BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	:	
COMPLAINT OF	:	
BELLSOUTH TELECOMMUNICATIONS	:	DOCKET NO.: 11-00119
LLC D/B/A AT&T TENNESSEE	:	
V.	:	
HALO WIRELESS, INC.	:	

HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS AND ANSWER TO THE COMPLAINT OF BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T TENNESSEE

COMES NOW Halo Wireless, Inc. ("Halo" or the "Debtor") and files this its Partial Motion to Dismiss (the "Motion") and Answer (the "Answer") to the Complaint of BellSouth Telecommunications, LLC, d/b/a AT&T Tennessee ("AT&T") (the "Complaint"), respectfully requesting that the Tennessee Regulatory Authority ("TRA") dismiss Counts I, II, and III of the Complaint.

HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS COUNTS I, II, AND III OF THE COMPLAINT OF BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T TENNESSEE

I. Preliminary Statement.

1. Halo's is a commercial mobile radio service ("CMRS") provider. Halo has a valid and subsisting Radio Station Authorization ("RSA") from the Federal Communications Commission ("FCC") authorizing Halo to provide wireless service as a common carrier. AT&T has filed a complaint that it claims to be a post-ICA dispute. While the parties do have an ICA in Tennessee, Halo contends that AT&T's Counts I, II and III do not really seek an interpretation or enforcement of those terms. As explained further below, AT&T is impermissibly and improperly seeking to have the TRA decide whether Halo is acting within and consistent with its federal license. The TRA, however, lacks the jurisdiction and capacity to take up that topic.

2. In addition, Halo sells CMRS-based telephone exchange service to Transcom Enhanced Services, Inc. ("Transcom"),[1] Halo's high volume customer. As explained further below, AT&T's Counts I, II and III do not actually seek an interpretation or enforcement of the ICA terms. Instead, AT&T is impermissibly and improperly seeking to have the TRA decide whether Transcom is "really" an Enhanced/Information Service Provider, because if Transcom is an end user then there can be no dispute that the traffic in issue does "originate[] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The TRA, however, lacks the jurisdiction and capacity to take up the issue of whether Transcom is "really" an ESP because (1) AT&T is precluded as a matter of law from disputing Transcom's ESP status and (2) the issue is governed by federal law and only the FCC or a federal court may resolve it.

3. On four separate occasions, courts of competent jurisdiction have ruled that Transcom is an Enhanced Service Provider ("ESP") *even for phone-to-phone calls*[2] because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities (the "ESP rulings"). Copies of the ESP rulings have been attached to this submission as **Exhibits A-D**. The court directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user. Three of these decisions were reached after the so-called "IP-in-the-Middle"

[1] Halo has other CMRS customers as well, but it is likely that AT&T's complaint does not address those customers.

[2] Transcom also has a very significant and growing amount of calls that originate from IP endpoints.

and "AT&T Calling Card" orders[3] and expressly took them into account. The courts ruled that Transcom is an End User, not a carrier. AT&T was a party to each of those proceedings and is bound by those decisions.

4. Halo is selling CMRS-based telephone exchange service to an ESP End User. All of the communications at issue originate from end user wireless customer premises equipment ("CPE") (as defined in the Act, 47 U.S.C. § 153(14))[4] that is located in the same MTA as the terminating location. The bottom line is that not one minute of the relevant traffic is subject to access charges. It is all "reciprocal compensation" traffic and subject to the "local" charges in the ICA. Further, and equally important, the ICA uses a factoring approach that allocates as between "local" and "non-local." Halo has paid AT&T for termination applying the contract rate and using the contract factor. AT&T cannot complain.

5. Multiple telecommunications companies, including TDS, AT&T and other ILECs do not like the arrangement between Halo and Transcom. They want the TRA and other commissions across the country to rule that Halo's service is "not wireless" and "not CMRS." However, as discussed more fully below, only the Federal Communications Commission ("FCC") has jurisdiction to make such determinations. Despite this fact, TDS, AT&T and multiple other ILECs have coordinated a multi-state attack on Halo and Transcom involving more than 100 ILECs suing Halo (and sometimes Transcom) in 20 different proceedings in 10

[3] *See* Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (rel. April 21, 2004) ("*AT&T Declaratory Ruling*" also known as "*IP-in-the-Middle*"); Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, FCC 05-41, 20 FCC Rcd 4826 (rel. Feb. 2005) ("*AT&T Calling Card Order*").

[4] Stated another way, the mobile stations (*see* 47 U.S.C. § 153(28)) used by Halo's end user customers – including Transcom – are not "telecommunications equipment" as defined in section 153(45) of the Act because the customers are not carriers. Halo has and uses telecommunications equipment, but its customers do not. They have CPE.

states, in all cases accusing Halo and Transcom of an "access charge avoidance scheme" without bothering to mention that Transcom has been ruled to be an ESP. In all the cases, the ILECs accuse Halo and Transcom of manipulating call stream data when they know that is not true. Neither Halo nor Transcom makes any changes to CPN. Halo populates the charge number field with Transcom's number because Transcom is Halo's end user customer, and the applicable industry standards call for this practice. The ICA *requires* Halo to populate the Charge Number parameter exactly the way that Halo does.

6. Halo's business model will bring 4G WiMAX broadband to unserved or underserved rural areas in many parts of the country without government subsidies, and for about the same cost as those consumers are paying now for basic telephone service. Meanwhile, Transcom's services lower the cost of communications to its customers, and this lower cost benefits users, including users in Tennessee. Halo and Transcom have a solid legal foundation for their business models, and those business models benefit consumers. That this result impacts the ILECs' *pecuniary* interest does not mean that Halo's services and Transcom's services are not consistent with the *public's* interest. Congress chose to allow competition. Any competitive entry will necessarily reduce the ILECs' revenues. Any decision that equates the ILECs' pecuniary interest with the public interest will necessarily mean that the TRA believes Congress' "competition experiment" was in error.

7. The underlying dispute is controlled by federal law, which therefore preempts any state disposition of these issues. TCA 65-5-109(m) allows the TRA to address "post-ICA" disputes, but it goes on to state that the TRA cannot entertain issues "as to which the FCC has exclusive jurisdiction."

8. The FCC has made it clear that decisions affecting federal telecom licensees like Halo, and their services, are not entrusted to the state commissions because doing so is impractical and would make deployment of nationwide wireless systems like Halo's "virtually impossible."[5]

9. The courts have agreed that state commissions cannot attempt to impose rate or entry regulation on wireless providers, and in particular, state commissions cannot issue "cease and desist" orders on wireless providers. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm.*, 648 F.2d 1350 (5th Cir. 1981). Further, Halo has a *federally*-granted right to interconnect and the FCC has asserted "plenary" jurisdiction over CMRS interconnection and expressly pre-empted any state authority to deny interconnection. Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, FCC 87-163, ¶¶ 12, 17, 2 FCC Rcd 2910, 2911-2912 (FCC 1987) ("*RCC Interconnection Order*").

10. The regulatory classifications for Halo and Transcom are defined and governed exclusively by *federal* law. For example, the ESP rulings hold that Transcom is *not* a carrier, is

[5] The FCC has directly held on several occasions that even the possibility of state regulation and inconsistent burdens and obligations constitutes a barrier to entry and must be avoided. *See, e.g.*, Declaratory Ruling, *In the Matter of Public Service Company of Oklahoma Request for Declaratory Ruling*, DA 88-544, ¶ 24, 3 FCC Rcd 2327, 2329 (rel. Apr. 1988) **(finding that "inconsistent state regulation" "would impede development of a uniform system of regulation for Commission licensees.")**; Second Report and Order, *In the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services; In the Matter of the Applications of Global Land Mobile Satellite, Inc.; Globesat Express; Hughes Communications Mobile Sattellite, Inc.; MCCA American Satellite Service Corporation; McCaw Space Technologies, Inc.; Mobile Satellite Corporation; Mobile Satellite Service, Inc.; North American Mobile Satellite, Inc.; Omninet Corporation; Satellite Mobile Telephone Co.; Sky-Link Corporation; Wismer & Becker/Transmit Communications, Inc.*, FCC 86-552, ¶ 40, 2 FCC Rcd 485, 491 (rel. Jan. 1987)**(finding that "permitting states to impose their individual regulatory schemes over" an FCC licensee "would not only be impractical but would seriously jeopardize the operation of the system. Requiring the consortium to adhere to fifty potentially conflicting" standards "would render implementation" "virtually impossible.")**

not an interexchange carrier ("IXC") and its traffic is *not* subject to access charges. These rulings hold, instead, that Transcom is an ESP and therefore an "end user" and is entitled to obtain "telephone exchange service" as an end user rather than "exchange access" as an IXC.

11. CMRS carriers – like Halo here – predominately provide "telephone exchange service" to end users.[6] States are pre-empted from imposing rate or entry regulation on CMRS. *See* 47 U.S.C. § 332(c)(3). Nor can states or local governmental authorities take action that will "prohibit or have the effect of prohibiting the provision of personal wireless services."[7] 47 U.S.C. § 332(c)(7)(B)(i)(II). The FCC has *exclusive* jurisdiction over wireless licensing, market entry by private and commercial wireless service providers and the rates charged for wireless services.

12. The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses because "a multitude of interpretations of the same certificate" will result.[8] *See Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79 (1959). The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued. *Id.* at 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th

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[6] See First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, ¶¶ 1004, 1006, 1008, 11 FCC Rcd 15499, 16045 (1996) ("Local Competition Order") (subsequent history omitted) (finding that CMRS predominately provides "telephone exchange service").

[7] "Personal Wireless Service" is defined in § 332(c)(7)(C)(i) and includes CMRS.

[8] "It appears clear that 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. * * * Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved." *Service Storage & Transfer Co. v. Com. of Va.*, 359 U.S. 171, 177 (1959).

Cir. 1989). If a state commission or AT&T believe that the federally-licensed entity is engaging in some "scheme" or "subterfuge" through its practices, the proper forum is the FCC. Similarly, if any state commission has a concern, its remedy is to petition the federal licensing body for relief. *Service Storage*, 359 U.S. at 179. A state commission cannot take any action that would "amount to a suspension or revocation" of a federal license. *Castle, Attorney General v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).[9]

II. The TRA should dismiss Count I of the Complaint because the traffic being sent to AT&T does originate from end user wireless equipment.

13. The ICA has a recital (cited by AT&T in ¶ 6 of the Complaint) that provides:

> Whereas, the Parties have agreed that this Agreement will apply only to (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) traffic that originates through wireless transmitting and receiving facilities before Carrier delivers traffic to AT&T for termination by AT&T or for transit to another network.

14. Contrary to AT&T's assertion in paragraph 7 of the Complaint, the traffic in issue *does* "originate[] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The network arrangement in every state and every MTA is the same. Halo has established a 3650 MHz base station in each MTA. Halo's customer has 3650 MHz wireless stations – which constitute CPE as defined in the Act – that are sufficiently proximate to the base station to establish a wireless link with the base station. When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo's network, and ultimately handed off to AT&T for termination

[9] "Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. ... It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate."

or transit over the interconnection arrangements that are in place as a result of the various interconnection agreements ("ICAs").

15. AT&T is apparently claiming that Halo is merely "re-originating" traffic and that the "true" end points are elsewhere on the PSTN. In making this argument, however, AT&T is advancing the exact position that the D.C. Circuit rejected in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In that case, the D.C. Circuit held it did not matter that a call received by an ISP is instantaneously followed by the origination of a "further communication" that will then "continue to the ultimate destination" elsewhere. The Court held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." In other words, the D.C. Circuit clearly recognizes – and functionally held – that an ESP is an "origination" and "termination" endpoint for intercarrier compensation purposes (as opposed to *jurisdictional* purposes, which does use the "end-to-end" test).

16. The traffic here goes to Transcom where there is a "termination." Transcom then "originates" a "further communication" in the MTA. In the same way that ISP-bound traffic *from* the PSTN is immune from access charges (because it is not "carved out by § 251(g) and is covered by § 251(b)(5), the call *to* the PSTN is also immune.[10] Enhanced services were defined long before there was a public Internet. ESPs do far more than just hook up "modems" and

[10] The incumbents incessantly assert that the ESP Exemption only applies "only" for calls "from" an ESP customer "to" the ESP. This is flatly untrue. ESPs "may use incumbent LEC facilities to originate and terminate interstate calls[.]" *See* NPRM, *In the Matter of Access Charge Reform*, 11 FCC Rcd 21354, 21478 (FCC 1996). The FCC itself has consistently recognized that ESPs – as end users – "originate" traffic even when they received the call from some other end-point. That is the purpose of the FCC's finding that ESPs systems operate much like traditional "leaky PBXs."

receive calls. They provide a wide set of services and many of them involve calls to the PSTN.[11] The FCC observed in the first decision that created what is now known as the "ESP Exemption" that ESP use of the PSTN resembles that of the "leaky PBXs" that existed then and continue to exist today, albeit using much different technology. Even though the call started somewhere else, as a matter of law a Leaky PBX is still deemed to "originate" the call that then terminates on the PSTN.[12] As noted, the FCC has expressly recognized the bidirectional nature of ESP traffic, when it observed that ESPs "may use incumbent LEC facilities to originate and terminate interstate calls." Halo's and Transcom's position is simply the direct product of Congress' choice to codify the ESP Exemption, and neither the FCC nor state commissions may overrule the statute.

17. In other proceedings, the ILECs have pointed to certain language in paragraph 1066 of the FCC's recent rulemaking that was directed at Halo, and the FCC's discussion of "re-origination." That language, however, necessarily assumes that Halo is serving a carrier, not an ESP. TDS told the FCC that Transcom was a carrier, and the FCC obviously assumed – while expressly not ruling – that the situation was as TDS asserted. This is clear from the FCC's characterization in the same paragraph of Halo's activities as a form of "transit." "Transit"

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[11] *See*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket Nos. 96-262, 96-263, 94-1, 91-213, FCC 96-488, 11 FCC Rcd 21354, 21478, ¶ 284, n. 378 (rel. Dec. 24, 1996); Order, *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, FCC 88-151, 3 FCC Rcd 2631, 2632-2633. ¶13 (rel. April 27 1988); Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983).

[12] *See*, Memorandum Opinion and Order, *MTS and WATS Market Structure*, Docket No. 78-72, FCC 83-356, ¶¶ 78, 83, 97 FCC 2d 682, 711-22 (rel. Aug. 22, 1983) [discussing "leaky PBX and ESP resemblance]; Second Supplemental NOI and PRM, *In the Matter of MTS and WATS Market Structure*, FCC 80-198, CC Docket No. 78-72, ¶ 63, 77 F.C.C.2d 224; 1980 FCC LEXIS 181 (rel. Apr. 1980) [discussing "leaky PBX"].

occurs when one carrier switches traffic *between two other carriers*. Indeed, that is precisely the definition the FCC provided in paragraph 1311 of the recent rulemaking.[13] Halo simply cannot be said to be providing "transit" when it has an *end user* as the customer on side and a carrier on the other side. Any other construction necessarily leads to the conclusion that the FCC has decided that the D.C. Circuit was wrong in *Bell Atlantic*.

