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 ENHANCED SERVICES, INC.'S REPLY BRIEF
(DEFERRED APPENDIX APPEAL)

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By Its Counsel

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I. Introduction.

In *Arlington* the Supreme Court discussed, but did not answer, whether the FCC can impose common carrier duties on enhanced/information service providers.[1] Transcom Enhanced Services, Inc.'s ("Transcom") petition presents that issue. The *Order* eliminates Transcom's statutorily-prescribed "end-user" status, and requires Transcom to assume common carrier burdens.

Transcom challenged the ruling on whether the "Halo/Transcom" arrangement fits within the "intraMTA" rule. Transcom also directly challenged other, broader rulings relating to the "ICC"[2] associated with Transcom's purchase of telephone exchange service from LECs, and imposition of two other common carrier burdens.

FCC Response Brief ("FCC Br.") 14-16 characterizes Transcom's arguments as "difficult to decipher" and contends they "make no sense." FCC's feigned incomprehension arises from a stubborn refusal to accept the results compelled by statute, binding

[1] *Arlington v. FCC*, __ S. Ct. __ (May 20, 2013), Op. at 6-8.

[2] "ICC" stands for *inter-**carrier*** compensation.

precedent, and even its own longstanding rules. FCC claims it is "unclear whether Transcom qualifies as an ESP" but admits it "made no finding." FCC fully knows a negative finding was not possible on the record before it. Two federal courts, in four different decisions, had no difficulty finding that Transcom *is* an ESP, is *not* a carrier, *is* an end-user and is *access-exempt* under the Act.

The FCC Response does not demonstrate that the *Order* passes muster, even under a *Chevron*[3] deference analysis. To the contrary, it illuminates a desire for unbridled discretion and freedom to wander far outside of Congress' delegation and statutory proscriptions.

Transcom's petition invokes two questions: (1) does the statute allow the FCC to impose ICC access charges on traffic processed by non-carriers who subscribe to an exchange carrier's "local" service for use as an input to an enhanced/information service output, and (2) can the FCC force Transcom to hew to its common carrier call identifying and/or must carry requirements?

[3] *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

II. Transcom *is* an ESP, and is suffering improper regulatory attacks.

Transcom does process a call "in the middle." But that is what ESPs have *always done*. Transcom is an "end-user" and employs "CPE"[4] rather than "telecommunications equipment." Transcom Br. 2, 10. ESPs purchase telephone exchange service to originate calls to or receive calls from the PSTN. ESPs "pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, even for calls that appear to traverse state boundaries."[5] FCC's current interpretation ignores why the "ESP exemption" was necessary in the first place.

Transcom's efforts to preserve its non-regulated end-user "non-access" status are indeed "controversial." There has been recent "intense scrutiny by regulators."[6] But that is because the FCC refuses to accept the consequence of Transcom's judicially-recognized ESP status, and has seized on the dispute as a way to

[4] 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). Transcom Br. 7. The FCC Brief does not even address the key question of whether Transcom uses "CPE" or "telecommunications equipment."

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

[6] FCC Br. at 4.

expand its reach to activities Congress expressly told FCC to leave alone.

FCC no longer likes the end-user/common carrier binary construct baked into the Communications Act. It disagrees with Congress' decision to codify the "ESP exemption" by treating ESPs as rating end-points where local calls originate and terminate. Congress' express statutory prohibition against common carrier regulation over businesses that use telecommunications to provide enhanced/information services, but do not themselves offer or provide telecommunications, impedes the FCC's overreaching regulatory zeal.

Transcom purchased "DataVoN" bankrupt assets in 2003. The court held that DataVoN was a "provider of wholesale enhanced information services." JA ___, Exhibit 1, p. 4, ¶20. AT&T ignored that ruling, and threatened to "disconnect" Transcom in 2004, precipitating another case. The second court, on three separate occasions, directly held that Transcom "is not an interexchange (long-distance) carrier" and offers "enhanced capabilities." The court repeatedly held that Transcom's traffic is not subject to exchange

access. (JA ___, Exhibit 2, pp. 5-6, Exhibit 3, pp. 2-3, Exhibit 4, pp. 2-6).

FCC Br. 7 characterizes Transcom as an "access charge avoidance" schemer, in concert with Halo, its exchange service vendor. Apparently two federal judges, in four different decisions participated in this alleged "access avoidance" "scheme." But if exchange access does not apply, there is no "access" to "avoid."

