**BEFORE THE TENNESSEE REGULATORY AUTHORITY**
**NASHVILLE, TENNESSEE**

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

# PRE-FILED DIRECT TESTIMONY OF RUSS WISEMAN ON BEHALF OF HALO WIRELESS, INC.

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**Q: Please state your name, title and business address.**

A: My name is Russ Wiseman. I am Chief Operating Officer for Halo Wireless, Inc. ("Halo"). My business address is 2351 W. Northwest Highway, Suite 1204, Dallas, TX 75220. I am responsible for all operations at Halo, including sales, marketing, network and system operations, and inter carrier relations.

**Q: Please state your educational background and experience.**

A: I received an MBA in International Finance from Fordham University Graduate School of Business, New York, N.Y. in 1991. Before then I obtained a Bachelor of Electrical Engineering from Manhattan College School of Engineering, New York, N.Y., in 1986.

My prior work experience, from most recent (prior to being engaged by Halo): From 2003 to 2010 I was the principal in RA Wiseman & Associates. I performed management consulting, specializing in strategic business and market planning, product and service development, and complex program management in technology-based industries. This included engagements with wireless, cable and other ventures, with particular emphasis on implementing business plans for providers and companies that integrate Internet, voice communications and video services or applications with other business operations. Between 2000 and 2002 I worked for Nucentrix Broadband Networks as the Senior Vice President – Internet Operations. As part of those responsibilities, I helped the company develop and implement its wireless broadband services using MMDS in small to medium sized markets. From 1999 to 2000 I was Executive Vice President/Chief Operating Officer for Flashnet Communications, Inc., prior to their ultimate sale to Prodigy and then AT&T. From 1997 to 1999 I was Chief Marketing Officer/VP Strategic Planning for PrimeCo Personal Communications, where I managed a strategic planning, corporate marketing and pre paid services staff of 60 people responsible for strategic planning,

corporate development, product development, product management, pricing strategy, promotions planning, market research and planning and competitor analysis. From 1992 through 1997 I was Managing Consultant/Practice Leader - Communications and Multimedia Practice - U.S. Consulting for PA Consulting Group, and was charged with bringing communications industry breadth and depth to the company. Domestic and international engagements focused on strategic business and market planning, product and service development, and complex program management.

From 1986 through 1992 I worked for Verizon Communications, first as Engineer - Central Office Design & Engineering, where I designed and implemented fiber optic/SONET and digital switching networks in the NYC and Mid State regions. Beginning in 1990, I was Staff Director, Corporate Planning. My duties included identifying, analyzing and recommending major business initiatives in communications, software and services industries. I was involved in M&A assessments for the purchase and sale of applications software and IT services businesses, including the assessment and ultimate sale of NYNEX Mobile to Bell Atlantic Mobile.

**Q: Are you an attorney?**

A: No.

**Q: On whose behalf are you appearing?**

A: I am appearing for the Halo Wireless, Inc. ("Halo").

**HALO'S FCC LICENSE**

**Q: Is Halo licensed by the FCC?**

A: Halo received a "Radio Station Authorization" from the FCC which I understand allows it to operate as a "common carrier" and operate stations in the "3650-3700" MHz band. I have attached this RSA as Wiseman Direct Exhibit 1.

**Q: Has Halo registered specific 3650-3700 base stations that serve within any Major Trading Area ("MTA") covering Tennessee?**

A: Yes. The following table lists the base stations that have completed registrations in the FCC's Universal Licensing System:

| Base Station Location | Associated MTA | State(s) served |
|---|---|---|
| Cartersville, GA | 11 – Atlanta | GA, SC, TN, AL |
| Gainseboro, TN | 43 – Nashville | TN, KY |
| Amherst, TN | 44 - Knoxville | TN, KY |

**Q: Has Halo established other base stations in other parts of the United States?**

A: Yes. Halo has 28 total registered base stations, so there are 25 others that do not serve any portion of Tennessee.

**INTRODUCTION TO INTERCONNECTION ARCHITECTURE**

**Q: Is Halo interconnected with AT&T within Tennessee?**

A: Yes. Halo has established interconnection with AT&T in 4 of the 5 LATAs that have Tennessee territory. MTA boundaries do not correspond with LATA boundaries and are usually much larger that LATAs. You may have a single LATA that is part of two or more MTAs, or you may have an MTA that includes two or more LATAs. Further, an MTA quite often crosses state boundaries. MTA 11 is a good example: it covers parts of Alabama, Georgia, and South Carolina as well as a portion of Tennessee.

MTA 11 includes all or parts of LATAs 434, 436, 438, 440, 442, 444, 446, 472, and 478, of which 472 (Chattanooga) is in Tennessee. To handle calls originating from our end user customers that have established connectivity with our Cartersville, Georgia base station, or to

handle calls originating from other carriers' end user customers in LATA 472, we have established interconnection at AT&T's CHTGTNNS84T tandem.

MTA 43 includes all or parts of the 464, 468 and 470 LATAs, of which 468 (Memphis) and 470 (Nashville) are in Tennessee. To handle calls originating from our end user customers that have established connectivity with our Gainseboro, Tennessee base station, or to handle calls originating from other carriers' end user customers in LATA 468, we have established interconnection at AT&T's MMPHTNMA84T tandem. For LATA 470, we have established interconnection at AT&T's NSVLTNWM92T tandem.

MTA 44 includes all or parts of the 466, 470 and 474 LATAs, of which 470 (Nashville) and 474 (Knoxville) are in Tennessee. To handle calls originating from our end user customers that have established connectivity with our Amherst, Tennessee base station, or to handle calls originating from other carriers' end user customers in LATA 470, we have established interconnection at AT&T's NSVLTNWM92T tandem.. For LATA 474 we have established interconnection at AT&T's KNVLTNMA84T tandem.

To put it another way, Halo has interconnection with AT&T in the following Tennessee LATAs: Chattanooga (LATA 472[1]), Knoxville (LATA 474[2]), Memphis (LATA 468[3]) and Nashville (LATA 470[4]). We do not have interconnection in the Bristol LATA (LATA 956).

I will get further into the interconnection architecture later in my testimony.

**Q: How did Halo obtain its agreement with AT&T?**

A: We adopted the T-Mobile/BellSouth ICAs under § 252(i), with a negotiated amendment. But getting there was not easy. Halo sent notices of adoption to AT&T. AT&T initially refused

[1] Halo secured a 1,000 block of numbers (423-486-1) in this LATA.
[2] Halo secured a 1,000 block of numbers (865-321-1) in this LATA.
[3] Halo secured a 1,000 block of numbers (901-736-1) in this LATA.
[4] Halo secured a 1,000 block of numbers (615-200-1) in this LATA.

to make the selected agreements available, raising, among other things, the same issues the company faces now with AT&T and the other ILECs.

**Q: What happened?**

A: Halo's counsel filed an FCC complaint, and requested "accelerated docket" treatment. At the FCC mediation, AT&T agreed to make the agreements available on the condition that the parties add an amendment. The parties negotiated this amendment's contents with the assistance of the FCC. Acceptable terms were reached, acceptable adoptable agreements were identified, and the adopted agreements were filed and approved in all of the states, along with the added amendment.

**Q: What does the amendment to all of the AT&T agreements say?**

A: It adds a "Whereas" clause that provides:

> Whereas, the Parties have agreed that this Agreement will apply only to (1) traffic that originates on AT&T Texas' network or is transited through AT&T Texas' 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 Texas for termination by AT&T Texas or for transit to another network.

**Q: Is this amendment language negotiated as part of the settlement of an FCC case one of the provisions AT&T has asked the TRA to interpret in this case?**

A: Yes, although AT&T has not mentioned this, it was negotiated and executed to settle an FCC case.