18. Halo agrees that a call handed off from a Halo *carrier customer* would not be deemed to originate on Halo's network.[14] But Transcom is not a carrier, it is an ESP. ESPs always have "originated further communications," but for compensation purposes (as opposed to jurisdictional purposes), the ESP is still an end-point and a call originator. Again, once one looks at this from an "end user" customer perspective, the call classification result is obvious. The FCC and judicial case law is clear that an end user PBX "originates" a call even if the communication initially came in to the PBX from another location on the PSTN and then goes back out and terminates on the PSTN.[15]

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[13] "1311. Transit. Currently, transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier's network. Thus, although transit is the functional equivalent of tandem switching and transport, today transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic. As all traffic is unified under section 251(b)(5), the tandem switching and transport components of switched access charges will come to resemble transit services in the reciprocal compensation context where the terminating carrier does not own the tandem switch. In the Order, we adopt a bill-and-keep methodology for tandem switched transport in the access context and for transport in the reciprocal compensation context. The Commission has not addressed whether transit services must be provided pursuant to section 251 of the Act; however, some state commissions and courts have addressed this issue." (emphasis added)

[14] *See* § 252(d)(2)(A)(i), which imposes the "additional cost" mandate on "calls that originate on the network facilities of the other carrier."

[15] *See, e.g., Chartways Technologies, Inc. v. AT&T, 8 FCC Rcd 5601, 5604 (1993); Directel Inc. v. American Tel. & Tel. Co.*, 11 F.C.C.R. 7554 (June 26, 1996); *Gerri Murphy Realty, Inc. v. AT&T*, 16 FCC Rcd 19134 (2001); *AT&T v. Intrend Ropes and Twines, Inc.*, 944 F.Supp. 701, 710 (C.D. Ill. 1996; *American Tel. & Tel. Co. v. Jiffy Lube Int'l., Inc.*, 813 F. Supp. 1164, 1165-1170 (D. Maryland 1993); *AT&T v. New York Human Resources Administration*, 833 F. Supp. 962 (S.D.N.Y. 1993); *AT&T, v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995); *AT&T Corp. v. Fleming & Berkley*, 1997 U.S. App. LEXIS 33674 *6-*16 (9th Cir. Cal. Nov. 25, 1997).

19. So, Halo has an end-user customer—Transcom. Although this end user customer receives calls from other places, for intercarrier compensation purposes, the calls still originate on Halo's network. That customer connects wirelessly to Halo. Transcom "originates" communications "wirelessly" to Halo, and all such calls are terminated within the same MTA where Transcom originated them (the system is set up to make sure that all calls are "intraMTA"). This arrangement matches up exactly with the requirement in the recital that AT&T relies on.

20. AT&T is barred from asserting that Halo's customer is not an end user. Halo's "High Volume" customer whose traffic is at issue is Transcom. Transcom and AT&T were directly involved in litigation, and the court twice held – over AT&T's strong opposition – that Transcom is an ESP and end user, is not a carrier, and access charges do not apply to Transcom's traffic. This specific set of rulings was incorporated into the Confirmation Order in Transcom's bankruptcy case. AT&T was a party and is bound by these holdings. AT&T is barred from raising any claim that Transcom is anything other than an ESP and end user qualified to purchase telephone exchange service from carriers, and cannot now collaterally attack the bankruptcy court rulings. Transcom's status as an end user is not subject to debate.

21. Once it is clear that Transcom is Halo's telephone exchange service end user customer, then all of AT&T's contentions simply fail. End users originate calls. The calls at issue are "end user" calls, so AT&T's assertions are flatly incorrect and the claim is based on the impermissible and incorrect premise that Halo's customers are not "end users" purchasing telephone exchange service in the MTA.

III. The TRA should dismiss Count II of the Complaint because Halo is not altering or deleting call detail, and therefore, Halo is not in breach of the ICA.

22. AT&T's contentions in Count II also fail once it is understood that this is end user telephone exchange service originating traffic, and the service being provided is functionally equivalent to an integrated services digital network ("ISDN") primary rate interface ("PRI") (hereinafter referred to as "ISDN PRI") trunk to a large communications intensive business customer. Indeed, Halo's signaling practices with regard to Charge Number are exactly the same as those AT&T uses when it provides ISDN PRI trunk service to a business customer.

23. To the extent any E.164 address is properly used for rating or jurisdictionalizing (which we deny), Charge Number address signal content, rather than that for Called Party Number ("CPN"), is the information that should be used. The reason is that the presentation of this address signal content correctly advertises that the call is originating from a Halo end user customer, and the particular billing number used demonstrates that the call originated in the same MTA as the terminating location.

24. For this reason, Halo's practices do not in any way prevent AT&T from accurately measuring, rating or billing this reciprocal compensation traffic; to the contrary it *ensures* that AT&T's systems recognize the end user telephone exchange traffic that it is. The ICAs in issue do not rate traffic based on telephone numbers, but if and to the extent AT&T's systems nonetheless (and in violation of the ICAs) use the calling and called numbers to rate, bill or validate, Halo's practice results in proper rating and billing.

25. The ICA *requires* Halo to populate the Charge Number parameter exactly the way that Halo does so. General Terms and Conditions § XIV.E is very clear:

> E. The parties will provide Common Channel Signaling (CCS) information to one another, where available and technically feasible, in conjunction with all

> traffic in order to enable full interoperability of CLASS features and functions except for call return. All CCS signaling parameters will be provided, including automatic number identification (ANI), originating line information (OLI) calling party category, charge number, etc. All privacy indicators will be honored, and the parties agree to cooperate on the exchange of Transactional Capabilities Application Part (TCAP) messages to facilitate full interoperability of CCS-based features between the respective networks. (emphasis added)

26. Halo performs the "Class 5" functions and populates the CPN and Charge Number parameters with the address signal information that should appear in each location. Halo's practices with regard to the Charge Number are exactly the same as AT&T's when it serves a business end user with an ISDN PBX.

27. Halo does not change the content or in any way "manipulate" the address signal information that is ultimately populated in the SS7 ISUP IAM Called Party Number ("CPN") parameter. Halo populates the Charge Number ("CN") parameter with the Billing Telephone Number of its end user customer Transcom. AT&T alleges improper modification of signaling information related to the CN parameter, but the basis of this claim once again results from the assertion that Transcom is a carrier rather than an end user.

28. Halo's network is IP-based, and the network communicates internally and with customers using a combination of WiMAX and SIP. To interoperate with the SS7 world, Halo must conduct a protocol conversion from IP to SS7 and then transmit call control information using SS7 methods. AT&T's allegations fail to appreciate this fact, and are otherwise technically incoherent. They reflect a distinct misunderstanding of technology, SS7, the current market, and most important, a purposeful refusal to consider this issue through the lens of CMRS telephone exchange service provided to an end user.

29. From a technical perspective, "industry standard" in the United States for SS7 ISUP is American National Standards Institute ("ANSI") T1.113, which sets out the semantics

and syntax for SS7-based CPN and CN parameters. The "global" standard is contained in ITU-T series Q.760-Q.769. ANSI T1.113 describes the CPN and CN parameters:

> Calling Party Number. Information sent in the forward direction to identify the calling party and consisting of the odd/even indicator, nature of address indicator, numbering plan indicator, address presentation restriction indicator, screening indicator, and address signals.
>
> Charge Number. Information sent in either direction indicating the chargeable number for the call and consisting of the odd/even indicator, nature of address indicator, numbering plan indicator, and address signals.

30. The various indicators and the address signals have one or more character positions within the parameter and the standards prescribe specific syntax and semantics guidelines. The situation is essentially the same for both parameters, although CN can be passed in either direction, whereas CPN is passed only in the forward direction. The CPN and CN parameters were created to serve discrete purposes and they convey different meanings consistent with the design purpose. For example, CPN was created largely to make "Caller ID" and other CLASS-based services work. Automatic Number Identification ("ANI") and CN, on the other hand, are pertinent to billing and routing. Halo's signaling practices on the SS7 network comply with the ANSI standard with regard to the address signal content.

31. Halo's practices are also consistent with the Internet Engineering Task Force ("IETF") "standards" for Session Initiated Protocol ("SIP") and SIP to Integrated Services Digital Network ("ISDN") User Part ("ISUP") mapping. Halo populates the SS7 ISUP IAM CPN parameter with the address signal information that Halo has received from its High Volume customer (Transcom). Specifically, Halo's practices are consistent with the IETF Request for Comments ("RFCs") relating to mapping of SIP headers to ISUP parameters. *See, e.g.*, G. Camarillo, A. B. Roach, J. Peterson, L. Ong, RFC 3398, *Integrated Services Digital Network*

(ISDN) User Part (ISUP) to Session Initiation Protocol (SIP) Mapping, © The Internet Society (2002), available at http://tools.ietf.org/html/rfc3398.

> When a SIP INVITE arrives at a PSTN gateway, the gateway SHOULD attempt to make use of encapsulated ISUP (see [3]), if any, within the INVITE to assist in the formulation of outbound PSTN signaling, but SHOULD also heed the security considerations in Section 15. If possible, the gateway SHOULD reuse the values of each of the ISUP parameters of the encapsulated IAM as it formulates an IAM that it will send across its PSTN interface. In some cases, the gateway will be unable to make use of that ISUP - for example, if the gateway cannot understand the ISUP variant and must therefore ignore the encapsulated body. Even when there is comprehensible encapsulated ISUP, the relevant values of SIP header fields MUST 'overwrite' through the process of translation the parameter values that would have been set based on encapsulated ISUP. In other words, the updates to the critical session context parameters that are created in the SIP network take precedence, in ISUP-SIP-ISUP bridging cases, over the encapsulated ISUP. This allows many basic services, including various sorts of call forwarding and redirection, to be implemented in the SIP network.
>
> For example, if an INVITE arrives at a gateway with an encapsulated IAM with a CPN field indicating the telephone number +12025332699, but the Request-URI of the INVITE indicates 'tel:+15105550110', the gateway MUST use the telephone number in the Request-URI, rather than the one in the encapsulated IAM, when creating the IAM that the gateway will send to the PSTN. Further details of how SIP header fields are translated into ISUP parameters follow.

32. Halo's high volume customer will sometimes pass information that belongs in the CPN parameter that does not correctly convey that the Halo end user customer is originating a call in the MTA. When this is the case, Halo still populates the CPN, including the address signal field with the original information supplied by the end user customer. Halo, however, also populates the CN parameter. The number appearing in the CN address signal field will usually be one assigned to Halo's customer and is the Billing Account Number, or its equivalent, for the service provided in the MTA where the call is processed. In ANSI terms, that is the "chargeable number." This practice is also consistent with the developing IETF consensus and practices and capabilities that have been independently implemented by many equipment vendors in advance of actual IETF "standards."

33. SIP "standards" do not actually contain a formal header for "Charge Number." Vendors and providers began to include an "unregistered" "private" header around 2005. The IETF has been working on a "registered" header for this information since 2008. *See* D. York and T. Asveren, SIPPING Internet-Draft, *P-Charge-Info - A Private Header (P-Header) Extension to the Session Initiation Protocol (SIP)* (draft-york-sipping-p-charge-info-01) © The IETF Trust (2008), available at http://tools.ietf.org/html/draft-york-sipping-p-charge-info-01 (describing "'P-Charge-Info', a private Session Initiation Protocol (SIP) header (P-header) used by a number of equipment vendors and carriers to convey simple billing information."). The most recent draft was released in September, 2011. *See* D. York, T. Asveren, SIPPING Internet-Draft, *P-Charge-Info - A Private Header (P-Header) Extension to the Session Initiation Protocol (SIP)* (draft-york-sipping-p-charge-info-12), © 2011 IETF Trust, available at http://www.ietf.org/id/draft-york-sipping-p-charge-info-12.txt. Halo's practices related to populating the Halo-supplied BTN for Transcom in the SS7 ISUP IAM CN parameter are quite consistent with the purposes for and results intended by each of the "Use Cases" described in the most recent document.

34. Halo notes that, with regard to its consumer product, Halo will signal the Halo number that has been assigned to the end user customer's wireless CPE in the CPN parameter. There is no need to populate the CN parameter, unless and to the extent the Halo end user has turned on call forwarding functionality. In that situation, the Halo end user's number will appear in the CN parameter and the E.164 address of the party that called the Halo customer and whose call has been forwarded to a different end-point will appear in the CPN parameter. Once again, this is perfectly consistent with both ANSI and IETF practices for SIP and SS7 call control signaling and mapping.

35. Halo is exactly following industry practice applicable to an exchange carrier providing telephone exchange service to an end user, and in particular a communications-intensive business end user with sophisticated CPE.

IV. Count III expressly disclaims that the traffic is subject to the ICA, and thus, the TRA lacks jurisdiction under 65-5-109(m), and the 180-day requirement does not apply. The Bankruptcy Stay prohibits consideration of any order to pay access charges.

36. AT&T incorrectly asserts that Halo's traffic is not reciprocal compensation traffic, but is instead subject to exchange access. Paragraph 14 of the Complaint asserts that the traffic in issue is not covered by the ICA at all. AT&T then asks that Halo be required to pay AT&T significant sums for access on both an historical and prospective basis.

37. AT&T indicates in note 4 that it proposes to defer Counts III and IV until after Counts I and II are disposed. Halo has moved to dismiss Counts I and II.[16] Since AT&T itself asserts that the entirety of the traffic is not covered by the ICA, Count III cannot be said to be part of a post-ICA dispute; instead, it is on its face a tariff collection action over which the TRA lacks jurisdiction because it is as a matter of law a claim for damages. Further, tariff collection actions are not the kind of proceedings "saved" for TRA jurisdiction under TCA 65-5-109(m), and the 180-day requirement does not apply.

38. Regardless, the Bankruptcy Court's order does not allow the TRA to "order" payment of any sums. It provides, in pertinent part:

> ... any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion and a decision in respect of such regulatory matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:
> A. liquidation of the amount of any claim against the Debtor; or

[16] The only Count over which the TRA does have jurisdiction is Count IV. Halo stands ready to try those issues.

B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the "Reserved Matters")

39. Therefore, the TRA cannot order payment of any access charges or address the amount of any access charges that might wrongly be held to apply.

40. Without waiver of and subject to the foregoing, Halo does not owe access charges to AT&T for several reasons.

41. First, as noted above, this is end user telephone exchange service originated intraMTA traffic, and as such is subject to section 251(b)(5) reciprocal compensation. It is not telephone toll traffic, is not "transit" and is not interMTA.

42. Second, and equally important, the ICA does not rate traffic as between reciprocal compensation and interMTA on a call-by-call basis. Instead, there is a negotiated factor that must be used. Section IV.F provides:

> The parties will use an auditable PLU factor as a method for determining the amount of traffic exchanged by the parties that is Local or Non-Local. The PLU factor will be used for traffic delivered by either party for termination on the other party's network.