Incredibly FCC Br. 19 goes on to *admit* Transcom can purchase "local" telephone exchange service as an end user. *But see Order* ¶¶956-958; Transcom Br. 32-36. The further admission that Transcom's CPE is in the same local calling area as the termination point necessarily means the calls are "local" and exchange access cannot apply.

III. Binding precedent says it ***is*** "two calls."

FCC exposes its efforts to re-write the law at FCC Br. 8, 14-15, 20 when it accuses Transcom of engaging in "flawed" reasoning by "breaking the call in two." FCC insists there is a "single call." *Order* ¶1006 and FCC Br. 8 characterize Transcom's activity as a "re-origination."

Transcom's position is firmly rooted in the statute and precedent. The same issue was directly presented in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), involving the FCC's *ISP Declaratory Ruling*.[7] There, CLECs and ISPs said the same thing: ESPs are an end-point, where calls originate or terminate for ICC purposes, even if the ESP then originates a further communication after performing its enhanced/information function. The FCC, as here, refused to accept that the communication is "broken in two" for ICC purposes. 14 FCC Rcd 3697-3701, ¶¶12-16.

Bell Atlantic overruled the FCC, noting that "the extension of 'end-to-end' analysis from jurisdictional purposes to the present context yields intuitively backwards results" (206 F.3d at 6): "ISPs, in contrast, are 'information service providers,'…which upon receiving a call originate further communications…ISP's origination of telecommunications as a result of the user's call is instantaneous…But this does not imply that the original communication does not 'terminate' at the ISP." 206 F.3d at 7. It is

[7] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (1999).

the FCC's position that is "flawed." Transcom *is* "the party initiating the call" and calls do originate and terminate in the same local area.

The FCC established Docket 01-92 to address the *Bell Atlantic vacatur* and issued the *ISP Remand Order*.[8] The D.C. Circuit again reversed in *Worldcom*. After several years of delay, FCC finally got it right in its 2008 *Core* order,[9] affirmed in *Core Mandamus.* These decisions were rendered in the same proceeding as the *Order*, and are binding precedent.[10]

The FCC obdurately refuses to accept the principles established by *Bell Atlantic*, *Worldcom* and *Core Mandamus*. The

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[8] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001), *rev'd WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[9] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 24 FCC Rcd 6475 (2008), *aff'd Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010).

[10] Indeed, they likely also fall under "the law of the case" doctrine, which applies to agencies. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 823 (10th Cir. 2007); *Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir. 2002); *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1280 (10th Cir. 2010); *Guidry v. Sheet Metal Workers Int'l Ass'n*, 10 F.3d 700, 705 (10th Cir. 1993), *cert. den.* 514 U.S. 1063 (1995). If resolution of the issue was a necessary step in resolving the earlier appeal, then the resolution is part of the law of the case. The law of the case doctrine generally requires this Court "to respect any decision of a sibling circuit issued at an earlier stage of the case." *Howard v. Zimmer, Inc.*, 711 F.3d 1148, 1151-1152 (10th Cir. 2012).

D.C. Circuit was exercising direct review of prior FCC orders in the same case (Docket 01-92), or precursors to it, and applied *Chevron*. *Bell Atlantic*, 206 F.3d at 9; *Worldcom*, 288 F.3d at 432; *Core Mandamus*, 592 F.3d at 193.

Bell Atlantic established that calls terminate to and originate from ESP CPE. The D.C. Circuit expressly distinguished between the jurisdiction of a communication (under "end-to-end") and the ICC rating flowing from ESP end-user status. 206 F.3d at 5-8. *Worldcom* again rejected the FCC's effort to remove ESP traffic from reciprocal compensation. 288 F.3d at 431.

Core Mandamus reviewed the FCC's response to the *Worldcom* remand. FCC finally accepted that ESP traffic is subject to §251(b)(5) (with ESP as end-point), but went on to hold it could nonetheless set the rate for this species of reciprocal compensation traffic because it is jurisdictionally interstate and thus §201 also applies. The D.C. Circuit re-affirmed *Bell Atlantic* and *Worldcom*, but agreed that the FCC has §201 rate setting power for interstate §251(b)(5) traffic. *Core Mandamus* affirmed because the FCC finally got it right: ESP communications "involve[] interstate

communications *that are delivered through local calls*." 592 F.3d at 143 (emphasis added).

FCC expressly adopted the position that the ESP's CPE location is the determinative rating "end-point" in a 2006 *amicus* brief submitted to the First Circuit. *See Global NAPs, Inc. v. Verizon New Eng., Inc.*, 444 F.3d 59 (1st Cir. 2006). Yet FCC has now returned to the notion that ESPs are "intermediate" points for ICC purposes, the very point on which *Bell Atlantic* reversed and vacated.

