IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SEAN A. LEV
GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

LAURENCE N. BOURNE
JAMES M. CARR
MAUREEN K. FLOOD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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GLOSSARY

CMRS	Commercial Mobile Radio Service
ERTA	Eastern Rural Telecom Association
ESP	Enhanced Service Provider
FCC	Federal Communications Commission
ISP	Internet Service Provider
LEC	Local Exchange Carrier
MTA	Major Trading Area
NTCA	National Telecommunications Cooperative Association
PSTN	Public Switched Telephone Network
VoIP	Voice over Internet Protocol

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FEDERAL RESPONDENTS' FINAL RESPONSE TO THE
TRANSCOM PRINCIPAL BRIEF

ISSUE PRESENTED

In the *Order* on review,[1] the Federal Communications Commission ("FCC") resolved a dispute over the proper interpretation of its rule defining whether a call qualifies as a non-access or "local" wireless call for purposes of intercarrier compensation. The dispute arose when Halo Wireless, Inc. ("Halo") claimed that the traffic it received from petitioner Transcom (its sole customer) was locally originated wireless traffic (and was therefore exempt from access charges). *Order* ¶1005 (JA at 768-69). The record showed, however, that most of the phone calls Transcom handed off to Halo originated elsewhere as long-distance calls (and were therefore subject to

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[1] *Connect America Fund*, 26 FCC Rcd 17663 (2011) ("*Order*") (JA at 390).

access charges). The FCC rejected Halo's assertion that the transmission "of a call over a wireless link in the middle of the call path" somehow converted "a wireline-originated call into a [wireless]-originated call" for purposes of intercarrier compensation. *Id.* ¶1006 (JA at 769). Instead, the agency clarified that, for purposes of its intercarrier compensation rules, "a call is considered to be originated by a [wireless] provider" only if the "party initiating the call has done so through a [wireless] provider." *Id.*

Transcom, Halo's business partner, challenges the FCC's reading of its own rule defining non-access wireless traffic. Transcom also challenges the FCC's authority to adopt certain rules regarding "phantom traffic" and call blocking. The issue presented is whether Transcom's challenges to the *Order* are procedurally barred and/or substantively meritless.

COUNTERSTATEMENT

A. Regulatory Background

Historically, federal and state regulators generally have required providers of long-distance telephone service to pay access charges to local exchange carriers ("LECs") that originate and terminate long-distance calls. *See* FCC Preliminary Br. 4-5. By contrast, "non-access" (or "local") telephone calls have been subject to a different intercarrier compensation regime. *See id.* at 11-12. Under the new intercarrier compensation rules

adopted in the *Order*, both access and non-access traffic will transition to a "bill-and-keep" framework that will replace intercarrier compensation obligations. *See Order* ¶¶736-737 (JA at 631). The changes the FCC adopted in the *Order* "maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime" for non-access calls "and compensation owed under the access regime." *Id.* ¶1004 (JA at 768).

In determining whether a service is subject to access or non-access compensation under both the pre-*Order* and existing transitional regimes, the FCC has applied a different intercarrier compensation rule to calls involving common carriers that provide mobile wireless phone service (also known as Commercial Mobile Radio Service or "CMRS"). Unlike calls between two wireline carriers, calls between LECs and CMRS providers have been treated as non-access calls – and are therefore not subject to access charges – if they originate and terminate within the same Major Trading Area ("MTA") – a geographic designation. *Order* ¶1003 (JA at 768); *see also* 47 C.F.R. §51.701(b)(2) (defining intraMTA calls between LECs and CMRS providers

as "Non-Access Telecommunications Traffic").[2] Under a rule adopted by the FCC in 2005, LECs "may not impose compensation obligations for traffic not subject to access charges upon [CMRS] providers pursuant to tariffs." 47 C.F.R. §20.11(d); *see also Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4855 (2005), *pet. for review pending*, *Ronan Tel. Co. v. FCC*, 9th Cir. No. 05-71995 (oral argument scheduled May 7, 2013). Under this rule, LECs can receive *no* intercarrier compensation for "intraMTA" wireless calls except through contractual arrangements with CMRS providers.

