IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

UNCITED TRANSCOM PRINCIPAL BRIEF
(DEFERRED APPENDIX APPEAL)

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CORPORATE DISCLOSURE STATEMENT

Transcom has no parent corporation, subsidiary, or affiliate that has issued shares to the public and there is no publicly owned corporation owning more than 10% of the stock of Transcom.

TRANSCOM'S SUPPLEMENT TO THE JOINT PRELIMINARY BRIEF'S GLOSSARY

Act	Federal Communications Act, 47 U.S.C. §§ 151 *et seq.*
CPE	Customer Premises Equipment
ISDN	Integrated Services Digital Network
PBX	Private Branch Exchange

TRANSCOM'S SUPPLEMENT TO THE JOINT PRELIMINARY BRIEF'S JURISDICTIONAL STATEMENT

Transcom has Article III standing to pursue this matter because: (1) it suffered an injury-in-fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) that injury is fairly traceable to the challenged action of the FCC rather than some third party not before the court; and (3) that injury is likely to be redressed by a favorable decision. *US Magnesium, LLC v. United States EPA*, 690 F.3d 1157, 1165 (10th Cir. 2012). Transcom has prudential standing because it (1) asserts its own legal rights; (2) presents more than "generalized grievances"; and (3) has an interest protected or regulated by the statute or constitutional guarantee in question. *Wyoming v. United States DOI*, 674 F.3d 1220, 1230-31 (10th Cir. 2012). The Court can redress Transcom's injuries by vacating the *Order* and remanding to the FCC with instructions.

TRANSCOM'S SUPPLEMENT TO THE JOINT PRELIMINARY BRIEF'S STATEMENT OF THE CASE

Transcom is a communications-intensive private business. [J.A. __]. Transcom provides enhanced information services to its customers. [J.A. __]. To send and receive information, Transcom uses CPE that connects to the telephone exchange service that Transcom buys from carriers. [J.A. __]. Transcom has never held itself out as a carrier, and does not use telecommunications equipment. [J.A. __]. Rather, Transcom is an ESP and an end-user of telecommunications services on the PSTN. [J.A. __].

Transcom is an "Internet" company. [J.A. __]. Unlike non-carrier parties like VON, however, Transcom does not provide "interconnected VoIP" or "non-interconnected VoIP" to retail consumers or businesses. [J.A. __]. Rather, Transcom provides wholesale enhanced/information services to other industry participants, including many of the VON members, as well as to cable telephony providers. Transcom's customers then interface with retail customers. [J.A. __].

Transcom's involvement in the proceeding below began relatively late. [J.A. __]. Beginning in March of 2011, certain ILECs

began filing comments and *ex parte* submissions complaining about ICC-related disputes with Halo Wireless, Inc. ("Halo"), one of Transcom's exchange carrier vendors. [J.A. __]. Those submissions also attacked Transcom's regulatory status and the classification of Transcom's traffic, and alleged that Halo and Transcom were engaging in improper call signaling practices. [J.A. __]. The ILECs contended that Transcom should be subject to FCC regulations governing carriers. [J.A. __].

On April 19, 2011, Halo replied to the ILECs' contentions and assertions. Transcom and Halo then conducted and submitted multiple *ex parte* meetings and filings, urging the FCC to reject the ILECs' views. [J.A. __].

In November 2011, the FCC responded to the dispute in the *Order*. The *Order* explicitly referred to Halo and its submissions,[1] but referred to Transcom only as a "high volume" "ESP" customer of

[1] *Order* ¶¶ 848, 979, 1003-1006 (and associated notes).

Halo.[2] The *Order* repeated the ILECs' allegations regarding Halo's handling of Transcom's traffic.[3]

The *Order* did not dispute that Transcom is an ESP and end-user rather than a carrier. The Order, however, ruled that ESPs like Transcom purchase "exchange access," provide "toll services," and are "intermediate" points instead of end-points for certain purposes. The Order also overturned prior decisions approving CMRS-based telephone exchange service to ESPs. The Order held that ESPs like Transcom are, like carriers, subject to ICC, "call identifying," and "must carry" rules.[4]

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[2] *Id.* ¶¶ 1005-1006.

[3] *Id.* ¶¶ 709, 712-714, 720 (and associated notes); *see also Order* n.1203 (reference to Windstream's XV comments, p. 16); slide 11 of the TDS September 23, 2011 *ex parte*.

[4] *See Order* ¶¶709, 712-14, 720, 848, 979, 1003-1006 and associated notes; *see also Order* n.1203.

SUMMARY OF THE ARGUMENT

Under the Act, as well as long-standing FCC rules, entities are either carriers or end-users. Carriers have specific rights and duties, and are subject to FCC regulation under Title II. End-users purchase regulated service from carriers, but are not themselves subject to Title II regulation.

ESPs like Transcom are not carriers. Rather, ESPs are end-users. Carriers provide telecommunications services using telecommunications equipment. ESPs are customers of carriers, using customer premises equipment to provide enhanced/information services to their own customers. ESPs are telecommunications *users*, not telecommunications *carriers*.

By ruling that Transcom is subject to carrier obligations regarding ICC, "call identification," and "must carry" rules, the FCC disregarded the distinction between carriers and end-users and exceeded its regulatory authority. The FCC's rulings were contrary to the Act and the FCC's own regulations, and were arbitrary and capricious. Moreover, the FCC's adjudicatory rulings specifically directed at Transcom and Halo based on the ILECs' complaints do not contain any findings on the first-order question of whether

Transcom is a common carrier even though the FCC could reach its result only if Transcom is a common carrier. The holdings were contrary to prior federal court rulings regarding Transcom's status. The result is inconsistent with prior FCC precedent, and the FCC failed to adequately explain why it was suddenly changing course.

ARGUMENT

An entity or person is either a carrier or an end-user for ICC purposes. End-users purchase telecommunications service from carriers that are in turn responsible for ICC. For ICC purposes, calls to the end-user *terminate* on the end-user's exchange carrier's[5] network, and calls from the end-user *originate* on the end-user's exchange carrier's network from end-user CPE[6] that connects to the exchange service.

[5] As used herein, an exchange carrier is a common carrier that provides telephone exchange service and/or exchange access, and it includes both LECs and CMRS. CMRS providers (called "radio common carriers" before 1993) provide exchange services even though they are not LECs, as defined in section 153(32). Common carrier mobile radio services were also exchange telecommunications services within the meaning of section II(D)(3) of the AT&T divestiture decree. *U.S. v. AT&T*, 578 F. Supp. 643, 645 (D.D.C. 1983).

