional toll calls originated by somebody else, mostly wireline-originated, as aggregated and sent to it by Transcom for termination by the RLEC Complainants. In this role, it is an IXC. Even if Halo is using "wireless-in-the-middle," this can be is not called CMRS-origination, as the FCC has now expressly ruled.

3. A State commission may inquire in the facts surrounding a jurisdictional defense

Halo ensconces itself in the possession of a free, non-exclusive and open use FCC spectrum license to shield it from any inquiry into what it is actually doing. The Motion to Dismiss asserts that merely holding a spectrum license precludes any inquiry whatsoever, including whether the spectrum is even used in the service provided or has any relevance at all to Halo's IXC delivery of third party toll traffic to the RLEC Complainants. Halo admits that it handles traffic that originates and terminates between points in Tennessee, but then proclaims that the technology used exempts it from this Commission's jurisdiction over intrastate traffic.³⁰

³⁰ Halo MTD at 5 (¶ 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.").

It is remarkably petulant to declare that:

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 [sic] simply cannot consider any of this, for it lacks jurisdiction over the entire question of whether the traffic is "not interstate."³¹

There are several fatal flaws in this reasoning. First and foremost, Halo must present the facts necessary to demonstrate the veracity of its claimed status as a CMRS provider. Simply because it holds a federal radio license that might be used to provide mobile service to end user customers does not mean that everything, or even anything, that Halo does is CMRS.

Carriers often operate different lines of business, each of which is treated differently for regulatory purposes. For example, AT&T is a wireless carrier (specifically a CMRS provider), a wireline telephone company (an ILEC), a long distance, interexchange carrier (an IXC), Internet access provider (an ISP) and a broadband provider (an information service provider). No one title is exclusive. The fact that a carrier may be a CMRS provider in one aspect of its business and, thus, subject to FCC regulations regarding CMRS providers, does not mean that all traffic handled by that carrier constitutes CMRS traffic such that any regulations regarding non-CMRS traffic are inapplicable to anything else it does.

Secondly, the same rules that the RLEC Complainants described in their prior Response to Transcom's Motion to Dismiss, namely, that "Preemption does not occur because 'I said so.'"³² If Halo claims that the facts of its operation are such that it is removed from state regulation, then Halo is required to demonstrate the facts to allow this Authority to make that determination.

³¹ Halo MTD at 21 (n. 20).

³² RLECs' Response In Opposition To Transcom at 5.

As also described in that Response to Transcom's similar Motion, federal courts consistently affirmed the states' right to investigate and to require a demonstration of preempted status:

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.³³

This view was also adopted by the Second Circuit Court of Appeals, again in a case ruling against Global NAPs' preemption theory.³⁴

Various states, in considering the preemption claims (on VoIP grounds) of Global NAPs, required that toll traffic deliverer (of Transcom traffic) bore the burden of proof with respect to establishing the nature of its traffic and that it was, in fact, enhanced. The Georgia Commission fully agreed that preemption is an affirmative defense³⁵ and that the party pleading the defense has the burden of proof.³⁶

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

³³ *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 72-73 (1st Cir. 2006).

³⁴ *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91 (2d Cir. 2006).

³⁵ *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.*; Georgia PSC Docket No. 21905-U, Initial Decision filed April 8, 2008 and Order Adopting in Part and Denying in Part the Hearing Officer's Initial Decision filed July 31, 2009; GAPSC 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.").

³⁶ *Id.* at 12 ("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 the principle, GNAPs had the burden of proof to demonstrate the subject traffic was of such a nature as to preempt the Authority."); *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 CO/p.*, 415 F.3d 741, 745 (7th Cir. 2005)."); *See also, Id.* at 10 ("... preemption is an affirmative defense and the party raising it bears the burden of proof.").

been handed off several times before ultimately reaching Sprint's network."³⁷ The Pennsylvania PUC also ruled that Global NAPs bore the burden to demonstrate its affirmative preemption defenses.³⁸ In each of these cases state jurisdiction was found to exist. The FCC so-found in a case similar to that here where an IXC was seeking to classify in-state calls as interstate.³⁹

As with the Georgia, Florida and Pennsylvania proceedings, and consistent with federal judicial rulings, Halo and Transcom bear the burden to demonstrate that the state is preempted from acting.

4. Moreover, even were Halo providing CMRS, the FCC has consistently acknowledged the State's authority over intercarrier compensation for intrastate CMRS Service

Halo employs a series of *non sequiturs* to predetermine the outcome of the discussion about what compensation applies. Of course, "non-access" traffic is not subject to access charges.⁴⁰ RLEC Complainants concede that FCC rules so state⁴¹ and that reciprocal compensation applies where the traffic originates and terminates in the same MTA (where the traffic delivered by Halo is originated by AT&T Wireless, for example).⁴² But, as Halo also concedes, access charges may also apply to CMRS traffic.⁴³

³⁷ *Complaint Against KMC Telecom*, Florida PSC Docket No. 041144-TP, Order No. PSC-05-1234-FOF-TP issued December 19, 2005.

³⁸ *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.

³⁹ *In the Matter of Thrifty Call, Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1*, CB/CPD File No. 01-17, Declaratory Ruling released November 12, 2004.