**Q: Does Halo believe that this particular provision should be interpreted by the FCC?**

A: Yes, of course. The FCC was the one that handled the case that gave rise to it. Further, in order to divine what it means, and the CMRS-specific laws it relates to, one inevitably has to get into the FCC-exclusive issues that are also in contention with all of the other ILECs.

**Q: Is all of the traffic in issue "traffic that originates through wireless transmitting and receiving facilities before Carrier delivers traffic to AT&T Texas for termination by AT&T Texas or for transit to another network"?**

A: Yes. Our end user customer "originates" the communication "through wireless transmitting and receiving facilities." AT&T – like all of the other telephone companies – wants to look past that, and see what happened before this occurs, and specifically whether the communication might have actually "started" on another network, been sent to and processed by our end user customer Transcom Enhanced Services, Inc. ("Transcom") and then "originated" (or "further originated") wirelessly to Halo in the MTA. I will discuss this further later in the testimony.

**HALO'S SERVICES**

**Q: Does Halo provide "commercial mobile services," "unlicensed wireless services," and/or "common carrier wireless exchange access services"?**

A: I am not a lawyer, but on the advice of counsel and the service definitions in § 332(c)(7)(C), Halo takes the position that its services are "licensed" under these provisions. My non-legal understanding is that Halo provides commercial mobile services. It is also my understanding that if and when Halo carries a call to or from an "Interexchange Carrier" ("IXC") providing "telephone toll service," Halo would be providing "common carrier wireless exchange access service" as I believe that term is used in § 332(c)(7). On the advice of counsel, our position is that our 3650 authority is a "licensed" service. If this position proves incorrect, then our understanding would be that our services would be considered "unlicensed wireless services" on the basis that we offer "telecommunications services using duly authorized devices which do not require individual licenses." Regardless, we still assert it is CMRS.

**Q: Does Halo provide "telephone toll service"?**

A: Again, I am not a lawyer. Our counsel has advised me that the Communications Act § 153(48) defines "telephone toll service" as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." I have also been advised that for CMRS purposes, the "Major Trading Area" ("MTA") is the relevant "exchange." As I will explain below, all of the communications delivered to AT&T over interconnection for termination to an AT&T user (or for transit to another carrier's user) enter Halo's network as the result of an "end user's" "wireless station" *originating* a communication with a Halo base station in a specific MTA. All of these communications are delivered for termination to a "station" in the same MTA as Halo's originating end user's wireless station. Halo does not transport communications between MTAs for any traffic that uses interconnection. Therefore, none of the traffic in issue is "between exchanges." Based on these facts, Halo asserts that its services do not fall within the definition of "telephone toll service."

Halo is not acting as an IXC for the calls in issue because Halo is not providing "telephone toll" as a part of any such call. None of the calls in issue fit the limited circumstances under which a CMRS provider is deemed to be providing telephone toll service and thus potentially subject to access charges.[5]

**Q: You mentioned your base stations. What functions to they perform?**

Halo's base stations are the wireless access points where it collects and delivers voice and data traffic from end-user customers who purchase wireless services from Halo. These wireless customers also purchase or lease wireless CPE (a customer-owned or leased "station") that when

[5] On the advice of counsel, Halo relies on: *Local Competition Order* ¶ 1043 and note 2485.

sufficiently proximate to a base station allows them to communicate wirelessly with that base station. The end user customer can then originate telecommunications within the MTA.

Under the Halo configuration, and with respect to voice services, only calls coming from customers connected to a base station in an MTA, and where the called numbers are also associated with a "rate center" within the same MTA, will be routed over the AT&T interconnection trunks for transport and termination in the same MTA. The service architecture supporting Transcom is designed so that any communication addressed to a different MTA would fail, *e.g.*, not complete.

Halo does have a "consumer" product that allows calls received by Halo from customers connecting to a base station within an MTA destined to a called party in a different MTA to be completed. Halo also has a "consumer" product whereby calls to and from Halo customers not accessing the Halo network at a base station access point (*e.g.*, customers accessing their voice services over another broadband Internet connection) can be completed. These calls, however, *are not* routed over the AT&T interconnection trunks. Rather, those calls are handled by Halo's IXC service provider, and that IXC provider pays all access charges that are due. In other words, when a local exchange carrier ("LEC") receives a Halo call for termination in an MTA, the call a) will have been originated by an end user customer's wireless equipment communicating with the base station in that same MTA, and b) will by design and default, be intraMTA as defined by the FCC's rules and its decision that the originating point for CMRS traffic is the base station serving the CMRS customer.

**RELATIONSHIP WITH TRANSCOM**

**Q. What is Halo's relationship with Transcom?**

A. One of customer and vendor, with each party serving in both roles, but for different services. As a vendor to Transcom (Transom as customer to Halo), Halo provides certain telecommunications services to Transcom, with Halo serving as a provider of common carrier CMRS services. Transcom purchases these CMRS services – which we call "High Volume" services – in the form of a "wireless telephone exchange service."[6] Transcom has represented to Halo that it is an enhanced/information service provider. We have been provided four separate federal court decisions that so hold. We are relying on our customer's representation and those decisions as the basis for our belief and understanding that Transcom is using the telephone exchange service it purchases from Halo as an input to its enhanced services. I am informed that under the Act and FCC rules, ESPs are not carriers and are instead end users.

As a customer of Transcom, Halo purchases certain core IP services, such as soft-switch capacity, media gateway ports, and IP bandwidth.

**Q. Are you familiar with the court decisions rendered by Judges Hale and Felsenthal regarding Transcom's status as an ESP?**

A. I have reviewed them.

**Q. What do you understand are the implications and ramifications of these decisions on Halo and Transcom with respect to the service Halo sells to Transcom?**

A. Based on advice of counsel, my understanding of these decisions is that they establish Transcom as an Enhanced Service Provider ("ESP"), and that as such, Transcom is, to Halo, an

[6] I am advised that "telephone exchange service" is defined in Communications Act § 153(47):

> (47) TELEPHONE EXCHANGE SERVICE.--The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

"end user" purchaser of Halo's common carrier telecommunication services. Furthermore, my understanding from these decisions and counsel is that when ESPs purchase services from a common carrier like Halo, access charges are not due on their traffic. Instead, the ESP purchases "telephone exchange service."

Going into further detail on this, it is our understanding that Transcom's operations have been reviewed by a federal court with jurisdiction to determine if Transcom is an ESP, and that on several occasions these courts affirmed that Transcom is indeed an ESP. Specifically, in *In re Transcom Enhanced Services, LLC* (the "Hale Opinion"), (Exhibit 2), the court held that Transcom does not provide telecommunications, and is an Enhanced Service Provider ("ESP"). The Hale Opinion concluded 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.'" See Exhibit 2, pg. 6. On the basis that Transcom's operations necessarily result in a change in content and often a net change in form, the Hale Opinion concluded that Transcom is an ESP. The Hale Opinion further posited that Transcom has never held itself out as a common carrier and there is no legal compulsion that Transcom operate or hold out as a common carrier.

Our understanding of the Hale Opinion is that AT&T and SBC contended that Transcom's service was similar to the service addressed by the FCC in the "IP-in-the-Middle" decision. However, our understanding of the Hale Opinion is that it rejected that argument and held that the service provided by Transcom is "distinguishable from AT&T's specific service in a number of material ways," and it goes on to list some of the distinctions.

Our understanding is that the Hale Opinion went on to hold that Transcom's service "fits squarely within the definitions of 'enhanced service' and 'information service' . . . and 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." Our understanding of the Hale Opinion is that it further held that 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."

I have been advised by counsel that the Hale Opinion was later vacated on grounds of mootness, but Judge Hale entered similar findings and rulings in the final Confirmation Order of Transcom's bankruptcy proceedings (Exhibit 3). See paragraph 4. Also, we understand that Judge Hale entered summary judgment in Transcom's favor in an adversary proceeding, and that summary judgment reiterated all of the findings made in the Hale Opinion (Exhibit 4). In addition, we understand that Transcom started its operations by purchasing the assets of a company called DataVon out of DataVon's bankruptcy, and the bankruptcy judge in that matter, Judge Felsenthal, made similar findings about the service provided by DataVon that Transcom was purchasing (Exhibit 5).