43. Similarly section VI.C.3 states:

> The Parties will use an auditable PLU factor as a method for determining whether traffic is Local or Non-Local. The PLU factor will be used for traffic delivered by either party for termination on the other party's network. The amount that each party shall pay to the other for the delivery of Local Traffic shall be calculated by multiplying the applicable rate in Attachment B-1 for each type of call by the total minutes of use each month for each such type of call. The minutes of use or portion thereof for each call, as the case may be, will be accumulated for the monthly billing period and the total of such minutes of use for the entire month rounded to the nearest minute. The usage charges will be based on the rounded total monthly minutes.

44. This negotiated factor cannot be unilaterally changed. Instead, it must be mutually acceptable. If the parties cannot reach agreement, then the dispute resolution

provisions in the ICA must be used. Any change to the factor is prospective only. AT&T has not proposed any change to the current negotiated factor. Halo has not agreed to any change. AT&T cannot unilaterally re-rate traffic – either historically or prospectively – absent a negotiated change or a mandated change after dispute resolution. Again, however, any mandated change would be prospective only.

45. Halo contests AT&T's attempt to unilaterally change the factors used to attribute traffic between intraMTA and interMTA. Factor changes cannot be dictated by AT&T, and use data or information AT&T collects and employs however it wants without ever disclosing the data or information to Halo. AT&T's "demand" to Halo, mentioned in paragraph 14 of the Complaint, did not request a change to the negotiated factor, did not ask Halo to agree to a change, and was inadequate to raise the issue of whether the factors should be changed and what any new factor should be within any informal or formal dispute resolution. AT&T's Complaint does not seek an order compelling a change to the factor. Therefore, regardless of whether any particular call somehow be deemed subject to the exchange access regime rather than section 251(b)(5), no relief can be granted because the ICA has a negotiated factor that already allocates minutes between those two regimes, and AT&T has not done what is necessary to obtain a change to that factor.

V. Conclusion.

46. AT&T's repeated, conclusory allegations that Halo is engaged in some kind of "scheme" are unfounded. All of these allegations are premised on the impermissible claim that Halo's customer is not an end user purchasing telephone exchange service. Halo is not an "aggregator" or what AT&T has in the past derisively called a "least-cost router." Halo has no

IXC customers that consume the equivalent of Halo's exchange access service[17]; each customer is an end user.

47. Halo is a CMRS provider and is providing CMRS service to its end user customers in the form of telephone exchange service. Halo does not provide any "telephone toll service" where the traffic is going over the interconnection arrangements with AT&T. Halo's end user customers can use the service as they see fit to transmit messages and information, and Halo – as a common carrier – does not and cannot inquire into its nature or content so long as the end user complies with Halo's terms of service. Halo's network was designed to obtain the result that only traffic handled by a base station communicating with a end user customer's wireless station in the MTA where the call is terminated will be routed to AT&T in that MTA. Once the end user/telephone exchange service nature of the traffic at issue is recognized, the "scheme" assertions – like all of AT&T's other spurious claims – simply vanish.

48. For the foregoing reasons, Counts I, II, and III of the Complaint should be dismissed.

HALO WIRELESS, INC.'S ANSWER TO COUNT IV OF THE COMPLAINT OF BELLSOUTH TELECOMMUNICATIONS, LLC D/B/A AT&T TENNESSEE

49. Halo admits that the TRA has jurisdiction over the "facilities" issue.

50. Halo denies that it ordered the specific interconnection "transport facilities" from AT&T that AT&T complains of, and Halo further denies that AT&T has provided the specific interconnection "transport facilities" to Halo that AT&T complains of.

[17] Halo can serve IXCs, and very likely will. When that happens, Halo will be providing exchange access as defined in the Act, and the associated traffic handled by both AT&T and Halo will be "jointly provided access," which means each of Halo and AT&T will be responsible for separately billing the IXC for the part of the access that each provides. Halo will not be responsible for paying AT&T's access entitlement.

51. Halo admits that AT&T has incorrectly billed Halo for certain alleged "transport facilities." Halo has properly disputed the incorrect billings. Halo notes that Halo has ordered other transport facilities from AT&T for which AT&T has billed charges. Halo has paid these bills, and they are not in dispute.

52. Halo denies that AT&T is entitled to payment for the specific alleged "transport facilities" that are in issue. Halo denies that AT&T is entitled to the relief it requests in paragraph 18 of the Complaint.

53. By way of explanation, Halo further submits that the parties are interconnected in several of the former BellSouth states. Under the ICA, AT&T may only charge for interconnection "facilities" when AT&T-provided "facilities" are used by Halo to reach the mutually-agreed Point of Interconnection ("POI"). This is made clear by the usage in IV.A and then IV.B and C, which must be read in conjunction with VI.B.2 a and b.

54. The architecture in place is as follows: Halo obtains transmission from its network to AT&T tandem buildings from third party service providers. In the vast majority of locations, the third party service provider has transport facilities and equipment in the tandem building, either in a "meet me room" area or via collocation facilities purchased from AT&T. In a small handful of locations, for example Nashville and New Orleans,[18] Halo's third party provider could not provide transport to the AT&T tandem Halo desired to use as the Type 2A interface location. In these rare instances, Halo ordered, and is paying for, entrance facilities from AT&T to reach the tandem building. Those are facilities, but Halo is paying for them, and those facilities are not part of this dispute.

[18] The New Orleans arrangement is not in issue in this matter.

55. In all other Tennessee markets, Halo has secured third party transport all the way up to the mutually-agreed POI. The third party transport provider will have a collocation arrangement in the AT&T Tennessee tandem. As part of its third party provided transport arrangements, Halo secures a Letter of Agency/Channel Facility Assignment ("LOA/CFA") from its third party transport service provider. The CFA portion of the LOA/CFA document consists of an Access Customer Terminal Location ("ACTL"), the third party provider's circuit ID, and a specific channel facility assignment (at the DS-3 or DS-1 level depending on the arrangements) on the third party's existing transport facilities. This CFA defines the specific rack, panel and jack locations at Halo's third party transport providers' digital signal cross-connect ("DSX") where Halo and AT&T meet to exchange traffic. In other words, the mutually-agreed POI between AT&T and Halo is located where AT&T "plugs in" its network on the DSX panel where the CFA is given to Halo by the third party transport provider. This is memorialized by the fact that each POI will have a POI Common Language Location Identifier ("CLLI") code, and the CLLI code corresponds exactly to the CFA location.

56. The ACTL CLLI and the corresponding CFA CLLI, are each composed of four sub-fields: (1) four characters to denote the city (formally called the Geographical code); (2) two characters to denote the state or province (the Geopolitical code); (3) two characters to denote the specific location or building address (the Network-Site code); and (4) three characters to specify a particular piece of equipment (the Network Entity code). For Tennessee (other than in Nashville, where Halo is using and is paying for an Entrance Facility) the Network Entity code clearly is not related to AT&T's tandem switch; instead, it corresponds to the third party transport provider's DSX. The POI is where Halo's network ends. Halo has expended

considerable sums to get to the POI location, which is in the AT&T tandem. AT&T is cost-responsible from there.

57. In order to implement interconnection, AT&T has to install *cross-connects* that go to the POI at the third party transport providers DSX that is inside the tandem building so that the parties can exchange traffic. AT&T has wrongly chosen to call these cross-connects "channel terminations" and is attempting to bill Halo out of the access tariff for these cross-connects even though they are on AT&T's side of the POI. AT&T is also charging Halo for certain multiplexing (DS3/DS1, and DS1/DS0).

58. There are three different physical interconnect situations in place today between Halo and AT&T that have POI nuances, but do not fundamentally change the POI arrangement from a cost responsibility stand point. These include:

a. Halo hand off at the T1 level;

b. Halo hand off at the DS-3 level, and where Halo's third party service provider provides a DS-3 to DS-1 mux/demux; and

c. Halo hand off at the DS-3 level, and where Halo has ordered, and AT&T is providing, DS-3 to DS-1 mux/demux.

59. In the first two situations (a) and (b), the POI is either a DSX-1 or DSX-3 cross connect frame owned by Halo's third party service provider. In the third situation (c), the POI can either be considered the DSX-3 cross-connect frame of Halo's service provider, or the DS-3/DS-1 muxing equipment used by AT&T to provide the muxing service Halo has ordered and is receiving from AT&T. But either way, the POI does not extend beyond the DS-1 interface point, and AT&T's responsibility to cross-connect to a DS-1 interface is not changed.

60. The DS-3 to DS-1 muxing/demuxing is done purely for AT&T's convenience; Halo was and is at all times prepared to support DS3 physical layer capability all the way into the tandem switch. Nonetheless, even though Halo could deny cost responsibility in these cases,

Halo is paying AT&T for the multiplexing. In other words, these charges are not in dispute. Other than for this DS-3 to DS-1 muxing, AT&T is not providing any transport or multiplexing on Halo's side of the POI. If and to the extent AT&T insists on moving forward with this part of the complaint, Halo reserves the right to seek a refund for the payments it has made for DS3/DS1 multiplexing.

61. AT&T appears to be attempting to recover charges for DS1/DS0 multiplexing that AT&T performs to knock out 24 DS0s from each cross-connect and then connect to a port on AT&T's tandem switch. This multiplexing is clearly on AT&T's side of the POI. Further, it may well be not even necessary. Most Class 4 tandem switches today have DS3 trunk port interfaces and DS1 interfaces are almost universal. Halo cannot understand why AT&T believes it should, and Halo must pay for, demultiplexing down to the DS0 level to get to the termination on the tandem trunk port. Regardless, the fact is that the DS1/DS0 multiplexing is occurring on AT&T's side of the POI.

62. As detailed above, AT&T's so-called "facility" charges, and the charges subject to dispute, entirely relate to discrete network elements that run from the POI to AT&T's tandem switch, including the de-multiplexing from a valid DS-1 interface to the DS-0 level for tandem trunk port physical termination. All of this is on AT&T's side of the POI, and they relate to "trunks" and "trunk groups." These are not "facilities." Even if cross-connects and multiplexing can be called "facilities," the ICA is crystal-clear that Halo is only responsible for "facilities" up to the POI and AT&T is responsible for all facilities on its side of the POI.

63. GTC Section IV.A clearly distinguishes between "facilities" and any trunk groups that establish "through connections" between the parties' switches, and lie on both sides of the POI. "By mutual agreement of the parties, trunk groups arrangements between Carrier and

BellSouth shall be established using the interconnecting facilities methods of subsection (B) of this section." IV.C then goes on to provide, in pertinent part, that "[i]n the event a party interconnects via the purchase of facilities and/or services from the other party, it may do so though purchase of services pursuant to the other party's interstate or intrastate tariff, as amended from time to time, or pursuant to a separate agreement between the Parties. In the event that such facilities are used for two-way interconnection, the appropriate recurring charges for such facilities will be shared by the parties based upon percentages equal to the estimated or actual percentage of traffic on such facilities, in accordance with Section V1.B below."

64. This provision is addressing **facilities** and not the trunks that ride on facilities. Again, trunks ride on facilities, and trunks will extend from switch to switch, with a POI somewhere in between. Each party will contribute the facilities that hold the trunk groups and their responsibilities begin and end at the POI.

65. IV.C establishes the "POI" concept, which serves as the location where traffic exchange occurs and where a carrier's financial responsibility for providing facilities ends and reciprocal compensation for completing the other carrier's traffic begins. Under the ICA, both parties are responsible for bringing facilities to the POI at their own cost, and do not recover "facility" charges from the other for facility costs unless party A buys a "facility" from party B to get from party A's network to the POI. Facility costs on the other side of the POI are not recoverable as such; instead, the providing party's cost recovery occurs through reciprocal compensation.

66. V.C states in pertinent part, "BellSouth and Carrier will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement..." The "cost sharing of 2-way trunks based on proportional originating use" concept

only applies when Halo uses AT&T-supplied facilities to support trunking as one of the alternatives in IV **to get to the POI**. FCC Rule 51.709(b) and paragraph 1062 of the *Local Competition Order* support this reading. The phrase "between two carrier's networks" (the FCC rule) and "between its network and the interconnecting carrier's network" (*Local Competition Order*) both make clear that ILECs cannot impose charges on the ILEC's side of the POI when the interconnecting carrier does not obtain ILEC facilities on the interconnecting carrier's side of the POI.

67. AT&T's Type 2A interconnection implementation process requires the CMRS provider to submit the order, even when part of what is being "ordered" pertains to facilities, trunks and other things on AT&T's side of the POI and for which the "ordering" carrier is not financially responsible. There is no choice; if the order is not submitted in a way the system likes, the order is rejected. Placement of such orders does not create an obligation on Halo's part to pay for facilities on AT&T's side of the POI. More specifically, following the mandatory procedures in AT&T's OSS cannot somehow constitute a waiver of or amendment to the ICA terms relating to cost responsibility.

68. When the parties were initiating interconnection, there were email exchanges between Halo and AT&T's service provisioning team on this very subject very early on in the ordering process. Halo expressed willingness to follow AT&T's process, but also maintained clarity on the POI designation as well as the fact that submitting orders did not change the cost responsibility arrangements in the ICA.

69. AT&T is attempting to shift cost responsibility to Halo when the ICA assigns responsibility to AT&T. As noted, Halo did order some transport facilities, in Nashville, by securing an Entrance Facility from AT&T. Halo is paying AT&T for these transport facilities,

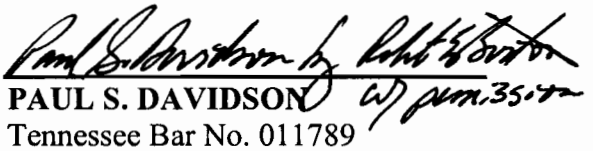
and this is not a part of the dispute. Further, Halo is paying AT&T for DS3/DS1 multiplexing, even though Halo at least arguably should not have any cost responsibility for this element.

70. Regardless, however, AT&T's billings for the cross-connects and any DS1/DS0 multiplexing that Halo has disputed are incorrect and not supported by the ICA. Count IV of the Complaint, AT&T's argument that Halo is in breach of the ICA because Halo has not paid AT&T for facilities, is without any foundation in the ICA and must be denied.

WHEREFORE, PREMISES CONSIDERED, Halo Wireless, Inc. respectfully requests that Counts I, II, and II be dismissed. If and to the extent any count is not dismissed, AT&T's requests for relief must be denied.

Dated this 1st day of December, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Partial Motion to Dismiss and Answer to the Complaint* was served via certified mail, return receipt requested, on the following counsel of record on this the 1st day of December, 2011:

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The following constitutes the order of the Court.