FCC can set the rate for jurisdictionally interstate ESP-related traffic handled between exchange carriers under §201, but it must comply with §252(d)(2) given that §251(b)(5) also applies. The binding precedent (which flows directly from the statute) is that ESPs *are* end-users and for *ICC* purposes calls originate from and terminate to ESP CPE. The §252(d)(2) "additional cost" criterion applies. "Access" does not meet that standard.

IV. FCC cannot distinguish between ESPs.

FCC Br. 18-19 claims *Bell Atlantic*, *Worldcom* and *Core Mandamus* addressed "only" "Internet Service Providers" and "dial-up" traffic and thus do not apply to Transcom. This is a gross

mischaracterization. *Bell Atlantic* used "ISP" to stand for "Information Service Provider" (206 F.3d at 6). Transcom has consistently asserted (and two federal courts found on four separate occasions) that it provides information service. Transcom is, therefore, an "ISP." FCC admits it did not find Transcom is *not* an enhanced/information service provider.

Regardless, the FCC's effort to distinguish here is undercut by its heavy reliance on the same cases for much broader purposes, including even legacy traffic. FCC ICC Br. pp. 17 (n.5), 19, 23-24;[11] *Order* ¶¶763 (n.1366), 768 (n.1383), 770 (n.1389), 771 (n.1392). FCC simultaneously inflates and collapses this precedent for strategic ends.

Order ¶946 and note 1905 claim untrammeled FCC discretion to decide whether a specific ESP, or a particular enhanced/information service, "deserves" the ESP exemption. The FCC pretends it can transitorily do as it wishes with "VoIP." Congress said different.

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[11] FCC's ICC Br. 24 asserts "nothing in the court's analysis [in *Core Mandamus*] is logically limited to the specific traffic at issue in that case (Internet Service Provider-bound traffic), which was just one subset of the overlapping 'inter-LEC connection[s]' described in its analysis."

The FCC never interpreted its rules to distinguish between different ESPs or enhanced services before 1996, which is when Congress codified the ESP Exemption (Transcom Br. 18).[12] In *Computer Inquiry* the FCC initially contemplated differentiating between "voice" and "non-voice" services, with only "non-voice" services being "enhanced." The *Computer Inquiry* Commission later decided that "enhanced" services could include "voice" capabilities. "An enhanced service is any offering over the telecommunications network which is more than a basic transmission service." *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417-421, ¶¶89-98 (1980) (quoting ¶97, emphasis added). "Voice and data" applications can be enhanced if the enhanced/information definitional criteria are otherwise met. *Id.*

All ESPs are end-users and all ESP CPE is an ICC end-point. The FCC does not have discretion to unilaterally decree that **some** ESPs or enhanced/information services should be "end-user"

[12] Congress passed the 1996 amendments and the FCC soon thereafter held that under the revised Act "all enhanced services are information services." *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, 21955-21956, ¶103 (1996).

winners, while *others* are carrier-like "intermediate" access, call-identifying and/or must-carry losers.

V. Counsel's *post-hoc* rationalizations do not save the *Order*.

FCC Br. 4-7, 17-18, 20 relies on "evidence" that was not before the FCC at the time of the *Order*, and makes legal arguments not contained in the *Order*. The Court is confined to review of the reasons stated in the *Order*. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 50 (1983); *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). The agency's reasoning is the focus; *post hoc* rationalizations of counsel must be disregarded. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *Sorenson Communs. v. FCC*, 567 F.3d 1215 (10th Cir. 2009); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). Judicial review is based entirely on the administrative record. 5 U.S.C. §706(2)(E). The Court cannot consider, much less be swayed by, self-serving "facts" first presented in the agency's brief.

Each state commission decision mentioned at FCC Br. 4-7, 18 and note 5 was rendered *after* the *Order*. The *Order* was the primary

basis for each. The state commissions had no choice but to implement the *Order* in their arbitral decisions because they are bound pending review by this Court.[13]

Section 153(24) requires that Transcom's regulatory status be based on what Transcom "offers" to *its direct customer*. The "Granddaughter in California" depicted on FCC Br. 6 is not Transcom's customer. The picture purposefully omits a representation of Transcom's customer, and ignores what Transcom's system does when the communication *from Transcom's customer* terminates on Transcom's enhanced/information system for enhanced/information processing. The picture then picks back up where Transcom's CPE "originates a further communication" over Halo's telephone exchange service in the same MTA as the "Grandmother in N.C." The "further communication" is intraMTA.