**Q. Has Transcom made any representations to Halo regarding its status as an ESP and treatment as an "end user" based on these decisions?**

A. Transcom has represented to Halo that since the issuance of the Hale and Felsenthal decisions, there has been no change in any of the relevant facts regarding its operations or services, which were determined to constitute enhanced/information services in those decisions. Transcom has further represented to Halo that its current business operations depend on these decisions confirming its status as an ESP and treatment as an "end user" under applicable FCC rules.

**Q: Is Transcom licensed by the FCC?**

A: Not in the sense that they obtain an individual written "authorization." As discussed above, we believe that judicial precedents have established Transcom as an ESP. It is my understanding that the FCC does not "license" ESPs. Instead, counsel has advised me that the FCC "authorized" ESPs to freely enter and exit the market. Counsel has also advised me that that the FCC prohibited states from regulating or supervising ESPs under common carrier or any other economic regulation, except to the extent the ESP is *also* a carrier and its ESP activities are **wholly** intrastate.[7]

**Q: Does Halo rely on Transcom's representations that it is an ESP and is treated as an "end user"?**

A: Transcom has supplied Halo's counsel with four separate federal court opinions directly holding that it is an "Enhanced Service Provider."[8] Based on the advice of counsel, Halo relies on Transcom's representations and the decisions of Judges Hale and Felsenthal. Halo's counsel's interpretation of these decisions is that Transcom is not an IXC and is instead an "end user." Halo's counsel's interpretation is that these decisions establish that Transcom is not subject to "exchange access"[9] but is instead allowed to buy "telephone exchange service." Counsel has advised me that under the FCC's rules, as well as the federal statute, only IXCs must buy "exchange access" and if the customer is an "end user" then the applicable service definition is "telephone exchange service."

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[7] On the advice of counsel, Halo relies on: *California v. FCC*, 905 F.2d 1217, 1239 (9th Cir. 1990) (affirming FCC preemption of state regulation over non-carrier ESPs); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) (*California III*), *cert. denied*, 514 U.S. 1050 (1995) (affirming FCC preemption of state regulations relating to common carriers' ESP activities unless they are "purely" intrastate).

[8] I will use "ESP" as a short-hand reference, since that is the terminology used in the four decisions. My understanding is that the statutory definition is "information service" provider and the reference to an "ISP" is synonymous with "ESP."

[9] *See* Communications Act § 153(16):

> EXCHANGE ACCESS.--The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

Halo is relying on these four opinions, and I believe this reliance is reasonable. It appears to me that the AT&T organization – which participated directly or through predecessors in interest in three of the four matters that gave rise to those decisions – simply does not like those decisions. So AT&T has decided to bring multiple and redundant (as well as extraordinarily expensive and resource-intensive) cases before each of the state commissions in the old BellSouth territory in an attempt to collaterally challenge Transcom's regulatory status as already decided in the four decisions. I believe AT&T is doing this with the specific goal of shooting both companies down. I am inferring from their actions that they hope to secure state-level rulings that two federal judges, Judges Hale and Felsenthal, were wrong, and they want various state commissions to overrule those decisions. Then they want these state commissions to hold that Halo cannot provide telephone exchange service to Transcom since Transcom is not "really" an ESP" and is instead "really" "just an IXC."

From my layman's perspective, it seems to me that the telephone companies are trying to get the states to interpret Halo's *federal* license, or authority, and the permitted scope of activities pursuant to that license/authority. The telephone companies' actions seem to signal an intent to get the states to either regulate ESPs or turn them into IXCs, albeit indirectly, by preventing the ESPs from obtaining the end user (telephone exchange) services the FCC said ESPs can buy *since ESPs are not IXCs*. If a state rules that a CMRS provider like Halo cannot provide telephone exchange service to an ESP, the ESP's only alternative is exchange access. But my understanding is that only IXCs are required to purchase exchange access. And our position is that Transcom is not an IXC.

If our interpretation of AT&T's position is correct, they are seeking to turn ESPs like Transcom into IXCs, and are trying to secure state level rulings that when Halo serves an ESP it

becomes an IXC as well, rather than a provider of telephone exchange service (an "exchange carrier").

From a Halo perspective, and in reliance on the Hale and Felsenthal decisions, and the advice of Halo counsel, we believe we are providing "telephone exchange service" to an "end user" that is entirely within an "exchange" (here the MTA) insofar as interconnection is involved. We also believe the end user customer (Transcom) purchasing telephone exchange service in the form of Halo's High Volume service is an ESP/ISP. Halo's counsel has advised me that the courts have recognized that an ESP/ISP is "simply a communications-intensive business end user" even though the ESP/ISP may receive calls that started on other networks. Counsel has also advised that the ESP/ISP status is preserved when "upon receiving a call" the ESP/ISP proceeds to "originate further communications."[10]

**Q: Do you admit that some of the communications in issue actually started on other networks?**

A: Most of the calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN. Judge Hale expressly discussed the PSTN-originated traffic Transcom processed and held that Transcom is still both an ESP and an end user. Other calls probably started at IP-based end-points. Halo is not in a position to determine where or on what network the call started, and we have not asked our customer.

In any event, one cannot rely on the "calling party number" as some indicator of where and on what network a call started. Numbers are not a reliable proxy for location, nor can you

[10] Halo relies on: *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5-9 (D.C. Cir, 2000).

assume that a call from a station associated with a particular number actually started on the network of the exchange carrier that was allocated the number from NANPA.

Our contention is that it simply does not matter from a Halo perspective. Counsel advises me that ESPs have always received calls that started somewhere else. The ESP takes the call, adds its enhanced functions and then – when necessary – secures termination from a carrier vendor by buying telephone exchange service.[11]

Based on conversations with counsel, our understanding and interpretation of Judges Hale's and Felsenthal's decisions regarding whether Transcom is an ESP is that they recognize that Transcom receives communications from its customers that started on other networks, including from LEC networks. The courts found that Transcom then processes the communication, changes the content and sometimes changes the form. Transcom then secures telephone exchange service from a carrier to arrange for final termination. My understanding is that the question in those cases was whether this meant Transcom can buy telephone exchange service or must purchase exchange access. Again, our view based on the advice of Halo counsel is that all four decisions hold that Transcom is exempt from exchange access and is an end user qualified to purchase telephone exchange service.

Halo is a common carrier. I am advised by counsel that as such, Halo has a legal obligation to offer service to any customer that fits a service definition. If and when a "communications intensive" end user business customer – including even another ESP – applies for High Volume service, we will provide the service on nondiscriminatory terms.

[11] The incumbents incessantly assert that the ESP Exemption only applies "only" for calls "from" an ESP customer "to" the ESP. Counsel advises 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."

Our position is that it is not appropriate to independently and unilaterally decide to reject or challenge the status of an entity seeking to obtain telecommunications service when that entity comes forward with *four federal court orders* that directly establish that customer's regulatory classification.

**Q: What is your reaction to all of the telephone companies' vigorous assertions that the calls in issue "really" originated on other networks?**

My reaction is that while the initial location of a call session initiation may be relevant to jurisdiction based on the "end-to-end" theory, we do not believe it is determinative to call rating for our CMRS traffic. We operate according to the rules of CMRS carriers, where traffic is originated by end users using wireless stations capable of movement at towers located in MTAs.

Beside this first principle issue, if the LECs are using the calling party number to identify the "originating network.", our position is this is not a reliable way to determine the starting location of a call, or the carrier network that the call started on. Consequently, it seems to me that any inter-carrier compensation regime founded on the assumption that you can definitively determine the starting point of a call is fundamentally flawed and subject to the very outcomes the LECs want to avoid: gaming and arbitrage. The fact of the matter is, wireline and wireless networks and services are converging, rapidly, and in ways that blur the traditional, once clear distinctions of wireless and wireline. Allow me to provide a few examples.