Signed May 16, 2006

Harlin DeWayne Hale
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**CASE NO. 05-31929-HDH-11**
	§	
TRANSCOM ENHANCED	§	**CHAPTER 11**
SERVICES, LLC,	§	
	§	**CONFIRMATION HEARING:**
DEBTOR.	§	**MAY 16, 2006 @ 10:00 a.m.**

ORDER CONFIRMING DEBTOR'S AND FIRST CAPITAL'S
ORIGINAL JOINT PLAN OF REORGANIZATION AS MODIFIED

Came on for consideration on May 16, 2006 the Original Joint Plan of Reorganization Proposed by Transcom Enhanced Services, LLC (the "Debtor") and First Capital Group of Texas III, L.P. ("First Capital") filed on March 31, 2006 (the "Plan"). The Debtor and First Capital are collectively referred to herein as the "Proponents." All capitalized terms not defined herein have the meanings ascribed to them in the Plan. Just prior to the confirmation hearing, the Proponents filed their Modifications to Plan which relate to the Objections to Confirmation filed by Carrollton-Farmers Branch, Dallas County, Tarrant County and Arlington ISD, as well as the

comments of the United States Trustee and the Objection to Cure Amount in Plan filed by Riverrock Systems, Ltd. ("Riverrock"). The modifications comport with Bankruptcy Code 1127. In addition to the above objections, Broadwing Communications LLC ("Broadwing") and Broadwing Communications Corporation ("BCC") (collectively "Broadwing") filed its Objection to Final Approval of Disclosure Statement and Confirmation of Plan on May 11, 2006. Similar to the objections of Riverrock and the taxing authorities, and based upon an agreement reached between the Debtor and Broadwing, Broadwing withdrew its objection and amended its ballots to accept the Plan at the confirmation hearing. The Bankruptcy Court, having considered the Disclosure Statement, the Plan, the statements of counsel, the evidence presented or proffered, the pleadings, the record in this case, and being otherwise fully advised, makes the following findings of fact and conclusions of law:

Findings of Fact

1. On February 18, 2005 (the "Petition Date"), the Debtor filed its voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"). Pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code, the Debtor is operating its business and managing its property as debtor in possession.

2. The Debtor was formed in or around May of 2003 for the purpose of purchasing the assets of DataVon, Inc. Since then, the Debtor has continued to provide enhanced information services, including toll quality voice and data communications utilizing converged, Internet Protocol (IP) services over privately managed private IP networks. The Debtor's information services include voice processing and arranged termination utilizing voice over IP technology.

3. The Debtor's network is comprised of Veraz I-gate and Pro media gateways, a Veraz control switch, miscellaneous servers, routers and equipment, and leased bandwidth. The network, which is completely scalable, is currently capable of processing approximately 600 million minutes of uncompressed, wholesale IP phone calls per month. However, the number of minutes processed may be increased significantly with more efficient use of IP endpoints. The architecture of the network also provides a service creation environment for rapid deployment of new services via XML scripting capabilities and SIP interoperability.

4. Currently, the Debtor is a wholesaler of VoIP processing and termination services to domestic long distance providers. (The Debtor is in the process of expanding its service offerings to include retail services and additional IP applications). The primary asset of the Debtor is a private, nationwide VoIP network utilizing state-of-the-art media gateway and soft switch technology, connected by leased lines. Utilization of this network enables the Debtor to provide toll-quality voice services to its customers at significantly lower rates than comparable services provided by traditional carriers. In contested hearings held on or about April 14, 2005, the Debtor established that its business activities meet the definitions of "enhanced service" (47 C.F.R. § 67.702(a)) and "information service" (47 U.S.C. § 153(20)), and that the services it provides fall outside of the definitions of "telecommunications" and "telecommunications service" (47 U.S.C. § 153(43) and (46), respectively), and therefore, as this Court has previously determined, Debtor's services are not subject to access charges, but rather qualify as information services and enhanced services that must pay end user charges.

5. On March 31, 2006, the Proponents filed their Original Plan of Reorganization (the "Plan") and Disclosure Statement for Plan (the "Disclosure Statement"). On April 3, 2006, the Proponents filed their Joint Motion for Conditional Approval of Disclosure Statement (the

"Motion for Conditional Approval"). On April 12, 2006, and over the objections of Broadwing and EDS Information Services, L.L.C. ("EDIS"), the Court entered its order granting the Motion for Conditional Approval and conditionally approving the Disclosure Statement (the "Conditional Approval Order"). Under the Conditional Approval Order, a final hearing to consider approval of the Disclosure Statement was combined with the confirmation hearing of the Plan, which hearings were set for May 16, 2006 at 10:00 a.m. (the "Combined Hearing"). Thereafter, and in accordance with the Conditional Approval Order, the Disclosure Statement was supplemented to address the concerns raised in the objections of both Broadwing and EDIS, the Plan and Disclosure Statement was distributed to creditors, interest-holders, and other parties-in-interest.

6. On or about April 10, 2006 and May 15, 2006, the Proponents filed non-material Modifications to the Plan pursuant to Bankruptcy Code § 1127 ("Plan Modifications").

7. The objections filed by Dallas County, Tarrant County, Carrollton-Farmers Branch ISD, Arlington ISD, Riverrock and Broadwing have been withdrawn.

8. The Proponents have provided appropriate, due and adequate notice of the Combined Hearing, the Disclosure Statement and Plan Supplements and the Plan Modifications, and such notice is in compliance with Bankruptcy Code § 1127 and Bankruptcy Rules 2002, 3019, 6006 and 9014. Without limiting the foregoing, as evidenced by certificates of service related thereto on file with the Court, and based upon statements of counsel, the Proponents have complied with the notice and solicitation procedures set forth in the April 12, 2006 Conditional Approval Order. No further notice of the May 16, 2006 Combined Hearing, the Plan, the Disclosure Statement or the Plan Modifications is necessary or required.

9. Class 1, consisting of the Pre-Petition Secured Claim on First Capital, is Impaired under the Plan and has accepted the Plan in accordance with Bankruptcy Code §§ 1126(c) and (d).

10. Class 2, consisting of the Post-Petition Secured Claim on First Capital, is Impaired under the Plan and has accepted the Plan in accordance with Bankruptcy Code §§ 1126(c) and (d).

11. Class 3, consisting of the Secured Claim on Redwing Equipment Partners Limited as successor-in-interest to Veraz Networks, Inc. ("Redwing"), is Impaired under the Plan and has accepted the Plan in accordance with Bankruptcy Code §§ 1126(c) and (d).

12. Class 4, consisting of the Secured Tax Claims, is Impaired under the Plan and has accepted the Plan in accordance with Bankruptcy Code §§ 1126(c) and (d).

13. Class 5, consisting of General Unsecured Claims, is Impaired under the Plan and has accepted the Plan in accordance with Bankruptcy Code §§ 1126(c) and (d).

14. Classes 6 and 7 of the Plan shall receive nothing under the Plan, and are deemed to reject the Plan.

15. Confirmation of the Plan is in the best interest of the Debtor, the Debtor's Estate, the Creditors of the Estate and other parties in interest.

16. The Court finds that the Debtor has articulated good and sufficient business reasons justifying the assumption of the executory contracts and unexpired leases specifically identified in Article X of the Plan, including the Debtor's Customer Contracts under Plan Section 10.01 and Vendor Agreements under Plan Section 10.02 and specifically listed on Exhibit 1-B of the Plan. No cure payments are owed with respect to the Debtor's Customer Contracts; and the only cure payments owed with respect to the Vendor Agreements are specifically identified in

Exhibit 1-B of the Plan. No other arrearages are owed with respect to the Vendor Agreements. Unless otherwise provided in the Plan Modifications, the proposed cure amounts set forth in Section 10.02 satisfies, in all respects, Bankruptcy Code § 365. Furthermore, the Court finds that the Debtor has articulated good and sufficient business reasons justifying the rejection of all other executory contracts and unexpired leases of the Debtor.

17. The Proponents have solicited the Plan in good faith and in compliance with the applicable provisions of the Bankruptcy Code.

Conclusions of Law

18. The Court has jurisdiction over this Chapter 11 Case and of the property of the Debtor and its Estate under 28 U.S.C. §§ 157 and 1334.

19. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

20. Good and sufficient notice of the Disclosure Statement, the Plan, solicitation thereof, the May 16, 2006 Combined Hearing and the Plan Modifications have been given in accordance with the requirements of the Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules for the Northern District of Texas and the April 12, 2006 Conditional Approval Order. The Plan Modifications that were filed with the Bankruptcy Court are non-material and do not require additional disclosure or re-solicitation of Plan acceptances and/or rejections.

21. Adequate and sufficient notice of the Plan Modifications has been provided to the appropriate parties which have agreed to the modifications. Pursuant to Bankruptcy Rule 3019, the Bankruptcy Court finds that the Plan Modifications do not adversely change the treatment of the holder of any Claim under the Plan, who has not accepted in writing the Plan Modifications.

All Creditors who have accepted the Plan without the Plan Modifications, are deemed to accept the Plan with the Plan Modifications.

22. The Plan complies with all applicable requirements of Bankruptcy Code §§ 1122 and 1123. Furthermore, the Plan complies with the applicable requirements of Bankruptcy Code §§ 1129(a) and (b), including, but not limited to the following:

a. the Plan complies with all applicable provisions of the Bankruptcy Code;

b. the Debtor and First Capital, as Proponents of the Plan, have complied with the applicable provisions of the Bankruptcy Code;

c. the Plan has been proposed in good faith and not by any means forbidden by law;

d. any payment made or to be made by the Debtor for services or for costs and expenses in or in connection with the case, has been approved by, or will be subject to the approval of, this Court as reasonable;

e. the Plan does not contain any rate change by the Debtor which requires approval of a governmental or regulatory entity;

f. each holder of a Claim or Equity Security Interest in an Impaired Class has accepted the Plan or will receive or retain under the Plan on account of such Claim or Equity Security Interest property of a value as of the Effective Date that is no less than the amount that such holder would receive or retain if the Debtor were liquidated under Chapter 7 of the Bankruptcy Code as of the Effective Date;

g. Classes 1, 2, 3, 4 and 5 are Impaired under the Plan, and have accepted the Plan;

h. the Plan does not unfairly discriminate against dissenting classes;

i. the Plan is fair and equitable with respect to each class of claims or interests that is impaired, and has not accepted, the Plan;

j. the Plan provides that holders of Claims specified in Bankruptcy Code §§ 507(a)(1)-(6) receive Cash payments of value as of the Effective Date of the Plan equal to the Allowed Amount of such Claims;

k. at least one Class of Creditors that is Impaired under the Plan, not including acceptances by Insiders, has accepted the Plan;

l. confirmation of the Plan is not likely to be followed by liquidation or the need for further financial reorganization by the Debtor;

m. all fees payable under 28 U.S.C. § 1930, have been timely paid or the Plan provides for payment of all such fees;

n. the Debtor is not obligated for the payment of retiree benefits as defined in Bankruptcy Code § 1114.

23. All requirements of Bankruptcy Code § 365 relating to the assumption, rejection, and/or assumption and assignment of executory contracts and unexpired leases of the Debtor have been satisfied. The Debtor has demonstrated adequate assurance of future performance with regard to the assumed executory contracts and unexpired leases of the Debtor.

24. The Redwing Settlement Agreement attached as Exhibit 1-A to the Plan is fair and equitable, and approval of the Redwing Settlement Agreement is in the best interests of the Debtor and its Estate.

25. All releases of claims and causes of action against non-debtor persons or entities that are embodied within Section 15.04 of the Plan are fair, equitable, and in the best interest of the Debtor and its Estate.

26. The Proponents and their members, officers, directors, employees, agents and professionals who participated in the formulation, negotiation, solicitation, approval, and confirmation of the Plan shall be deemed to have acted in good faith and in compliance with the applicable provisions of the Bankruptcy Code with respect thereto and are entitled to the rights, benefits and protections of Bankruptcy Code §§ 1125(d) and (e).

27. The Disclosure Statement contains "adequate information" as defined in 11 U.S.C. § 1125. All creditors, equity interest holders and other parties in interest have received appropriate notice and an opportunity for a hearing of the Plan and the Disclosure Statement.

28. The Plan and Disclosure Statement have been transmitted to all creditors, equity interest holders and parties in interest. Notice and opportunity for hearing have been given.

29. The requirements of §1129 (a) and (b) have been met.

30. The Plan as proposed is feasible.

31. All conclusions of law made or announced by the Court on the record in connection with the May 16, 2006 Combined Hearing are incorporated herein.

32. All conclusions of law which are findings of fact shall be deemed to be findings of fact and vice versa.

It is therefore,

ORDERED that the Disclosure Statement for Original Joint Plan of Reorganization filed by the Debtor and First Capital on March 31, 2006, is hereby APPROVED; it is further

ORDERED that the Original Joint Plan of Reorganization filed by the Debtor and First Capital on March 31, 2006, as modified, is hereby CONFIRMED; it is further

ORDERED that the Debtor and First Capital are authorized to execute any and all documents necessary to effect and consummate the Plan; it is further

ORDERED that pursuant to section 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006, the assumption of the Customer Contracts, as specifically defined in Section 10.01 of the Plan, is hereby approved; it is further

ORDERED that pursuant to section 365(a) of the Bankruptcy Code and Bankruptcy Rule 6006, the assumption of the Vendor Agreements, as specifically defined in Section 10.02 of the Plan, is hereby approved; it is further

ORDERED that unless otherwise agreed to in writing by the Reorganized Debtor and the counter-party to the Vendor Agreement, the Reorganized Debtor shall cure the arrears

specifically listed in Exhibit 1-B of the Plan by tendering six (6) equal consecutive monthly payments to the Vendor Agreement counter-party until the arrears are paid in full; it is further

ORDERED that, except for the Customer Contracts, Vendor Agreements, and executory contracts or leases that were expressly assumed by a separate order, all pre-petition executory contracts and unexpired leases to which the Debtor was a party are hereby REJECTED effective as of the Petition Date; it is further

ORDERED that pursuant to Bankruptcy Rule 9019, the Redwing Settlement Agreement is hereby APPROVED, and the Debtor may execute any and all documents required to carry out the Redwing Settlement, including, but not limited to the Redwing Settlement Agreement, and such agreement shall be in full force and effect; it is further

ORDERED that nothing contained in this Order or the Plan shall effect or control or be deemed to prejudice or impair the rights of the Debtor, the Reorganized Debtor, Veraz Networks, Inc. or Redwing with respect to the dispute over the validity or extent of any license claimed by the Debtor in 15,000 ICE or logical ports currently utilized by the Debtor in connection with the operation of its network and each of the Debtor, the Reorganized Debtor, Veraz Networks, Inc. and Redwing reserve all of their rights with respect to such issue; it is further

ORDERED that except as otherwise provided in Plan Section 15.03, First Capital, the Debtor, the Reorganized Debtor, and the Reorganized Debtor's present or former managers, directors, officers, employees, predecessors, successors, members, agents and representatives (collectively referred to herein as the "Released Party"), shall not have or incur any liability to any person for any claim, obligation, right, cause of action or liability (including, but not limited to, any claims arising out of any alleged fiduciary or other duty) whether known or unknown, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or

omission, transaction or occurrence from the beginning of time through the Effective Date in any way relating to the Debtor's Chapter 11 Case or the Plan; and all claims based upon or arising out of such actions or omissions shall be forever waived and released (other than the right to enforce the Reorganized Debtor's obligations under the Plan).

