violation of license and hold Halo subject to state authority as a consequence); N (asking the commission to set aside the FCC's rule that CMRS traffic origination point is the base station serving the CMRS customer).

61. This dispute is quite similar to the jurisdictional tussles over "private radio service" that raged from 1974 to 1989 and even thereafter. Congress preempted state-level entry and rate regulation over CMRS as part of the 1993 amendments. Before 1993, however, the FCC in 1974[17] and then Congress in 1982 pre-empted state-level regulation over private radio. Section 331(c)(3) as enacted in 1982 provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service."

62. Even after the courts had repeatedly affirmed the FCC's prior preemption and Congress then ratified it,[18] many Radio Common Carriers ("RCCs") did not like that they were subject to state-level regulation, but other entities not subject to state-level regulation could compete against them. Like the complainants in this case, these RCCs on occasion went to state commissions and tried to convince the state commission to "find" the private service providers

---

[17] *See e.g., National Assoc. of Regulatory Utility Comm'rs v. Federal Communications Com.*, 525 F.2d 630, 634-635 (D.C. Cir. 1976):

> Second, 30 MHz (806-821 MHz and 851-866 MHz) is allocated to private services, to be licensed to operators in the Public Safety, Industrial and Land Transportation areas, as authorized under 47 C.F.R. §§ 89, 91, 93. Thus, under existing regulations, this allocation makes available additional spectrum for eligible applicants who wish to obtain a license to operate a station, either for their own private purposes, or, with several other eligibles, on a non-profit, cost-sharing basis. In addition, the Orders would create a new category of private mobile operators, eligible for licensing on the 30 MHz presently being allocated. This new category of operators, known as Specialized Mobile Radio Systems (SMRS), would operate on a commercial basis to provide service to third parties. Licensing is to be on a first-come, first-served basis, with SMRS applications treated no differently than those of other private applicants. Because it seeks to utilize a profit motive to speed development and refinement of mobile radio technologies, the Commission concludes that SMRS should not be subject to the common carrier regulations of Title II of the Communications Act, and that state certification of SMRS should be preempted.

[18] *See, e.g., Telocator Network of America v. FCC*, 761 F.2d 763 (D.C. Cir. 1985) ("*Millicom case*").

were not "really" private service providers and therefore were subject to state regulation notwithstanding the preemption. Mississippi took a shot, and was brought to heel by the federal courts. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm.*, 648 F.2d 1350 (5th Cir. 1981).[19] Pennsylvania tried it, the FCC on three separate occasions held it could not do so, and Pennsylvania ultimately decided to give up the effort.[20] Louisiana took up the cause and issued a "cease and desist order" to a provider. The FCC ruled that Louisiana's action was "without force and effect" and the provider was free "to continue to operate irrespective of any ruling to the contrary at the state level."[21]

63. In all of these instances the allegation at the state commission was that the private service provider was acting outside of the federal authorization, or had violated that authorization, with the effect that the private service provider was no longer protected from state common carrier regulation. In each instance the FCC or the courts squarely held that *only* the FCC could decide whether the state could act. In each instance the FCC or the courts held that the entity was not subject to state common carrier regulation and no state could assert that it was a common carrier or subject to regulation as such at the state level.

---

[19] "This Court, having considered the arguments of the parties, views the Mississippi Public Service Commission's application of Miss.Code § 77-3-3 (1972) to plaintiff Motorola as an illegal attempt to usurp jurisdiction to regulate communication activity that is preempted by the Federal Communications Commission. ... The FCC has exclusive jurisdiction to 'classify radio stations ... prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class ... encourage the larger and more efficient use of radio in the public interest ... (and) make such rules and regulations and prescribe such restrictions and conditions ... as may be necessary to carry out the provisions of this Act....' 47 U.S.C. § 303(a), (b), (g), (r) (1970)."