Carriers like T-Mobile offer services today that allow their wireless users to originate calls using wireless base stations connected to wired broadband networks. Are calls using these devices wireless or wireline orginated? Is this traffic subject to reciprocal compensation, or subject to access?

Verizon Wireless offers Home Phone Connect, a service that allows VZW customers to port their home numbers to VZW and use traditional landline phones to make calls over their wireless network. Is this a mobile wireless service? Fixed wireless? Wireline? Is this traffic subject to reciprocal compensation, or subject to access? Would calls from a ported landline number be viewed by a terminating LEC as a wireless call or a wireline call? We suspect the latter as the CPN would be a landline telephone number. But these calls would all transgress the VZW wireless network.

A growing trend today with smart phones is that wireless users today can use Skype or GoogleVoice service as an application on a smart phone. Skype and GoogleVoice quite often obtain numbers from CLEC "numbering partners" such as Level 3 or Bandwidth.com. Let's assume the numbering partner is Bandwidth.com. An AT&T Wireless customer can originate a call while traveling in California using Skype on an AT&T-provided wireless smart phone. In this example Skype has sub-assigned a number 865-219-3111[12] to the AT&T Wireless user. The Skype user's outbound call, let's say to a PSTN user served by a local exchange carrier such as AT&T, probably will not go out over Bandwidth.com's network, even though Bandwidth.com's number will be signaled. It will be completed over AT&T Wireless's IP network and then go to Skype's network and then be routed to a Skype vendor to start the termination chain. The call, however, will appear to the AT&T LEC as a wireline originated call, since the Calling Party Number is a "wireline" number. Under the ILECs theories, the AT&T LEC would claim this call started "on the PSTN" in Knoxville and Bandwidth.com was the "originating LEC." However, those inferences would be incorrect. Since a smart phone was used, it would be "wireless." It

[12] This number is within the 865-219-3 "thousands block." Bandwidth.com has that block. It is associated with the Knoxville, Tennessee rate center in L:ATA 474.

started in California, not Tennessee. Bandwidth.com probably never touched the call at all in any way. Finally it would be an IP-originated call and did not "originate on the PSTN."

If the smart phone toting Skype user in California was calling someone in Tennessee within MTA 44 and LATA 474, our ESP end user Transcom could very well receive it from one of its customers that have contracted with Skype. If so, Transcom would process the call and hand it to Halo via Transcom's wireless CPE that is communicating with our Amherst, Tennessee base station. Halo would hand the call off to AT&T at its KNVLTNMA84T tandem. AT&T would then terminate or transit the call to the terminating carrier.

I believe AT&T would probably "rate" this as an intraMTA, intraLATA call, because they would see it as a Knoxville number calling a user within the same MTA, but they would probably claim it is "wireline" PSTN originated and therefore not permissible under the ICA, as the number is a wireline number. We would agree it is intraMTA because we received it from our end user customer at our base station in MTA 44 and it terminated in MTA 44. We would strongly disagree that it was "wireline" PSTN originated.

For a converged IP service provider such as Halo, the starting network or the type of number used simply does not matter. And even if it did, there is no way for us to definitively determine where a call started, for the same reasons as mentioned above. Trying to maintain this distinction is fighting a losing battle, and swimming against the strong tide of market, technical and regulatory evolution occurring in the telecommunications industry.

Halo has an end user with a wireless station in each MTA. The end user customer's wireless station ***originates*** a communication in that MTA, and all of the communications in issue terminate in the same MTA. The "origination" by Transcom in the MTA could well be the

"**origination** of a *further* communication" rather than the actual starting end-point but from an intercarrier compensation perspective the calls originate on our network.

Halo does recognizes that the actual starting point is relevant to an "end to end" test for jurisdiction. However, based on the advice of counsel, we believe this does not matter from a Halo perspective since the call is still subject to reciprocal compensation. Counsel advises that the federal courts have on several occasions directly held that the "end-to-end" theory is relevant to jurisdiction, but it "is not dispositive" of the intercarrier compensation that applies. Our contention, based on a careful consideration of the relevant regulations, is that the "jurisdiction" of a call is a separate question from whether "reciprocal compensation" or "access charges" are due on that call.[13]

Halo and Transcom are related companies. But Halo must still operate under the rules applicable to common carriers. We cannot interfere with or discriminate based on what our end user customer is doing on its side before our end user customer ***originates*** (further or otherwise) an end user call in an MTA.[14] We believe all that matters is whether our traffic comes to us from an end user employing a CMRS-based wireless facility in the same MTA.

**Q: Does the ICA with AT&T specifically address this topic?**

[13] On the advice of counsel, Halo relies on: *Bell Atlantic*, 206 F.3d at 5-6, 8, and Order on Remand and R&O and Order and FNPRM, *High Cost Universal Service Reform, Federal-State Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering. Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, ¶ 22, 24 FCC Rcd 6475, 6485-86 (2008) (emphasis added):

> "22. Our result today is consistent with the D.C. Circuit's opinion in *Bell Atlantic*, which concluded that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under section 251(b)(5). It is also consistent with the D.C. Circuit's *WorldCom* decision, in which the court rejected the Commission's view *that section 251(g)* excluded ISP-bound traffic from the scope of *section 251(b)(5)*, but made no other findings.

[14] An ILEC that is selling a private line to the end user customer might have reason to inquire whether the user is employing a "leaky PBX" in order to determine if the "leaky PBX surcharge" applies, but we are not a LEC.

A: It does. As I noted already, the negotiated amendment flowing from the FCC case 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.

AT&T is alleging that the traffic in issue does not either originate or terminate wirelessly. In other words, AT&T claims that the Transcom traffic does not "originate[] through wireless transmitting and receiving facilities…"

**Q; Do you agree with AT&T?**

A: No. Halo has an end user customer (Transcom) that is using wireless equipment in the MTA to originate calls. When the call starts somewhere else before it gets to Transcom, Transcom adds its enhanced functions and then originates a communication (or, in the words of the D.C. Circuit in *Bell Atlantic* "originates a further communication") to Halo through its end user wireless station. The communication is initiated using Transcom's wireless CPE, which is connected using our 3650 spectrum to Halo's "wireless transmitting and receiving facilities." Transcom is indeed originating the call. Counsel advises that this is a straightforward application of the "contamination" doctrine.[15]

**Q: If we assume that Judges Hale and Felsenthal were correct, and if all of the traffic that traverses interconnection is originated by an end user in the MTA, what is your**

[15] Counsel advises that the "contamination doctrine" is explained in Memorandum Opinion and Order, *In The Matter Of Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service*; DA 95-2190, ¶¶ 17-18, 10 FCC Rcd. 13,717 ¶ 17-18 (October 18, 1995), citing to Memorandum Opinion and Order, *Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide Certain Types of Protocol conversion Within Their Basic Network*, FCC 84-561 (Nov. 28, 1984) and Phase II, Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 2 FCC Rcd 3072, 3080 (1987).

**understanding of the "intercarrier compensation" for the end-user originated calls from Halo that the telephone companies terminate?**

A: My understanding is that the calls are "non-access" for purposes of 47 C.F.R. § 20.11(d). If Transcom is "exempt" from access charges like Judges Hale and Felsenthal ruled, that logically follows. If Halo is providing intraMTA service to Transcom, given that Transcom is "originating" the communications in the same MTA, then to I believe that the traffic is "reciprocal compensation" under 47 C.F.R. § 51.701(b)(2).

