

FARRIS MATHEWS BOBANGO PLC

ATTORNEYS AT LAW

Nashville · Memphis

HISTORIC CASTNER-KNOTT BUILDING
618 CHURCH STREET, SUITE 300
NASHVILLE, TENNESSEE 37219

(615) 726-1200 telephone · (615) 726-1776 facsimile

H. LaDon Baltimore
dbaltimore@farrismathews.com

Direct Dial:
(615) 687-4243

December 8, 2011

Dr. Kenneth Hill, Chairman
Tennessee Regulatory Authority
c/o Sharla Dillon, Docket & Records Manager
460 James Robertson Parkway
Nashville, TN 37243

Re: Docket 11-00108, *Complaint of TDS Telecom, et al. v. Halo Wireless, Inc., et al.*

Dear Chairman Hill:

Attached for your information is the response by TDS Telecom and others to Transcom's ex parte filing with the Federal Communications Commission.

Sincerely,



H. LaDon Baltimore
Norman J. Kennard
Attorneys for Petitioners

Cc: Paul S. Davidson
James M. Weaver
VIA E-MAIL

Steven H. Thomas
W. Scott McCollough



THOMAS, LONG,
NIESEN & KENNARD

Attorneys and Counsellors at Law

NORMAN J. KENNARD
Direct Dial: 717.255.7627
nkennard@thomaslonglaw.com

December 1, 2011

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

Re: *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 No. 01-92; *Federal-State Board on Universal Service*, CC Docket No. 96-45; Rural Call Completion Workshop

Dear Ms. Dortch:

This communication is submitted by TDS Telecom, the Missouri Small Telephone Company Group ("MSTCG"), and the Texas Statewide Telephone Cooperative, Inc. ("TSTCI") in response to letters submitted on October 11 and 19, 2011¹ and, again, on November 9, 2011 by Steven H. Thomas, Esq. (McGuire, Craddock & Strother, P.C.) on behalf of Transcom Enhanced Services, Inc. ("Transcom").

1. The Commission's Order

Under Federal Communications Commission (the "Commission") rules and precedent, the good faith of carriers to pay their bills is presumed, but this is not always the case. With increasing frequency, some carriers intentionally misrepresent their traffic and/or engage in extensive self-help schemes of nonpayment, taking advantage of time-consuming regulatory and legal challenges, ultimately declaring bankruptcy before they can be made to pay. By defrauding the terminating company, the "bad actors" of the world place an undue burden on those carriers who play by the rules – and their customers – while undermining the Commission's monumental task of rationalizing intercarrier compensation and encouraging robust network investment in unserved areas.

¹ Transcom's *Ex Parte* Letter dated October 19, 2011 forwards a letter dated October 17, 2011 directed to Mr. William Dever, Chief, Competition Policy Division.

On September 22, 2011, various representatives of the industry met with Commission Staff to discuss the latest culprit in this long line of avoidance schemes -- Halo Wireless, Inc. ("Halo") -- and its claims that traffic wirelessly handed off by its affiliate Transcom, as "Enhanced Service Provider" ("ESP"), in the middle of call and subsequent delivery as CMRS transport somehow re-originate the call such that it should be rated as a local call (i.e., intraMTA) regardless of the actual point of origination.²

The industry very much appreciates the Commission's subsequent decision to reign in bad actors and its acknowledgement of the negative impact that these providers have on consumers and the marketplace. In the words of Commissioner Michael J. Copps, the Commission's Order "puts the brakes on the arbitrage and gamesmanship that have plagued [Intercarrier Compensation] for years and that have diverted private capital away from real investment in real networks. Today, we say 'no more.'"³

Specifically, the Commission'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. As the Commission described:

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.⁴

The Commission's ruling expressly acknowledges all of the Halo/Transcom claims, including that Transcom is an ESP and the connection between Halo and Transcom transforms all calls, regardless of origination, into non-access traffic.⁵

² See Letter of Gregory W. Whiteaker dated September 23, 2011.

³ Commissioner Michael J. Copps, Order at 749.

⁴ Order at ¶¶ 979 and 1006.

⁵ 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 appears, however, that Transcom continues to insist that it is an ESP and an “end-user” of telecommunications services, such that Halo cannot be required to pay access charges when delivering the toll calls aggregated and forwarded by Transcom.