[20] In the *Matter of Paul Kelley d/b/a American Teltronix*, 3 FCC Rcd 1091 (1988) (Delegated Authority); Memorandum Opinion and Order, *Paul Kelley d/b/a American Teltronix Licensee of Station WNHM552*, 3 FCC Rcd 5347 (1988) (On Review); *Second Memorandum Opinion and Order*, 5 FCC Rcd 1955 (1990) (On reconsideration); *Mobilfone of Northeastern Pennsylvania, Inc. v. Paul Kelley, d/b/a American Teltronix*, C-871182 and C-871578, 1989 Pa. PUC LEXIS 135, 70 Pa. PUC 302 (Penn PUC, 1989).

[21] Declaratory Ruling, *In the Matter of Data Com, Inc.; and American Welding Supply, Inc., Licensee of Station KNBP-212 in the Business Radio Service*, FCC 86-315, 104 F.C.C.2d 1311 (rel. Jul. 1986).

64. The caselaw is manifest that states have been preempted. No state has the power or jurisdiction to "interpret" Halo's federal status in an ill-advised effort to find some "violation" or "exception" within the federal law that could then be used to assert state-level regulation. States purely and simply cannot act or assert jurisdiction unless and until the FCC says state action is permissible.

65. The FCC has exclusive original jurisdiction over communications by wire or radio that are interstate. *See* 47 U.S.C. § 152. Additionally, under § 152 (also called "Section 2 of the Act"), the FCC has exclusive original jurisdiction over the authorization to communicate by radio on an interstate or intrastate basis and then the exclusive jurisdiction over regulation of radio communications themselves. *See, e.g.*, 47 U.S.C. §§ 152(a), 201, 202, 203, 214, 332.

66. Section 152(b) originally reserved rights to the states to regulate intrastate communication service by wire or radio. Section 332(c)(3) (passed in 1993) expressly preempted state regulation over market entry and the rates charged by mobile service providers. Section 332(c)(7) allows state and local governments to retain some zoning authority over "siting" of "personal wireless service facilities," but § 332(c)(7)(B)(i)(II) expressly denies any state or local government the power to take any action that prohibits or has the effect of prohibiting the provision of personal wireless services. Halo provides personal wireless services, and thus, no state or local government may prohibit or take action that has the effect of prohibiting Halo's provision of its service. The complainants are each contending that Halo lacks authority to provide its personal wireless service (CMRS), and they are seeking or intend to seek a *state commission* order allowing blocking, which obviously would have the effect of prohibiting Halo from using its already-installed facilities to provide its personal wireless services. The

complainants are requesting that a state prohibit, or take action having the effect of prohibiting, Halo's wireless service.

67. The complaints both ultimately rely on the proposition that Halo is violating the Communications Act or an FCC rule, exceeding the scope of its federal authorizations and conducting activity that is subject to state entry regulation, and assert that Halo is subject to an access charge because of claimed "exceptions" or "interpretations" of the Communications Act and FCC rules. The complaints are dressed up using state law claims, but they are in fact, and must be construed to be, inappropriate § 206 complaints because if Halo's activities *do* fall under its federal authorizations and *do not* incur an access charge under *federal* law, then no contrary state laws or rules can lawfully be enforced to the contrary. There is, however, no provision, and no authority, that would allow a party to file a case with a state commission alleging a violation of the Communications Act or FCC rules, or seeking a declaratory ruling involving questions about the Communications Act or FCC rules.

68. The complainants' *state commission* filings seek extraordinary relief based on their interpretations of Halo's *federal* authorizations and Halo's insistence that the complainants honor the *federal* rules. The entire matter is subject to the exclusive original jurisdiction of the FCC, and the state completely lacks jurisdiction. The commission cannot grant the requested relief.

c. This is not a § 252 case; the complainants refuse to use the process given to them by the FCC that would allow them to enter the § 252 process.