⁴⁰ Halo MTD at 13 (¶26) ("Under the FCC's rules, when carriers are indirectly interconnected, all 'nonaccess' traffic is subject to a 'no compensation' regime unless and until the indirectly interconnected carriers enter into a written ICA.").

⁴¹ 47 C.F.R. § 20.11(d).

⁴² The FCC November 18th Order revises this to "bill and keep. This does not affect this complaint, however, as the traffic at issue here is interMTA (toll) and not intraMTA (local).

⁴³ Halo MTD at 14 (¶29) ("[T]he FCC's rules and rulings have specifically set out the limited circumstances under which a CMRS provider will be providing 'telephone toll service,' and, thus, be subject to access charges.").

As the RLEC Complainants have consistently stressed, the intrastate access billings sent to Halo *only* reflect charges for wireline interexchange and wireless interMTA traffic between points within the State of Tennessee. No access charges have been applied to “non-access” traffic. “Access” charges have been applied only to “access” traffic.

Halo’s broad proclamation that “[o]nly the FCC can decide whether any particular traffic is or is not ‘interstate’ and subject to its exclusive original jurisdiction”⁴⁴ ignores the fact that the separation between interstate and intrastate was resolved long ago and that the rules have been applied consistently since, including by RLEC Complainants in their access bills to Halo.

The FCC has now reaffirmed those rules and specifically rejected Halo’s contrary interpretation.⁴⁵

D. TRANSCOM’S CLAIM TO BE AN ESP AND HALO’S CLAIM TO SERVE ONE IS UNPROVEN AND IRRELEVANT

As with Halo’s putative status as a CMRS provider, Transcom and Halo claim ESP status for Transcom and, then, argue federal preemption from that conclusory self-judgment, even while acknowledging that the label is assumed.⁴⁶ Once again, Halo and Transcom misconstrue what this complaint is about. The Complaint does not argue what services Halo is entitled to offer.⁴⁷ RLEC Complainants do not suggest that Halo is not entitled to serve an ESP. It simply maintains that Transcom is not one. While RLEC Complainants admit that Transcom “*claims* to

⁴⁴ Halo MTD at 5 (¶ 9) (citing *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79 (1959)).

⁴⁵ FCC November 18th Order at ¶ 1006.

⁴⁶ Halo MTD at 17 (¶ 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 FCC long ago decided that enhanced services should not be regulated by either the FCC under Title I of the Communications Act or by the states in any respect. This commission completely lacks jurisdiction to take up the questions of whether Halo’s purported ESP customer ‘should’ or ‘can’ be regulated for intrastate purposes as a common carrier, 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.”).

⁴⁷ Halo MTD at 15 (¶ 31) (“Complainants imply that Halo cannot serve or has no authority to serve ESPs, such as the alleged customer Transcom, and that Halo’s service is ‘illegal.’”)

be an Enhanced Service Provider,”⁴⁸ it disputes this claim, the same as when Global NAPs asserted it. RLEC Complainants question whether Transcom is an ESP and how an entity can be an ESP that offers no enhanced services to end use customers, but which instead offers “voice termination” services to other interexchange carriers. These claims are further addressed in the RLEC Complainants’ Response In Opposition, which is incorporated herein by reference.

Nor would it legally matter if Transcom were enhancing the traffic under the precedent of the *Time Warner Declaratory Ruling*.⁴⁹ The fact that the content may be enhanced by someone else does not change the telecommunication nature of Halo’s delivery. The transiting carrier is providing a telecommunications service even if the call was part of an information service. It is entitled to interconnection and must also pay access.

In the *Time Warner Declaratory Ruling*, the FCC ruled upon whether MCI and Sprint were entitled to interconnection on traffic that could be considered an information service (cable VoIP service).⁵⁰ 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.⁵¹

⁴⁸ Halo MTD at 16 (¶ 32).

⁴⁹ *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*”).

⁵⁰ “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.

⁵¹ *Time Warner Declaratory Ruling* at ¶ 9-10.

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 and 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 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”).*⁵²

Like the wholesale CLECs, Halo has obtained an interconnection agreement with AT&T (and delivery access to RLEC Complainants) on the basis that it is a telecommunications carrier. Having gained these rights, it cannot now claim that the traffic is not telecommunications and deny the payment of access charges.

E. FEDERAL LAW DOES NOT PRECLUDE A STATE FROM TERMINATING A CARRIER OF INTRASTATE CALLING THAT DEFIES STATE LAW

Halo’s arguments about “blocking”⁵³ suffers from several flaws. First, blocking, when regulatory approval is given, is not blocking. Blocking occurs when a carrier unilaterally ceases accepting traffic from another. RLEC Complainants have not done this, but rather filed this Complaint seeking authority to cease service to Halo if it does not pay. It also asks that, if the Commission determines that Halo is operating telephone lines or offering intrastate telecommunication services that it be compelled to comply with state law. If the Commission

⁵² *Time Warner Decision* at ¶ 17 (emphasis added).

⁵³ Halo MTD at 20 (¶39) (“The complainants request an ‘order’ by the TRA authorizing them to block Halo traffic. 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.”).

concludes Halo's services are not CMRS and Halo rather is an interexchange carrier delivering intrastate, then state certification is required. Suspension of services while Halo complies is not "blocking" either.