*** END OF ORDER ***

PREPARED BY:

By /s/ David L. Woods (5.16.06)
J. Mark Chevallier
State Bar No. 04189170
David L. Woods
State Bar No. 24004167
MCGUIRE, CRADDOCK & STROTHER, P.C.
ATTORNEYS FOR DEBTOR and
DEBTOR-IN-POSSESSION

The following constitutes the ruling of the court and has the force and effect therein described.

Harlin DeWayne Hale

Signed September 20, 2007 **United States Bankruptcy Judge**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
TRANSCOM ENHANCED SERVICES, LLC,	§	**CASE NO. 05-31929-HDH-11**
	§	
DEBTOR.	§	
	§	
TRANSCOM ENHANCED SERVICES, INC.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
GLOBAL CROSSING BANDWIDTH, INC. and GLOBAL CROSSING TELECOMMUNICATIONS, INC.,	§	**ADVERSARY NO. 06-03477-HDH**
	§	
Defendants.	§	
	§	

GLOBAL CROSSING BANDWIDTH, INC. and GLOBAL CROSSING TELECOMMUNICATIONS, INC.,	§
Third Party Plaintiffs,	§
v.	§
TRANSCOM ENHANCED SERVICES, LLC and TRANSCOM COMMUNICATIONS, INC.,	§
Third Party Defendants.	§

ORDER GRANTING TRANSCOM'S MOTION FOR PARTIAL SUMMARY JUDGMENT BASED ON THE AFFIRMATIVE DEFENSE THAT TRANSCOM QUALIFIES AS AN ENHANCED SERVICE PROVIDER

On this date, came on for consideration the Motion For Partial Summary Judgment On Counterplaintiffs' Sole Remaining Counterclaim Based On The Affirmative Defense That Transcom Qualifies As An Enhanced Service Provider (the "Motion") filed by Transcom Enhanced Services, Inc. ("Transcom" or "Counterdefendant"), in which Transcom seeks summary judgment on the sole remaining counterclaim (the "Counterclaim") asserted by Counterplaintiffs' Global Crossing Bandwidth, Inc. ("GX Bandwidth") and Global Crossing Telecommunications, Inc. ("GX Telecommunications") (collectively, "GX Entities" or "Counterplaintiffs") based on the affirmative defense that Transcom qualifies as an enhanced service provider.

Twice previously, this Court has ruled that Transcom qualifies as an enhanced service provider, and therefore is not obligated to pay access charges, but rather must pay end user charges. In filing the motion, Transcom relied heavily on the evidence previously presented to this Court in contested hearings (the "ESP Hearings") involving the SBC Telcos (collectively, "SBC") and AT&T

Corp. ("AT&T") along with Affidavits from a principal of Transcom and one of Transcom's expert witnesses establishing that Transcom's system has not changed since the time of the ESP Hearings, that the services provided to the GX Entities by Transcom are the same as the services provided to all other Transcom customers, and that Transcom's expert witness is still of the opinion that Transcom's business operations fall within the definitions of "enhanced service provider" and "information service."

In response to the Motion, Counterplaintiffs have asserted that they neither oppose nor consent to the relief sought in the Motion. In their responses to Transcom's interrogatories, however, Counterplaintiffs asserted that Transcom did not qualify as an enhanced service provider because its service is merely an "IP-in-the-middle" service, which Transcom asserts is a reference to the FCC's Order, *In The Matter Of Petition For Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges,* 19 FCC Rcd 7457, Release Number FCC 04-97, released April 21, 2004 (the "AT&T Order").

During the ESP Hearings, a number of witnesses testified on the issue of whether Transcom is an enhanced service provider and therefore exempt from payment of access charges. The transcripts and exhibits from those hearings have been introduced as summary judgment evidence in support of the Motion. That record establishes by a preponderance of the evidence that the service provided by Transcom is distinguishable from AT&T's specific service (as described in the AT&T Order) in a number of material ways, including, but not limited to, the following:

(a) Transcom is not an interexchange (long distance) carrier.

(b) Transcom does not hold itself out as a long distance carrier.

(c) Transcom has no retail long distance customers.

(d) The efficiencies of Transcom's network result in reduced rates for its customers.

(e) Transcom's system provides its customers with enhanced capabilities.

(f) Transcom's system changes the content of every call that passes through it.

On its face, the AT&T Order is limited to AT&T and its specific services. This Court therefore holds again, as it did at the conclusion of the ESP hearings, that the AT&T Order does not control the determination of whether Transcom qualifies as an enhanced service provider.

The term "enhanced service" is defined at 47 C.F.R. § 67.702(a) as follows:

> For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

The term "information service" is defined at 47 USC § 153(20) as follows:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

The definitions of "enhanced service" and "information service" differ slightly, to the point that all enhanced services are information services, but not all information services are also enhanced services. See First Report And Order, *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, 11 FCC Rcd 21905 (1996) at ¶ 103.

The Telecom Act defines the terms "telecommunications" and "telecommunications service" in 47 USC § 153(43) and (46), respectively, as follows:

> The term "telecommunications" means 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. (emphasis added).
>
> The term "telecommunications service" means the offering of *telecommunications* for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used. (emphasis added).

These definitions make clear that a service that routinely changes either the form or the content of the transmission would fall outside of the definition of "telecommunications" and therefore would not constitute a "telecommunications service."

Whether a service pays access charges or end user charges is determined by 47 C.F.R. § 69.5, which states in relevant part as follows:

> (a) End user charges shall be computed and assessed upon end users ... as defined in this subpart, and as provided in subpart B of this part. (b) Carrier's carrier charges [i.e., 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.* (emphasis added).

As such, only telecommunications services pay access charges. The clear reading of the above provisions leads to the conclusion that a service that routinely changes either the form or the content of the telephone call is an enhanced service and an information service, not a telecommunications service, and therefore is required to pay end user charges, not access charges.

Based on the summary judgment evidence, the Court finds that Transcom's system fits squarely within the definitions of "enhanced service" and "information service," as defined above. Moreover, the Court finds that Transcom's system falls outside of the definition of "telecommunications service" because Transcom's system routinely makes non-trivial changes to user-supplied information (content) during the entirety of every communication. Such changes fall outside the scope of the operations of traditional telecommunications networks, and are not

necessary for the ordinary management, control or operation of a telecommunications system or the management of a telecommunications service. As such, Transcom's service is not a "telecommunications service" subject to access charges, but rather is an information service and an enhanced service that must pay end user charges. Judge Felsenthal made a similar finding in his order approving the sale of the assets of DataVoN to Transcom, that DataVoN provided "enhanced information services." *See* Order Granting Motion to Sell, 02-38600-SAF-11, no. 465, entered May 29, 2003. Transcom now uses DataVoN's assets in its business.

In the Counterclaim, paragraph 94 makes the following assertion:

> Under the Communications Agreement, the Debtor asserted that it was an enhanced service provider. Not only did the Debtor make this assertion, it agreed to indemnify GX Telecommunications in the event that assertion proved untrue.

The Counterclaim goes on to allege that Transcom failed to pay access charges, and that Transcom is therefore liable under the indemnification provision in the governing agreement to the extent that it does not qualify as an enhanced service provider. In response to the Counterclaim, Transcom asserted the affirmative defense that it does indeed qualify as an enhanced service provider, and therefore has no liability under the indemnification provision. The Motion seeks summary judgment on that specific affirmative defense.

The Court has previously ruled, and rules again today, that Transcom qualifies as an enhanced service provider. As such, it is the opinion of the Court that the Motion should be granted.

It is therefore ORDERED that the Motion is GRANTED, and Transcom is awarded summary judgment that the GX Entities take nothing by their Counterclaim.

###END OF ORDER###

427 B.R. 585
(Cite as: 427 B.R. 585)

C

United States Bankruptcy Court,
N.D. Texas,
Dallas Division.
In re TRANSCOM ENHANCED SERVICES, LLC, Debtor.

No. 05–31929–HDH–11.
April 29, 2005.

Background: Bankrupt telecommunications provider that had filed for Chapter 11 relief moved for leave to assume master agreement between itself and telephone company.

Holdings: The Bankruptcy Court, Harlin D. Hale, J., held that:
(1) bankruptcy court had jurisdiction, in connection with motion by bankrupt telecommunications provider to assume master agreement between itself and telephone company, to decide whether Chapter 11 debtor qualified as enhanced service provider (ESP), so as to be exempt from payment of certain access charges, and
(2) debtor fit squarely within definition of "enhanced service provider" and was exempt from payment of access charges, as required for it to comply with terms of master agreement that it was moving to assume, and as required for court to approve this motion as proper exercise of business judgment.

So ordered.

West Headnotes

[1] Bankruptcy 51 ⚿2048.2

51 Bankruptcy
51I In General
51I(C) Jurisdiction
51k2048 Actions or Proceedings by Trustee or Debtor
51k2048.2 k. Core or related proceedings. Most Cited Cases

Bankruptcy court had jurisdiction, in connection with motion by bankrupt telecommunications provider to assume master agreement between itself and telephone company, to decide whether Chapter 11 debtor qualified as enhanced service provider (ESP), so as to be exempt from payment of certain access charges, where debtor's status as ESP bore directly upon whether it could satisfy terms of master agreement and whether its decision to assume this agreement was proper exercise of its business judgment; forum selection clause in master agreement, while it might have validity in other contexts and require that any litigation over debtor's status as ESP take place in New York, did not deprive court of jurisdiction to decide issue bearing directly on propriety of allowing debtor to assume master agreement. 11 U.S.C.A. § 365.

[2] Bankruptcy 51 ⚿3111

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3111 k. "Business judgment" test in general. Most Cited Cases

In deciding whether to grant debtor's motion to assume executory contract, bankruptcy court must ascertain whether or not debtor is exercising proper business judgment. 11 U.S.C.A. § 365.

[3] Bankruptcy 51 ⚿3111

51 Bankruptcy
51IX Administration
51IX(C) Debtor's Contracts and Leases
51k3110 Grounds for and Objections to Assumption, Rejection, or Assignment
51k3111 k. "Business judgment" test in general. Most Cited Cases

Telecommunications 372 ⚿866

372 Telecommunications

372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k866 k. Pricing, rates and access charges. Most Cited Cases

Bankrupt telecommunications provider whose communications system resulted in non-trivial changes to user-supplied information for every communication processed fit squarely within definition of "enhanced service provider" and was exempt from payment of access charges, as required for it to comply with terms of master agreement that it was moving to assume, and as required for court to approve this motion as proper exercise of business judgment. 11 U.S.C.A. § 365; Communications Act of 1934, § 3 (43, 46), 47 U.S.C.A. § 153(43, 46); 47 C.F.R. § 64.702(a), 69.5.

*585 *MEMORANDUM OPINION*

HARLIN D. HALE, Bankruptcy Judge.

On April 14, 2005, this Court considered Transcom Enhanced Services, LLC's (the "Debtor's") Motion To Assume AT & T *586 Master Agreement MA Reference No. 120783 Pursuant To 11 U.S.C. § 365 ("Motion").[FN1] At the hearing, the Debtor, AT & T, and Southwestern Bell Telephone, L.P., et al ("SBC Telcos") appeared, offered evidence, and argued. These parties also submitted post-hearing briefs and proposed findings of fact and conclusions of law supporting their positions. This memorandum opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 7052 and 9014. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 151, and the standing order of reference in this district. This matter is a core proceeding, pursuant to 28 U.S.C. § 157(b)(2)(A) & (O).

FN1. Debtor's Exhibit 1, admitted during the hearing, is a true, correct and complete copy of the Master Agreement between Debtor and AT & T.

I. Background Facts

This case was commenced by the filing of a voluntary Bankruptcy Petition for relief under Chapter 11 of the Bankruptcy Code on February 18, 2005. The Debtor is a wholesale provider of transmission services providing its customers an Internet Protocol ("IP") based network to transmit long-distance calls for its customers, most of which are long-distance carriers of voice and data.

In 2002, a company called DataVoN, Inc. invested in technology from Veraz Networks designed to modify the aural signal of telephone calls and thereby make available a wide variety of potential new services to consumers in the area of VoIP. The FCC had long supported such new technologies, and the opportunity to change the form and content of the telephone calls made it possible for DataVoN to take advantage of the FCC's exemption provided for Enhanced Service Providers ("ESP's"), significantly reducing DataVoN's cost of telecommunications service.

On September 20, 2002, DataVoN and its affiliated companies filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas, before Judge Steven A. Felsenthal. Southwestern Bell was a claimant in the DataVoN bankruptcy case. On May 19, 2003, the Debtor was formed for purposes of acquiring the operating assets of DataVoN. The Debtor was the winning bidder for the assets of DataVoN and on May 28, 2003, the bankruptcy court approved the sale of substantially all of the assets of DataVoN to the Debtor. Included in the order approving the sale, were findings by Judge Felsenthal that DataVoN provided "enhanced information services".

On July 11, 2003, AT & T and the Debtor entered into the AT & T Master Agreement MA Reference No. 120783 (the "Master Agreement"). In an addendum to the Master Agreement, executed on the same date, the Debtor states that it is an "enhanced information services" provider, providing data communications services over private IP networks (VoIP), such VoIP services are exempt from the access charges applicable to circuit switched interexchange calls, and such services would be provided over end user local services (such as the SBC Telcos).

AT & T is both a local-exchange carrier and a long-distance carrier of voice and data. The SBC Telcos are local exchange carriers that both originate and terminate long distance voice calls for carriers that do not have their own direct, "last mile" connections to end users. For this service, SBC Telcos charge an access charge. Enhanced service providers ("ESP's")

are exempt from paying these access charges, and the SBC Telcos had been in litigation *587 with DataVoN during its bankruptcy, and has recently been in litigation with the Debtor, AT & T and others over whether certain services they provide are entitled to this exemption to access charges.

On April 21, 2004, the FCC released an order in a declaratory proceeding between AT & T and SBC (the "AT & T Order") that found that a certain type of telephone service provided by AT & T using IP technology was not an enhanced service and was therefore not exempt from the payment of access charges. Based on the AT & T Order, before the instant bankruptcy case was filed, AT & T suspended Debtor's services under the Master Agreement on the grounds that the Debtor was in default under the Master Agreement. Importantly, the alleged default of the Debtor is not a payment default, but rather pursuant to Section 3.2 of the Master Agreement, which, according to AT & T, gives AT & T the right to immediately terminate any service that AT & T has reason to believe is being used in violation of laws or regulations.

AT & T asserts that the services that the Debtor provides over its IP network are substantially the same as were being provided by AT & T, and therefore, the Debtor is also not exempt from paying these access charges. At the point that the bankruptcy case was filed, service had been suspended by AT & T pending a determination that the Debtor is an ESP, but AT & T had not yet assessed the access charges that it asserts are owed by the Debtor.