[6] CPE is employed by end-users. In contrast, carriers use telecommunications equipment. *Compare* 47 U.S.C. § 153(16) *with* 47 U.S.C. § 153(52).

The FCC erred by treating end-user ESPs that do not provide interconnected VoIP[7] like carriers or *quasi*-carriers in its ICC and "call-identifying" rules.

The FCC's new rules unlawfully obliterate mandatory distinctions relating to carriers' and non-carrier end-users' roles and destroy the statutorily-mandated classification scheme between "enhanced[8]/information[9]" service[10] and the three statutorily defined

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[7] Transcom does not provide retail service to consumers, and instead offers its enhanced/information services to other parties, that in turn serve consumers. Transcom does not supply any transmission to ultimate consumers, and merely uses the PSTN to supply a finished product. Therefore, from both a demand side and supply side perspective, Transcom does not "offer" or "provide" "telecommunications." *C.f.*, *Vonage Holdings Corp. v. FCC*, 489 F.3d 1232, 1239-41 (D.C. Cir. 2007).

[8] The FCC's rules define "enhanced service" in 47 C.F.R. § 64.702(a).

[9] 47 U.S.C. § 153(24).

[10] Despite the different wording, the statutory definition for "information service" and the older FCC definition for "enhanced service" obtain the same practical result. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 992-94 (2005). Transcom will refer to all enhanced/information service providers as ESPs.

"telecommunications services"[11] ("telephone exchange service,"[12] "exchange access,"[13] and "telephone toll service"[14]).

Exchange service is not telephone toll service. An exchange carrier cannot be subjected to exchange access charges for handling end-users' outgoing exchange service calls. An exchange carrier providing telephone exchange service to an end-user is not providing "transiting."[15] When an exchange carrier allows an IXC to access an end-user to allow origination of telephone toll calls, the exchange carrier is not providing exchange access to the end-user. Transit and exchange access are carrier-to-carrier products, not carrier-to-user products.

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[11] 47 U.S.C. § 153(53).

[12] 47 U.S.C. § 153(54)

[13] 47 U.S.C. § 153(20)

[14] 47 U.S.C. § 153(55).

[15] The FCC defined "transit" in paragraph 1311 of the *Order* to mean service by one carrier *to another carrier* (*i.e.*, carrier B takes traffic from carrier A and "transits" that traffic to carrier C because carriers A and C are not directly interconnected) yet improperly applied that term to Halo's service to Transcom.

ESPs do not offer "telecommunications"[16] on a "common carrier"[17] basis. Therefore, ESPs are not "telecommunications carriers,"[18] and cannot be said to offer or provide "telecommunications service." In particular, ESPs cannot provide "telephone toll service" given that it is by definition a telecommunications service. ESPs buy telecommunications and then provide non-regulated and non-common carrier enhanced/information service.

ESPs are end-users, and like all other end-users, do not purchase exchange access as a matter of law. "Exchange access," by definition, is for *carriers* rather than end-users and applies only "for the purpose of the origination or termination of telephone toll service."[19] Neither the ESP nor its exchange carrier vendor can be assessed exchange access, or access-like ICC charges, by another carrier for exchange service traffic because that is "LEC-LEC" traffic

[16] 47 U.S.C. § 153(50).

[17] 47 U.S.C. § 153(11).

[18] 47 U.S.C. § 153(51).

[19] 47 U.S.C. § 153(20).

subject to section 251(b)(5) and the additional cost criterion in section 252(d)(2).

The *Order* directly and adversely affects Transcom in several ways. First, the FCC engaged in a faulty adjudication of Transcom's status and the nature of the services it was receiving from Halo.

Second, the *Order* expressly (in some places) and implicitly (in other places) deprives Transcom of its statutory right to be (a) an end-user[20] customer and purchase telephone exchange service, and (b) an end-point where communications originate or terminate for ICC purposes.

Third, the *Order* effectively removes CMRS providers from the pool of competitively available exchange service suppliers to Transcom.

Fourth, the *Order* increases supply costs for Transcom by imposing non-section 252(d)(2) compliant ICC obligations on Transcom's vendors, and they will pass this additional and unlawful cost on to Transcom.

[20] 47 C.F.R. § 69.2(m).

Fifth, the *Order* unlawfully imposes carrier or *quasi*-carrier regulation on Transcom through the "phantom traffic" and "must-carry" requirements.

The Court should hold unlawful and vacate the *Order*.

I. The *Order* violates the Act's bright-line distinction between carriers and end-users.

The *Order* abandoned the "carrier or end-user" dichotomy that is rooted in history and codified in the Act. This binary construct controls the operation of permissible ICC rules. The FCC inexplicably reversed course, exceeded its general and ancillary jurisdiction, and fundamentally misconstrued the Act.

A. ESPs are end-users, not carriers.

The FCC established the binary concept of carrier or end-user in its very first access charge rules promulgated in 1983.[21] This bright-line distinction remains in the rules.[22] Any entity not acting in a carrier capacity always was and still is an end-user. Congress adopted this approach: sections 153(11) and 153(51) expressly

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[21] *In the Matter of MTS and WATS Market Structure*, 93 FCC2d 241 (1983).

[22] *Compare In the Matter of MTS and WATS Market Structure*, 93 FCC2d at 399 (Appendix A, containing text of 1983 rule 69.2(m)) *with* current 47 C.F.R. § 69.2(m)).

prohibit the FCC from imposing carrier obligations on an entity when it is not providing telecommunications service, and is therefore occupying a "business" end-user role.

This distinction is fundamental. Carriers have specific rights, duties, and responsibilities, and they are subject to regulation. End-users merely purchase regulated service from carriers, and are not regulated by the FCC or the states.

The 1971 *Computer Inquiry* decision[23] distinguished between "pure communications" provided by carriers and non-carrier "data processing." Even then, the FCC was aware that data processing sometimes yields applications that look very similar to common carrier services.[24] Data-based message switching directly competed with Western Union's then still-regulated services. The FCC knew:

> These two things look very similar to each other. However, one was regulated; the other was not. One was expensive; the other one was cheap, and avoided

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[23] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 FCC2d 267 (1971), *aff'd, GTE Service Corp. v. FCC*, 474 F.2d 724, 726 (2d Cir. 1973), *dec'n on remand*, 40 F.C.C.2d 293 (1973).

[24] Delbert D. Smith, *The Interdependence of Computer and Communications Services and Facilities: A Question of Federal Regulation*, 117 U. PA. L. REV. 829, note 4, 831, 836 (1969).