The Companies engaged in litigation involving the Halo/Transcom access arbitrage scheme understand that the Commission has now ruled upon and rejected this ESP-exempt claim, as well as the CMRS re-origination fiction. By way of further background for the Commission this letter seeks to correct, for the public record, some of the more egregious legal and factual misrepresentations contained in Transcom’s various presentations to the Commission.

2. Transcom’s operations in the least cost market.

Transcom is a high volume, least cost routing (“LCR”) carrier operating in the middle of toll calling networks. By its own description, Transcom’s “core service offering is voice termination services.”⁶ “Voice termination” service is the intermediate routing of telephone calls between carriers for termination to the carrier serving the called party. Transcom describes that it accepts traditional “circuit switched” protocols, such as time division multiplexing. Its website boasts of terminating “nearly one billion minutes per month”⁷ on behalf of the “largest Cable/MSOs, CLECs, broadband service providers, and wireless customers.”⁸

The LCR market is composed of interconnected carriers offering wholesale call completion (termination) services. All carriers originating with long distance calls, including local exchange carriers, wireless providers, and voice over Internet protocol providers, seek the most efficient means to deliver the call for termination at the lowest possible cost. As a result, there are many carriers offering wholesale transport and/or termination services.

To the best of our knowledge, Transcom has never directly delivered a call to any terminating local exchange company. From all available information, it appears that Transcom consistently hands the call off to another carrier *before* the final delivery step. In fact, Transcom’s presence in the call path is invisible and non-traceable to everyone but the carrier immediately preceding and succeeding it in the routing chain.

According to Court and/or State Regulatory Commission decisions, disputes involving two delivering carriers previously employed by Transcom -- Global NAPs and CommPartners --

⁶ <http://www.transcomus.com/product.html> (“Voice Termination Service. This is our core service offering. Transcom provides termination services throughout the world with a focus on North America. Transcom has an on net footprint that covers about 70% of the US Population.”).

⁷ <http://www.transcomus.com/index.html> (“A facilities based provider, Transcom terminates nearly one billion minutes per month. Transcom’s customers include the largest Cable/MSOs, CLECs, broadband service providers, and wireless carriers.”).

⁸ <http://www.transcomus.com/background.html> (“Typical customers include consumer and enterprise VoIP (Voice over Internet Protocol) providers, cable/ MSOs, ILECs (Incumbent Local Exchange Carriers), IXCs (Inter-Exchange Carriers), foreign PTTs, calling card operators, wireless carriers, ISPs (Internet Service Providers) and content providers.”).

cost the industry well over \$100 million. Global NAPs previously reported that a substantial portion of its traffic was delivered to it by Transcom,⁹ a matter that Transcom conceded in a federal district court case on the sworn testimony of its Chairman and CEO, Robert S. Birdwell (aka Scott Birdwell).¹⁰ Global NAPs is now in receivership and, as Mr. Birdwell stated to the Supreme Court, New York County, last year, began to "lose footprint" and was suffering from "service and financial instability."¹¹ CommPartners is in bankruptcy.

With the shut-down/slow-down of arbitrage operations by Global NAPs and CommPartners, and having thus lost these conduits for the delivery of aggregated traffic to other networks, the principals of Transcom created Halo Wireless, Inc. and Halo Wireless Services, Inc., for the primary purpose of delivering Transcom's third party-originated wireline and wireless toll calls to terminating carriers served by AT&T and Verizon tandems, respectively. Halo has acknowledged in its own pending bankruptcy proceeding that Transcom is its *only* customer.¹²

Numerous traffic studies performed by TDS Telecom and other, similarly situated carriers using standard industry techniques confirm that Transcom-Halo traffic flows are originated exclusively by other carriers, mostly wireline-based companies. The vast majority of the traffic delivered is originated from traditional wireline carriers, including Verizon and AT&T, as well as the cable companies, including Comcast and Charter.¹³ These would appear to be the same types of companies to whom Transcom offers (or who ultimately make use of) "voice termination" service.

Transcom's most recent letter to the Commission asserts that several states "appear to be on the verge of attempting to exercise state-level regulation as if it were a common carrier providing a telecommunications service..."¹⁴ These cases are in their preparation phase and no state commission has yet acted. We expect the state complaint proceedings, however, will reveal Transcom to be a common carrier in its delivery of "voice termination" toll traffic. On its website, Transcom openly solicits new customers and business.¹⁵ The state commissions, of

⁹ See, for example, *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 ("the majority of [GNAPs'] traffic is received from three other carriers, Transcom, CommPartners and PointOne..."); *Joint Petition Of Hollis Telephone et al for Authority to Block the Termination of Traffic from Global NAPs Inc.*, NH PUC Docket No. DT 08-028, Reconsideration Order, Order No. 25,088 dated November 9, 2009; and *Matter of the Complaint of AT&T Ohio v. Global NAPs, Ohio, Inc.*, PUCO Case No. 08-690-TP-CSS, Opinion and Order dated June 9, 2010.