[13] State PUCs conducting arbitrations and federal courts reviewing PUC arbitrations are bound by FCC regulations for so long as they are in force. The *Order* can only be attacked through the Petitions for Review pending before the Court. *Pac. Bell Tel. Co. v. Cal. PUC*, 621 F.3d 836, 843 (9th Cir. 2010); *US West Comms. Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002); *GTE S., Inc. v. Morrison*, 199 F.3d 733, 742-43 (4th Cir. 1999).

VI. The "clarification" of the "intraMTA rule" cannot be squared with prior FCC decisions.

The "intraMTA rule" was promulgated in the 1996 *Local Competition Order*, as Rule 51.701(b)(2) :

> (b) Local telecommunications traffic. For purposes of this subpart, local telecommunications traffic means:
> …
> (2) telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.[14]

There is no factual dispute that Transcom's CPE and the delivery point for Halo service was *always* in the same MTA as the terminating location. The "controversy" is whether Transcom's CPE is the rating origination point, or an "intermediate" point. The image on FCC Br. 6 clearly depicts Transcom's service delivery point from Halo in the same MTA as "Grandmother." If Transcom's CPE is an end-point and originates calls, then the call is intraMTA.

"Local" (intraMTA) traffic is subject to §251(b)(5). When a CMRS end-user originates a call that terminates to an ILEC end-

[14] This Court compared and contrasted §51.701(b)(1) and (2) in *Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1264-1268 (10th Cir. 2005). State commissions define "LEC" local areas. FCC exercised its authority over wireless and decreed that the MTA is the "local area" for CMRS purposes.

user in the same MTA (or *vice-versa*), the "intraMTA rule" applies. FCC's decision to apply §251(b)(5) to "intraMTA" invokes the "additional cost" standard in §252(d)(2). *Atlas*, *supra*.

The 2005 *T-Mobile* decision[15] required ISP-bound terms for "non-access" (intraMTA) traffic. FCC necessarily contemplated that CMRS could provide telephone exchange service to ESPs, and the traffic would be subject to the "intraMTA rule" if the call originated from or terminated to ESP CPE in the same MTA "local calling area" as the ILEC end-user. Transcom Br. 38-39.

FCC amended its rules in 2007 to ensure CMRS providers can be "number partners" for ESPs by providing telephone exchange service to them. *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers*, 22 FCC Rcd 19531, 19549-50 (2007). The 1996, 2005 and 2007 decisions all contemplated that CMRS can provide telephone exchange service to ESPs, and the ESP's CPE location determines whether the call is "intraMTA." Transcom Br. 36-42.

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[15] *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 (2005).

The *Order* abruptly and retroactively held (in the guise of "clarification") that the "controversial" service Halo (a CMRS provider) was providing to Transcom (an ESP) was not "local" even though Halo and Transcom were doing *exactly* what the FCC had multiply said was local, expressly permitted, and something it wanted to encourage.

The *Order's* purported "clarification" of the "intraMTA rule" is no such thing. It was a retroactive reversal of prior decisions approving CMRS-based telephone exchange service to ESPs with the ESP CPE as an end-point. The *Order*, without any explanation, interpreted the "intraMTA rule" to prohibit CMRS-based telephone exchange service to ESPs through the numbering partner arrangements it had expressly authorized only a few years ago. The FCC Response does not acknowledge, much less try to distinguish, these decisions. It merely denies that the "intraMTA" rule ever contemplated that ESP CPE could be an end-point, and then retreats into a plea for *Auer*[16] deference. The radical change from prior interpretations and decisions backwardly eliminates ESPs'

[16] *Auer v. Robbins*, 519 U.S. 452 (1997).

long-held "end-user" and "end-point" status under the "intraMTA rule.

Auer deference does not apply when "an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). If an agency's interpretation "under the guise of interpreting a regulation, [created] *de facto* a new regulation," *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000), or subjects a party to "unfair surprise" and potential liability for prior conduct, *Auer* deference is inapplicable. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-70 (2012); *see also Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011), (Scalia, J., concurring but questioning continued propriety of *Auer* deference).

The FCC never, until the *Order*, interpreted the "intraMTA rule" to exclude ESP traffic. To the contrary, the Commission on at least three occasions made decisions which necessarily treated the ESP CPE as an ICC end-point. Transcom relied on the prior interpretations, and had no notice the FCC would abruptly change

its position to exclude ESP traffic *on a retroactive basis* through a "clarification" of the intraMTA rule.