> regulatory fees. One is a substitute service for the other.[25]

The *Computer Inquiry* categories later changed to "basic" (telecommunications) service and "enhanced" service,[26] but the thrust was the same. Enhanced services are not regulated under Title II; ESPs are not "common carriers" and are instead merely business end-users. The fact that the ESP's service is similar to or substitutable for a telecommunications service does not matter to the analysis.[27]

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[25] Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, 55 Fed. Comm. LJ 167, 171 (2003).

[26] *In re Amendment of Section 64.702 of the Commission's Rules and Regulations* ("*Second Computer Inquiry*"), 77 F.C.C.2d 384 (1980); *Second Computer Inquiry*, 84 FCC2d 50 (1980); *Second Computer Inquiry*, Further Reconsideration, 88 F.C.C.2d 512 (1981), *aff'd*, *Computer & Commc'ns Indus. Assoc.*, 693 F.2d at 203, *cert. den.*, *Louisiana Pub. Serv. Comm'n. v. FCC*, 461 U.S. 938 (1983).

[27] *In the Matter of Cox Cable Communications, Inc., et al, Petition for Declaratory Ruling*, 102 FCC2d 110, 118-22 (1985).

ESPs purchase telephone exchange service,[28] and can use it to originate calls to the PSTN or receive calls from the PSTN. This is so even if the enhanced service is "interexchange." The FCC reaffirmed that ESPs are end-users when it articulated the "ESP Exemption" in the 1980s, and held that ESPs could continue to "pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."[29]

ESPs are not telecommunications carriers. Under FCC rules, only carriers are subject to access charges.[30] Under the Act, only telephone toll service is subject to exchange access.[31] Telephone toll

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[28] An ESP can purchase telephone toll service from an IXC. The fact that the IXC's customer is an ESP (rather than another type of end-user) does not exempt the IXC from exchange access. But the *Order* attempts to turn ESPs into IXCs by characterizing the ESP's product (not some toll service the ESP is buying) as toll. *Order* ¶¶ 945, 957. It also subjects the ESP's exchange carrier vendor to access charges on the ESP's originating traffic as if the exchange carrier is providing telephone toll when the exchange carrier vendor is actually providing telephone exchange service.

[29] *In the Matter of Access Charge Reform;* 12 FCC Rcd 15982, 16131-32 n. 498 and 499 (1997).

[30] 47 C.F.R. § 69.5(b).

[31] 47 U.S.C. § 153(20).

service is, by definition, a telecommunications service, so ESPs do not offer telephone toll service.

ESPs purchase telecommunications as end-users and use that input to provide non-regulated and non-common carrier enhanced/information service.[32] ESPs are end-users and purchase end-user exchange services – just as would any other "communications-intensive business end user."[33]

The 1996 amendments codified the FCC's rule-based carrier/end-user, telecommunications service/enhanced service construct.[34] Congress codified this model through the statutory definitions of, *inter alia*, "common carrier," "customer premises equipment," "exchange access," "information service,"

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[32] "Under *Computer II*, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. *The information service provider, indeed, is itself a user of telecommunications*; that is, telecommunications is an input in the provision of an information service." *In the Matter of Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11535, n. 138 (1998) (emphasis added).

[33] *Bell Atlantic Tel. Cos. v. FCC,* 206 F.3d 1, 7 (D.C. Cir. 2000).

[34] *Brand X,* 545 U.S. at 975-77.

"telecommunications carrier," "telecommunications equipment," "telecommunications service," and "telephone toll service" in section 153.

This approach is implemented through Title II as well as many of the FCC's still-existing rules.[35] It comprises the basic structure and operation of the statute. Title II applies to common carriers. Section 153(11) provides that a common carrier is "any person engaged as a common carrier for hire" and section 153(51) defines a "telecommunications carrier" as "any provider of telecommunications services" and goes on to say that "[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services."

Section 153(53) reinforces the import of common carrier status by defining a telecommunications service as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" – merely a different way of

[35] *See, e.g.,* 47 C.F.R. § 69.5(a) and (b).

describing the essential attributes of common carriage.[36] "Carriers" employ "telecommunications equipment" to provide "telecommunications service" (section 153(52)), whereas persons "other than a carrier" use "customer premises equipment" to "originate, route, or terminate telecommunications" (section 153(16)).

Congress also codified the "ESP Exemption."[37]

> Under law prior to the 1996 Telecommunications Act, this exception was called the enhanced services exception or ESP exception. … The Act essentially codified the pre-existing exception. …"[38]

Carriers "interconnect" with other carriers under rules, terms, and conditions prescribed by the FCC and state commissions pursuant to sections 201, 251, 252 and 332(c)(1)(B). As explained below, end-users – even those that operate extensive "private

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[36] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994).

[37] *PAETEC Communs. v. CommPartners, LLC*, 2010 U.S. Dist. LEXIS 51926, **5-6, n. 2 (D.D.C., 2010)(citations omitted), *appeal dism'd*, *PAETEC Communs., Inc. v. Shapiro*, 2012 U.S. App. LEXIS 8718 (D.C. Cir. 2012).

[38] *Id.*; *see also Brand X*, 545 U.S. at 975-977; *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-83 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 555 U.S. 1099 (2009).

networks" – have a federal right to attach to the PSTN using CPE by purchasing "exchange service."[39]

End-users buy service from carriers. Carriers interconnect so users on disparate networks can communicate. The carriers involved settle amongst each other for ICC. They then collect from their respective end-users under a tariff or contract.

B. Calls originate from and terminate to end-user CPE for ICC purposes.

End-users (including ESPs) employ CPE. Under the prevailing law, CPE is an end point from which calls originate or terminate for compensation purposes. This is so even if the call started somewhere else before it got to the end-user's CPE, which then sent the call back out. For tariff and ICC purposes (as opposed to jurisdictional purposes), calls originate from the end-user's CPE, and the end-user is the financially responsible party to its carrier vendor for calls from CPE.[40]

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[39] *In the Matter of Atlantic Richfield Company*, 3 FCC Rcd 3089, 3089, n. 1, 3090, n. 7 (1988), *review den.*, *PUC of Texas v. FCC*, 886 F.2d 1325, 1331, n.5 (D.C. Cir., 1989) ("*ARCO*").

[40] *See, e.g.*, *AT&T v. Intrend Ropes & Twines*, 944 F. Supp. 701, 708-711 (C.D. Ill., 1996) (applying filed tariff doctrine and collecting judicial and regulatory decisions defining "originate" for compensation purposes).