Second, Halo's arguments against blocking are based upon the same infirm arguments as have been previously refuted. Halo's interexchange "voice termination" service is not a federal service and the Commission would not be blocking federal traffic. Its claim that Transcom is providing VoIP service is explained nowhere and seems to be a random attempt to interject yet another slight of hand.⁵⁴

Third, the cases cited by Halo relate solely to carriers that serve end user customers. There is no specter here of calls not completing. There is no Halo-(or Transcom-) originated traffic in any of the traffic analysis undertaken by RLEC Complainants. Halo and Transcom simply are both links in the delivery chain of a call originated by someone else and terminated by someone else. Their presence in these calls is non-essential and, were their companies' operations to be terminated, the traffic would flow as it did before Halo came to Tennessee. There are a myriad of other long distance carriers serving Tennessee and they would quickly and efficiently pick up where they left off. In the final analysis, Halo and Transcom are simply seeking to prolong their free ride taken at RLEC Complainants' expense.

Finally, the means by which Halo and Transcom secured the ability to deliver calls, namely interconnection agreement with AT&T, was based upon Halo's representation that it was intending to offer intraMTA CMRS service and, therefore, entitled to interconnect under the Telecommunications Act. As detailed in this Answer, Halo does no such thing and, thus,

⁵⁴ Halo MTD at 21 (¶ 41) ("The cited state rules and laws do not apply to this set of circumstances, but even if they did, they would be preempted given that the traffic is interstate, given that even according the complainants is VoIP traffic coming from one of Halo's customers for whom Halo serves as a "numbering partner." The complainants would end up blocking VoIP traffic, and that is a violation of § 201 (b)."). Parenthetically, the RLEC complaint makes no such representation.

misrepresented itself. There is no public interest benefit of perpetuating an arrangement obtained by fraud.

F. THE COMMISSION HAS THE STATE AUTHORITY TO HEAR THIS CASE

Finally, Transcom and Halo undertake some generalized scatter shots claiming that the Commission lacks jurisdiction under the Tennessee Code to hear RLEC Complainants' Complaint.

Cueing from RLEC Complainants' description of Halo as "an access customer," Halo suggests that: "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."⁵⁵ The label of "customer" is irrelevant. Telecommunications service providers are "customers" of other telecommunications service providers and this fact does not remove them from the jurisdiction of the TRA. If such label removed such providers from jurisdiction of the TRA, then the TRA could not enforce disputes under the 1996 Telecommunications Act or any other federal or state law. Halo and Transcom are public utilities, and as such, are subject to the jurisdiction of the TRA, even if they are "customers". There are no exemptions from TRA jurisdiction for such "customers" as Halo and Transcom. T.C.A. §65-4-117(a)(1) and (3).

G. COUNTS ALLEGING VIOLATIONS OF T.C.A. § 65-35-102(2) WITHDRAWN

Complainants hereby acknowledge that they are withdrawing the allegations that Halo and Transcom violated T.C.A. § 65-35-102(2). The Amended Complaint does not set forth such allegations.

⁵⁵ Halo MTD at 25 (¶ 49) (Continuing, Halo also states that: "The TRA does not have state-level jurisdiction over complaints filed by LECs against their "mere" customers.").

CONCLUSION

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

This 1st day of December, 2011.

Respectfully submitted,



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Attorneys for Complainants

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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This 1st day of December, 2011.


H. LaDon Baltimore

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HERMAN & WHITEAKER, LLC

VIA ECFS

September 23, 2011

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

RE: *Ex Parte* Notice - Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; High-Cost Universal Service Support, WC Docket No. 05-337; Developing a Unified Intercarrier Compensation Regime, CC Docket 01-92; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link-Up, WC Docket No. 03-109

Dear Ms. Dortch:

On September 22, 2011, Tom McCabe and Norman Kennard representing TDS Telecom (TDS), Colin Sandy, Bob Gnapp, and Mark Novy of the National Exchange Carrier Association (NECA), Jill Canfield of the National Telecommunications Cooperative Association (NTCA), Steve Pastorkovich of the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and the undersigned counsel on behalf of twenty-eight members of the Missouri Small Telephone Company Group (MoSTCG), met with Albert Lewis, John Hunter, Randy Clarke, Victoria Goldberg and Rebekah Goodheart of the Wireline Competition Bureau (WCB), Margaret Dailey and Terry Cavanaugh of the Enforcement Bureau, and Peter Trachtenberg of the Wireless Telecommunications Bureau of the Federal Communications Commission (FCC or Commission). Mr. Gnapp and Mr. Novy participated in the meeting via telephone.

The participants discussed the attached presentation regarding Halo Wireless, Inc. (Halo). Specifically, the representatives of TDS discussed TDS's experience in seeking compensation from Halo for the termination of traffic. The representatives of NECA presented a summary of the significant volumes of Halo traffic being terminated to NECA members. The participants also explained that the "re-origination" of a call over a wireless link in the middle of the call path does not alter the jurisdiction of the call or convert a wireline-originated call into a wireless call.



Herman & Whiteaker, LLC
September 23, 2011
Page 2 of 2

Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS with your office. If you have any questions or require additional information, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Whiteaker', with a long horizontal flourish extending to the right.