B. The Halo/Transcom Business Arrangement

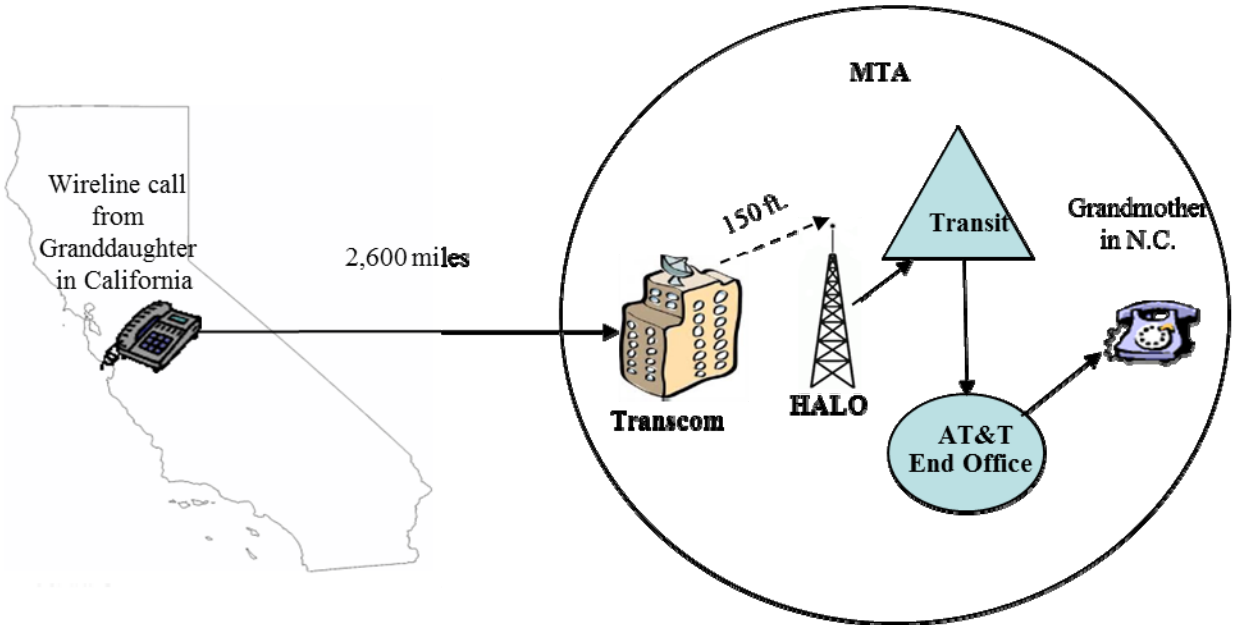
Seeking to take advantage of the "intraMTA rule," Halo and Transcom entered into a controversial business arrangement that has generated intense scrutiny by regulators and courts. Halo is a CMRS provider. *In re Halo Wireless, Inc.*, 684 F.3d 581, 584 (5th Cir. 2012). Transcom "is Halo's only paying customer and the source of 100% of Halo's revenues nationwide."

[2] An MTA is the largest FCC-authorized license area for wireless carriers. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16014 ¶1036 (1996). Typically, an MTA is much larger than a local calling area for wireline calls. For example, in North Carolina, there are only two MTAs, but over 400 wireline local calling areas. *BellSouth Telecomms., Inc. v. Halo Wireless, Inc.*, 2012 WL 4481442, *3 (N.C. Utils. Comm'n Sept. 27, 2012) ("*Halo North Carolina*"); *see also* 47 C.F.R. §24.202(a) (defining MTAs).

Halo Wireless, Inc. v. Craw-Kan Tel. Coop., Inc., 2012 WL 3544982, *7 (Mo. PSC Aug. 1, 2012) ("*Halo Missouri*").

Transcom and Halo "have 'overlapping' ownership," *Halo Missouri* *7, and they operate "in concert." *Id.* *9. Transcom sells a call "routing" service to long-distance carriers – *i.e.*, it serves as a link "in the middle of long-distance calls" between the originating and terminating points of the calls it handles. *Id.* *8. Transcom "aggregates third-party long distance traffic" from its customers "and then hands the traffic off to Halo." *Id.* *9. "Halo takes these calls from Transcom in one MTA" and delivers them to the terminating LEC "in that same MTA" via Halo's wireless network. *Re Halo Wireless, Inc.*, 2012 WL 3068512, *2 (Wisc. PSC Jul. 27, 2012) ("*Halo Wisconsin*").