**Q: Does the ICA track the foregoing FCC rules?**

A: Yes, but it uses different terminology in some places by referring to traffic as "local" rather than "reciprocal compensation traffic" or "telecommunications traffic" as used in the rules. I would refer the Commission to General Terms and Conditions section I.D:

> D. Local Traffic is defined for purposes of reciprocal compensation under this Agreement as: (1) any telephone call that originates on the network of Carrier within a Major Trading Area ("MTA") and terminates on the network of BellSouth in the same MTA and within the Local Access and Transport Area ("LATA") in which the call is handed off from Carrier to BellSouth, and (2) any telephone call that originates on the network of BellSouth that is handed off to Carrier in BellSouth's service territory and in the same LATA in which the call originates and terminates and is delivered to the network of Carrier in the MTA in which the call is handed off from BellSouth to Carrier. For purposes of this Agreement, LATA shall have the same definition as that contained in the Telecommunications Act of 1996, and MTA shall have the same definition as that contained in the FCC's rules. Traffic delivered to or received from an interexchange carrier is not Local Traffic. Interexchange access as defined in 47 CFR Part 69 and in comparable state utility laws ("Access Traffic") is not Local Traffic.

**Q: Do you contend that Transcom's end-user originated calls within the MTA are "local" traffic" as defined above?**

A: Yes. It is "reciprocal compensation" traffic and meets the definition of "local" in the agreement.

**Q: Has Halo paid AT&T for the reciprocal compensation/local traffic it has terminated?**

A: We have paid AT&T a lot of money for both termination services and facility charges. In Tennessee alone we have paid AT&T approximately $120,000 since the date the parties interconnected for terminating local traffic, both for "reciprocal compensation" and transit termination services, (*i.e.*, delivery of calls through AT&T to other networks). In fact, Halo's monthly expense for termination services to ILECs, including AT&T, is roughly 40-45% of our monthly operating revenue, far and away the single largest monthly operating expense line item. This expense is 2-3 times the next highest expense category.

**Q: Does the agreement have definitions for other traffic times?**

A: Yes. There is a definition for "Non-Local Traffic" in section I.F: "Non-Local Traffic is defined as all traffic that is neither Local Traffic nor Access Traffic, as described in section VII of this Agreement."

**Q: I notice that "access traffic" is excluded from the definition of "Non-Local" traffic. Does the agreement define "access traffic"?**

A: There is not a "stand-alone" definition, but one appears in the above-quoted definition of "Local Traffic": "Interexchange access as defined in 47 CFR Part 69 and in comparable state utility laws ('Access Traffic') is not Local Traffic."

**Q: So you take this to mean that "access traffic" is defined as "Interexchange access as defined in 47 C.F.R. Part 69 and in comparable state utility laws"?**

A: Yes.

**Q: How does 47 C.F.R. Part 69 define "Interexchange access"?**

A: I am not aware of a specific definition in Part 69 for that term. Section 69.2(b), however, says that "Access service includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication." Section 69.5(a) and (b) then differentiate between "end user" and "carriers' carrier" charges:

> (a) End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.
>
> (b) Carrier's carrier 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.

**Q: What does this tell you as a non-lawyer?**

A: That "Interexchange access" in the FCC realm means "the use of services and facilities for origination or termination of interstate or foreign telecommunications" that are also "between exchanges." Further, there are two types of "access" charges: those applicable to "end users" under 69.5(a) and those applicable to "interexchange carriers" under 69.5(b).

**Q: Let's turn to state law then. Do you know whether or how Tennessee utility law defines "Interexchange access"?**

A: I am informed by counsel that section 1220-4-80-01(l) defines "Interexchange Access Service" as "A telecommunications service to provide access between end users and an Interexchange carrier and/or private line services between end users."

**Q: Is Halo an IXC?**

A: I have already explained that with regard to the interconnection we have with AT&T we are not, because we do not provide telephone toll.

**Q: Is Transcom an IXC?**

A: The four decisions discussed earlier expressly say it is not.

**Q: Does the ICA address what would happen if Transcom is in fact an IXC?**

A: Yes. Section IV.G. says "[u]nless otherwise agreed, when the parties deliver Access Traffic from an Interexchange Carrier ('IXC') to each other, each party will provide its own access services to (and bill at its own rates) the IXC."

**Q: Are you saying that if Transcom is an IXC AT&T cannot recover access charges from Halo?**

A: We say Transcom is not an IXC. But if one assumes that Transcom is an IXC it seems pretty clear from IV.G. that AT&T is contractually required to send any access bills to "the IXC" and not to Halo.

**Q: Is Halo an "end user"?**

A: Halo is a CMRS provider. We are an "exchange carrier." Therefore the answer is no.

**Q: Is Transcom an "end user"?**

A: The four decisions discussed earlier expressly say it is.

**Q: So do you believe that Halo actually has any "Access Traffic"?**

A: No.

**Q: Does the agreement contemplate call-by-call review to determine whether it is "local" or "nonlocal" traffic?**

A: No.

**Q: What kind of traffic does Halo have?**

A: Halo has "Local Traffic" and, because of the way the ICA works, one kind of "Non-Local Traffic."

**Q: What kind of "Non-Local Traffic" as defined by the ICA does Halo have?**

A: "Intermediary Traffic." This is defined in section I.C:

> C. Intermediary Traffic is defined as the delivery, pursuant to this agreement or Commission directive, of local or toll (using traditional landline definitions)

traffic to or from (i) a local exchange carrier other than BellSouth; (ii) a competitive or alternative local exchange carrier ("CLEC"); or (iii) another telecommunications carrier such as a CMRS provider other than Carrier through the respective networks of BellSouth or Carrier, and delivered from or to an end user of BellSouth or Carrier. All local or toll traffic from a local exchange carrier delivered to Carrier not originated on the BellSouth network by BellSouth is considered Intermediary Traffic.

**Q: Is this the defined term for what most people call "transit," *e.g.*, when AT&T switches a Halo-originated call to some other network besides AT&T?**

A: Yes.

**Q: Are the "transit" calls in this case still originated by a Halo end user in the same MTA as where they terminate"**

A: Yes. The ICA definition of "local" only includes calls that terminate on AT&T's network. It thus excludes "intermediate" even when the call is still intraMTA and therefore subject to reciprocal compensation.

**Q: Does the ICA contemplate that each call will be separately rated as a "Local" or "Non-Local" or "Access" call?**

A: No. the ICA says that the parties will use factors for all traffic that is not "transited" by AT&T to another terminating network. The current negotiated factors are 99% "local" (IntraMTA) and 1% access, (InterMTA). Transit usage is billed based on actual traffic flows. In other words, traffic factors do not apply to transit traffic.

**Q: So Halo is paying AT&T "access" for 1% of the minutes here, even though it believes none of the traffic is actually subject to access charges?**

A: Yes. We contracted to pay some measure of access even though we believe there is none. It was easier to accept this result than it would have been to arbitrate for a complete agreement. I would note that AT&T apparently thinks that more – if not all – of the traffic is access. My position is the factors currently in use were the result of mutual agreement. AT&T wants to be

paid more in access charges than the factor would allow. Our position is that the factors are binding until they are changed by mutual agreement. The change will then apply on a prospective basis.

**Q: Has AT&T requested that Halo negotiate for a change to the factors?**

A: No. They have just sent demands for payment of access, and have now filed this complaint. I must observe that the complaint itself does not request that the TRA mandate a change to the factors. AT&T just wants TRA to ignore the contract factors and order payment of access charges for far more calls than the contract factors permit.

**SIGNALING ISSUES**

**Q: So far you have been mostly addressing AT&T's Count I. Count II of the Complaint accuses Halo of violating terms of the ICA related to signaling. What is your response?**

A: Halo is following industry and regulatory standards. We pass CPN information delivered to us unaltered in any way. We populate the Charge Number parameter with the Billing Telephone Number of our end user customer in the MTA when the CPN information is different from the Charge Number information. This is done to denote the "chargeable number" for the call. AT&T is simply wrong when it claims Halo is "manipulating," "changing," "stripping" or doing anything improper with regard to the Charge Number information

**Q: Has AT&T accused Halo with manipulating "Calling Party Number"?**

A: No. That is because Halo populates the address signal information that belongs in the CPN unchanged. Halo does not remove, alter or manipulate this information in any way.