VII. FCC authority to impose "call identification" and "must-carry" on non-carriers was preserved below.

FCC Br. 11, 21 and 24-25 incorrectly asserts that FCC was not given an opportunity to pass whether it has authority to promulgate binding "call identification" and "must-carry" rules on non-carriers. VON and Google, among others, directly challenged extending regulation to non-carriers in both regards. (JA __ (Vonage); __, __ pp. 3-5, __ p. 6, (Google); __, __, __ pp. 6-62 (FGIP). These questions are ripe for review and properly before the Court under §405(a).

VIII. The Order fails *Chevron* steps 1 and 2.

The core question is whether any substantive provision of the Communications Act allows the FCC to extend its common carrier "access," "call identifying" and "must-carry" rules to non-carrier Internet-based information service providers using "ancillary" authority.

An agency receives deference only when there is "a statutory ambiguity" that constitutes an implicit delegation to gap-fill. *Arlington* Op. 1. The first step is "'whether Congress has directly spoken to the precise question at issue.'" *Id.* 4. Here, the Court makes a *de novo* and independent determination. *Toomer v. City Cab*, 443 F.3d 1191, 1195 (10th Cir. 2006). Agencies receive "no deference on the existence of ambiguity." *ABA v. FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). At both steps, courts must "tak[e] seriously, and apply[] rigorously, in all cases, statutory limits on agencies' authority." *Arlington* Op. 16.

Congress expressly withheld Title II authority over information service; the Internet has "economic and political significance" and should be "untrammeled" by state or federal regulation. Congress crafted a distinct regulatory scheme for information services, and directed that the Internet must remain "unfettered by…regulation," 47 U.S.C. §230(b)(2). Exchange access only applies to "telephone toll," which is by definition a "telecommunications service." An entity can be assigned common carrier duties only insofar as it ***is*** a common carrier. Section 153(11). An entity can be assigned "telecommunications carrier" obligations only insofar as it ***is***

providing "telecommunications service." Section 153(51). There is no ambiguity or gap for the FCC to fill, and FCC is illicitly trying to create a gap it can then unilaterally fill as it wants. Congress has directly spoken to the question, and precluded the FCC from regulating information service, or imposing carrier duties on non-carriers. *See, FDA v. Brown & Williamson*, 529 U.S. 120, 159-60-61 (2000).

Even when a statutory gap or ambiguity exists, a court can only defer to a *reasonable* construction. The FCC's construction of the Act is unreasonable because Congress decreed that the Internet must remain unregulated and prohibited the FCC from imposing carrier duties on non-carriers. 47 U.S.C. §§153(11), 153(51), 230(b)(2), 332(c)(2).

IX. Exchange Access does not apply to ESP traffic.

The FCC Response does not defend the part of the *Order*[17] opining that ESPs can be forcibly subjected to exchange access,

[17] *Order* ¶¶ 956-958 conjured up a non-statutory "toll" service category broader than the statutory definition of "telephone toll" and then subjected the broader "toll" category to exchange access, even though §153(20) limits the coverage of "exchange access" to "telephone toll." Transcom Br. 30-36. Underlying all of this, however, is the notion that ESP CPE is an "intermediate" point rather than an "end-point."

despite Transcom's direct challenge as to the service it wants to purchase from LECs. Transcom Br. 30-36. The FCC Response nakedly claims Transcom's local calls are "access." The Act forecloses the possibility that exchange access charges will apply to end-user telephone exchange service traffic, since neither the end-user nor the exchange provider is providing "telephone toll." The *Order* expressly applies exchange access to traffic that is not "telephone toll" in direct contravention of the Act.

The FCC's permitted actions, and the lawful ICC results it can prescribe for to "end-user" "telephone exchange service" traffic, are unambiguously constrained by the statute. The exchange carrier is providing "telephone exchange service" to an end-user; the traffic is "reciprocal compensation" under §251(b)(5) and the "additional cost" criterion in §252(d)(2) controls. "Access" pricing that does not comport with §252(d)(2) cannot apply to telephone exchange service traffic as a matter of law.

Chevron applies to the FCC's "exchange access" ruling, but the Commission failed to analyze the issue through the binding lens of ESPs as end-users and ICC end-points.