Under this arrangement, for example, when a teenager in California uses her wireline phone to call her grandmother in Raleigh, North Carolina, the call "would travel across the country, eventually hit Transcom's equipment at a Halo/Transcom tower site [in the vicinity of Raleigh], [and] travel wirelessly to Halo for 150 feet." *Halo North Carolina* *6. Halo would then hand off the call "to AT&T, [the LEC that] would terminate the call in Raleigh on its [wireline] network." *Id.* The following diagram illustrates the call's path:



Typically, this wireline long-distance call from California to North Carolina would be subject to access charges under longstanding FCC rules. Yet when LECs such as AT&T sought to collect terminating access charges for the calls Halo sent to them, Halo asserted that Transcom "terminated [each] call and then originated a new call." *Halo North Carolina* *6. According to Halo, this "new" call was a wireless-originated intraMTA call and therefore not subject to access charges. *Id.*

Halo took this position even though Transcom "does not originate" any of the calls it passes to Halo or "decide who will be called (the calling party does)." *Halo Missouri* *10. "Transcom does not alter or add to the content of any call." *Id.* Rather, it "only tries to make the voice communications

[clearer] by suppressing background noise and adding comfort noise" (a feature that "other carriers normally provide … as an incidental part of voice service"). *Id.* For each call that Transcom hands off to Halo, the parties at either end of the call "place and receive calls in exactly the same way they would if Transcom did not exist." *Id.*

In response to Halo's assertion that the calls it received from Transcom were not subject to access charges, a number of LECs filed complaints against Halo with state regulatory commissions throughout the nation, seeking to collect payment for the termination of calls transmitted by Halo. "Because of the numerous suits filed against Halo," the company filed for Chapter 11 bankruptcy in August 2011. *Halo*, 684 F.3d at 585. Thus far, the state commissions that have adjudicated disputes involving Halo have invariably ruled against Halo. *See* note 5 below.

C. The *Order* On Review

As part of the rulemaking proceeding that led to the *Order* on review, the FCC sought comment on "the proper interpretation" of its intraMTA rule governing LEC-CMRS traffic. *Order* ¶1003 (JA at 768). In response, the Eastern Rural Telecom Association ("ERTA"), a group of rural LECs, told the FCC that Halo was engaging in a practice known as "phantom traffic" – *i.e.*, altering certain identifying information for the calls it delivered "to make

the traffic appear to be wireless," even though the calls were actually wireline-originated. Letter from Jerry Weikle, ERTA, to Marlene Dortch, FCC, Jul. 8, 2011, Attachment at 1 (JA at 2950) ("July 8 ERTA Letter"); *see also* Letter from Jerry Weikle, ERTA, to Marlene Dortch, FCC, Oct. 14, 2011, Attachment at 1 (JA at 3916). ERTA and another group of rural LECs, the National Telecommunications Cooperative Association ("NTCA"), produced evidence "indicating that most of the calls" delivered by Halo "either did not originate on a CMRS line or were not intraMTA." *Order* ¶1005 (JA at 769); *see also* July 8 ERTA Letter, Attachment at 3 (JA at 2952).

Halo contested these claims in a letter it submitted to the FCC in this proceeding. It maintained that the traffic it sends to LECs for termination is intraMTA wireless traffic because "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." Letter from W. Scott McCollough, Counsel for Halo, to Marlene Dortch, FCC, Aug. 12, 2011, Attachment at 9 (JA at 3158).

In the *Order*, the FCC clarified that "a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule" *only* if the "party initiating the call has done so through a CMRS provider." *Order* ¶1006 (JA at 769) (discussing 47 C.F.R. §51.701(b)(2)). The FCC further

stated that "the 're-origination' of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call" for purposes of intercarrier compensation. *Id.* The agency rejected "Halo's contrary position." *Id.*[3]

In addition, to address complaints about "phantom traffic" generally, the FCC adopted a rule to "prohibit service providers from altering or stripping relevant call information." *Order* ¶719 (JA at 624). The new rule requires "all telecommunications providers" and providers of interconnected Voice over Internet Protocol ("VoIP") service "to pass the calling party's telephone number (or, if different, the financially responsible party's number), unaltered, to subsequent carriers in the call path." *Id.* This rule is designed to ensure that terminating carriers receive the information they need to determine whether a call is subject to intercarrier compensation obligations, and (if so) which carrier is responsible for payment. The rule applies to any "intermediate provider" – that is, "any entity that carries or processes traffic that traverses or will traverse" the public switched telephone