**Q: Other telephone companies alleged that Halo is changing the address signal information in the CPN parameter. Is this true?**

A: Their allegation is flatly incorrect. First of all, what they are ignoring is that Halo connects to its customers using newer technology that is not SS7-based. Thus there is no "CPN" as such. The FCC's definition of "Calling Party Number" on its face is limited to SS7-based networks.[16] We do not get SS7 "CPN" so there is nothing to change and the rules they quote simply do not apply to begin with. Our IP-based systems do, however have call control methods and protocols, and there is a location for the same type information. What Halo does is look to that location, pull out the information that belongs in an SS7 CPN parameter and then our "signaling gateway" populates that very same information in the SS7 CPN parameter. Halo ***never*** populates the SS7 CPN parameter with an address signal that is different from address signal contained the equivalent IP-based information we receive from our customer. We do not change, strip, alter, modify, manipulate or do anything else to "CPN."

**Q: Let's discuss "Charge Number" a little more. What is going on here?**

A: My discussion above about the fact that we are an IP-based network applies here too. But setting that aside, the FCC's rules and industry practices for the SS7 Charge Number ("CN") parameter are different than for CPN. The FCC has a different definition for "Charge Number."[17] Two things are important with respect to this definition. First, it uses different terminology ("billing number") than the ANSI standard ("chargeable number"). Second, notice that the definition refers to "delivery of the calling party's billing number in a Signaling System 7

[16] Based on the advice of counsel, Halo relies on: 47 C.F.R. § 64.1600(e): "(e) Calling party number. The term 'Calling Party Number' refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network."

[17] *See* 47 C.F.R. § 64.1600(f): "The term 'charge number' refers to the delivery of the calling party's billing number in a Signaling System 7 environment by a local exchange carrier to any interconnecting carrier for billing or routing purposes, and to the subsequent delivery of such number to end users."

environment *by a local exchange carrier* to any interconnecting carrier …" Halo is an *exchange carrier* but it is not a l*ocal exchange carrier*. One could fairly say the definition excludes us.[18]

Regardless, the telephone companies' contentions regarding "industry practices" are wrong to the extent they imply the practices do not allow an exchange carrier to populate an address signal in the CN where one did not exist before, or to even change it. The industry practice is to in fact do so when necessary to indicate that the end user customer's billing number ("chargeable number") is different from what might possibly be inferred from the CPN information.[19]

**Q: Some of the telephone companies assert that industry practices have provided that the CN address signal must always represent a number from the first "originating network." Is that true?**

A: Not according to our experts. If this were true, then it seems to me that AT&T has been violating the rules because they routinely replace the original CN or insert a new CN when one of their users has turned on "call forwarding," a call is addressed to that user from a different network, and their user has forwarded the call to a number associated with yet a third network.

Unless someone can point us to different standards that we're not familiar with, Charge Number information is not restricted to an address from only the first network. Its purpose is to designate the billing number of the carrier's end user customer. Sometimes the signaling carrier's

[18] The FCC's new rule 64.1601(a)(1) (which goes into effect on November 29, 2011) may, however, apply. In pertinent part it says that "…Entities subject to this provision that use Signaling System 7 (SS7) are required to transmit the calling party number (CPN) associated with all PSTN Traffic in the SS7 ISUP (ISDN User Part) CPN field to interconnecting providers, and are required to transmit the calling party's charge number (CN) in the SS7 ISUP CN field to interconnecting providers for any PSTN Traffic where CN differs from CPN." I'm not sure how a CMRS provider can send "CN" when the applicable definition of CN expressly applies only to LECs, but I will let the lawyers debate that point.

[19] *See* ITU-T series Q.760-Q.769. ANSI T1.113 describes the CN parameter:

> 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. (emphasis added)

end user customer is served by a network other than the first network, as would be the case with the call forwarding example. In our case, Transcom is our end user customer. Therefore, we signal a number we assigned to Transcom for use as the "Billing Telephone Number" for the account in that MTA, just as would an ILEC with a large business customer running a "leaky PBX." This is fully in accord with industry practices.

**Q: Would the telephone companies be able to make the same signaling claims regarding the CN address signal information if Transom is an "end user" purchasing "telephone exchange service?"**

A: No. While the technology is different the functionality we provide to Transcom is much like what telephone companies have provided to large "communications-intensive" business customers with PBXs for many years. Even AT&T has admitted before the bankruptcy court that the CN parameter was designed to allow presentation of a billing number associated with a business user's PBX.[20] Our CN signaling practices were carefully designed to be consistent with those applicable to a provider of telephone exchange service to a large and communications-intensive business end user.

If there was no dispute over Transcom's status, (*e.g.*, the ILECs would quit trying to re-litigate the Felsenthal and Hale decisions) none of them could contend that Halo's practices are contrary to the industry standards.

**Q: When did Halo begin to populate Transcom's BTN in the CN address signal?**

[20] AT&T proffered testimony from its witness Neinast in the bankruptcy case. Mr. Neinast's proffer on page 19 admits that "The Charge Number (CN) field is also used in conjunction with CPN for intercarrier compensation. The Charge Number is used when a large customer with a Private Branch Exchange (PBX) desires to have all of its traffic billed to a single billing telephone number. This is an accepted practice across the industry and service providers have agreed upon billing system rules to accommodate this. When CN is used and is different from the CPN, billing systems are programmed to use the number in the CN field and to ignore the number in the CPN field.

A: In February of 2011, soon after the FCC released its proposed "phantom signaling" rules.[21] The proposed rules expressly contemplated that CN would be populated with the number of the "responsible party."[22] In our case that is Transcom. Halo was being proactive and decided to implement the proposed rules in order to prevent allegations of supporting "phantom traffic."

**Q: How did that work out for you?**

A: The ILECs contended that conforming to the FCC's proposed phantom traffic rules resulted in phantom traffic. I have yet to fully understand that one.

**Q: Has the FCC now promulgated final rules?**

A: Yes. They apparently believed that the language in the proposed rule concerning "financially responsible party" caused problems.[23] So they came up with a different approach. We are not sure that the change helps to clarify anything, and we believe that even under the new rules it is proper to signal the Transcom BTN, but in the interest of trying to reduce the noise level in all these state proceedings Halo will cease populating Transcom's BTN in the CN address signal on December 29, 2011, which is the effective date of the new rules. Sadly, I suspect that the very entities that complained about Halo populating this information in the CN will now complain when we stop.

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[21] NPRM and FNPRM, *Connect America Fund et al*., WC Docket Nos. 10-90 et al., FCC 11-13, , ¶ 631 26 FCC Rcd 4554 (Feb. 9, 2011) and published at 76 Fed. Reg. 11632 (March 2, 2011).

[22] *See* Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support*, WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161, ¶ 719, __ FCC Rcd __ (rel. November 18, 2011) ("*2011 USF/ICC Rules Order*") ("719. In the USF/ICC Transformation NPRM, we also sought comment on a proposed rule that would prohibit service providers from altering or stripping relevant call information. More specifically, we proposed to require all telecommunications providers and entities providing interconnected VoIP service to pass the calling party's telephone number (or, if different, the financially responsible party's number), unaltered, to subsequent carriers in the call path. …" (emphasis added)

[23] *2011 USF/ICC Rules Order* ¶ 720. ("In response to comments in the record, we make several clarifying changes to the text of the proposed rules in this section. First, commenters objected to the use of the undefined term "financially responsible party" in the proposed rules. We agree with the concerns and clarify that providers are required to pass the billing number (e.g., CN in SS7) if different from the calling party's number. …" (footnotes omitted))

**Q: Is this practice change an admission that Halo was acting inconsistently with the ICA for Tennessee?**

A: Absolutely not. To the contrary we think the ICA actually calls for a CN in our circumstance and the FCC's new rule would allow it. There are three potentially relevant contract provisions. AT&T's complaint conveniently omits mention of two and relies only on one.. I will set out all three:

Section IV.C. provides in pertinent part:

> … The parties' respective facilities shall (i) provide the necessary on-hook, off-hook answer and disconnect supervision (ii) shall hand off calling party number ID when technically feasible and (iii) shall honor privacy codes and line blocking requests if possible. …

Section XIV.E states:

> 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)

I read these two provisions to essentially require the parties to use industry standard SS7 signaling methods. As I noted, "industry standard" expressly contemplates populating the CN address signal with the "chargeable number" – which is the BTN – when that is different from the CPN. I repeat that our practice is the same as the incumbents use with call forwarding or when they provide ISDN PRI-based telephone exchange service to a larger business customer.