Gregory W. Whiteaker

Attachment

cc: (via email)

Albert Lewis
John Hunter
Randy Clarke
Victoria Goldberg
Rebekah Goodheart
Margaret Dailey
Terry Cavanaugh
Peter Trachtenberg

Halo/Transcom Access Arbitrage

Presentation to FCC

September 22, 2011

Participants

TDS Telecom

Missouri Rural ILECs

NECA

OPASTCO

NTCA

Summary

- Halo is sending a combination of wireline and wireless-originated access traffic and attempting to disguise it as intra-MTA wireless-originated traffic to get free termination service;
- Transcom is aggregating toll traffic and delivering the traffic to its affiliate Halo Wireless in order to fraudulently avoid paying access charges.
- TDS has used the originating and terminating end-points of the calls to establish 78% is wireline interexchange, 10% is non-Halo wireless inter-MTA; and 12% non-Halo wireless local or intraMTA CMRS.
- Halo Wireless has filed bankruptcy and the owner Scott Birdwell has created a new company Halo Wireless Services Inc. to interconnect in Verizon Markets.

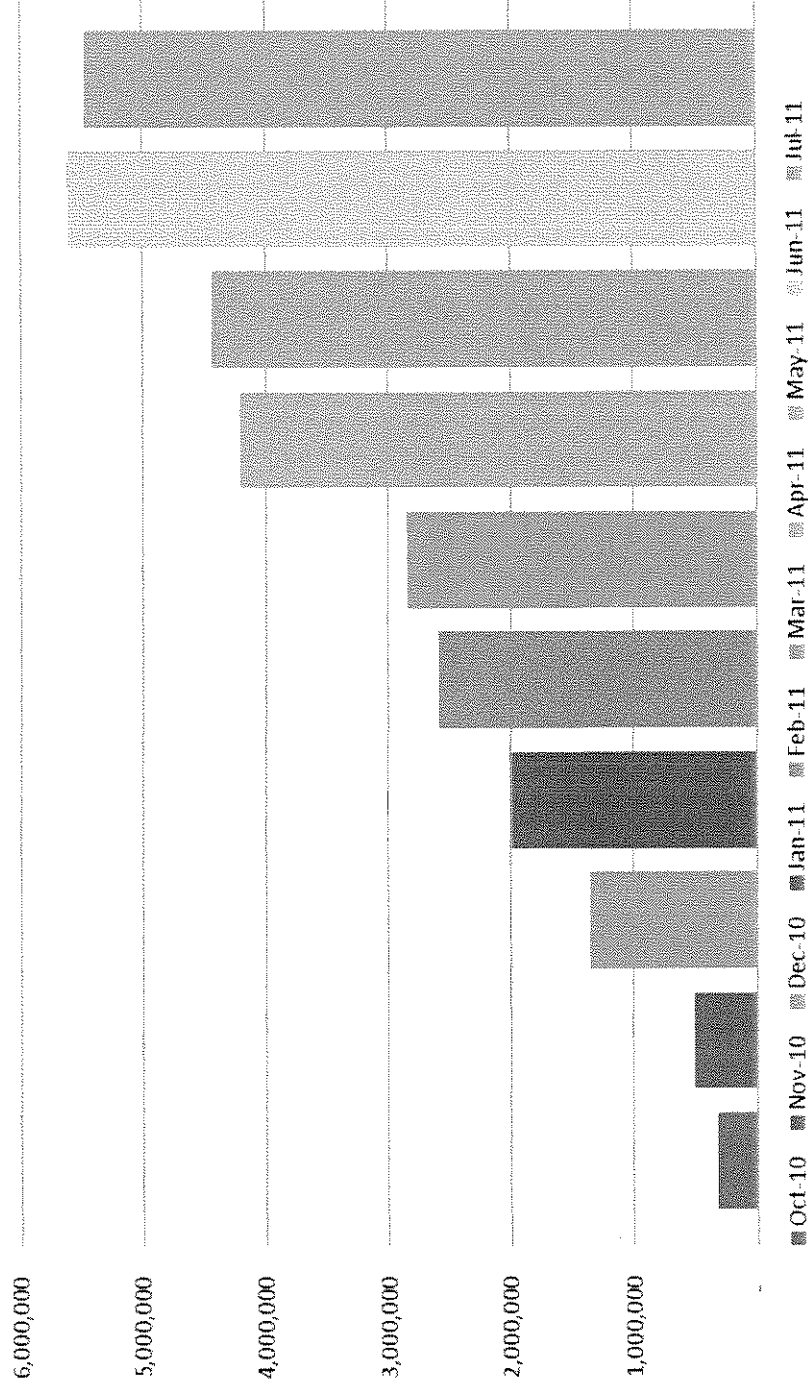
FCC Should Address Access Arbitrage

- * FCC should confirm that “technology-in-the-middle” does not alter jurisdiction or nature of traffic
 - * Confirm legal obligation to pay interstate access, consistent with “IP-in-the-middle” precedent
 - * Reaffirm state authority to address disputes over intrastate traffic, regardless of technology in the middle.
- * FCC should confirm that “re-origination” of traffic does not alter jurisdiction or nature of traffic
 - * Reaffirm “end-to-end” analysis, even if “CMRS-in-the-middle”.
- * FCC should require all providers to accurately populate and pass call originating information for all traffic originating or terminating on the PSTN (enforcement mechanisms necessary)
 - * Include originating carrier information also to allow accurate identification of responsible parties.
- * FCC should confirm that carriers may cease accepting and terminating traffic delivered through access avoidance schemes.