[3] Because all telecommunications traffic will eventually be subject to a bill-and-keep framework under the new intercarrier compensation rules, *see Order* ¶¶736-737 (JA at 631), the intraMTA rule eventually will become irrelevant. During the multi-year transition to bill-and-keep, however, carriers will continue to collect access charges (albeit at transitional rates). *See id.* ¶¶739, 933 (JA at 632, 729).

network ("PSTN") "at any point insofar as that entity neither originates nor terminates that traffic." *Id.* ¶720 (JA at 624); *see also* 47 C.F.R. §64.1600(f).

SUMMARY OF ARGUMENT

In the *Order*, the FCC adopted a reasonable interpretation of its intraMTA rule. It also took sensible steps to guard against "phantom traffic" and to prohibit call blocking by VoIP providers. Transcom's challenges to these actions are unavailing. Many of Transcom's arguments are procedurally barred, and all of them lack merit.

I. An agency's interpretation of its own rule "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted). The FCC's reasonable reading of its intraMTA rule easily satisfies this deferential standard of review.

The rule in question defines as "Non-Access Telecommunications Traffic" (*i.e.*, local traffic that is not subject to access charges) any phone call "exchanged between a LEC and a CMRS provider that, *at the beginning of the call*, originates and terminates within the same [MTA]." 47 C.F.R. §51.701(b)(2) (emphasis added). In construing this rule, the FCC reasonably found that the transmission "of a call over a wireless link in the middle of the call path does not convert a wireline-originated [long-distance] call into a

CMRS-originated [local] call for purposes of [intercarrier] compensation." *Order* ¶1006 (JA at 769). Rather, the FCC reasonably concluded that "a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule" only if the "party initiating the call has done so through a CMRS provider." *Id.* Hence, in the case of the hypothetical call described in the Counterstatement, because the teenager in California initiated the call to her grandmother in North Carolina as a wireline call, that call remains a wireline call for purposes of intercarrier compensation.

Transcom maintains that the insertion of Transcom and Halo in the middle of the call path transforms the call into an intraMTA wireless call and thereby exempts the call from access charges. The FCC rightly rejected that notion. Transcom and Halo seek to convert long-distance calls into "local" wireless calls to avoid paying access charges. The FCC reasonably interpreted its rule to prohibit such a scheme.

II. During the administrative proceeding, no party challenged the FCC's authority to prohibit non-carriers from altering call signaling information concerning the caller's phone number. Therefore, Transcom may not raise any such challenge in this Court. *See* 47 U.S.C. §405(a); *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1044 (10th Cir. 2011).

In any event, there is no merit to Transcom's contention (Br. 46-48) that the FCC lacked authority to bar non-carriers from altering caller identification information. The agency properly found that it had authority to do so because this prohibition is necessary for the FCC to effectuate its duties under Title II of the Communications Act.

III. For several reasons, Transcom is precluded from challenging the ban on call blocking by VoIP providers. First, the issue has been waived because no party presented it to the FCC. In addition, Transcom lacks standing to challenge the ban on call blocking by VoIP providers. Transcom cannot demonstrate that it is injured by – or even subject to – the ban because it is not a VoIP provider. Furthermore, Transcom's assertion that the FCC may specifically ban Transcom from blocking calls someday is unripe for review. In any event, as we explained in our response to the principal brief of the Voice on the Net Coalition, the FCC acted well within its authority when it banned call blocking by VoIP providers.

ARGUMENT

I. THE FCC REASONABLY INTERPRETED ITS RULE DEFINING "NON-ACCESS" WIRELESS CALLS FOR PURPOSES OF INTERCARRIER COMPENSATION.

This Court's "review of an agency's interpretation of its own regulations is substantially deferential." *Copar Pumice Co. v. Tidwell*, 603

F.3d 780, 794 (10th Cir. 2010) (internal quotation marks omitted). The agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512). Under this highly deferential standard of review, the FCC's reading of its intraMTA rule easily passes muster.