¹⁰ *Verizon New England, Inc. v Transcom Enhanced Services, Inc.* 2010 NY Slip Op 51073(U), 27 Misc 3d 1236(A), Decided on June 17, 2010 (<http://law.justia.com/cases/new-york/other-courts/2010/51073.html>).

¹¹ *Id.*

¹² Halo claims it also provides some retail service free of charge as a "beta" project, but concedes that its sole source of revenue is from Transcom.

¹³ TDS is 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.

¹⁴ Transcom *Ex Parte* Letter dated November 9, 2011 at 2.

¹⁵ <http://www.transcomus.com/product.html> ("Transcom's end-to-end global connectivity and comprehensive services do more than meet your communications needs-they give you a competitive advantage in the marketplace. Our worldwide network, state-of-the-art technology and unmatched reliability enable us to bring you the highest

course, will carefully review the facts presented and applicable law to determine the appropriate outcome.

3. Transcom's claim to be an enhanced service provider.

Having lost Global NAPs and CommPartners as delivery conduits to the terminating carriers and now forced to abandon the spurious claim that Halo can convert traffic from wireline to wireless and interLATA to intraMTA under the Commission's recent Order, Transcom is attempting to further develop its original theory of traffic laundering in the hope that it will somehow stick this time.

Specifically, Transcom has asserted, before the state commissions, that it has "federal authority" to operate as an ESP.¹⁶ This assertion is unsupported. As this Commission is well aware, there is no such thing as a federal "ESP" license. Transcom simply claims, with no supporting facts, to be an ESP, and that this, thereby, entitles it to collect and convert the long distance traffic of others into traffic that is not subject to access charges. This ESP claim is unproved, since Transcom has assiduously avoided any regulatory determination of the merits.¹⁷ And, as explained further below, Transcom's belief that it can launder others' long distance traffic into "access-free" traffic is simply without merit.

Transcom's *ex parte* letters to the Commission provide no meaningful demonstration that Transcom is an ESP.¹⁸ Ensuring "that both sides can hear each other" is hardly an enhanced service.¹⁹ While also claiming to "offer enhanced functions and capabilities to end users[.]"²⁰

quality services at competitive prices. With Transcom, it's never "one size fits all." We work closely with you to understand your needs and create customized solutions that keep your costs low-without sacrificing quality or efficiency. Unlike many of our competitors, we're easy to talk to. As a Transcom customer, you'll always have direct access to our executive and customer service teams. That means that when a question comes up, you don't have to work hard to get an answer. As we see it, easy access and personalized service build closer, more profitable relationships. Transcom is a new kind of communications company. We understand your business. We have the energy and know-how to support your success. **And we make it all easy for you.**") (emphasis in original).

¹⁶ *Complaint Of TDS Telecom On Behalf Of Its Subsidiaries Blue Ridge Telephone Company, Camden Telephone & Telegraph Company, Inc., Nelson-Ball Ground Telephone Company, Against Halo Wireless, Inc., Transcom Enhanced Services, Inc., And Other Affiliates For Failure To Pay Terminating Intrastate Access Charges For Traffic And For Expedited Declaratory Relief And Authority To Cease Termination Of Traffic*, GA PSC Docket No. 34219, Transcom Motion to Dismiss at 9-10 (¶16) ("State regulatory authorities do not have and may not assume the power to interpret the boundaries of federally authorized activities or to impose state level regulation on operations assertedly not within the federal authorization.").

¹⁷ In those states (Georgia and Tennessee) in which Transcom's putative status as an ESP were under investigation, the cases were "removed" from state jurisdiction as a result of procedural manipulation associated with Halo's state regulatory bankruptcy filing of August 8, 2011. In Tennessee, the removal has been recently vacated and the case remanded and TDS Telecom is in the process of seeking a remand of the Georgia case as well.