69. State commissions have some residual jurisdiction over purely intrastate communications under § 152(b). That authority, however, was considerably reduced by the passage of the 1993 amendments to the Communications Act which expressly preempted state-level regulation of or restriction of market entry and state-level regulation of wireless service

rates. Further, the 1996 amendments to the Act even further circumscribed state commission authority, even for purely intrastate activity. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, n. 6 (1999).[22] Congress delegated only certain duties and powers to state commissions as part of the 1996 amendments, and then required that when states are exercising these limited duties they limit the activity to implementing the FCC's rules.[23] The complaints do not claim to be founded on § 252 of the Communications Act, and thus this commission completely lacks jurisdiction because all of the issues raised are FCC-exclusive issues that do not fall within the states' remaining residual power or their delegated authority. In any event, the complainants are essentially and ultimately requesting that the commission *ignore* and effectively *overturn* the FCC's rules and specific parts of the Communications Act.

70. Under the FCC's rules, when carriers are indirectly interconnected, all "non-access" traffic is subject to a "no compensation" regime unless and until the indirectly

---

[22] "JUSTICE BREYER appeals to our cases which say that there is a "'presumption against the pre-emption of state police power regulations,'" post, at 10, *quoting from Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and that there must be "'clear and manifest' showing of congressional intent to supplant traditional state police powers," *post*, at 10, *quoting from Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. The appeals by both JUSTICE THOMAS and JUSTICE BREYER to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts -- but it is hard to spark a passionate "States' rights" debate over that detail." (emphasis added)

[23] Halo acknowledges there are a few instances where state-level rules can be applied as part of a § 252 arbitration or in a "post-ICA dispute." But those rules cannot be inconsistent with FCC regulations, and they cannot serve to override any provision in the Communications Act. In any event, the complaints are not founded on § 252 and do not purport to be a § 252(b) arbitration petition or a post-ICA dispute. Indeed, the complainants rant at Halo for advising them all they had to do to get paid lawful compensation is "request interconnection" and "invoke the negotiation and arbitration procedures contained in section 252 of the Act" just as the FCC's *T-Mobile* rule 20.11(e) tells them they ***must*** do.

interconnected carriers enter into a written ICA.[24] The FCC's *T-Mobile* decision (which this commission is surely aware of, since the ILEC complainants now before the commission precipitated that case) promulgated a rule allowing ILECs to send a written "request for interconnection" that "invoke[s] the negotiation and arbitration procedures contained in section 252 of the Act" to a CMRS provider. *See* 47 CFR § 20.11(e). At that point, the carriers must negotiate terms implementing their respective duties under § 251(a), (b) and, if applicable, (c). If the parties are unable to resolve all issues through negotiation, the incumbent may request that the CMRS provider "submit to arbitration by the state commission." *See* 47 C.F.R. § 20.11(e).

71. Halo has repeatedly and consistently recognized the ILEC complainants' right under 20.11(e) to "request interconnection" from Halo and "invoke the negotiation and arbitration procedures contained in section 252 of the Act." Halo has repeatedly and consistently said that once Halo receives a "request for interconnection" from an ILEC Halo will "negotiate in good faith" just like the rule requires, and Halo will acknowledge that the parties have entered the § 252 process. Indeed, Halo has received compliant 20.11(e) requests – *i.e.*, requests that did "request interconnection" and did "invoke the negotiation and arbitration procedures contained in section 252 of the Act" – from (1) a national conglomerate of ILECs, (2) a company with Arkansas and Oklahoma ILEC operations, (3) a group of 13 California ILECs and, very recently, (4) a small Texas ILEC. Halo accepted those requests and agreed they were compliant. Thus, Halo and all those companies are currently engaged in the § 252 process. Further, Halo has agreed to pay interim compensation at a negotiated price to the national company and is discussing the appropriate price with the others. The interim payment obligation for each of those companies is/will be effective back to the day after the compliant request was received.

[24] *See T-Mobile Order* note 57 ["Under the amended rules, however, in the absence of a request for an interconnection agreement, no compensation is owed for termination."].

Halo is busily engaged in substantive negotiations with these companies, and topics include proposed agreement terms, direct IP-based interconnection, reciprocal compensation, jointly-provided access, and the balance of standard interconnection agreement required by § 251.