II. Issues

The issues before the Court are:

(1) Whether the Debtor has met the requirements of § 365 in order to assume the Master Agreement; and

(2) Whether the Debtor is an enhanced service provider ("ESP"), and is thus exempt from the payment of certain access charges in compliance with the Master Agreement.[FN2]

FN2. AT & T has stated in its Objection to the Motion that since it does not object to the Debtor's assumption of the Master Agreement provided the amount of the cure payment can be worked out, the Court need not reach the issue of whether the Debtor is an ESP. However, this argument appears disingenuous to the Court. AT & T argues that the entire argument over cure amounts is a difference of about $28,000.00 that AT & T is willing to forgo for now. However, AT & T later states in its objection (and argued at the hearing):

> "To be sure, this is not the total which ultimately Transcom may owe. It is also possible that ... Transcom will owe additional amounts if it is determined that it should have been paying access charges. But at this point, AT & T has not billed for the access charges, so under the terms of the Addendum, they are not currently due.... AT & T is not requiring Transcom to provide adequate assurance of its ability to pay those charges should they be assessed, but will rely on the fact that post-assumption, these charges will be administrative claims.... Although Transcom's failure to pay access charges with respect to prepetition traffic was a breach, the Addendum requires, as a matter of contract, that those pre-petition charges be paid when billed. This contractual provision will be binding on Transcom post-assumption, and accordingly, is not the subject of a damage award now."

AT & T Objection p. 3–4. As will be discussed below, in evaluating the Debtor's business judgment in approving its assumption Motion, the Court must determine whether or not its approval of the Motion will result in a potentially large administrative expense to be borne by the estate.

AT & T argues against the Court's jurisdiction to determine this question as part of an assumption motion. However, the Court wonders if AT & T will make the same argument with regard to its post-assumption administrative claims it plans on asserting for past and future access charges that it states it will rely on for payment instead of asking for them to be included as cure payments under the pre-

sent Motion.

***588 III. Analysis**

Under § 365(b)(1), a debtor-in-possession that has previously defaulted on an executory contract [FN3] may not assume that contract unless it: (A) cures, or provides adequate assurance that it will promptly cure, the default; (B) compensates the non-debtor party for any actual pecuniary loss resulting from the default; and (C) provides adequate assurance of future performance under such contract. *See* 11 U.S.C. § 365(b)(1).

FN3. The parties agree that the Master Agreement is an executory contract.

In its objection, briefing and arguments made at the hearing, AT & T does not object to the Debtor's assumption of the Master Agreement, provided the Debtor pays the cure amount, as determined by the Court. It does not expect the Debtor to cure any non-monetary defaults, including payment or proof of the ability to pay the access charges that have been incurred, as alleged by the SBC Telcos, as a prerequisite to assumption. *See In re BankVest Capital Corp.*, 360 F.3d 291, 300–301 (1st Cir.2004), *cert. denied*, 542 U.S. 919, 124 S.Ct. 2874, 159 L.Ed.2d 776 (2004) ("Congress meant § 365(b)(2)(D) to excuse debtors from the obligation to cure nonmonetary defaults as a condition of assumption.").

Only the Debtor offered evidence of the cure amounts due at the hearing totaling $103,262.55. Therefore, based on this record, the current outstanding balance due from Debtor to AT & T is $103,262.55 (the "Cure Amount"). Thus, upon payment of the Cure Amount Debtor's Motion should be approved by the Court, provided the Debtor can show adequate assurance of future performance.

[1][2] AT & T argues that this is where the Court's inquiry should cease. Since AT & T has suspended service under the Master Agreement, whether or not the Debtor is an ESP, and thus exempt from payment of the disputed access charges is irrelevant, because no future charges will be incurred, access or otherwise. This is because no service will be given by AT & T until the proper court makes a determination as to the Debtor's ESP status. However, in its argument, AT & T ignores the fact that part of the Court's necessary determination in approving the Debtor's motion to assume the Master Agreement is to ascertain whether or not the Debtor is exercising proper business judgment. *See In re Liljeberg Enter., Inc.*, 304 F.3d 410, 438 (5th Cir.2002); *In re Richmond Leasing Co.*, 762 F.2d 1303, 1309 (5th Cir.1985).

If by assuming the Master Agreement the Debtor would be liable for the large potential administrative claim, to which AT & T argues that it will be entitled,[FN4] or if the Debtor cannot show that it can perform under the Master Agreement, which states that the Debtor is an enhanced information services provider exempt from the access charges applicable to circuit switched interexchange calls, and the Debtor would loose money going forward under the Master Agreement should it be determined that the Debtor is not an ESP, then the Court should deny the Motion. On this record, the Debtor has established that it cannot perform under the Master Agreement, and indeed cannot continue its day-to-day operations or successfully reorganize, unless it qualifies as an Enhanced Service Provider.

FN4. See n.2 above.

AT & T and SBC Telcos argue that a forum selection clause in the Master Agreement should be enforced and that any determination as to whether the Debtor***589** is an ESP, and thus exempt from access charges, must be tried in New York. While this argument may have validity in other contexts, the Court concludes that it has jurisdiction to decide this issue as it arises in the context of a motion to assume under § 365. *See In re Mirant Corp.*, 378 F.3d 511, 518 (5th Cir.2004) (finding that district court may authorize the rejection of an executory contract for the purchase of electricity as part of a bankruptcy reorganization and that the Federal Energy Regulatory Commission did not have exclusive jurisdiction in this context); *see also, Ins. Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.)*, 118 F.3d 1056 (5th Cir.1997) (Bankruptcy Court possessed discretion to refuse to enforce an otherwise applicable arbitration provision where enforcement would conflict with the purpose or provisions of the Bankruptcy Code).

In re Orion, which is heavily relied upon by AT & T, is inapplicable in this proceeding. *See In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir.1993). On its face, *Orion* is distinguishable from this case in that in

Orion, the debtor sought damages in an adversary proceeding at the same time it was seeking to assume the contract in question under Section 365. The bankruptcy court decided the Debtor's request for damages as a part of the assumption proceedings awarding the Debtor substantial damages. Here, the Debtor is not seeking a recovery from AT & T under the contract which would augment the estate. Rather the Debtor is only seeking to assume the contract within the parameters of Section 365. Similar issues to the one before this Court have been advanced by another bankruptcy court in this district.

The court in *In re Lorax Corp.*, 307 B.R. 560 (Bankr.N.D.Tex.2004), succinctly pointed out that a broad reading of the Orion opinion runs counter to the statutory scheme designed by Congress. *Lorax*, 307 B.R. at 566 n. 13. The *Lorax* court noted that *Orion* should not be read to limit a bankruptcy court's authority to decide a disputed contract issue as part of hearing an assumption motion. *Id.* To hold otherwise would severely limit a bankruptcy court's inherent equitable power to oversee the debtor's attempt at reorganization and would diffuse the bankruptcy court's power among a number of courts. The *Lorax* court found such a result to be at odds with the Supreme Court's command that reorganization proceed efficiently and expeditiously. *Id.* at 567 (citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 376, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988)). This Court agrees. The determination of the Debtors status as an ESP is an important part of the assumption motion.

Since the Second Circuit's 1993 *Orion* opinion, the Second Circuit has further distinguished non-core and core jurisdiction proceedings involving contract disputes. In particular, if a contract dispute would have a "much more direct impact on the core administrative functions of the bankruptcy court" versus a dispute that would merely involve "augmentation of the estate," it is a core proceeding. *In re United States Lines, Inc.*, 197 F.3d 631, 638 (2d Cir.1999) (allowing the bankruptcy court to resolve disputes over major insurance policies, and recognizing that the debtor's indemnity contracts could be the most important asset of the estate). Accordingly, the Second Circuit would reach the same conclusion of core jurisdiction here since the dispute addressed by the Motion "directly affect[s]" the bankruptcy court's "core administrative function." *United States Lines*, at 639 (citations omitted).

Determination, for purposes of the motion to assume, of whether the Debtor *590 qualifies as an ESP and is exempt from paying access charges (the "ESP Issue") requires the Court to examine and take into account certain definitions under the Telecommunications Act of 1996 (the "Telecom Act"), and certain regulations and rulings of the Federal Communications Commission ("FCC"). None of the parties have demonstrated, however, that this is a matter of first impression or that any conflict exists between the Bankruptcy Code and non-Code cases. Thus, the Court may decide the ESP issues for purposes of the motion to assume.

[3] Several witnesses testified on the issues before the Court. Mr. Birdwell and the other representatives of the Debtor were credible in their testimony about the Debtor's business operations and services. **The record establishes by a preponderance of the evidence that the service provided by Debtor is distinguishable from AT & T's specific service in a number of material ways, including, but not limited to, the following:**

(a) Debtor is not an interexchange (long-distance) carrier.

(b) Debtor does not hold itself out as a long-distance carrier.

(c) Debtor has no retail long-distance customers.

(d) The efficiencies of Debtor's network result in reduced rates for its customers.

(e) Debtor's system provides its customers with enhanced capabilities.

(f) Debtor's system changes the content of every call that passes through it.

On its face, the AT & T Order is limited to AT & T and its specific services. This Court holds, therefore, that the AT & T Order does not control the determination of the ESP Issue in this case.

The term "enhanced service" is defined at 47 CFR § 67.702(a) as follows:

> For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

The term "information service" is defined at 47 USC § 153(20) as follows:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Dr. Bernard Ku, who testified for SBC was a knowledgeable and impressive witness. However, during cross examination, he agreed that he was not familiar with the legal definition for enhanced service.

The definitions of "enhanced service" and "information service" differ slightly, to the point that all enhanced services are information services, but not all information services are also enhanced services. See First Report And Order, *In the Matter of Implementation of the Non–Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, 11 FCC Rcd 21905 (1996) at ¶ 103.

The Telecom Act defines the terms "telecommunications" and "telecommunications*591 service" in 47 USC § 153(43) and (46), respectively, as follows:

> The term "telecommunications" means 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. (emphasis added).
>
> The term "telecommunications service" means the offering of *telecommunications* for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used. (emphasis added).

These definitions make clear that a service that routinely changes either the form or the content of the transmission would fall outside of the definition of "telecommunications" and therefore would not constitute a "telecommunications service."

Whether a service pays access charges or end user charges is determined by 47 C.F.R. § 69.5, which states in relevant part as follows:

> (a) End user charges shall be computed and assessed upon end users ... as defined in this subpart, and as provided in subpart B of this part. (b) Carrier's carrier charges [i.e., 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*, (emphasis added).

As such, only telecommunications services pay access charges. The clear reading of the above provisions leads to the conclusion that a service that routinely changes either the form or the content of the telephone call is an enhanced service and an information service, not a telecommunications service, and therefore is required to pay end user charges, not access charges.

Based on the evidence and testimony presented at the hearing, the Court finds, for purposes of the § 365 motion before it, that the Debtor's system fits squarely within the definitions of "enhanced service" and "information service," as defined above. Moreover, the Court finds that Debtor's system falls outside of the definition of "telecommunications service" because Debtor's system routinely makes non-trivial changes to user-supplied information (content) during the entirety of every communication. Such changes fall outside the scope of the operations of traditional telecommunications networks, and are not necessary for the ordinary management, control or operation of a telecommunications system or the management of a telecommunications service. As such, Debtor's service is not a "telecommunications service" subject to access charges, but rather

is an information service and an enhanced service that must pay end user charges. Judge Felsenthal made a similar finding in his order approving the sale of the assets of DataVoN to the Debtor, that DataVoN provided "enhanced information services". *See* Order Granting Motion to Sell, 02-38600-SAF-11, no. 465, entered May 29, 2003. The Debtor now uses DataVoN's assets in its business.

Because the Court has determined that the Debtor's service is an "enhanced service" not subject to the payment of access charges, the Debtor has met its burden of demonstrating adequate assurance of future performance under the Master Agreement. The Debtor has demonstrated that it is within Debtor's reasonable business judgment to assume the Master Agreement.

Regardless of the ability of the Debtor to assume this agreement, the Court cannot go further in its ruling, as the Debtor has requested to order AT & T to resume *592 providing service to the Debtor under the Master Agreement. The Court has reached the conclusions stated herein in the context of the § 365 motion before it and on the record made at the hearing. An injunction against AT & T would require an adversary proceeding, a lawsuit. Both the Debtor and AT & T are still bound by the exclusive jurisdiction provision in § 13.6 of the Master Agreement, as found by the United States District Court for the Northern District of Texas, Hon. Terry R. Means. As Judge Means ruled, any suit brought to enforce the provisions of the Master Agreement must be brought in New York.

IV. Conclusion

In conclusion, the Court finds that the provisions of 11 U.S.C. § 365 have been met in this case. Because the Court finds that the Debtor's service is an enhanced service, not subject to payment of access charges, it is therefore within Debtor's reasonable business judgment to assume the Master Agreement with AT & T.

Only the Debtor offered evidence of the cure amounts at the hearing. Based on the record at the hearing, the current outstanding balance due from Debtor to AT & T is $103,262.55. To assume the Master Agreement, the Debtor must pay this Cure Amount to AT & T within ten (10) days of the entry of the Court's order on this opinion.

A separate order will be entered consistent with this memorandum opinion.

Bkrtcy.N.D.Tex.,2005.
In re Transcom Enhanced Services, LLC
427 B.R. 585

END OF DOCUMENT

The following constitutes the order of the Court.

Signed May 28, 2003.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	**CASE NO. 02-38600-SAF-11**
	§	**(Jointly Administered)**
DATAVON, INC., et al.,	§	**CHAPTER 11**
	§	
DEBTORS.	§	
	§	

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

Upon the motion of DataVoN, Inc. ("DataVoN"), DTVN Holdings, Inc. ("DTVN"), Zydeco Exploration, Inc. ("Zydeco"), and Video Intelligence, Inc. ("VI") (collectively, the "Debtors") dated December 31, 2002, for, among other things, entry of an order under 11 U.S.C. §§ 105(a), 363, 365 and 1146(c), and Fed.R.Bankr.P. 2002, 6004, 6006 and 9014 (i) authorizing

and approving the sale of substantially all of the assets of the estate free and clear of liens, claims, encumbrances, interests and exempt from any stamp, transfer, recording or similar tax; (ii) authorizing the assumption and assignment of various executory contracts and unexpired leases; (iii) establishing an auction date, related deadlines and bid procedures in connection with the asset sale; (iv) approving the form and manner of sale notices to be sent to potential bidders, creditors and parties-in-interest; and (v) approving certain break-up fees in connection with the solicitation of higher or better offers for the assets (the "Sales Motion");[1] and the Court having entered on February 20, 2003 an order with respect to the Sale (i) Establishing Auction Date, Related Deadlines and Bid Procedures; (ii) Approving the Form and Manner of Sales Notices; and (iii) Approving Break-up Fees in Connection with the Solicitation of Higher or Better Offers (the "Bid Procedures Order"), that scheduled a hearing on the Sale Motion (the "Sale Hearing") and set an objection deadline with respect to the Sale; and the Sale Hearing having been commenced on April 1, 2003; and the Court having reviewed and considered the Sales Motion, the objections thereto, if any, and the arguments of counsel made and the evidence proffered or adduced at the Sale Hearing; and it appearing that the relief requested in the Sales Motion is in the best interests of the Debtors, their estates, creditors and other parties in interest; and upon the record of the Sale Hearing and in this case; and after due deliberation thereon; and good cause appearing therefore; it is hereby

FOUND AND DETERMINED THAT:[2]

1. The Court has jurisdiction over the Sales Motion pursuant to 28 U.S.C. § 1334.

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[1] Unless otherwise defined, capitalized terms used herein shall have the meanings ascribed to them in the Sales Motion.