¹⁸ While Transcom accuses TDS Telecom of presenting "egregious factual and legal misrepresentations" in its *Ex Parte* Letter dated October 11, 2011, that letter points to no such errors, except a failure to defer to a series of 2005 Texas bankruptcy court rulings. As discussed in this letter, that decision was subsequently vacated and is of no effect.

¹⁹ Transcom *Ex Parte* Letter dated October 19, 2011 at 1.

²⁰ *Id.*; See also Transcom *Ex Parte* Letter dated October 11, 2011 ("Transcom changes the content and often changes the form" of the calls that traverse its network).

Transcom does not identify a single such “enhancement.” It simply continues to proclaim that it is an ESP. Vague assertions that simply mouth the words are an insufficient basis to determine ESP status.

Indeed, the entire premise of treating a wholesale interexchange carrier as an ESP is absurd and unsupportable both factually and legally. From its position of transporting traffic in the middle of a call, Transcom has no opportunity to offer enhanced services. Transcom is undertaking a simple delivery function as an intermediate transport provider. There is no such thing as an “ESP-in-the middle.” Nor can Transcom point to any precedent for one. Even if one were to give full credit to Transcom’s claim of ensuring call quality, this is merely “incidental” to the telecommunication call traversing Transcom’s network and is a service to which the called and calling parties are completely oblivious.

Under Section 64.702 of the Commission’s rules, adopted in the *Computer II* decision,²¹ a service is considered “enhanced” if it does at least one of the following:

1. “[E]mploy[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information”;
2. “[P]rovides the subscriber additional, different, or restructured information”; or
3. “[I]nvolves subscriber interaction with stored information”.²²

Transcom performs none of these enhancements.

The Commission has long 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,” even where a service “may fall within the literal reading of the enhanced service definition.”²³ 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 under the 1996 Act,” regardless of whether the technical definition of an “enhanced” service can be stretched to fit the service in question.²⁴

²¹ *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*: Tentative Decision, 72 F.C.C.2d 358 (1979), Final Decision, 77 F.C.C.2d 384 (1980), *recon.*, Mem. Op. and Order 84 F.C.C.2d 50 (1981), *further recon.*, Order on Further Reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further recon.*, Mem. Op. and Order, 56 Rad. Reg. 2d (P&F) 301 (1984).

²² 47 C.F.R. § 64.702 (1992).

²³ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) (“Non-Accounting Safeguards Order”) at ¶ 107 (citing *North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, Memorandum Opinion and Order, 101 F.C.C.2d 349, ¶¶ 24-28 (1985)) (Emphasis added).

²⁴ *Id.*

In the *AT&T IP-in-the-Middle* proceeding,²⁵ this Commission rejected the claim that a call was enhanced in the middle (by the use of Internet) 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 Commission'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."²⁶

There is "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."²⁷ The Commission further explained that its approach was necessary to ensure that AT&T was not "place[d]...at a competitive disadvantage"²⁸ where "some carriers may be paying access charges for these services while others are not."²⁹

The same result was thereafter applied in the *AT&T Calling Card Decision*, which held 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.³⁰ Following its rationale in the *AT&T IP in the Middle Decision*, the Commission reaffirmed that 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.³¹

A service is an enhanced service if the information provided is "not incidental" to telecommunications service, but rather is "the essential service provided."³²

²⁵ 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*").

²⁶ *Id.* at ¶ 15.

²⁷ *Id.* at ¶ 17.

²⁸ *Id.* at ¶ 19.

²⁹ *Id.*

³⁰ *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 ¶ 16, n.28 (Emphasis added) (where the fundamental nature of the service offered to the end user is telephone service, the service is not an "enhanced" service).

³¹ *Id.* at ¶ 15.

³² *AT&T Calling Card Decision 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).

Here, Transcom provides no end user services; nor does it offer any enhancements discernable to the end user. Indeed, end users are completely unaware that Transcom is even involved in call delivery.

State commissions have previously reviewed Transcom's operations. In a Pennsylvania on-the-record complaint case, Global NAPs presented a Texas A&M associate professor who testified about Transcom's enhancements having interviewed the company's personnel. (Transcom itself refused to appear in the case.) Four Transcom improvements were identified: 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:

... 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).'