TDS Telecom – Halo Wireless/Transcom Enhanced Services (Transcom) Complaint

- TDS has complaints pending in GA and TN against Halo Wireless and Transcom, and is participating in a complaint in MO against Halo Wireless.
- 2009-2010 – Halo Wireless began opting into interconnection agreements between AT&T and other CMRS Providers.
- October 2010 – TDS began receiving minutes from Halo Wireless for termination. The total number of minutes in October 2010 was approximately 327,000. By August 2011 TDS terminated over 5,000,000 minutes.

Halo Wireless Minutes Terminated by TDS Telecom



TDS Telecom – Halo Wireless/Transcom Enhance Services Inc. (Transcom) Timeline

- April 2011- Based on a review of SS7 data TDS issued access invoices to Halo Wireless.
- Halo has disputed these access bills alleging that Halo is a Commercial Mobile Radio Service (CMRS) provider, and claiming that all the traffic delivered to TDS for termination is intraMTA CMRS traffic which is not subject to access charges.
- August 2011 – Through August 2011 access charges owed by Halo Wireless is in excess of \$800,000 and grows by \$150,000 per month.

TDS Telecom – Halo Wireless/Transcom Timeline

- April 2011 – Halo Wireless Services Inc. was incorporated and has entered into or seeking interconnection agreements in Verizon markets.
- August 8, 2011 – Halo Wireless filed for voluntary bankruptcy, owing millions of dollars to RLECs and AT&T.

Bankruptcy

- TDS, like all RLECs, has lost millions of dollars in access revenues because of access arbitrage.
- Companies such as Global NAPs, CommPartners and now Halo Wireless create regulatory and legal loop holes that do not exist in order to exploit lengthy and costly regulatory delays while continuing to use the networks of RLECs free of charge.
- Transcom has benefited greatly from these schemes as they have used these carriers to terminate millions of minutes without payment of access charges.
- The loss of these revenues ultimately impacts deployment of broadband services to rural America.

Halo Wireless Service

- Halo Wireless' Ex Parte Alleges to Provide Two (2) Services;
(1) Broadband Wireless Mobile Voice and Data Services to Retail Consumers and (2) Common Carrier Wireless Exchange Service to ESPs and Enterprise Customers
- Halo Wireless' Retail Voice Service offering is similar to that of Magic Jack in that it requires a broadband connection and a laptop computer.



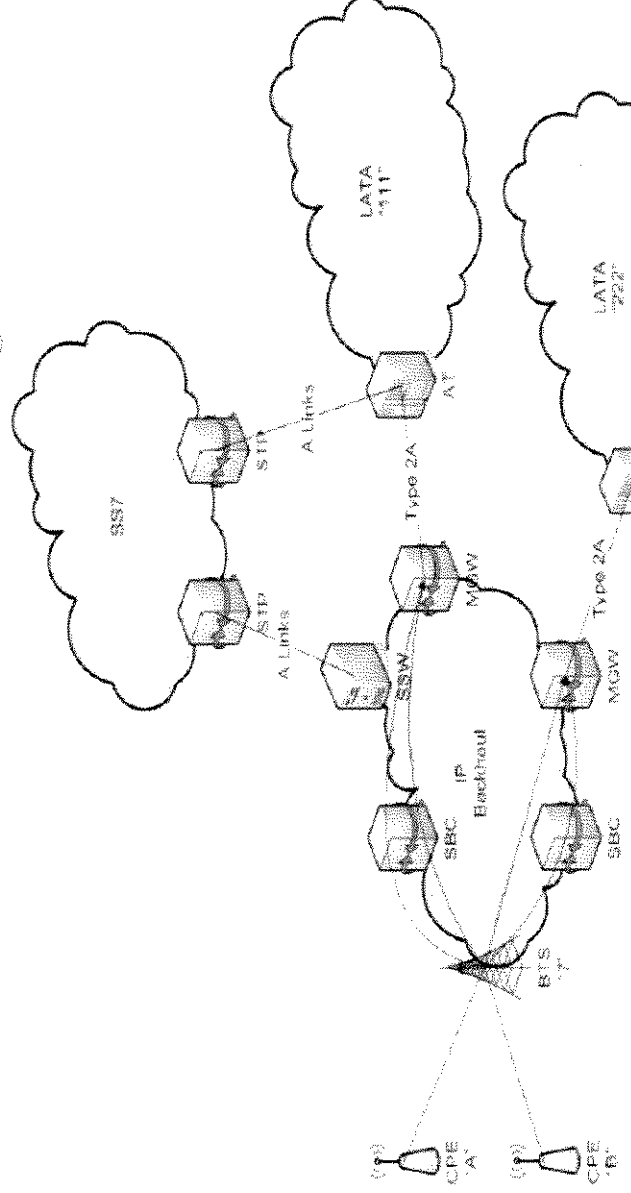
Halo Wireless Service

- Halo's primary business is the "High Volume" Customer offering, delivering third-party traffic to the tandem for termination to the local exchange carriers' end user.
- Halo Wireless' "High Volume" Customer offering allows its affiliate company Transcom Enhanced Services, Inc. to terminate traffic, principally toll, aggregated from IXC's, Cable Providers, CLEC and Wireless Providers.
- Transcom is the only "High Volume" Customer served by Halo.