72. Halo and the BPS complainants have conducted several discussions on this topic, and exchanged correspondence as well. Each time Halo patiently explained that the BPS complainants have yet to submit a "request for interconnection" that complies with 20.11(e). Instead, the BPS complainants repeatedly send letters that request "negotiations" for "an agreement." Further, some of these "requests for agreement" that purport to rest on 20.11(e) were submitted on behalf of Green Hills, FCSI, FCSII and MTCC even though they are not ILECs, and are flatly ineligible for the entire process.

73. Halo has advised the BPS ILECs that despite their poor choice of words Halo was willing to accept they had adequately "invoke[d] the negotiation and arbitration procedures contained in section 252 of the Act." Halo, however, advised the BPS ILECs that they still – after all these months and many responses pointing out the omission – have not "requested interconnection." The requirement to "request interconnection" is important because the "request for interconnection" has procedural implications rooted in both 20.11(e) and also § 252(a)(1).[25] More important, "interconnection" is a term of art, with discrete *physical* meaning and results. Under the FCC's rules, "interconnection" under §§ 251(a) and 251(c)(2) (along with the "physical connections" referred to in § 332(c)(1)(B), which in turn implements the "physical connection" aspects of § 201(a)), means "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." *See* 47 C.F.R. 51.5. *See also Competitive Telcoms. Ass'n v. FCC*, 117 F.3d 1068, 1071 (8th Cir. 1997).

[25] Section 252(a)(1) expressly requires "a request for interconnection, services, or network elements pursuant to Section 251." This substantive "request for interconnection, services, or network elements pursuant to section 251" then kicks off the procedural aspects of § 252.

74. At such time as any of the ILEC complainants "request interconnection" and "invoke the negotiation and arbitration procedures contained in section 252 of the Act," Halo will – as it has done with many other ILECs that recognized the rule requirements – enter negotiations under § 252, and attempt to reach a resolution on the issues carriers must negotiate under § 251. The complainants' blocking and state complaint are largely designed to coerce Halo into "voluntarily" agreeing to "negotiate and enter into a binding agreement ... without regard to the standards set forth in subsections (b) and (c) of section 251." *See* § 252(a)(1). Halo, however, is "clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act." *See Coserv LLC v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 488 (5th Cir. 2003).[26]

75. Rule 20.11(e) is rooted in § 332(c)(1)(B) of the Communications Act. Section 332(c)(1)(B) in turn rests on § 201. These are separate and independent *exclusive* grants of authority to the FCC. States do not have any power to interpret, apply or enforce the rule, § 201 or § 332(c)(1)(B). The FCC has exclusive original jurisdiction to decide whether the complainants have "properly" or "sufficiently" invoked their rights under 20.11(e) in order to start the "252" process. The states have not been delegated – by Congress or the FCC – the power to interpret, apply or enforce 20.11. The question is not subject to resolution by a state commission, since §§ 201 and 332 and 20.11 are outside the scope of an arbitration under § 252.[27] Only *after* it is clear that the parties are within the § 252 process (by agreement or as a

[26] Judge Jackson of the Eastern District of Missouri recently applied the Fifth Circuit's *CoServ* decision by holding that "[w]here the parties have voluntarily included in their negotiations issues other than those required by § 251(b) and (c), the additional issues are subject to compulsory arbitration under § 252(b)(1)." *Southwestern Bell Tel. Co. v. Clayton*, 2011 U.S. Dist. LEXIS 4273 (E.D. Mo. Jan. 18, 2011). The complainants blocking and state complaint are entirely designed to coerce Halo into "voluntarily" including the FCC-exclusive issues in negotiations, so the issues would then be subject to state-level determinations as part of an arbitration. Halo refuses to do so, as it is "clearly free" to do.