[2] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief sought in the Sales Motion are §§ 105(a), 363(b), (f), (m), and (n), 365, and 1146(c) of the United States Bankruptcy Code (11 U.S.C. §§ 101-1330, as amended (the "Bankruptcy Code")) and Fed.R.Bankr.P. 2002, 6004, 6006 and 9014.

3. As evidenced by the certificates of service and publication previously filed with the Court, and based on the representations of counsel at the Sale Hearing, (i) proper, timely, adequate and sufficient notice of the Sales Motion, the Sale Hearing, and the Sale has been provided in accordance with Bankruptcy Code §§ 105(a), 363, 365 and 1146(c), and Fed.R.Bankr.P. 2002, 6004, 6006 and 9014 and in compliance with the Bidding Procedures Order; (ii) such notice was good and sufficient, and appropriate under the particular circumstances; and (iii) no other or further notice of the Sales Motion, the Sale Hearing, or the Sale is or shall be required.

4. As evidenced by the certificates of service and publication previously filed with the Court, and based on the representations of counsel at the Sale Hearing, (i) proper, timely, adequate and sufficient notice of the assumption and assignment of the Assumed Contracts and the cure payments to be made therefore has been provided in accordance with Bankruptcy Code §§ 105(a) and 365 and Fed.R.Bankr.P. 9014; (ii) such notice was good and sufficient; and (iii) no other or further notice of the assumption and assignment of the Assumed Contracts is or shall be required.

5. As demonstrated by: (i) the testimony and other evidence proffered or adduced at

the Sale Hearing and (ii) the representations of counsel made on the record at the Sale Hearing, the Debtors and the Bid Selection Committee marketed the Assets and conducted the Sale process in compliance with the Bidding Procedures Order.

6. The Debtors: (i) have full corporate power and authority to execute the Agreement and all other documents contemplated thereby, and the sale of the Assets by the Debtors has been duly and validly authorized by all necessary corporate action of the Debtors; (ii) have all of the corporate power and authority necessary to consummate the transactions contemplated by the Agreement; and (iii) have taken all corporate action necessary to authorize and approve the Agreement and the consummation by the Debtors of the transactions contemplated thereby. No consents or approvals other than those expressly provided for in the Agreement are required for the Debtors to consummate such transactions.

7. Approval of the Agreement and consummation of the Sale at this time are in the best interests of the Debtors, their estates, their creditors, and other parties in interest.

8. The Debtors have demonstrated both (i) good, sufficient, and sound business purpose and justification and (ii) compelling circumstances for the Sale pursuant to Bankruptcy Code § 363(b) prior to, and outside of, a plan of reorganization in that, among other things:

a. The Debtors and the Bid Selection Committee diligently and in good faith marketed the Assets to secure the highest and best offer therefore. Further, the Debtors and the Bid Selection Committee published a notice substantially in the form of the Sale Notice in *The Wall Street Journal.* The terms and conditions set forth in the Agreement, and the transfer to Purchaser of the Assets pursuant thereto, represent a fair and reasonable purchase price and constitute the highest and best offer obtainable for the Assets.

b. A sale of the Assets at this time to Purchaser pursuant to Bankruptcy Code § 363(b) is the only viable alternative to preserve the value of the Assets and to maximize the Debtors' estates for the benefit of all constituencies. Delaying approval of the Sale may result in Purchaser's termination of the Agreement and result in an alternative

outcome that will achieve far less value for creditors.

c. Except as otherwise provided in this Sale Order, the cash proceeds of the Sale will be distributed to the Debtors' administrative and pre-petition creditors under the terms of a confirmed liquidating Chapter 11 plan.

d. The highest and best offer received for the purchase of the Assets came from Transcom Communications, Inc. ("Transcom" or "Purchaser").

9. On March 3, 2003, the Debtors filed their Notice of Cure Amounts Under Contracts and Leases that may be Assumed and Assigned to Purchaser of Substantially All of Debtors' Assets, detailing the executory contracts that may be assumed and assigned to the successful purchaser of the Debtors' assets (the "Assumed Contracts"). The Cure Notice not only fixed the Cure Amount for each contract for any non-objecting party, but also constituted a waiver by any non-objecting party to the assumption and assignment of the various contracts to the Purchaser. The Assumed Contracts are unexpired and executory contracts within the meaning of the Bankruptcy Code. Pursuant to the Agreement, the Purchaser shall cure all monetary defaults under the Assumed Contracts as provided for in the Notice or as agreed between the parties to any Assumed Contract. There are no non-monetary defaults requiring cure. The Sale satisfies the requirements of Bankruptcy Code § 365(b). The Debtors are not required to cure any defaults of the kind described in Bankruptcy Code § 365(b)(2). The Purchaser's excellent financial health and own expertise in the telecommunications industry provide adequate assurance of future performance to all non-debtor parties to Assumed Contracts. Pursuant to Bankruptcy Code § 365(f), all restrictions on assignment in any of the Assumed Contracts are unenforceable against the Debtors and all Assumed Contracts may lawfully be assigned to the Purchaser.

10. A reasonable opportunity to object or be heard with respect to the Sale Motion

and the relief requested therein has been afforded to all interested persons and entities, including: (i) each and every holder of a "claim" (as defined in Bankruptcy Code § 101(5)) against the Debtors; (ii) each and every holder of an equity or other interest in the Debtors; (iii) each and every contractor and subcontractor that has performed any services or otherwise dealt with any of the Assets; (iv) each and every Governmental Entity with jurisdiction over the Debtors or any of the Assets; (v) each and every holder of an Encumbrance on any of the Assets; (vi) the Office of the United States Trustee for the Northern District of Texas; (vii) the Official Committee of Unsecured Creditors appointed in the Debtors' cases under the Bankruptcy Code, if any; (viii) any and all other persons and entities upon whom the Debtors are required (pursuant to the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure or any order of the Court) to serve notice; (ix) any and all other persons and entities upon whom Purchaser instructed Seller to serve notice; and (x) any parties who are on the list of prospective purchasers maintained by CRP.

11. The Agreement was negotiated, proposed, and entered into by the Debtors, CRP, members of the Bid Selection Committee, and Purchaser without collusion, in good faith, and from arm's-length bargaining positions. None of the Debtors, CRP, members of the Bid Selection Committee, and the Purchaser has engaged in any conduct that would cause or permit the Agreement to be avoided under Bankruptcy Code § 363(n).

12. Purchaser is a good faith purchaser under Bankruptcy Code § 363(m) and, as such, is entitled to all of the protections afforded thereby. Purchaser will be acting in good faith within the meaning of Bankruptcy Code § 363(m) in closing the transactions contemplated by the Agreement at all times after the entry of this Sale Order.

13. The consideration provided by Purchaser for the Assets pursuant to the

Agreement: (i) is fair and reasonable, (ii) is the highest and best offer for the Assets, (iii) will provide a greater recovery for the Debtors' creditors than would be provided by any other practical, available alternative, and (iv) constitutes reasonably equivalent value and fair consideration under the Bankruptcy Code.

14. The Sale must be approved promptly in order to preserve the value of the Assets.

15. The transfer of the Assets to Purchaser will be a legal, valid, and effective transfer of such Assets, and will vest Purchaser with all right, title, and interest of the Debtors to such Assets free and clear of all Interests, including those: (i) that purport to give any party a right or option to effect any forfeiture, modification, right of first refusal, or termination of the Debtors' or Purchaser's interest in such Assets, or any similar rights, or (ii) relating to taxes arising under, out of, in connection with, or in any way relating to the operation of the Debtors' business prior to the date (the "Closing Date") of the consummation of the Agreement (the "Closing").

16. Purchaser would not have entered into the Agreement, and would not have been willing to consummate the transactions contemplated thereby, if the sale of the Assets to Purchaser were not free and clear of all Interests, or if Purchaser would, or in the future could, be liable for any of the Interests. Thus, any ruling that the sale of Assets was not free and clear of all Interests, or that Purchaser would, or in the future could, be liable for any Interests would adversely affect the Debtors, their estates, and their creditors.

17. The Debtors may sell the Assets free and clear of all Interests because, in each case, one or more of the standards set forth in Bankruptcy Code §§ 363(f)(1)-(5) has been satisfied. Those holders of Interests who did not object, or who withdrew their objections, to the Sale or the Sales Motion are deemed to have consented pursuant to Bankruptcy Code § 363(f)(2).

Those holders of Interests who did object fall within one or more of the other subsections of Bankruptcy Code § 363(f) and are adequately protected by having their Interests, if any, attach to the cash proceeds of the Sale.

18. Except with respect to the payment of the Cure Amounts and the Assumed Liabilities, the transfer of the Assets to Purchaser will not subject Purchaser, prior to the Closing Date, to any liability whatsoever with respect to the operation of the Debtors' business or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, on any theory of law or equity, including, without limitation, any theory of equitable subordination or successor or transferee liability.

19. The valuations placed by the Bid Selection Committee on the Purchaser's bid are fair and reasonable and reflect fair and reasonable consideration for the sale of the Assets.

20. Through DataVoN, the primary operating subsidiary, the Debtors provide enhanced information services, including toll-quality voice and data services utilizing converged, Internet protocol (IP) transmitted over private IP networks. DataVoN, Inc., the primary operating subsidiary of the Debtors is a provider of wholesale enhanced information services. DataVoN provides toll quality voice and data communications services over private IP networks (VoIP) to carrier and enterprise customers. Companies who deploy soft switch equipment on an IP network can provide high quality video, voice, and data services while retaining flexibility, scalability, and cost efficiencies. DTVN is a holding company with no operations of its own. DataVoN's information services include voice origination, voice termination, 8xx origination and termination, utilizing voice over IP technology. VI formerly provided video services. That

line of business has been withdrawn. Zydeco, once the manager of DTVN's corporate oil and gas holdings, sold most of its assets in the third quarter of 2001 and retains only nominal activity.

21. Objections to the Sales Motion were filed by Cisco Systems, Inc. and Unipoint Holdings, Inc. with respect to certain aspects of the Sales Motion. Those objections were resolved by settlement terms announced on the record as follows: (1) the "Transcom Note" as set forth in section 9.32(g) of the Agreement shall be modified to provide that the original principal amount of the note may not be less than $1,282,539 and that such principal and accrued interest, if any, may be offset only by an allowed secured claim of Transcom as set forth in a final order; (2) the interest accuring on any allowed secured claim of Transcom, if any, will be equal to and shall not exceed an offsetting interest under the Transcom Note; (3) on the Closing Date of the Sale, Transcom shall wire transfer the sum of $100,000 to Unipoint, per Unipoint's instructions, in connection with that certain Reimbursement Agreement executed by and between Unipoint and Transcom; (4) Transcom will, at Closing, pay $440,000.00, to Hughes & Luce, LLC, to be held in Hughes & Luce, L.L.P.'s IOLTA Trust Account, in trust for the payment of Cisco's administrative claim in this case in accordance with the Term Sheet by and between Cisco and the Debtors as approved by the Court in its Order dated March 26, 2003, with such funds to be wire transferred by Hughes & Luce, L.L.P., pursuant to written instructions of Cisco, no later than 72 hours after the date of Closing of the Sale; and (5) Transcom shall amend the Agreement to reflect that Transcom is not acquiring net operating losses of the Debtors. Each of the foregoing terms shall be collectively referred to hereafter as the "Settlement Terms."

22. All cash consideration paid on the date of Closing of the Sale ("Sale Proceeds") shall be delivered to Hughes & Luce, L.L.P. ("H&L") and shall be placed in H&L's IOLTA

Trust Account. In addition to the Sale Proceeds, pursuant to the Settlement Terms, $440,000.00 shall be delivered to H&L, to be disbursed to Cisco pursuant to written instructions of Cisco, no later than 72 hours after the date of Closing of the Sale. Pursuant to the terms of that certain Order approving employee stay put bonuses, $344,860.54 of the Sale Proceeds, if delivered to H&L, shall be disbursed to the DataVoN, Inc. payroll account pursuant to written instructions from DataVoN, Inc., for the purpose of funding the employee stay put bonuses. After the aforesaid disbursements to Cisco and for the employee stay put bonuses, all remaining Sale Proceeds delivered to H&L shall be held in H&L's IOLTA Trust Account until the earlier to occur of (i) Confirmation of the Plan and creation of the Liquidating Trust, at which time H&L shall transfer such remaining Sale Proceeds to the Liquidating Trust by wire transfer, pursuant to the written instructions of the Liquidating Trustee, (ii) receipt by H&L of written Order of the Court ordering disbursement of the Sale Proceeds if the Plan is not Confirmed, or (iii) June 30, 2003, and petition by H&L to the Court requesting further direction of the Court regarding disbursement of remaining Sale Proceeds.