How is Transcom Enhanced Service, Inc. Involved in Access Arbitrage?

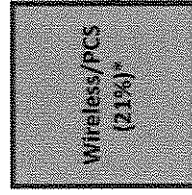
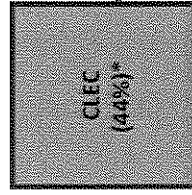
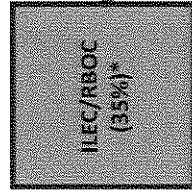
- According to Transcom's website, its core service offering is "voice termination service" for which it boasts a current run rate of nearly one billion minutes per month.
- Despite the importance of local termination to its business, it does not appear that Transcom directly interconnects with a tandem provider, but instead it uses a third-party provider to deliver traffic to the tandem operator.
- The CEO and President of Transcom and Halo Wireless were the same individual. (Only recently has Halo Wireless identified a new CEO.)

Halo Wireless's core network is all IP from customer wireless access points up through the IP-TDM conversion for ILEC traffic exchange.*

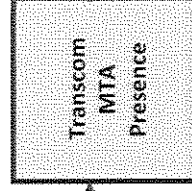
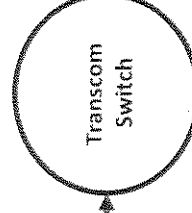
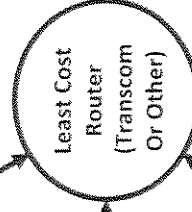


Actual Halo Call Flow Diagram

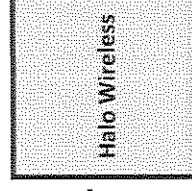
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Origination



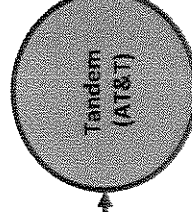
Least Cost
Routing



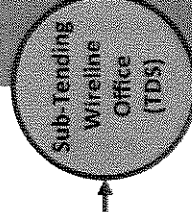
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Alleged Mid-Call
Wireless Hand-Off



Call
Termination



*All Halo-delivered traffic is third-party originated. 88% of traffic is interexchange or interMTA, based upon originating and terminating points, to which access applies. The amount in the parenthesis is the percentage of access rated traffic originated by each carrier segment (ILEC/RBOC, CLEC/Cable and Wireless/PCS).

Halo claims all traffic is IntraMTA CMRS

- Composite results of analysis performed on over 2.5 Million minutes terminated by TDS companies for Halo.
- Majority (78%) of traffic was originated by non-CMRS wireline CLEC, ILEC, and cable companies.
- Less than 12% was either wireline local or IntraMTA CMRS.
- 88% of the traffic is subject to interstate and intrastate access charges.
- No traffic was originated by an end-user customer of Halo.

Halo FCC Meeting August 10, 2011

- Halo's claim that all traffic traversing interconnection arrangements originate from customer wireless link base stations in the same MTA is simply false and misleading.

Halo FCC Meeting August 10, 2011

Orig Company	Orig CTR Type	Orig LATA	Term CTR Type	Term CTR	Term Company	Term LATA	TCSM CTR	Contract Date	Orig Telephone	Term Telephone	#OU
SPRINT SPECTRUM LP	PCS	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/9/2011	706 627-XXXX	706 632-XXXX	0.1
NEW CINGULAR WRL - GA	WIRELESS	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/5/2011	706 631-XXXX	706 632-XXXX	0.3
VERIZON WIRELESS-GA	WIRELESS	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/15/2011	706 699-XXXX	706 838-XXXX	0.1
BELLSOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/30/2011	706 721-XXXX	706 258-XXXX	1.2
BELL SOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/27/2011	706 722-XXXX	706 258-XXXX	1.5
BELLSOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/27/2011	706 722-XXXX	706 632-XXXX	1.7
KNOLLOGY OF GEORGIA, INC.	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/3/2011	706 729-XXXX	706 374-XXXX	2.4
BELLSOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/25/2011	706 733-XXXX	706 258-XXXX	0.4
BELL SOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/20/2011	706 733-XXXX	706 632-XXXX	2.3
COMCAST PHONE OF GEORGIA, LLC - GA	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/14/2011	706 733-XXXX	706 632-XXXX	2.3
BELLSOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/10/2011	706 736-XXXX	706 374-XXXX	2.1
DELTACOM, INC. - GA	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/26/2011	706 736-XXXX	706 632-XXXX	1.8
KNOLLOGY OF GEORGIA, INC.	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/5/2011	706 737-XXXX	706 374-XXXX	9.1
BELLSOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/31/2011	706 737-XXXX	706 632-XXXX	0.1
BELLSOUTH SO BELL	RBOC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/28/2011	706 737-XXXX	706 632-XXXX	0.4
KNOLLOGY OF GEORGIA, INC.	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/5/2011	706 738-XXXX	706 374-XXXX	7.7
KNOLLOGY OF GEORGIA, INC.	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/31/2011	706 738-XXXX	706 374-XXXX	0.3
COMCAST PHONE OF GEORGIA, LLC - GA	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/28/2011	706 738-XXXX	706 632-XXXX	2.2
LEVEL 3 COMMUNICATIONS, LLC - SC	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/7/2011	706 738-XXXX	706 632-XXXX	0.2
BANDWIDTH.COM - GA	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/29/2011	706 751-XXXX	706 632-XXXX	3.4
BANDWIDTH.COM - GA	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/29/2011	706 751-XXXX	706 632-XXXX	0.4
BANDWIDTH.COM - GA	CLEC	442	346	ILEC	BLUE RIDGE TEL CO	438	429F	5/9/2011	706 751-XXXX	706 632-XXXX	0.5