The intraMTA rule defines as "Non-Access Telecommunications Traffic" any phone call "exchanged between a LEC and a CMRS provider that, *at the beginning of the call*, originates and terminates within the same [MTA]." 47 C.F.R. §51.701(b)(2) (emphasis added). In resolving the dispute between Halo and numerous rural LECs over the proper interpretation of this rule, the FCC reasonably concluded that an entity could not create a "new" intraMTA wireless call – and thereby avoid paying access charges – merely by interjecting itself in the middle of a wireline long-distance call that originated outside the MTA. As the agency explained, the transmission "of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call" for purposes of intercarrier compensation. *Order* ¶1006 (JA at 769). Rather, "a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule" only if the "party initiating the call has done so through a CMRS provider." *Id.*

Consider, for example, the hypothetical described in the Counterstatement, in which a teenager in California uses her wireline phone to call her grandmother in North Carolina. Under the FCC's reading of the intraMTA rule, that call is a wireline-originated call because the calling party (the granddaughter in California) used a wireline phone to place the call. The agency rightly rejected the notion that the call somehow "re-originates" when Transcom or Halo transmits the call (with the same calling party and recipient) over a wireless link in the middle of the call path, and that the call is somehow transformed into a "local" wireless call for purposes of intercarrier compensation.

Transcom's contrary position makes no sense, and it certainly provides no reason to overturn the FCC's reasonable reading of its own rule. Under Transcom's reading of the FCC's rule, Transcom "terminates" the teenager's call to her grandmother and originates a "new" wireless call by handing off the call to Halo in the North Carolina MTA where the grandmother lives. That reading bears no resemblance to reality. There is a single call between the granddaughter and the grandmother, and that call is terminated by the LEC that serves the grandmother (not by Transcom or Halo). *Cf.* 47 C.F.R. §51.701(d) (for purposes of non-access traffic, "termination" is defined as "the switching" of traffic "at the terminating carrier's end office switch, or

equivalent facility, and *delivery of such traffic to the called party's premises*") (emphasis added).

As one of the state regulatory commissions that rejected Halo's arguments explained, for each call that Transcom sends to Halo, the calling party (*e.g.*, the teenager in California who calls her grandmother) "[has] no relationship with Transcom, [does] not dial Transcom's number, [has] no idea Transcom [is] even involved with the call, and [ends] up talking to the person she dialed in the first place … without dialing any extra numbers or codes." *Halo North Carolina* *6. The parties at either end of these calls "place and receive calls in exactly the same way they would if Transcom did not exist." *Halo Missouri* *10.

Transcom's arguments in support of its odd reading of the FCC's rule are difficult to decipher, but Transcom appears to contend (Br. 12-23) that it is an "end user" because it characterizes itself as an Enhanced Service Provider ("ESP"). According to Transcom, because it is an "end user," it serves as an end point in the middle of the hypothetical call from California to North Carolina – essentially breaking the call in two. This argument suffers from multiple flaws.

To begin with, it is unclear whether Transcom qualifies as an ESP under the FCC's rules.[4] In any event, the FCC made no finding as to Transcom's ESP status, and its reading of the intraMTA rule did not depend on whether Transcom was an ESP. Even assuming that Transcom is an ESP, the FCC has never ruled that ESPs in the middle of a call path originate or terminate calls for purposes of the intraMTA rule. Therefore, contrary to Transcom's assertion (Br. 39-42), the agency's interpretation of the intraMTA rule in the *Order* is not inconsistent with any previous FCC order.

Transcom makes much of the FCC's longstanding practice of exempting ESPs from paying access charges. Br. 20. Under this exemption, ESPs "are treated as end users" solely to permit them to pay end-user rates (instead of access charges) when they "use local business lines for access." *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2637 n.53 (1988). This "ESP exemption" is irrelevant to the FCC's interpretation of the intraMTA rule.

[4] The FCC defines enhanced services as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. §64.702(a). In its brief, Transcom does not describe what "enhanced" service it provides.

Even assuming that ESPs are treated as "end users" for purposes of the ESP exemption, the intraMTA rule does not even use the term "end user." Rather, the rule focuses on the points at which a call originates and terminates.