The initial FCC decisions articulating the "ESP Exemption" found that ESP use of the PSTN is like large business end-user PBXs[41] that "leak" interexchange private network traffic into the exchange.[42] ESPs use exchange service "to originate and terminate interstate calls."[43] ESPs are "end-users and thus may use local business lines for access for which they pay local business rates and subscriber line charges."[44] If they purchase special access lines that connect to "leaky" CPE "they also pay the special access surcharge under the same conditions as those applicable to end-users."[45]

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[41] A PBX is an end-user on-site switching system that connects to telephone exchange service, and distributes traffic to "stations," which can be telephones or any other terminal device, including FAX machines or computer terminals. Old-style PBXs used analog "PBX trunks." Newer PBXs connect to ISDN PRI trunks supplied by an exchange carrier.

[42] *MTS and WATS Market Structure*, 97 FCC 2d 682, 711 (1983); *In the Matter of MTS and WATS Market Structure*, 77 FCC2d 224, ¶ 63 (1980).

[43] *In the Matter of Access Charge Reform*, 12 FCC Rcd 15982, 16131-32 (1997).

[44] *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633, n. 53 (1988).

[45] *Id.*

Calls into an ESP platform have always been a "termination" for compensation purposes.[46] Calls exiting an ESP platform have always been an "origination" for compensation purposes.[47] The "rating" of the call as between local or toll for compensation purposes was always determined by looking at the ESP's CPE as the relevant end-point.[48] This was always the case even though from an "end-to-end" perspective the ESP is "in the middle" of a communication, as the gateway between participants. Therefore, *for ICC purposes*, when a communication starts somewhere else, goes to the ESP platform and the ESP hands the call off to its exchange service vendor after performing its enhanced/information functions, the call entering the ESP's system is a "termination" and the call going back out is an "origination."[49] Telephone exchange service is

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[46] *Bell Atlantic,* 206 F.3d at 6.

[47] *Id.*; *see also In the Matter of Access Charge Reform; Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, 11 FCC Rcd 21354, 21478 (1996).

[48] 47 C.F.R. § 51.701(d). The FCC's rules refer to a customer "premise" but that is merely where the CPE is located.

[49] *See, e.g.*, *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, 5988 (1987), *vacated as moot*, 7 FCC Rcd. 5644 (1992).

not "transiting." Telephone exchange service is not "telephone toll." Telephone exchange service is not "exchange access."

The FCC tried to change this result in 1999, but the D.C. Circuit reversed, holding that ISP-bound[50] calls are a "termination" for ICC purposes even though the ISPs "upon receiving a call originate further communications…" and for jurisdictional purposes the ISP is in the middle of the call.[51] The D.C. Circuit's holding is part of the law of this case, and FCC cannot lawfully overrule the D.C. Circuit.

ESPs, like all other end-users, purchase *telephone exchange service* rather than exchange access, and they use the service to originate calls from their CPE or receive calls with their CPE.[52]

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[50] An internet service provider ("ISP") is merely one kind of ESP.

[51] *Bell Atlantic,* 206 F.3d at 6-7. The D.C. Circuit pointedly distinguished between non-carrier ESPs and IXCs, and went on to note that *jurisdictional* analysis looks at the communication from end to end (with the ESP in the middle) whereas for the *compensation* purposes the ESP is an end-point. The D.C. Circuit certainly did not accept that an exchange carrier providing service to an ESP is providing "transiting."

[52] *See Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, 11 FCC Rcd at 21478.

ESPs' CPE, like all other end-user CPE, is an end-point where calls originate or terminate for ICC purposes.

Carrier telecommunications equipment *is* an "intermediate" point. End-user CPE, however, has never been treated as an intermediate point for ICC purposes. Conference calling precedent illustrates the difference. Carrier telecommunications equipment used to conference multiple callers is an *intermediate* point. End-user CPE used to create a conference call, however, is an *end-point*, where calls originate or terminate for ICC purposes.[53] This principle was applied to end-user ESPs in *AT&T v. Jefferson Telephone Company*, 16 FCC Rcd 16130, 16131 (2001). The FCC's new notion that service to an ESP is "transiting" rather than origination or termination (*Order* ¶ 1006) has no basis in the Act or the precedent.

C. The FCC violated statutory boundaries.

The Act identifies only three telecommunications services. LECs provide telephone exchange service and exchange access.[54] IXCs provide telephone toll service. CMRS providers primarily

[53] "Because two calls originate or terminate over the subscriber's common line, both properly incur a CCL charge." *AT&T Corp. v. Bell Atlantic*, 14 FCC Rcd 556, 586-87 (1998).

[54] *Bell Atlantic*, 206 F.3d at 8.

provide exchange service,[55] but the CMRS provider can also occupy an IXC role when *the CMRS provider*[56] transports a user's communication between two MTAs. Specific statutory provisions directly address compensation for each of these three services.

Section 153(54)(A) contemplates that telephone exchange service related calls are covered by "the exchange service charge" from the exchange carrier to the end-user. If the called party is on a different exchange carrier's network, the exchange carrier is responsible for termination charges, and the applicable ICC regime is section 251(b)(5) reciprocal compensation.[57] Termination charges for telephone exchange service calls must be cost-based: section 252(d)(2)(a) requires that the charge recover only the "additional cost" incurred by the terminating carrier.

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[55] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15595, 16999 ("*Local Competition Order*")(subsequent history omitted).

[56] As opposed to the CMRS customer transporting over a private network.

[57] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 430-31 (D.C. Cir. 2002).

The Act also controls "compensation"[58] for "exchange access" and "telephone toll service" provided by IXCs. Here, the exchange carrier gives the IXC access to end-users on each end so the IXC can provide telephone toll service and the exchange carrier recovers "access charges" from the IXC.

The definition of "telephone toll service" in section 153(55) contemplates that the IXC will recover "a separate charge not included in contracts with subscribers for exchange service" as its payment from the subscriber. The IXC "collects from the user and pays both LECs – the one originating and the one terminating the call."[59]

The statutory definitions for "telephone exchange service," "exchange access," and "telephone toll service" reflect Congress' decision that end-users will pay their selected carrier and *intercarrier* charges will flow among and between common carriers that are providing a telecommunications service.

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[58] Unlike reciprocal compensation, exchange access has no statutory costing criterion; it is merely bounded by the "just and reasonable" standard.

[59] *WorldCom*, 288 F.3d at 431.

ICC is about *intercarrier* obligations, not end-user obligations. End-users are not regulated, nor are they directly assessed intercarrier charges; they pay an "exchange service charge" to an exchange carrier,[60] or they pay "a separate charge not included in contracts with subscribers for exchange service" to the IXC that directly provides telephone toll service to them. The carrier serving the end-user is then responsible to the other carriers in the call delivery chain for all ICC obligations.