NOW THEREFORE, IT IS HEREBY:

General Provisions

ORDERED that the Sales Motion is granted, as further described herein; it is further

ORDERED that all objections to the Sales Motion or to the relief requested therein that have not been withdrawn, waived, or settled and all reservations of rights included in any objection to the Sales Motion are hereby overruled on the merits; it is further

ORDERED that the Court's findings and conclusions stated at the Sale Hearing are incorporated herein; it is further

Approval of the Agreement

ORDERED that the Agreement as modified by the Settlement Terms, and all of the terms and conditions thereof, are hereby approved; it is further

ORDERED that pursuant to Bankruptcy Code § 363(b), the Debtors are authorized and directed to consummate the Sale as modified by the Settlement Terms, pursuant to and in accordance with the terms and conditions of the Agreement as modified by the Settlement Terms; it is further

ORDERED that the Debtors are authorized and directed to execute and deliver, and empowered to perform under, consummate and implement, the Agreement as modified by the Settlement Terms, together with all additional instruments and documents that may be reasonably necessary or desirable to implement the Agreement as modified by the Settlement Terms, and to take all further actions as may be requested by Purchaser for the purpose of assigning, transferring, granting, conveying and conferring the Assets to Purchaser or as may be necessary or appropriate to the performance of the obligations as contemplated by the Agreement as modified by the Settlement Terms; it is further

ORDERED that on the Closing Date of the Sale, the Debtors and Hughes & Luce, L.L.P. ("H&L") shall (i) refund the $50,000 deposit paid by Unipoint Holdings, Inc. ("Unipoint") and held by H&L in its IOLTA trust account by wire transfer per written instructions from Unipoint, (ii) refund the $50,000 deposit paid by CNM Network Inc. ("CNM") and held by H&L in its IOLTA trust account by wire transfer per written instructions from CNM, and (iii) provided Transcom substitutes the equivalent sum on the Closing Date of the Sale, refund the $50,000

deposit paid by Transcom and Sowell and held by H&L in its IOLTA trust account by wire transfer per written instructions from Transcom; it is further

Assignment and Assumption of Assumed Contracts

ORDERED that the Debtors are hereby authorized and directed, in accordance with § 365(b) of the Bankruptcy Code: (i) to assume and assign to the Purchaser the Assumed Contracts, with the Purchaser being responsible for the cure amounts specified in Exhibit "A" attached hereto (the "Cure Amounts") and (ii) to execute and deliver to the Purchaser such assignment documents as may be necessary to sell, assign, and transfer the Assumed Contracts. The Purchaser shall provide no adequate assurance of future performance under the Assumed Contracts, other than its promise to perform pursuant to the terms and conditions of the Assumed Contracts. Pursuant to Bankruptcy Code §§ 365(a), (b), (c) and (f), the Purchaser is directed to pay the Cure Amounts on the Closing Date, within a reasonable period of time thereafter, or as agreed by the Purchaser with the non-debtor party or parties to any Assumed Contract; it is further

ORDERED that upon the closing of the Agreement in accordance with this Order, any and all defaults under the Assumed Contracts shall be deemed cured in all respects; it is further

ORDERED that all provisions limiting the assumption and/or assignment of any of the Assumed Contracts are invalid and unenforceable pursuant to Bankruptcy Code § 365(f); it is further

Transfer of Assets

ORDERED that pursuant to Bankruptcy Code §§ 105(a) and 363(f), all Assets shall be transferred to Purchaser as of the Closing Date, and all Assets shall be free and clear of all

Interests, with all such Interests to attach to the net proceeds of the Sale in the order of their priority, with the same validity, force, and effect which they now have as against the Assets, subject to any claims and defenses the Debtors may possess with respect thereto; it is further

ORDERED that except as expressly permitted or otherwise specifically provided by the Agreement as modified by the Settlement Terms or this Sale Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade and other creditors holding Interests against or in the Debtors or the Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or non-contingent, senior or subordinated), arising under, out of, in connection with, or in any way relating to the Debtors, the Assets, the operation of the Debtors' businesses prior to the Closing Date, or the transfer of the Assets to Purchaser, are hereby forever barred, estopped, and permanently enjoined from asserting against Purchaser or its successors or assigns, their property, or the Assets, such persons' or entities' Interests; it is further

ORDERED that the transfer of the Assets to Purchaser pursuant to the Agreement as modified by the Settlement Terms constitutes a legal, valid, and effective transfer of the Assets and shall vest Purchaser with all right, title, and interest of the Debtors in and to all Assets free and clear of all Interests; it is further

Additional Provisions

ORDERED that the consideration provided by Purchaser for the Assets under the Agreement as modified by the Settlement Terms shall be deemed to constitute reasonably equivalent value and fair consideration under the Bankruptcy Code and under the laws of the United States, any state, territory, possession thereof, or the District of Columbia; it is further

ORDERED that the consideration provided by Purchaser for the Assets under the Agreement as modified by the Settlement Terms is fair and reasonable and may not be avoided under Bankruptcy Code § 363(n); it is further

ORDERED that on the Closing Date of the Sale, each of the Debtors' creditors is authorized and directed to execute such documents and take all other actions as may be necessary to release its Interests in the Assets, if any, as such Interests may have been recorded or may otherwise exist; it is further

ORDERED that this Sale Order (a) shall be effective as a determination that, on the Closing Date, all Interests existing as to the Debtors or the Assets prior to the Closing have been unconditionally released, discharged, and terminated, and that the conveyances described herein have been effected, and (b) shall be binding upon and shall govern the acts of all entities including without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state, and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the Assets; it is further

ORDERED that each and every federal, state, and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Agreement; it is further

ORDERED that if any person or entity that has filed financing statements, mortgages, mechanic's liens, *lis pendens*, or other documents or agreements evidencing Interests in the Debtors or the Assets shall not have delivered to the Debtors prior to the Closing Date, in proper form for filing and executed by the appropriate parties, termination statements, instruments of satisfaction, releases of all Interests which the person or entity has with respect to the Debtors or the Assets or otherwise, then (a) the Debtors are hereby authorized and directed to execute and file such statements, instruments, releases and other documents on behalf of the person or entity with respect to the Assets and (b) Purchaser is hereby authorized to file, register, or otherwise record a certified copy of this Sale Order, which, once filed, registered, or otherwise recorded, shall constitute conclusive evidence of the release of all Interests in the Assets of any kind or nature whatsoever; it is further

ORDERED that Purchaser shall not have any liability or responsibility for any liability or other obligation of the Debtors arising under or related to the Assets, other than payment of the Cure Amounts, the amounts specified in the Settlement Terms and the Assumed Liabilities and its obligations to perform under the Assumed Contracts after the Closing Date. Without limiting the generality of the foregoing, Purchaser shall not be liable for any claims against the Debtors or any of their predecessors or affiliates, and Purchaser shall not have any successor or vicarious liabilities of any kind or character whether known or unknown as of the Closing Date, now existing or hereafter arising, whether fixed or contingent, with respect to the Debtors or any obligations of the Debtors arising prior to the Closing Date except as specified in the Settlement Terms; it is further

ORDERED that under no circumstances shall Purchaser be deemed a successor of or to the Debtors for any Interest against or in the Debtors or the Assets of any kind or nature whatsoever. The sale, transfer, assignment and delivery of the Assets shall not be subject to any Interests, and Interests of any kind or nature whatsoever shall remain with, and continue to be obligations of, the Debtors. All persons holding Interests against or in the Debtors or the Assets of any kind or nature whatsoever shall be, and hereby are, forever barred, estopped, and permanently enjoined from asserting, prosecuting, or otherwise pursuing such Interests against Purchaser, its successors and assigns, its properties, or the Assets with respect to any Interest of any kind or nature whatsoever such person or entity had, has, or may have against or in the Debtors, their estates, officers, directors, shareholders, or the Assets. Following the Closing Date no holder of an Interest in the Debtors shall interfere with Purchaser's title to or use and enjoyment of the Assets based on or related to such Interest, or any actions that the Debtors may take in its chapter 11 case; it is further

ORDERED that subject to, and except as otherwise provided in, the Bidding Procedures Order, any amounts that become payable by the Debtors pursuant to the Agreement or any of the documents delivered by the Debtors pursuant to or in connection with the Agreement shall (a) constitute administrative expenses of the Debtors' estate and (b) be paid by the Debtors in the time and manner as provided in the Agreement without further order of this Court; it is further

ORDERED that this Court retains jurisdiction to enforce and implement the terms and provisions of the Agreement, the Settlement Terms, and all amendments thereto, any waivers and consents thereunder, and of each of the documents executed in connection therewith in all respects, including, but not limited to, retaining jurisdiction to (a) compel delivery of the Assets

to Purchaser, (b) resolve any disputes arising under or related to the Agreement except as otherwise provided therein, (c) interpret, implement, and enforce the provisions of this Sale Order, and (d) protect Purchaser against any Interests in the Debtors or the Assets; it is further

ORDERED that nothing contained in any plan of liquidation confirmed in these cases or in any final order of this Court confirming such plan shall conflict with or derogate from the provisions of the Agreement, the Settlement Terms, or the terms of this Sale Order; it is further

ORDERED that the transfer of the Assets pursuant to the Sale shall not subject Purchaser to any liability with respect to the operation of the Debtors' business prior to the Closing Date or by reason of such transfer under the laws of the United States, any state, territory, or possession thereof, or the District of Columbia, based, in whole or in part, directly or indirectly, on any theory of law or equity, including, without limitation, any theory of equitable subordination or successor or transferee liability; it is further

ORDERED that the transactions contemplated by the Agreement as modified by the Settlement Terms are undertaken by Purchaser in good faith, as that term is used in Bankruptcy Code § 363(m), and accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Sale shall not affect the validity of the Sale to Purchaser, unless such authorization is duly stayed pending such appeal. Purchaser is a purchaser in good faith of the Assets and is entitled to all of the protections afforded by Bankruptcy Code § 363(m); it is further

ORDERED that the terms and provisions of the Agreement, the Settlement Terms and this Sale Order shall be binding in all respects upon, and shall inure to the benefit of, the Debtors, their estates, and their creditors, Purchaser, and their respective affiliates, successors

and assigns, and any affected third parties including, but not limited to, all persons asserting Interests in the Assets, notwithstanding any subsequent appointment of any trustee(s) under any chapter of the Bankruptcy Code. The terms and provisions of the Agreement and of this Sale Order likewise shall be binding on any such trustee(s); it is further

ORDERED that the failure specifically to include any particular provisions of the Agreement in this Sale Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Agreement as modified by the Settlement Terms be authorized and approved in its entirety; it is further

ORDERED that the Agreement and related agreements, documents, or other instruments may be modified, amended, or supplemented by the parties thereto, in a writing signed by both parties, and in accordance with the terms thereof, without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the Debtors' estates or impair the Settlement Terms; it is further

ORDERED that the transfer of the Assets pursuant to the Sale is a transfer pursuant to Bankruptcy Code § 1146(c), and accordingly shall not be taxed under any law imposing a stamp tax or a sale, transfer, or any other similar tax; it is further

ORDERED that as provided by Fed.R.Bankr.P. 6004(g), this Sale Order shall not be stayed for 10 days after the entry of the Sale Order and shall be effective and enforceable immediately upon entry; it is further

ORDERED that the provisions of this Sale Order and the Settlement Terms recited herein are non-severable and mutually dependent; and it is further

ORDERED that in the event that Purchaser fails to close the Sale Agreement as modified by the Settlement Terms on or before June 2, 2003, the Debtors shall close under the next highest bid from Unipoint Holdings, Inc. reflected in its Asset Purchase Agreement of April 25, 2003 (the "Unipoint APA"). In such event, this Order and all of its findings shall be automatically effective as to Unipoint Holdings, Inc. as "Purchaser" and the Unipoint APA as the "Sale Agreement" without further hearing or order of this Court.

END OF ORDER # #

EXHIBIT A TO SALE ORDER

Non-Debtor Contract Party	Agreement Name/Description	Proposed Cure Amount (as of April 4, 2003)
Broadwing Communication Services, Inc.	Master Service Agreement dated February 28, 2001 as amended and supplemented; Settlement Agreement as approved by Bankruptcy Court Order dated January 28, 2003	$ 60,000.00
Campbell Road Village (Ippolito)	Gross Standard Shopping Center Lease dated May 19, 2000	$ 1,455.17
Dell Financial Services	Lease dated August 1, 2001	$ 10,238.32
Electronic Data Systems Corporation (EDS)	Sublease Agreement September 27, 2002	$ -
Gulfcoast Workstation Corp	Equipment Lease Agreement dated February 2, 2002	$ 20,000.00
Illuminet, Inc.	Connectivity Service Agreement dated October 4, 2000	$ 18,116.95
IpVerse/Nexverse	Software Licenses Agreement dated April 11, 2001	$ 746,144.25
IX-2 Networks	License Agreement for Use of Collocation Space dated March 28, 2000	$ -
Looking Glass Networks	Looking Glass Service Agreement dated December 2001	$ 1,062.00
OneStar Long Distance	Wholesale Service Agreement dated November 12, 2002	$ -
Pae Tec Communications, Inc.	Wholesale Local Service Agreement dated July 2002	$ 27,289.38
RiverRock Systems, Ltd.	Application Service Provider Agreement date May 1, 2001	$ 86,029.48
Sun Microsystems, Inc.	Sun Microsystems, Inc. Customer Agreement dated March 28, 2001	$ 27,687.33
The CIT Group	Lease Agreement dated October 16, 2001	$ 1,076.50

EXHIBIT A TO SALE ORDER

Focal Communications Corporation	Master Service Agreement dated June 14, 2001, as amended	As Agreed	
Transcom Communication Corporation	Master Service Agreement dated August 15, 2001, as supplemented	$	1,192,229.61
Barr Tel/ColoCentral	Master Services Agreement	$	-
C2C Fiber, Inc. n/k/a Capital Telecommunications, Inc.	Master Services Agreement dated August 31, 2001	$	-
Cytus Communication	Master Services Agreement dated December 20, 2002	$	-
ePhone Telecom, Inc.	Master Services Agreement dated April 3, 2002	$	-
Excel Telecommunications, Inc.	Master Services Agreement dated January 19, 2001	$	-
Florida Digital Network	Master Services Agreement dated September 7, 2001	$	-
Go-Comm, Inc.	Master Services Agreement dated April 1, 2002	$	-
Grande Communications Networks, Inc.	Master Services Agreement dated April 13, 2001	$	-
IDT Telecom LLC	Master Services Agreement dated February 12, 2002	$	-
IONEX Telecommunications, Inc.	Master Services Agreement dated October 28, 2002	$	-
ITC DeltaCom Communications, Inc.	Master Services Agreement dated September 25, 2002	$	-
ITXC Corporation	Master Services Agreement dated September 31, 2002	$	-
Linx Communications, Inc.	Master Services Agreement dated June 5, 2002	$	-
Macro Communications, Inc.	Master Services Agreement dated December 3, 2002	$	-

EXHIBIT A TO SALE ORDER

Novatel, Inc.	Reciprocal Services Agreement dated January 18, 2002	$	-
Novolink Communications, Inc.	Reciprocal Services Agreement dated January 10, 2002	$	-
Orion Telecommunications Corporation	Master Services Agreement dated August 13, 2001	$	-
TCAST Communications, Inc.	Master Services Agreement dated July 10, 2002	$	-
Telic Communications, Inc.	Master Services Agreement dated September 21, 2001	$	-
Transcom Communications, Inc.	Master Services Agreement dated February 16, 2001	$	-
TXU Communications Telecom Services Company	Master Services Agreement dated April 9, 2002	$	-
Voice Exchange, Inc.	Master Services Agreement dated May 2, 2002	$	-
Webtel Wireless, Inc.	Master Services Agreement dated July 19, 2002	$	-
WorldxChange Corporation	Master Services Agreement dated August 15, 2002	$	-
World Link Telecom, Inc.	Master Services Agreement dated October 9, 2002	$	-
XTEL	Master Services Agreement	$	-
TRC Telecom, Inc.	Master Services Agreement dated December 20, 2001	$	-
Capital Telecommunications, Inc.	Master Services Agreement dated March 19, 2001	$	-
SafeTel, Inc.	Master Services Agreement dated June 27, 2002	$	-
CT Cube LP	Master Services Agreement dated September 25, 2002	$	-

EXHIBIT A TO SALE ORDER

CGKC&H Rural Cellular #2	Master Services Agreement dated September 25, 2002	$	-
Dollar Phone Corporation	Master Services Agreement dated February 4, 2003	$	-
Pae Tec Communications, Inc.	Reciprocal Services Agreement dated July 15, 2002	$	-
MCI Worldcom Network Services, Inc.	Termination Services Agreement dated July 31, 2001	$	-
McGregor Bay Communications, Inc.	Agency Agreement dated March 18, 2002	$	-
Chip Greenberg Studios, Inc.	Agency Agreement dated July 25, 2002	$	-
CallNet, L.L.C.	Agency Agreement dated June 27, 2001	$	-
Barry L. Greenspan	Agency Agreement dated January 10, 2002	$	-
Brandon J. Becicka	Agency Agreement dated May 9, 2002	$	-
		$	2,191,328.99