Perhaps Transcom means to suggest that because it is supposedly an "end user," it serves as an origination and/or termination point with respect to the calls it hands off to Halo. That is simply not true. No one who initiates those calls is calling Transcom. And neither Transcom nor Halo is "originating" another call when Transcom sends a call to Halo. They are simply routing the call on its way to its ultimate destination. Neither the calling party nor the call recipient is even aware of Transcom's involvement. Thus, in the case of our hypothetical example, when the grandmother answers her phone in North Carolina, she of course understands that she is receiving a call from her granddaughter in California, *not* from Transcom. For purposes of the intraMTA rule, the call "originates" with the teenager and "terminates" with the grandmother. Even if (as Transcom suggests) the concept of an "end user" were relevant in this context, the "end users" in this scenario would be the teenager and her grandmother, not Transcom.

After examining the circumstances surrounding the calls that Transcom passes to Halo, the FCC properly rejected Halo's contention that those calls are "intraMTA" wireless calls exempt from access charges. It reasoned that,

for purposes of the intraMTA rule, "a call is considered to be originated by a CMRS provider" *only* if the "party initiating the call has done so through a CMRS provider." *Order* ¶1006 (JA at 769). All eleven state regulatory commissions that have addressed this issue have reached the same conclusion.[5] This Court should do likewise.

Transcom claims (Br. 33-34, 51) that the FCC's interpretation of its intraMTA rule is somehow in tension with the D.C. Circuit's decisions in *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), and *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Those cases do not help Transcom. They involved the intercarrier compensation rules governing calls to Internet service providers ("ISPs"). Transcom does not purport to be an ISP; hence, *Bell Atlantic* and *WorldCom* are inapposite. In the case of the

[5] *See Halo North Carolina* **5-9; *Halo Wisconsin* **2-4; *Halo Missouri* **14-32; *Palmerton Tel. Co. v. Global NAPs South, Inc.*, 2010 WL 1259661 (Pa. PUC Mar. 16, 2010) (because Transcom does not provide "'enhanced' traffic under applicable federal rules," the traffic it handles "cannot be exempted from the application of appropriate jurisdictional carrier access charges"); *Re TDS Telecom*, 2012 WL 3552699 (Ga. PSC Jul. 17, 2012); *BellSouth Telecomms., LLC v. Halo Wireless, Inc.*, 2012 WL 4093711 (S.C. PSC Jul. 17, 2012); *In re: Complaint and petition for relief against Halo Wireless, Inc.*, 2012 WL 5384928 (Fla. PSC Oct. 31, 2012); *Re Illinois Bell Tel. Co. and Halo Wireless, Inc.*, 2012 WL 5296140 (Ill. Commerce Comm'n Oct. 24, 2012); *BellSouth Telecomms., LLC v. Halo Wireless, Inc.*, 2012 WL 6643035 (Miss. PSC Dec. 10, 2012); *BellSouth Telecomms., LLC v. Halo Wireless, Inc.*, 2013 WL 121550 (Ky. PSC Jan. 7, 2013); *In re: Complaint of Concord Telephone Exchange, Inc.*, Docket No. 11-00108 (Tenn. Regulatory Auth. Apr. 18, 2012).

ISP-bound phone calls at issue in those cases, the callers were in fact dialing the local number assigned to their ISPs in order to receive dial-up Internet access service. By contrast, with respect to the calls Transcom sends to Halo, none of the parties who initiated those calls is calling Transcom.

As for the remainder of Transcom's attacks on the FCC's reading of its intraMTA rule, Transcom never presented those claims to the agency. Therefore, the claims are waived, and the Court should dismiss them. *See* 47 U.S.C. §405(a); *Sorenson*, 659 F.3d at 1044.

In any event, Transcom's arguments lack merit. For example, there is no basis for Transcom's assertion (Br. 35) that it "can no longer directly contract with an exchange carrier for telephone exchange service" after the *Order*. Nothing in the *Order* precludes Transcom from purchasing telephone exchange service from Halo or any other carrier. The FCC's clarification of the intraMTA rule simply means that Transcom may no longer claim to "originate" or "terminate" a telephone call when it serves as an intermediate provider of routing service in the middle of the call.

Finally, Transcom complains that the *Order* will result in a "massive cost increase" for Transcom's "LEC vendors" (such as Halo),[6] which will

[6] *See* Br. 3 (describing Halo as "one of Transcom's exchange carrier vendors").