³³

While Transcom argues that TDS "refuse[s] to recognize that Transcom is an ESP even though it has four decisions by two separate courts expressly holding that Transcom is an ESP, is not a carrier and is exempt from exchange access[,]"³⁴ these "decisions" have either been vacated or are unpublished (or both). Neither vacated decisions nor unpublished decisions have precedential value³⁵ and, therefore, should generally not be cited.³⁶ The only published opinion on which Transcom relies was later vacated by the District Court³⁷ and, therefore has no preclusive effect and cannot "spawn ... further legal consequences or prejudice ... future litigation."³⁸

³³ *Palmerton v. Global NAPs*, *supra*, Order at 37-38. Palmerton, the RLEC bringing the complaint argued that "the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled [if they occur at all] are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony." *Id.* at 36.

³⁴ Transcom *Ex Parte* Letter dated October 19, 2011 at 2 and Transcom *Ex Parte* Letter dated October 11, 2011 at - 4.

³⁵ *E.g.*, *Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.*, 418 F.3d 820 (8th Cir. 2005); *Cavalier ex rel. Cavalier v. Caddo Parish School Bd.*, 403 F.3d 246, 256 (5th Cir. 2005) ("We are not bound by our affirmance of the district court in *Bryant*. The opinion is not precedential, as it is an unpublished opinion").

³⁶ *Hupman v. Cook*, 640 F.2d 497, 501 (4th Cir. 1981).

³⁷ *In re Transcom Enhanced Services, LLC*, 427 B.R. 585, 591 (Bankr. N.D. Tex 2005), *vacated by AT&T Corp. v. Transcom Enhanced Servs., LLC*, NO. 3: 05-CV-1209, 2006 U.S. Dist. LEXIS 97000, at *14 (N.D. Tex. Jan. 20, 2006).

³⁸ 427 B.R. 585 at 14 (citing *Mississippi Power & Light Co. v. Fed. Energy Regulatory Comm'n*, 724 F.2d 1197, 1198 (5th Cir. 1984)).

The first unpublished bankruptcy decision involves DataVoN, Inc. (“DataVoN”),³⁹ the operating assets of which were acquired by Transcom. Included in the Sale Order were “findings” repeating language contained in the DataVoN/AT&T interconnection agreement that identified DataVoN as “an ESP.”⁴⁰ However, the Sale Order did not contain any explicit findings that either DataVoN or Transcom was an ESP within the meaning of applicable telecommunications law and the Order certainly did not address either companies’ liability for access charges.⁴¹

Less than two years after acquiring DataVoN’s assets, Transcom, itself, filed for bankruptcy protection,⁴² where it asserted that it would be unable to “continue its day-to-day operations or successfully reorganize, unless it qualifie[d] as an Enhanced Service Provider.”⁴³ There is no discussion in the Bankruptcy Court ruling regarding what of Transcom’s operations qualified it as an ESP, except to note that Transcom had purchased substantially all of the assets of DataVoN previously.⁴⁴ In any event, this finding was later vacated by the District Court and, therefore, presently has absolutely no binding or preclusive effect.⁴⁵

A bankruptcy court has no telecommunications regulatory expertise and is focused upon discharging the debtor from bankruptcy. Moreover, since none of the bankruptcy rulings describe Transcom’s operations upon which ESP status was based, the 2005 Texas bankruptcy court ruling lacks even persuasive value, inasmuch as the current dispute involves Transcom’s assertion that it is entitled to ESP treatment when it participates in the middle of a toll call. Regardless of what Transcom may have been doing in 2005 or what it presented to the bankruptcy court, the question of Transcom’s current claim has not been addressed.

Accordingly, none of the “four decisions” upon which Transcom relies have any precedential value whatsoever and in no way should any of these opinion/orders inform or influence the decision of state or federal regulators on the issue of whether Transcom is, or ever has been, an ESP and/or liable for access charges.

Nor would it legally matter even were Transcom enhancing the traffic. Under the precedent of the *Time Warner Declaratory Ruling*,⁴⁶ the fact that the content may be enhanced

³⁹ *In re DataVoN, Inc.*, Case No. 02-38600 in the United States Bankruptcy Court for the Northern District of Texas, Order Granting Motion for Entry of Orders (I) Authorizing and Approving Sale of Substantially All Assets Free And Clear of Liens, Claims, Encumbrances, Interests and Exempt From Any Stamp, Transfer, Recording or Similar Tax; (Ii) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases; (Iii) Establishing Auction Date, Related Deadlines And Bid Procedures; (Iv) Approving the Form and Manner of Sale Notices; and (V) Approving Break-Up Fees In Connection With the Solicitation of Higher or Better Offers [Dkt. No. 465].

⁴⁰ *Id.* at 2-3.