The FCC's new regime abrogates the statutory distinctions between non-carrier end-users – including ESPs of all kinds – and carriers providing telecommunications service. It brushes aside mandated differences in treatment between the two exchange carrier services (exchange access and telephone exchange service) and the one IXC service (telephone toll service). The FCC obliterated statutory distinctions between enhanced/information services and telecommunications services, and end-users and carriers.

[60] Similarly, under FCC rules they pay end-user charges to the exchange carrier that directly provides service to them. *See* 47 C.F.R. § 69.5(b).

The FCC summarily, and without any discussion, opined that calls do not "originate" from ESPs' CPE, but it illogically held to the concept that calls "terminate to" ESPs for compensation purposes. This was legal error, arbitrary and capricious.

II. FCC erroneously imposed *quasi*-carrier status on Transcom in its ICC, call identifying, and "must carry" rules.

A. The FCC cannot regulate end-users.

The FCC cannot "regulate" an end-user merely because the end-user is purchasing a telecommunications service, even if the user needs telecommunications to provide a jurisdictionally interstate non-common carrier communications-related service. End-user rights, duties, and responsibilities flow from the contract with or tariff of the common carrier from whom the end-user purchases telecommunications service. The FCC can require a carrier to include terms in a tariff or contract that control or restrict how the customer uses the service, but it cannot directly regulate end-users absent specific statutory authority.

The Southern District of New York considered a case involving hotels that subscribed to AT&T's long distance service and allowed

guests to make interstate toll calls.[61] The hotels passed through AT&T's charge and added a separate fee.[62] The principal question was whether the hotels could add the fee.[63] First, the government sought to enforce AT&T's interstate tariff, which forbade users from adding a surcharge.[64] Second, the government asserted that the hotels were violating the Act itself.[65] The court held that since the hotels were not common carriers they could not violate the Act, but as users they were bound by the tariff.[66]

Broadcasters, video providers, and private radio carriers all provide "communications by wire or radio" to their customers. They are not common carriers. Thus, when any of these entities need to purchase telecommunications service from a carrier, they are merely end-users, and there is a "carrier-user" relationship, not a "carrier-carrier" relationship. Neither the courts nor the FCC have

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[61] *U.S v. AT&T.*, 57 F. Supp. 451 (S.D.N.Y. 1944), *aff'd. sub nom. Hotel Astor, Inc. v. United States*, 325 U.S. 837 (1945).

[62] *U.S. v. AT&T*, 57 F. Supp. at 453-54.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* at 455-56.

traditionally attached any significance to the fact that the user happens to provide communications by wire and radio and uses it to support its non common-carrier product.[67] *Carterphone*, a seminal case involving end-users' right to attach CPE to the PSTN, involved a private mobile radio system's right to connect to the PSTN via end-user tariff arrangements.[68]

In contrast, CMRS providers are responsible for compliance with the FCC's rules, including operation of user stations (radio CPE)[69] and ICC.[70] End-users are subject *only* to the terms of their contract with the CMRS provider. Similarly, LECs are common carriers and have interconnection rights and duties. One of those duties is *intercarrier* compensation. LEC end-user customers pay end-user charges to their carrier vendor, and have no ICC or other duties to any other carriers.

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[67] *See Ivy Broadcasting Co. v. AT&T*, 391 F.2d 486, 488-89, 494-95 (2d Cir. 1968); *Nw. Indiana Tel. Co. v. FCC*, 824 F.2d 1205 (D.C. Cir. 1985).

[68] *In the Matter of Use of the Carterfone Device*, 13 F.C.C.2d 420, 424, n. 3 (1968).

[69] 47 C.F.R. §§ 22.313(c)(1), 22.377, 24.232(c), 90.1319, 90.1333.

[70] 47 C.F.R. § 20.11(b), (c), (d).

The statute has always contained, and the rules have always reflected, a carrier-user distinction. The new rules create an exception for certain non-carrier ESPs, but this "exception" is premised on the same legal error identified by the D.C. Circuit in *Bell Atlantic* and *WorldCom*, *see infra* pages 33-34.

The *Order* imposes the carrier responsibilities and burdens described below on non-carriers, but gives none of the benefits of common carriage. This was legal error and arbitrary and capricious.

B. ESPs do not purchase exchange access service and do not provide telephone toll service.

1. The FCC erred by holding that ESPs have always purchased exchange access.

Paragraphs 956 through 958 of the *Order* conclude that ESPs have always purchased exchange access. The FCC reaches this result by erroneously equating its rule-based definition of "access service" with the statutory term "exchange access." It then compounds the error by equating "information access" with "exchange access" even though both terms are separately used in section 251(g).

Section 153(20) defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of

the origination or termination of telephone toll services." The exchange carrier is giving *an IXC* "access to" *end-users'* "telephone exchange services or facilities." End-users buy telephone exchange service; IXCs buy exchange access so they can provide telephone toll service to end users over their exchange service arrangement.

FCC rules define "access service" as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."[71] End-users pay FCC-mandated end-user access service charges to their LEC vendor.[72] End-users are *not* receiving section 153(20) exchange access under the plain reading of that definition. End-user access service under the FCC definition is merely the interstate component of section 153(54) telephone exchange service.

"Carrier's carrier" charges under section 69.5(b) do correspond to exchange access under the statute. The rule makes clear that the "service" is to interexchange carriers that "use local exchange switching facilities."

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[71] 47 C.F.R. § 69.2(b).

[72] 47 C.F.R. § 69.5(a).

Telephone toll service, telephone exchange service, and exchange access are different services.[73] The *Order* incorrectly treats access service under its rule and statutory exchange access as synonymous, but they are not.[74]

The FCC also implicitly concludes that "information access," as used in section 251(g), is the same thing as "exchange access" even though Congress specifically listed both terms in that section, and therefore intended that they not be given the same meaning. They are not the same. Congress decided that ESPs should obtain information access by purchasing telephone exchange service under the now-codified "ESP Exemption."

The reference to "information access" in section 251(g) was part of the transition Congress was making from the Modification of Final Judgment, *U.S v. AT& T*, 552 F. Supp. 131, 334-335 (D.D.C 1982) ("*MFJ*"), to a statutory approach. As explained by the Joint Explanatory Statement of the Committee of Conference, S. Conf.

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[73] *See Local Competition Order*, 15598-99 (Note the Section D heading before ¶186: "Interexchange Service is Not Telephone Exchange Service or Exchange Access.").

[74] This is evident by a simple comparison of 47 USC § 153(20) with 47 CFR § 69.5(b).