AT&T cites to this provision in XIV.G:

> G. The parties will provide each other with the proper call information, including all proper translations for routing between networks and any

information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.

I do not see how our practice of populating our customer's BTN in the CN address signal violates XIV.G. We are providing "proper call information" because we are using industry standards applicable to provision of telephone exchange service to a business end user. What particularly confounds me is that AT&T is complaining because we are providing *additional* information: we populate the CPN *and* the CN. I might understand if we were providing less information or maybe if we were manipulating CPN, but AT&T is getting more information, not less.

**Q: Does signaling CN information inhibit AT&T's ability to bill?**

A: I fail to see how it could. 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.

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.

This negotiated factor cannot be unilaterally changed. Instead, any change 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. Halo's position is that 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.

**COUNT IV: FACILITIES CHARGES**

**Q. Has Halo ordered any interconnection "transport facilities" from AT&T?**

A: Yes we have. But the ones we ordered are not the ones AT&T is complaining about. I will explain this point further below. Not all of the things that AT&T is calling "interconnection transport facilities" are in fact "facilities."[24] Halo is not responsible for them in any event.

**Q: Please describe the physical interconnection that is in place between Halo and AT&T in Tennessee.**

A: 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,[25] 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, AT&T provisioned as part of the circuit design, and Halo acknowledges cost responsibility for, entrance facilities from AT&T to reach the tandem building. However, we recently discovered that certain Entrance Facility and DS3 multiplexing charges in Nashville

[24] For purposes of this testimony I may still refer to the cross-connects and multiplexing as "facilities." I do so merely to use consistent terminology. Halo does not agree they are actually "facilities."

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

have not been paid. We are determining the amounts in issue and will work with AT&T to determine the amounts due. To be clear, Halo admits that it is responsible for the charges related to the Entrance Facility in Nashville and the associated multiplexing in Nashville..

**Q: How much has Halo paid AT&T for the Nashville Entrance Facilities and DS3 multiplexing charges?**

A: We have paid AT&T approximately $6,000.00 since that facility was brought up, both for Entrance Facilities and DS3 multiplexing services. We expect that approximately $35,000 is due for the Nashville arrangement. I will present a more exact number in my Rebuttal.

**Q: Please describe the situation in all other Tennessee markets.**

A: 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.

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 building. AT&T is cost-responsible from there.

In order to implement interconnection in Chattanooga AT&T has installed *cross-connects* that go from its tandem switch to a panel, and then from the panel to the POI. The cross-connects to the POI are at the DS1 level. AT&T claims to also be performing DS0/DS1 multiplexing for the switch port termination.

AT&T is providing DS1/DS3 multiplexing in Memphis and Knoxville. In those locations AT&T has installed *cross-connects* that go from its tandem switch to a multiplexer where they mux up the DS1s to DS3. They then installed a cross-connect from the DS1/DS3 to the POI. The POI interface between AT&T and Halo in Memphis and Knoxville is at the DS3 level. AT&T claims to be performing DS0/DS1 multiplexing for the switch port termination as well.

AT&T has been charging Halo for a switch port, DS0/DS1 multiplexing and cross-connects in Chattanooga. In Memphis and Knoxville AT&T is charging Halo for a switch port, DS0/DS1 multiplexing and cross-connects. AT&T is also charging for DS1/DS3 multiplexing and then for cross-connects from the DS1/DS3 mux to the POI.

As noted, the Halo POI in Chattanooga, Knoxville and Nashville is the CFA location on our transport vendor's DSX. Each of these three POIs is inside the tandem building. This is the location where the parties exchange traffic. AT&T has wrongly chosen to call the 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 DS0/DS1). AT&T is also assessing switch port charges.

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.

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 Halo has ordered and is receiving from AT&T in Knoxville and Memphis. 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.

**Q: Please explain a little more about multiplexing.**

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 denies cost responsibility in these cases, Halo has paid and disputed the charges for DS1/DS3 multiplexing and the cross connect from the POI to the

DS3/DS1 mux in Knoxville and Memphis. If and to the extent AT&T insists on moving forward with this part of the complaint, Halo seeks a refund for the payments it has made for DS3/DS1 multiplexing.

**Q: How much have you paid AT&T for DS3 multiplexing?**

A: We have paid AT&T approximately $25,000 for DS1/DS3 multiplexing in Tennessee, for Nashville, Knoxville and Memphis. The Nashville multiplexing portion is not disputed.

**Q: What is your position on the multiplexing charges?**

A: As noted, we do not dispute the DS1/DS3 multiplexing in Nashville. We dispute the rest.

AT&T appears to be attempting to recover charges for DS1/DS0 multiplexing that AT&T performs to create 24 DS0s that 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 is necessary to de-multiplex down to the DS0 level to get to the termination on the tandem trunk port when it is not technically necessary. We certainly don't understand why AT&T thinks we should pay for it. Regardless, the fact is that the DS1/DS0 multiplexing is occurring on AT&T's side of the POI.

We dispute the DS1/DS3 multiplexing and associated cross-connects for Knoxville and Memphis. The bills have been paid, but they are still disputed.

**Q: What is your position on the port charges?**

A: We have disputed them. AT&T is responsible for the costs of its own switch ports, just as Halo is responsible for the cost of Halo's switch ports (or the equivalent).

**Q: What is your position on the so-called "facility" charges AT&T is trying to assess?**

A: Several of AT&T's so-called "facility" charges, and the charges subject to dispute, entirely relate to discrete connections and equipment functions 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 many 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.

**Q: What does the ICA have to say about all of this?**

**A:** 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[26] and then IV.B[27] and C,[28] which must be read in conjunction with VI.B.2 a and b.[29]

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[26] A. 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. Each party will use commercially reasonable efforts to construct its network, including the interconnecting facilities, to achieve optimum cost effectiveness and network efficiency.

[27] B. There are three methods of interconnecting facilities: (1) interconnection via facilities owned, provisioned and/or provided by either party to the other party[note 1] (2) physical collocation; and (3) virtual collocation where physical collocation is not practical for technical reasons or because of space limitations. Type 1, Type 2A and Type 2B interconnection arrangements described in BellSouth's General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended, may be purchased pursuant to this Agreement provided, however, that such interconnection arrangements shall be provided at the rates, terms and conditions set forth in this Agreement. Rates and charges for both virtual and physical collocation may be provided in a separate collocation agreement. Rates for virtual collocation will be based on BellSouth's Interstate Access Services Tariff, FCC #1, Section 20 and/or BellSouth's Intrastate Access Services Tariff, Section E20. Rates for physical collocation will be negotiated on an individual case basis.

Note 1 provides:

On some occasions Carrier may choose to purchase facilities from a third party. In all such cases carrier agrees to give BellSouth 45 (forty five) days notice prior to purchase of the facilities, in order to permit BellSouth the option of providing one-way trunking, if, in its sole discretion BellSouth believes one-way trunking to be a preferable option to third party provided facilities. Such notice shall be sent pursuant to Section XXIX. In no event shall BellSouth assess additional interconnection costs or per-port charges to Carrier or its third-party provider should Carrier

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

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purchase facilities from a third party, e.g. the same charges that BellSouth would charge Carrier should it provide the service.