"now pay access" charges for the traffic they receive from Transcom and deliver to terminating LECs. Br. 42. But as a number of state regulators have found, the only reason that Halo was not previously paying access charges was that Transcom and Halo were improperly trying to avoid access charges by misconstruing the intraMTA rule and purporting to convert long-distance calls into "local" wireless calls. The FCC reasonably interpreted its rule to prohibit such schemes.

II. THE FCC HAS AUTHORITY TO PROHIBIT ALL "INTERMEDIATE PROVIDERS" FROM ALTERING CALLER IDENTIFICATION INFORMATION.

To guard against "phantom traffic" (the removal or alteration of call-identifying information to avoid paying intercarrier compensation), *Order* ¶703 (JA at 617), the FCC adopted a new rule. It requires "[i]ntermediate providers" within an interstate or intrastate call path that originates and/or terminates on the PSTN to "pass unaltered to subsequent providers in the call path signaling information identifying the telephone number, or billing number, if different, of the calling party that is received with a call." 47 C.F.R. §64.1601(a)(2); *see also Order* ¶¶719-720 (JA at 624-25). The rule 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." 47 C.F.R. §64.1600(f); *see also*

Order ¶720 (JA at 624). This broad definition of "intermediate provider" includes not only telecommunications carriers, which are subject to regulation under Title II of the Communications Act, but also non-carriers.

Transcom argues that the FCC lacks authority to bar non-carriers from altering information identifying a caller's phone number. Br. 46-48. This claim is procedurally barred because no party presented it to the FCC. 47 U.S.C. §405(a); *Sorenson*, 659 F.3d at 1044. It is also incorrect.

Even assuming that Transcom is not a common carrier subject to Title II of the Act, as Transcom contends, the FCC has authority to bar non-carriers from altering caller identification information "under its Title I ancillary jurisdiction." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 976, 996 (2005); *see also Order* n.1232 (JA at 623-24). Title I of the Communications Act empowers the FCC to take measures that are "reasonably ancillary to the effective performance of the [FCC's] various responsibilities" under the Act. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 659-70 (1972). Moreover, section 4(i) of the Act authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions." 47 U.S.C. §154(i). The FCC's decision to bar

non-carrier intermediate providers from altering call-identifying information falls well within this Title I authority. The FCC cannot effectively regulate intercarrier compensation under Title II if non-carriers can take action that allows carriers to evade their payment obligations to other carriers.

Transcom contends that Title I does not give the FCC "untrammeled freedom to regulate activities over which the statute fails to confer … [FCC] authority." Br. 47 (quoting *Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010)). But the D.C. Circuit acknowledged in *Comcast* that the FCC could properly exercise ancillary authority if: (1) the agency's "general jurisdictional grant under Title I … covers the regulated subject"; and (2) "the regulations are reasonably ancillary to the [FCC's] effective performance of its statutorily mandated responsibilities." *Comcast*, 600 F.3d at 646 (internal quotation marks omitted). The FCC's action here satisfies *Comcast*'s two-part test.

First, the phone calls to which the rule applies fall within the FCC's "general jurisdictional grant under Title I." *Order* n.1232 (JA at 623) (quoting *Comcast*, 600 F.3d at 646). FCC jurisdiction over interstate "communication by wire or radio," 47 U.S.C. §152(a), clearly encompasses telephone calls, which involve "transmission of [voice] by aid of wire, cable,

or other like connection," *id.* §153(59), and/or "transmission [of voice] by radio," *id.* §153(40).

Second, the FCC's prohibition against alteration of call-identifying information by non-carrier intermediate providers is "reasonably ancillary to the [agency's] effective performance of its statutorily mandated responsibilities." *Order* n.1232 (JA at 623-24) (quoting *Comcast*, 600 F.3d at 646); *see also Southwestern Cable*, 392 U.S. at 178. In the *Order*, the FCC sought to fulfill its statutory mandate under 47 U.S.C. §251(b)(5) by moving toward a "bill-and-keep" framework that will eventually phase out intercarrier compensation obligations. *Order* ¶736 (JA at 631). To ensure a measured transition to bill-and-keep, the agency prospectively adopted a transitional intercarrier compensation framework for providers of wireline and VoIP services. *See id.* ¶¶739, 933 (JA at 632, 729). The FCC found that it could not effectively implement "the prospective intercarrier compensation regime" it adopted "under section 251(b)(5)" unless it ensured that terminating carriers received the caller identification information they needed to collect transitional intercarrier compensation. *Id.* ¶718 (JA at 624). Without such information, calls would "terminat[e] without [intercarrier] compensation." *Id.* The resulting "costs created by phantom traffic" would need to be recovered through "end-user rates" or universal service subsidies,