Rep. No. 230, 104th Cong., 2d Session at 123 (1996), the term came directly from, and is applying, the *MFJ* definition of "information access." The *MFJ* did not consider information access to be a category separate and distinct from telephone exchange services; "information access" was "the provision of specialized exchange telecommunications services by a BOC in an exchange area…"[75] Information access under the *MFJ* was a subcategory of telephone exchange service. It was *not* exchange access. Congress imported this directly into the Act.

In *WorldCom*, the D.C. Circuit rejected the FCC's efforts to conflate "information access" with "exchange access," and carve ESP traffic out of section 251(b)(5) through section 251(g).[76] Paragraph 958 of the *Order* tries to distinguish *WorldCom* by asserting that "by contrast, there is no evidence that the exchange of toll VoIP-PSTN traffic inherently involves the exchange of traffic between two LECs." This cryptic comment cannot justify an attempt to "carve out" ESP traffic that *is* between two LECs. The *Order* nonetheless imposes access reciprocal compensation that does not

[75] *AT&T MFJ*, 552 F. Supp. at 334-335 (emphasis added).

[76] 288 F.3d at 430-31.

meet the section 252(d)(2) "additional cost" mandate on VoIP traffic that is between two LECs.[77] *Bell Atlantic* or *WorldCom* do not allow this result.

Bell Atlantic remanded for an explanation of how "exchange access" could apply to ESPs.[78] The FCC never complied with that instruction. The *Order* once again treats "information access" as a form of "exchange access," but the FCC has never explained how the dissonant words in the two definitions can be read to mean the same thing. The *Order* still does not justify "how regarding noncarriers as purchasers of 'exchange access' fits with the statutory definition of that term."[79] The *Order* does not successfully rationalize "why [ESP] traffic is 'exchange access' rather than 'telephone exchange service."[80]

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[77] The new rules require an ESP's exchange carrier vendor to pay prices inconsistent with section 252(d)(2), and the LECs will certainly pass that on to Transcom. Since the FCC has now prevented CMRS-based service, Transcom is now functionally limited to using LECs. Thus, the FCC's excuse makes no sense.

[78] 206 F.3d at 8-9.

[79] *Id.* at 9.

[80] *Id.*

2. The FCC erred by holding that ESPs provide toll and purchase exchange access.

Telephone toll service is by definition a telecommunications service.[81] Non-carrier ESPs do not provide "telephone toll service." The FCC tried to get around this problem in paragraphs 945 and 957 of the *Order* by stating that VoIP providers provide "toll" and then equating "VoIP toll" with "telephone toll service." If a non-carrier can be said to provide "toll," then that term is necessarily broader (and different) than "telephone toll service," as defined by the Act. The Act says that only telephone toll service is subject to exchange access. The FCC's efforts to interpret the Act by omitting inconvenient words must fail.

C. The FCC illegally subjected ESPs' toll traffic to access reciprocal compensation.

The rules impose higher costs on Transcom in two ways. First, the holding that ESPs purchase exchange access means that Transcom can no longer directly contract with an exchange carrier for telephone exchange service. Second, Transcom's exchange service vendors now must pay access reciprocal compensation for

[81] *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7543 (2006).

Transcom's traffic that is deemed to be "toll VoIP-PSTN," whereas before they did not since the traffic was subject to the section 252(d)(2) additional cost constraint. Transcom's vendors will of course pass this additional cost on to Transcom.

Neither of these results pass statutory muster. Transcom has the statutory right to purchase telephone exchange service from exchange carriers and cannot be compelled to purchase exchange access. Further, sections 251(b)(5) and 251(g) do not authorize a terminating LEC to assess a non section 252(d)(2)-compliant price on traffic delivered from another exchange carrier that is delivering telephone exchange service traffic for termination.

D. The FCC inexplicably reversed prior decisions authorizing CMRS providers to provide telephone exchange service to ESPs.

Only carriers (applicants "authorized to provide service") can obtain telephone numbers ("numbering resources").[82] Non-carrier end-users, including interconnected VoIP providers and other ESPs, indirectly obtain numbering resources by establishing a *carrier-user*

[82] *See* 47 CFR § 52.15(g)(2)(i).

relationship with an exchange carrier.[83] Interconnected VoIP providers, for example, "have to partner with a local exchange carrier (LEC) to obtain North American Numbering Plan (NANP) telephone numbers" by "purchas[ing] a retail product (such as a Primary Rate Interface Integrated Services Digital Network (PRI ISDN)[84] line) from a LEC, and then us[ing] this product to interconnect with the PSTN in order to send and receive certain types of traffic between its network and the carrier networks."[85]

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[83] *In the Matter of Administration of the NANP*, 19 FCC Rcd 10708, 10709 (2004)("VoIP providers offering interconnection with the [Public Switched Telephone Network] typically obtain [telephone] numbers through services offered by local exchange carriers and do not obtain telephone numbers from the numbering administrators (i.e., the NANPA or PA), because in most cases they are not certified as a carrier by a state.").

[84] ISDN is a telephone exchange service that provides a high-capacity digital connection to end-user CPE. There are two types. (1) ISDN BRI (2B+D) provides the equivalent of 2 digital voice-grand channels (64 kbps) and one control channel. (2) ISDN PRI (23B+D) provides the equivalent of 23 digital voice-grade (B) channels, and has 1 "data" (D) or control channel over a 1.5 MBPS circuit. Small businesses and residential end-users often use ISDN BRI. Large business customers and ESPs typically purchase ISDN PRI, because it allows for flexible and dynamic control by the end-user of the entire 1.5 MBPS capability from the LEC, and also allows end-user call control signaling flexibility.

[85] *In the Matter of Administration of the NANP*, 20 FCC Rcd 2957, 2959 (2005).

In 2008, the FCC amended its rules to expressly allow CMRS providers to engage in ESP wholesale numbering partner service in competition with LECs. It required LECs to port numbers in to a CMRS provider upon request when the CMRS provider is serving an interconnected VoIP provider, and it made special implementing provisions within its porting rules to facilitate this competition.[86]

T-Mobile[87] specifically required ILECs to let CMRS providers have ISP-bound terms. ISP-bound traffic to an ESP served by a CMRS provider is non-access traffic. Thus, in 2005 and then again in 2008, the FCC specifically amended its rules to clarify that CMRS carriers can provide telephone exchange service to ESPs, and correctly characterized the traffic as retail and non-access.[88] In the CMRS context, that necessarily means that traffic from a PSTN

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[86] *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531, 19549-50 (2007).

[87] *In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, 20 FCC Rcd 4855, 4856, 4865, ns. 6, 14, 16 (2005).