X. FCC cannot rely on ancillary jurisdiction to directly regulate end-users through "call identifying" or "must-carry."

The FCC Response does not try to defend the *Order*'s reliance on §706 as authority to impose call identifying rules on non-carriers. *See* Transcom Br. 47. The sole argument is that FCC can police carriers only if it extensively regulates end-users. FCC Br. 23-24, 26; *See also* FCC VON Response 11, 17, 19.

FCC cannot exercise direct regulatory control over Transcom's business or property. FCC cannot impose "call identifying" carrier rules to create a back-door method to "rate" the traffic as "access." FCC Br. 23-24 admits the sole purpose for extending the "call identifying" rule to non-carriers is to identify "access" traffic so carriers can bill it. The FCC cannot impose "no blocking" rules that then force the non-carrier to handle unwanted "access" traffic and pay access charges that cannot apply under the Act.

FCC Br. 21-24 justifies "ancillary" regulation over end-user ESPs by claiming it is necessary to enforce its Title II authority over carriers. FCC's expansive view of its ancillary authority must be judicially restrained:

> Were we to accept that theory of ancillary authority, we see no reason why the Commission would have to

> stop there, for we can think of few examples of regulations that apply to Title II common carrier services, Title III [radio] services, or Title VI cable services that the Commission, relying on the broad policies articulated in section 230(b) and section 1, would be unable to impose upon Internet service providers.

Comcast Corp. v. FCC, 600 F.3d 642, 655 (D.C. Cir. 2010).

The call identifying and must-carry rules were extended to non-carrier "intermediate" providers purely as an enforcement tool. FCC wants to police access treatment for ESP traffic by ensuring the exchange carrier vendor pays exchange access on traffic originated by an ESP using the exchange carrier's telephone exchange service. Since access cannot apply, however, the rules serve no lawful purpose. But regardless, Congress denied Title II regulation over ESPs. The FCC cannot do indirectly what it could not directly do, and that means FCC cannot use Title I to conscript ESPs into enforcement agents by imposing Title II obligations on them.

XI. FCC did not clearly admit Transcom is not bound by "must-carry."

FCC Br. 24-26 does not deny that the "must-carry" obligation is a common carrier obligation, or that it is extending it to non-carriers. The requirement to offer service indiscriminately and on

general terms is a *per se* common carrier obligation. *Cellco Partnership v. FCC*, 700 F.3d 534, 547 (D.C. Cir. 2012). *In the Matter of Preserving the Open Internet Broadband Industry Practices*, 25 FCC Rcd 17905, 17951, ¶79, n. 251 (2010) admits "no blocking" ("must-carry") is a "common carrier" duty. "Must-carry" requires a non-carrier to provide services it does not wish to provide, to support locations it does not wish to service.

FCC Br. 25 admits that Transcom is not bound by "must-carry." The admission, however, is premised on a faulty assumption: that Transcom does not provide "VoIP." That is not true. Transcom does provide VoIP; it simply does not provide "interconnected VoIP" or "non-interconnected VoIP." Transcom Br. 2, 48. "VoIP" is far more than just those two discrete things, and FCC well knows it. *In the Matter of IP-Enabled Services*, 19 FCC Rcd 4863, 4864-4879 (2004) (surveying then-current "VoIP").

FCC must unequivocally state whether Transcom's "VoIP" service is bound. For so long as the rule may in fact conscript Transcom into indiscriminately supporting high-access rate areas, and paying excessive access prices that should not apply, then Transcom has standing and the issue is ripe.

CONCLUSION

Congress expressly imposed limits. ESPs are not subject to regulation as common carriers. The Court must reject the FCC's efforts to extend its reach to activity Congress purposefully and unambiguously removed from FCC's all-controlling bureaucratic grasp.

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

Respectfully submitted,

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2. This filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 10th Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Bookman Old Style font.

3. All required privacy redactions have been made.

4. This filing was scanned for viruses with Kaspersky Endpoint Security, updated on June 12, 2013, and according to the program is free of viruses.

/s/ W. Scott McCollough

June 12, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on June 12, 2013, consistent with the "Order Governing Procedures for the Electronic Filing of All Briefs in the Consolidated Proceeding," I caused the foregoing document to be sent electronically to FCC_briefs_only@ca10.uscourts.gov in Adobe format with the subject line containing the 11-9900 case number and specifying that this is the "Uncited Transcom Enhanced Services, Inc.'s Reply Brief." I also certify that, consistent with the Order, this document will be furnished through ECF electronic service to all parties in this case through a registered CM/ECF user. This document will then be available for viewing and downloading on the CM/ECF system.

/s/ W. Scott McCollough

June 12, 2013