"undermining the transitional role for intercarrier compensation charges" that the FCC envisioned when it comprehensively reformed intercarrier compensation. *Id.*

To "address these concerns," the FCC concluded that it was "necessary" to prohibit all intermediate providers (including non-carriers) from altering caller identification information. *Order* ¶718 (JA at 624). The FCC explained that, if it barred only carriers from altering such information, they could easily circumvent the ban by having a non-carrier agent perform the task. To prevent such evasion, the agency reasonably applied the ban to "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." *Id.* ¶720 (JA at 624). This reasonable exercise of ancillary authority was designed to ensure that the creation of "phantom traffic" would not undermine the FCC's transitional intercarrier compensation framework under section 251(b)(5).

III. THE COURT LACKS JURISDICTION TO REVIEW TRANSCOM'S CHALLENGE TO THE FCC'S BAN ON CALL BLOCKING BY VOIP PROVIDERS.

Finally, Transcom challenges the FCC's decision to extend its ban on call blocking to VoIP providers. Br. 48-49 (citing *Order* ¶974 (JA at 756)). This claim is barred by 47 U.S.C. §405(a) because neither Transcom nor any

other party presented the issue to the agency. *See Sorenson*, 659 F.3d at 1044; FCC Response to Voice on the Net Coalition Principal Brief, Section I.

Even if Transcom had not waived the claim, this Court lacks jurisdiction to consider it. Transcom lacks Article III standing to challenge the FCC's decision to ban call blocking by VoIP providers. Transcom maintains that it is not a VoIP provider (*see* Br. 2); therefore, the call blocking decision to which it objects does not apply to it. Transcom has not alleged a concrete "injury in fact" that is "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 565 n.2 (1992). Indeed, Transcom itself acknowledges that the call blocking decision "may not apply" to it. Br. 48. "Without an allegation of specific, concrete harm, [Transcom does] not have standing." *Nat'l Council for Improved Health v. Shalala*, 122 F.3d 878, 884 (10th Cir. 1997).

Insofar as Transcom suggests that the FCC may someday bar Transcom from blocking calls, that claim is plainly unripe. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Los Alamos Study Group v. U.S. Dep't of Energy*, 692 F.3d 1057, 1065 (10th Cir. 2012) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

In any event, as we explain in Section IV of the FCC Response to the Voice on the Net Coalition Principal Brief, the FCC acted well within its authority when it banned call blocking by VoIP providers.

CONCLUSION

Insofar as Transcom's claims are procedurally barred, its petition for review should be dismissed. In all other respects, the petition should be denied.

Respectfully submitted,

WILLIAM J. BAER
ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

SEAN A. LEV
GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL
COUNSEL

/s/ James M. Carr

LAURENCE N. BOURNE
JAMES M. CARR
MAUREEN K. FLOOD
COUNSEL

FEDERAL COMMUNICATIONS
COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitation of the Second Briefing Order. It does not exceed 15% of the size of the brief to which it is responding. The Transcom Principal Brief was certified to be 9,033 words in length. Therefore, the FCC may file a response brief up to 10,387 words in length. This brief contains 5,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). If the words in the chart on p.6 were included, the total would be 5,332 words.

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/s/ James M. Carr
James M. Carr
Counsel

July 24, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2013, I caused the foregoing Federal Respondents' Final Response to the Transcom Principal Brief to be filed by delivering a copy to the Court via e-mail at FCC_briefs_only@ca10.uscourts.gov. I further certify that the foregoing document will be furnished by the Court through (ECF) electronic service to all parties in this case through a registered CM/ECF user. This document will be available for viewing and downloading on the CM/ECF system.

/s/ James M. Carr
James M. Carr
Counsel

July 24, 2013