Halo FCC Meeting August 10, 2011

- Halo claimed that only traffic destined to telephone exchange in the same MTA in which the tower resides is accepted for termination over this link; all other traffic is routed to an IXC for handling, and exchange access charges are paid is simply false and misleading.

InterMTA CMRS Traffic

Delivered via Local Interconnection

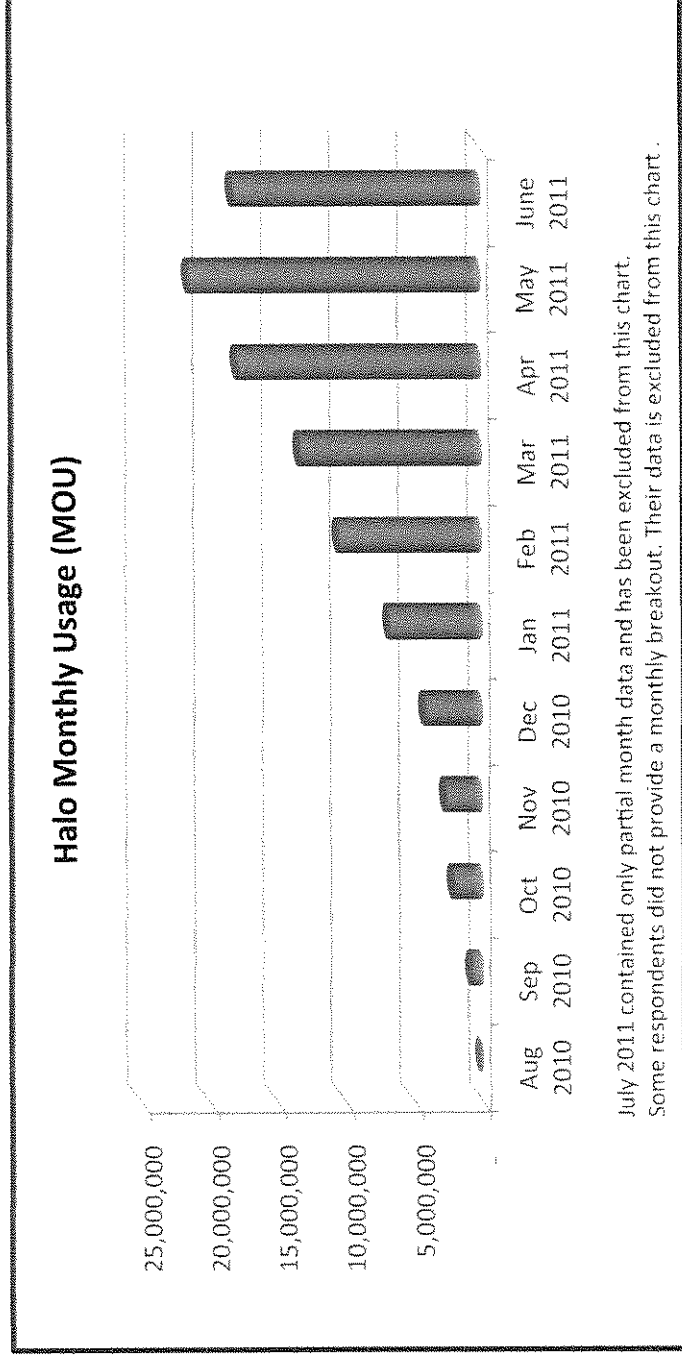
not via IXC as Halo claims

Orig Telephone	Orig MTA	Term Telephone	Term MTA	MOU	PortPS OCN	PortPS OCN Name
229 232-XXXX	37	706 632-XXXX	11	37.2	NEXTEL 6232	COMMUNICATIONS, INC.
229 379-XXXX	37	706 374-XXXX	11	18.4	ALLIED WIRELESS COMMUNICATIONS LLC 6298	DBA ALLTEL - GA
229 403-XXXX	37	706 632-XXXX	11	32.3	ALLIED WIRELESS COMMUNICATIONS LLC 6298	DBA ALLTEL - GA
229 561-XXXX	37	706 258-XXXX	11	7.7	CELLCO PARTNERSHIP DBA 6540	VERIZON WIRELESS - GA
229 563-XXXX	37	706 374-XXXX	11	28.7	CELLCO PARTNERSHIP DBA 6540	VERIZON WIRELESS - GA
229 630-XXXX	37	706 374-XXXX	11	9.4	NEW CINGULAR WIRELESS 6214	PCS, LLC - GA
850 621-XXXX	17	706 632-XXXX	11	5.3	NEW CINGULAR WIRELESS 6214	PCS, LLC - GA
305 951-XXXX	15	706 374-XXXX	11	41.8	NEW CINGULAR WIRELESS 6214	PCS, LLC - GA
817 798-XXXX	7	706 632-XXXX	11	8.3	NEW CINGULAR WIRELESS 6534	PCS, LLC - IL