[28] C. The parties will accept and provide any of the preceding methods of interconnection. Carrier may establish a POI on BellSouth's network at any technically feasible point in accordance with the 47 CFR 51.703(b). Carrier must designate a POI at at least one BellSouth access tandem within every LATA Carrier desires to serve, or alternatively, Carrier may elect (in addition to or in lieu of access interconnection at BellSouth's access tandem) to interconnect directly at any BellSouth end office for delivery of traffic to end users served by that end office. Such interconnecting facilities shall conform, at a minimum, to the telecommunications industry standard of DS-1 pursuant to Bellcore Standard No. TR-NWT-00499. Signal transfer point, Signaling System 7 ("SS7") connectivity is required at each interconnection point after Carrier implements SS7 capability within its own network. BellSouth will provide out-of band signaling using Common Channel Signaling Access Capability where technically and economically feasible, in accordance with the technical specifications set forth in the BellSouth Guidelines to Technical Publication, TRTSV-000905. The parties' respective facilities shall (i) provide the necessary on-hook, off-hook answer and disconnect supervision (ii) shall hand off calling party number ID when technically feasible and (iii) shall honor privacy codes and line blocking requests if possible. In 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 VI.B below.

[29] B. Compensation of Facilities

1. Where one-way trunking is used, each party will be solely responsible for the recurring and non-recurring cost of that facility up to the designated POI(s) on the terminating party's network.

2. The Parties agree to share proportionately in the recurring costs of two-way interconnection facilities.

a. To determine the amount of compensation due to Carrier for interconnection facilities with two-way trunking for the transport of Local Traffic originating on BellSouth's network and terminating on Carrier's network, Carrier will utilize the prior months undisputed Local Traffic usage billed by BellSouth and Carrier to develop the percent of BellSouth originated Local Traffic.

b. BellSouth will bill Carrier for the entire cost of the facility. Carrier will then apply the BellSouth originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by BellSouth to Carrier. Carrier will invoice BellSouth on a monthly basis, this proportionate cost for the facilities utilized by BellSouth.

> In 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.

This provision is addressing **facilities** and not the trunks that ride on facilities. Again, trunks ride on facilities, and trunks will extend from switch port to switch port, 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.

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.[30]

**Q: Why do you say the cost recovery for the traffic in issue comes through reciprocal compensation?**

[30] Counsel has requested that I provide citations to *Southwestern Bell v. PUC*, 348 F.3d 482 (5th Cir. 2003). The Fifth Circuit defined the POI as "a point designated for the exchange of traffic between two telephone carriers. It is also the point where a carrier's financial responsibility for providing facilities ends and reciprocal compensation for completing the other carrier's traffic begins." 348 F.3d at 484. As applied to our situation, that means that AT&T recovers the cost of the "facilities" in issue as part of reciprocal compensation and § 251(b)(5) rather than "interconnection" under § 251(c)(2).

A: Take a look at the definition of "transport" in FCC rule 51.701(c).[31] Reciprocal compensation "Transport" includes "transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act *from the interconnection point* between the two carriers to the terminating carrier's end office switch." (emphasis added.) This has to mean AT&T recovers the cost of "facilities" on its side of the POI through reciprocal compensation rather than "interconnection facilities" at least insofar as the "facilities" are used to carry traffic from Halo to AT&T that goes to an AT&T end user.

**Q: Please continue your discussion of the ICA terms.**

A: 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**.

**Q: Is this reading of the ICA consistent with FCC rules?**

A: Yes. FCC Rules 51.701(c) (discussed above) and 51.709(b) as well as paragraph 1062 of the *Local Competition Order* all support this reading. The phrase "between two carrier's networks" (51.709(c)) 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.

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[31] Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

**Q: Did Halo "order" these cross-connects and DS1/DS0 multiplexing functions with the implied or express agreement to pay for them notwithstanding what the agreement says?**

A: 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.

When the parties were initiating interconnection, we communicated to AT&T orally and in writing where the POI would be. We secured a POI CLLI corresponding to the CFA location within the AT&T building for each LATA and that was what we tried to use on the order forms. AT&T never took issue with establishing the POI at the CFA location. 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.

**Q: What are the POI locations in Tennessee?**

A: Here is a list of each, along with the situation regarding entrance facilities and multiplexing:

| LATA name | LATA # | AT&T Tandem CLLI | POI CLLI | DS3/DS1 Interface | AT&T DS3-DS1 Muxing (Y/N) | AT&T Entrance Facility (Y/N) |
|---|---|---|---|---|---|---|
| Memphis | 468 | MMPHTNMA84T | MMPHTNMAX9Y | DS3 | Y | N |
| Nashville | 470 | NSVLTNWM92T | NSVLTNMTXHZ | DS3 | Y | Y |

| | | | | | | |
|---|---|---|---|---|---|---|
| Chattanooga | 472 | CHTGTNNS84T | CHTGTNNSXVY | DS1 | N | N |
| Knoxville | 474 | KNVLTNMA84T | KNVLTNMAXEZ | DS3 | Y | N |

As you can see the POI CLLI for the three locations were we do not use an AT&T-supplied Entrance Facility convey that the POI is in the same building as the tandem, but is *not at the tandem switch*. Rather it is at the place where we get CFA/LOA from our vendor. Specifically, the POI CLLI expressly denotes the rack, panel and jack location at Halo's third party transport provider's DSX as reflected from the precise "Channel Facility Assignment" we receive from our third party transport vendor.

**Q: What do you believe AT&T is trying to do?**

A: AT&T is attempting to shift cost responsibility for what it calls "facilities" to Halo when the ICA assigns responsibility to AT&T because the "facilities" are all on AT&T's side of the POI. AT&T's billings for the cross-connects, DS3/DS1 multiplexing and the DS1/DS0 multiplexing that Halo has disputed are incorrect and not supported by the ICA.

**Q: Does this conclude your testimony?**

A: Yes. I reserve the right to make corrections of any errors we may discover by submitting an *errata*. And, of course, we may file rebuttal to AT&T's direct testimony.

# Federal Communications Commission

Wireless Telecommunications Bureau

## RADIO STATION AUTHORIZATION

LICENSEE: HALO WIRELESS

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

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

**FCC Registration Number (FRN):** 0018359711

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

**Market Name:** Nationwide

**Channel Block:** 003650.00000000 - 003700.00000000 MHz

**Waivers/Conditions:**

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

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



EXHIBIT 1

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



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

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 Lilieberg 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 16, 2006**

**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 SERVICES, LLC,** | § | **CHAPTER 11** |
| | § | |
| | § | **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.**

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. | § | |

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



EXHIBIT 4

| | |
|---|---|
| **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###

**The following constitutes the order of the Court.**

**Signed May 28, 2003.**

**United States Bankruptcy Judge**

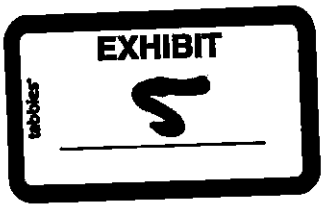
**IN THE UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

| | | |
|---|---|---|
| **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) [illegible]; (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

**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** [illegible] CNM Network Inc. ("CNM") and held by H&L in its [illegible] instructions from CNM, and (iii) provided [illegible]

## 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 # # #

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served via certified mail, return receipt requested, on the following counsel of record on this the 19th day of December, 2011:

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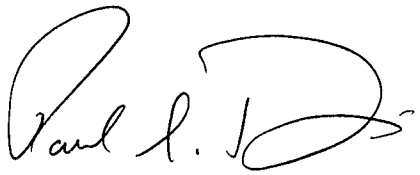

Paul S. Davidson