⁴¹ *See In re DataVoN, Inc.*, Case No. 02-38600 in the United States Bankruptcy Court for the Northern District of Texas. *See also* the Unpublished Finding.

⁴² *See In re Transcom Enhanced Services, LLC*, Case No. 05-31929 in the United States Bankruptcy Court for the Northern District of Texas.

⁴³ *In re Transcom Enhanced Services, LLC*, 427 B.R. 585, 587 (Bankr. N.D. Tex 2005).

⁴⁴ *Id.* at 586.

⁴⁵ *See infra*, fn 2 and 3.

⁴⁶ *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*

by someone else does not change the telecommunications nature of the delivering carrier, be it by Global NAPs, Halo, or Transcom itself. The delivering carrier is providing a telecommunications service even if the call was part of an information service. Having obtained interconnection, the delivering carrier is obligated to pay the same intercarrier compensation as all other carriers. In the *Time Warner Declaratory Ruling*, the Commission held that, irrespective of the originating technology, the deliverer of such traffic is providing a "telecommunications service."⁴⁷ It made no difference to the Commission that the traffic delivered was "enhanced" by protocol conversion or any other processes. The Commission further ruled that intercarrier compensation, including access charges, are due from the delivering carrier regardless of any upstream enhancements.⁴⁸

Thus, Transcom's claim of an ESP exemption is both factually incorrect and legally irrelevant. In view of the established precedent, 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.

4. Interconnection with Transcom.

Transcom acknowledges that, under its theory of operating as an "information service provider," it is not entitled to interconnect,⁴⁹ but, at the same time argues that the incumbent local exchange carriers ("ILECs") have refused to interconnect "on any basis other than exchange access."⁵⁰ There are several problems associated with this set of claims.

First, we are not aware that Transcom has ever sought to interconnect with an ILEC. At the very least, TDS and members of the MSTCG have no record of any such request and doubt that Transcom would have submitted a request for interconnection. Next, Transcom's incorrect, self-ascribed ESP label is simply a gambit to avoid access. Were Transcom truly interested in interconnection, it could follow the statutory process and negotiate directly for interconnection.

Finally, neither TDS Telecom nor the MSTCG Companies nor any other ILEC of which we are aware, has ever insisted that interconnection with another carrier be on an "access only" basis. The TDS and MSTCG Companies rate traffic according to the industry and regulatory

Telecommunications Services to VoIP Providers, WC Docket No. 06-55, Memorandum Opinion and Order, released March 1, 2007, at ¶ 2 ("*Time Warner Declaratory Ruling*").

⁴⁷*Time Warner Declaratory Ruling* at ¶¶ 9-10 ("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.").

⁴⁸ *Time Warner Declaratory Ruling* at ¶ 17 ("[T]he 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.") (emphasis added), citing Verizon Comments in WC Docket No. 06-55 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.").

⁴⁹ Transcom *Ex Parte* Letter dated October 19, 2011 at 3.

⁵⁰ Transcom *Ex Parte* Letter dated October 19, 2011 at 2.

December 1, 2011

Page 11

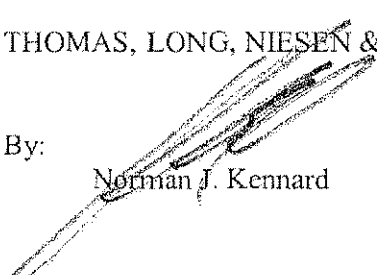
conventions as either local or toll and apply reciprocal compensation or access charges accordingly. Most carriers are a combination of both. Were Transcom to deliver local traffic, TDS Telecom and the MSTCG member companies would rate and bill it accordingly. What the Companies will not do is pretend that Transcom is an end user and its long distance traffic exempt from access when it can be seen – and when Transcom's own marketing materials appear to indicate – that the traffic is aggregated from many other carriers and many other sources on a national basis for purposes of call termination.

Thank you for your attention to this matter. Should you or any member of the Commission Staff have any questions or comments, please do not hesitate to contact us at your convenience.

Sincerely,

THOMAS, LONG, NIESEN & KENNARD

By:


Norman J. Kennard

NJK:tlt

cc: Jeff Goldthorp
Deena Shetler
Myrva Charles
Albert Lewis
John Hunter
Randy Clarke
Victoria Goldberg
Rebekah Goodheart
Margaret Dailey
Terry Cavanaugh
Peter Trachtenberg