NECA Study

CMKS Dispute Data Collection

- Issued to NECA Pool participants In July 2011
 - * 169 respondents
 - Several NECA pool members declined to respond to this survey citing current litigation with Halo Wireless
 - * 118 million terminating MOU attributed to Halo



Legal Issues

HALO'S SERVICE IS NOT PRESUMPTIVELY CMRS

- The Commission licenses 3650-3700 MHz service on a free, non-exclusive basis. Licensees may choose to provide private or common carrier radio services. 47 CFR § 90.1309.
- In adopting this rule, the Commission stated that the type of service actually provided will determine the regulatory classification and obligations of the licensee. *In the Matter of Wireless Operations in the 3650-3700 MHz Band* (2005).
- Halo may, in fact, use its 3650-3700 MHz license to provide CMRS service or not. The nature of the service actually provided by Halo, rather than Halo's characterization of that service, determine whether or not it qualifies as CMRS.

CALLING JURISDICTION IS DETERMINED BY ORIGINATION/

TERMINATION POINTS

- * The foundation of call rating and billing is the Commission's post-divestiture principle that the origin and destination points of a call, as measured by the telephone number locations, determine whether the call is interstate or intrastate for purposes of assessing switched access charges. *MCI Telecommunications* (1985). TDS' interstate and intrastate tariffs references the same language.
- * This same methodology applies to wireless-originated traffic. The Commission directed, in 1996, that this same methodology (end to end based upon the calling and called number) would be used for wireless traffic and it explained that the *initial* cell site or perhaps the mobile switching center could be used to determine the location a wireless call's origination. *First Local Competition Order* (1996).
- * These routing and billing rules have been affirmed numerous times and have not been changed. *Intermodal Number Portability Order; VoIP Porting Decision*; and *Regulation of Prepaid Calling Card Services* (2006).

INTRASTATE ICC INVOLVING WIRELESS IS THE JURISDICTION OF THE STATES

- * The Commission has consistently acknowledged that there is a state component of wireless traffic and the states set the intercarrier compensation for such calling, even where CMRS might be involved. *North County Merits Order* 2009.
- * The full FCC fully affirmed the Enforcement Bureau Order. *North County Review Order*.
- * This ruling was affirmed in its entirety last spring by the District of Columbia Court of Appeals. *MetroPCS California, LLC v. F.C.C.*, 644 F. 2d 410, 413 (D.C. Cir. 2011).

THRIFTY CALL RULING AFFIRMS THESE POINTS

- * In a 2004 case, a long distance wholesaler (a carrier's carrier like Halo and Transcom), argued that, since the calls were handed off by the upstream carriers in Georgia, the calls were rated as if the calls were originated in Georgia. *Thrifty Call* (2004).
- * The terminating company (like TDS Telecom here) filed suit before the state commission to collect intrastate access charges on intrastate toll calls regardless of whether the call was routed through Georgia or not. The North Carolina Commission determined that "the traffic at issue is intrastate if it originates and terminates in North Carolina or if it 'enters a customer network' in North Carolina and terminates in North Carolina.
- * The Commission both affirmed that the state was the proper jurisdiction to bring such a complaint and the North Carolina Commission ruling on the merits, when Thrifty Call brought a subsequent request for declaratory ruling.

TECHNOLOGY IN THE MIDDLE DOES NOT AFFECT THESE RATING AND BILLING PRINCIPALS

- * The technology in the middle of a call does not change its nature for billing purposes either.
- * The Commission rejected AT&T's declaratory petition, concluding that AT&T's specific service was a telecommunications service since customers obtained only voice transmission with no net protocol conversion and thus subject to terminating access charges. *AT&T IP-in-the-Middle Decision* (2004).

TRANSCOM IS NOT AN ESP

- Transcom and Halo claim that all of the long distance traffic delivered is “enhanced” by Transcom and, therefore, is exempt from terminating access charges.
- The “enhanced” service designation 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.” *AT&T Calling Card Decision* (2005).
- In Transcom’s case, 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. *AT&T 900 Dial-It Services* (1989).
- Transcom provides no end user services and the claim to enhance that call is frivolous.

AS A TELECOMMUNICATIONS PROVIDER, ENHANCEMENTS DON'T AFFECT HALO'S OBLIGATIONS

- Even if Transcom were enhancing the traffic, it does not matter as to Halo.
- Under the precedent of the *Time Warner Declaratory Ruling* (2007), the fact that the content may be enhanced upstream by someone else does not change the telecommunication nature of Halo's delivery.
- As the Commission further ruled in its *Time Warner Declaratory Ruling*, access payments are due regardless of and upstream enhancements (in that case, the originating technology).
- Like the wholesale CLECs, Halo has obtained an interconnection agreement with AT&T (and indirect delivery access to TDS Telecom) on the basis that it is a telecommunications carrier.
- Having gained these rights, it cannot now claim that the traffic is not telecommunications and deny the payment of access charges.

THANK YOU

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