[88] CMRS providers have always provided telephone exchange service, *Local Competition Order*, 11 FCC Rcd at 16999, ¶1013, so express recognition that this can include service to an ESP did not make new law.

caller to an ESP's CPE and traffic from an ESP's CPE to a called party on the PSTN is intraMTA if the ESP's CPE and the other party are both in the same MTA.

Paragraphs 1005 and 1006 of the *Order*, which discuss Halo by name and Transcom by implication, abruptly and without explanation depart from the FCC's prior precedent and rules. Paragraph 1006 holds that Halo is providing transiting (rather than telephone exchange service to Transcom), and it holds that traffic is subject to the intraMTA rule "only if the calling party initiating the call has done so through a CMRS provider."[89] The FCC went so far as to question whether a CMRS numbering partner arrangement (which was suddenly transmuted from telephone exchange service to transiting) is even a "CMRS service,"[90] even though it had expressly blessed service to ESPs in *T-Mobile* – which was in *this proceeding* – and in the porting context.

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[89] The FCC failed to apply its prior holdings that CMRS providers like Halo can be a numbering partner to ESPs by providing a retail "ISDN-like" service. Instead, the FCC looked through this arrangement to see if the distant "calling party initiating the call" was a CMRS subscriber–even though the "calling party" is not Transcom's customer or Halo's customer.

[90] *See Order* at n. 2128.

Halo and Transcom advised the FCC that they were merely doing what the FCC had specifically authorized in 2005 and 2008. [J.A. __]. The FCC nonetheless chose to abruptly and without any explanation reverse course by characterizing CMRS numbering partner service to ESPs as transiting rather than telephone exchange service. By questioning whether number partner service is even CMRS at all, the FCC has effectively guaranteed that CMRS providers will not participate in this market.

The FCC's new approach to CMRS numbering partner service stands in stark contrast to its treatment of ESP traffic when a LEC is the numbering partner. Paragraph 1006 of the *Order* holds (incorrectly) that Transcom is not an end-point on its CMRS numbering partner's network for ICC purposes, but elsewhere the *Order* inconsistently provides that a call from the PSTN to a LEC numbering partner and then handed off to a VoIP provider for delivery in some distant location on some other ultimate network constitutes a termination on the exchange carrier's network for ICC purposes. *See* rules 51.703(c) and 51.913(b).

The FCC's disposition even as to LEC numbering partner service is, however, internally and logically inconsistent. LEC

wholesale partners to VoIP providers are treated as the originating carrier for ICC purposes because they bear the ICC burden,[91] but the determination of whether a call is non-access telecommunications or access reciprocal compensation is based on the geographic location of the actual IP end-point, which often will be on a completely different network, or on the Internet. Thus, an exchange carrier acting as a wholesale partner is simultaneously *originating* the call and *not originating* the call for ICC purposes. Further, even though the exchange carrier is actually providing telephone exchange service (or exchange access, according to the FCC) to the ESP, and it is not providing a telephone toll service, it is nonetheless assigned telephone toll compensation burdens for "LEC-LEC" traffic that do not comport with section 252(d)(2).

The FCC arbitrarily, capriciously, and without acknowledgement or explanation, reversed prior precedent by effectively preventing CMRS providers from acting as wholesale or numbering partners to ESPs, thereby depriving Transcom of a

[91] *See Order* ¶¶ 721, 729, 980, 998, 1006 (explaining that the "originating" carrier is cost-responsible, and applying to VoIP even if the calls starts on other network).

significant source of competitive supply for exchange services. Transcom is now largely limited to LEC-provided services, and has to try to survive within the FCC's new regime for ESPs that receive LEC-based service, including the massive cost increase occasioned by the *Order* because its LEC vendors now pay access reciprocal compensation rather than non-access reciprocal compensation on LEC-LEC traffic.

E. The FCC engaged in faulty adjudication.

The ILECs asserted that Transcom is an IXC.[92] Transcom showed that it is not a common carrier, and more important, provides enhanced/information services.[93] Transcom supplied several federal court rulings directly so holding.[94]

The FCC did not decide this question in paragraph 1006 of the *Order*. The FCC did not apply the appropriate analysis for common

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[92] *See, e.g.,* TDS, *et al.* September 23, 2011 *ex parte* slide 28.

[93] Transcom November 9, 2011 *ex parte*, p. 2 and attachments; Transcom October 17, 2011 *ex parte*, pp. 2-3.

[94] *Id.*

carriage.[95] The FCC certainly could not just impose common carrier status without careful analysis and individualized attention to Transcom-specific facts.[96] There is no "unfettered discretion in the Commission to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve. The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities."[97]

Since the FCC did not find common carriage, the necessary result is that Transcom is an end-user. As an end-user, Transcom is able to purchase telephone exchange service, and Transcom's

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[95] *NARUC v. FCC*, 525 F.2d 630, 641-642 (D.C. Cir. 1976) (*NARUC I*) (carrier must voluntarily undertake "to carry for all people indifferently"; or it is decided there will be "any legal compulsion thus to serve indifferently, and if not, second, whether there are reasons implicit in the nature of [the entity's] operations to expect an indifferent holding out to the eligible user public"); *NARUC v. FCC*, 533 F.2d 601, 608-610 (D.C. Cir. 1976)(*NARUC II*)("to be common carrier one must allow customers to "transmit intelligence of their own design and choosing")(collectively "*NARUC*").

[96] If the FCC had undertaken to decide the question the only evidence on any of the *NARUC* prongs came from Transcom and conclusively demonstrated that Transcom is not a common carrier. The ILECs' "proof" was vigorous assertion and *ipse dixit*.

[97] *NARUC I*, 525 F.2d at 644.

CPE is an end-point where calls originate or terminate for compensation purposes. But the FCC did not follow this mandatory course. Instead, it held in paragraph 1006 of the *Order* that Halo was providing transiting – which involves a *carrier-carrier* relationship rather than a *carrier-user* relationship.[98] The FCC unlawfully deprived Transcom of its end-user status, but it never actually held that Transcom is not an end-user.

The FCC also singled out Halo/Transcom and made entity-specific adjudicatory findings concerning the specific service that Halo was providing and Transcom was receiving. Specifically, the FCC's "transiting" finding necessarily means Halo was not providing telephone exchange service to Transcom, and was instead engaging in carrier-carrier activity. The FCC could reach its desired result only if Transcom is a common carrier, but it did not resolve that first-order question.

[98] *See Order* ¶ 1311. The FCC did what the D.C. Circuit held it could not do in both *Bell Atlantic* and *WorldCom*: treat an ESP as an intermediate rather than an end-point for ICC purposes.

The analysis was incomplete, arbitrary, and inconsistent. The FCC's faulty adjudication of the Halo/Transcom issue must be reversed.

F. The FCC unlawfully extended call identifying rules and "must-carry" rules to non-carriers.

An agency can impose rules on entities subject to regulation even when there are "relatively immediate effects for parties beyond those directly subject to regulation."[99] There is a difference, however, between rules mandating or prohibiting action by a regulated entity that has an effect on others, and rules that specifically target unregulated entities. The rules in *Nat'l Cable & Telecomms. Ass'n* applied "only to [regulated] cable companies, however, and they neither require nor prohibit any action by [unregulated] MDUs."[100] In contrast, the signaling and blocking rules in the *Order* do directly regulate non-carriers.

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[99] *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 666 (D.C. Cir. 2009). Rules applying to regulated entities cannot exploit a perceived ambiguity to "render nugatory restrictions that Congress has imposed," *Nat'l Cable & Telecomms. Ass'n*, 567 F.3d at 666, *citing AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005), and as shown above that has occurred here too.

[100] *Nat'l Cable & Telecomms. Ass'n*, 567 F.3d at 667.

1. The FCC's call identifying obligations impermissibly regulate non-carriers.

New rule 64.1600(f) defines "intermediate provider" as "*any entity* that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic."[101] This sweeping coverage extends far beyond common carriers or even interconnected VoIP providers; it includes anyone that touches traffic but does not originate or terminate. Since the FCC apparently believes that traffic does not originate or terminate at a "leaky PBX," the new rule regulates thousands of enterprises with corporate networks like the one in *ARCO*. Transcom is an "intermediate provider" under this definition, since paragraph 1006 of the *Order* holds that Transcom does not originate traffic. Transcom and every other non-carrier private network operator that in any way connects to the PSTN using a leaky PBX are now regulated entities under new rule 64.1601(a)(2).

Paragraph 718, note 1232, of the *Order* asserts that Title I provides jurisdiction to impose call identifying obligations on non-common carriers because "the regulations are reasonably ancillary

[101] (emphasis added).

to the Commission's effective performance of its statutorily mandated responsibilities."[102] Title I, however, does not give "untrammeled freedom to regulate activities over which the statute fails to confer….Commission authority."[103]

The call identifying rules assert plenary authority over entities that are not within Title II. The question is therefore whether there is a specific delegation that can be sufficiently stretched to allow this action. Note 1232 of the *Order* lists one statutory justification for the new rules: section 706 [47 U.S.C. § 1302], which is not even part of the Act. Section 706, however, "does not constitute an independent grant of…authority to employ other regulating methods."[104] In any event, section 706 pertains to broadband, but the call identifying rules relate to the PSTN. Section 706 does not

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[102] *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-692 (D.C. Cir. 2005)).

[103] *Comcast*, 600 F.3d at 661 (D.C. Cir. 2010)(internal quotes omitted).

[104] *Comcast*, 600 F.3d at 659 (citing *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 FCC Rcd. 24011, 24044, ¶ 69 (1998)); *see also* McDowell Dissent, 26 FCC Rcd at 18410 ("section 706 is narrow in scope and does not provide the Commission with specific or general authority to do much of anything").

even apply. The FCC's sole justification (section 706) for the assertion of sweeping plenary call identifying authority over non-common carriers fails.

2. The FCC unlawfully imposed "must-carry" obligations on non-common carriers.

Paragraph 974 of the *Order* prohibits interconnected and non-interconnected VoIP providers from "blocking" traffic. They must carry all calls. As noted, Transcom does not provide either of these services, so the requirement may not apply. If the FCC nonetheless intended to extend its "must-carry" ruling to Transcom, it acted far outside of its authority and was arbitrary and capricious.

An entity that is not a common carrier has the inherent right to "make individualized decisions, in particular cases, whether and on what terms to deal."[105] A non-common carrier can freely choose whether to serve, or not serve, and if it decides whether to serve it has the right to decide whether its service will, or will not, include certain capabilities. Transcom can choose where it wants to provide service, and where it wants to *not* provide service. Transcom has absolutely no duty to indifferently serve. Since Transcom is not an

[105] *NARUC I*, 525 F.2d at 641.

FCC licensee of any sort, it has no obligation to carry content-neutral information to any and all destinations selected by its customer.

The "must carry" obligation (if it applies) imposes a carrier burden on Transcom, results in higher termination costs for Transcom, particularly in rural areas,[106] and forces Transcom to send traffic to these new high-cost areas even when it does not wish to do so.

The FCC cannot conscript Transcom into this kind of servitude. The FCC's call identifying rule and the "must-carry" obligation (if it applies to Transcom) are far beyond the FCC's authority and are arbitrary and capricious.

[106] Paragraph 974 of the *Order* recognized that the new rules create an incentive to "block" in order to avoid high access costs.

CONCLUSION

The FCC is acting under the statute it wishes it had, not the statute it has. "[N]otwithstanding the difficult regulatory problem of rapid technological change posed by the communications industry, the allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer."[107] The FCC is straining to implement its preferred policy *despite* the Act, rather than consistent with it. The FCC is asserting powers it simply does not have, and doing things that the Act does not permit. The FCC does not have the discretion, or general or ancillary jurisdiction, to ignore statutory requirements or prohibitions by conflating the distinctly different rights, duties, and obligations assigned to carriers on the one hand and end-users on the other. Nor can it so casually assign the duties of one on the other, or confer the benefits of one on the other, in the absence of specific authority.

In particular, the FCC cannot turn non-carrier ESP end-users into carriers or *quasi*-carriers, but that is precisely what it did to

[107] *Comcast*, 600 F.3d at 661.

ESPs in the *Order*. The holding that ESPs purchase exchange access rather than telephone exchange service is flatly inconsistent with the Act's definitions. The holding that an ESP's exchange service vendor must pay non-cost based termination charges violates section 252(d)(2).

Ultimately, the FCC has repeated and compounded the error identified by the D.C. Circuit in *Bell Atlantic* and *WorldCom* by treating ESP CPE as an intermediate switching point rather than end points from which calls originate or terminate for compensation purposes. The FCC's imposition of "call identifying" rules on "any entity that carries or processes traffic that traverses or will traverse the PSTN at any point" impermissibly regulates end-users operating private networks. The imposition of must-carry obligations on non-carriers has no basis in the Act.

Transcom asks this Court to hold unlawful and vacate the *Order*.

Respectfully submitted,

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October 23, 2012

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October 23, 2012