[27] The FCC was able to hold that the states could no longer "address the issue" of intercarrier compensation for ISP-bound traffic because even though ISP-bound traffic falls within § 251(b)(5) it **also** – just like CMRS traffic covered by § 332(c)(1)(B) – is subject to § 201, over which the FCC has exclusive jurisdiction and over which the states have no jurisdiction. *See* Order on Remand, R&O and FNPRM, *High Cost Universal Service Reform, Federal-State*

result of a ruling by the FCC) will the states have any authority over the parties' relationship when a timely petition for arbitration is filed, at which point the state commission is to "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement." *See* 47 U.S.C. § 252(b)(4)(C). Note also that even then the state commission's jurisdiction and delegated power is limited under § 252(b)(4)(A).[28]

76. The ILEC complainants have not implemented this FCC-prescribed remedy, and they do not base any part of their complaints on an assertion that Halo and the complainants are operating within the § 252 context. Indeed, they are asking this commission to relieve them of the burdens imposed by these binding federal rules, and railing at Halo for demanding that they follow it.

77. The complaints are not based on the commission's arbitral powers under § 252(b) or its power to approve interconnection agreements under § 252(e). This is not a "§ 252" proceeding and therefore the commission cannot assert or find jurisdiction based on § 252.

d. The commission is bound by FCC rules and cannot grant the complainants' request that they be relieved from the obligation to follow FCC rules.

78. The *T-Mobile Order* also promulgated 47 C.F.R. § 20.11(d), which prohibits local exchange carriers from imposing access charges pursuant to tariff on "non access" traffic. The *T-*

Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering. Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services, FCC 08-262, ¶¶ 17-22, Dockets 01-92, *et al*, 24 FCC Rcd 6475, 6483-6486 (2008), *aff'd, Core Communs., Inc. v. FCC*, 592 F.3d 139, (D.C. Cir. 2010), *cert. den. Core Communs., Inc. v. FCC*, 131 S. Ct. 597, 178 L. Ed. 2d 434 (2010). The FCC extensively discussed the similarity of treatment with regard to ISP-bound and CMRS traffic, and observed the courts' consistent recognition that the FCC has the exclusive power to promulgate "rules of special concern" to CMRS. *Id.* ¶¶ 17, 20 and note 76; *see also Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *vacated and remanded in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) and *Qwest Corp. v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001).

[28] "The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)."

Mobile Order reiterated its definitions of "access" and "non-access."[29] Further, under the Communications Act, "exchange access" charges apply only to "telephone toll service" and the FCC's rules and rulings have specifically set out the limited circumstances under which a CMRS provider will be providing "telephone toll service," and be subject to access charges as a consequence.[30] If the complainants want to secure a change to the FCC's rules, they must apply to the FCC, because state commissions must follow them and cannot change, limit, expand or find "exceptions." States "no longer have any authority to address this issue."[31]

D. THE COMMISSION LACKS JURISDICTION OVER COMPLAINANTS' REQUEST FOR PERMISSION TO BLOCK BASED ON ALLEGED SIGNALING IMPROPRIETIES OR FAILURE TO PAY COMPENSATION BASED ON HALO'S RELIANCE ON FCC RULE 20.11(d) AND (E)

79. The complainants claim certain "signaling" improprieties. The ILECs that are defendants in Halo's FCC complaint, however, decided to begin blocking early on, back when the only issue was that Halo would not pay access billings for intraMTA traffic because of 20.11(d) and was insisting that the complainants had to comply with 20.11(e) if they wanted to be paid for transport and termination. Signaling was not an issue at the time. *See* Exhibits 2, 3,

---

[29] *See T-Mobile Order*, note 6 (FCC 2005) ["the term "non-access traffic" refers to traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act and ISP-bound traffic."]

[30] *See Local Competition Order* ¶ 1043 and note 2485:

> 1043. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges.
>
> Note 2485: "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is 'roaming' in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier' carrier ['access'] charges is defined by § 69.5(b) of our rules." ...

[31] *See, e.g.*, Order on Remand and Report and Order, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151, 9171–72, para. 82 (2001) (*ISP Remand Order*), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

and 4 attached hereto. The signaling issue is a *post-hoc* rationalization being raised to put Halo in a false light.

80. Networks must employ some type of "call control" in order for calls to work – *e.g.*, be set up and torn down. This is particularly so when more than one carrier's network is involved in any given call, such as when the calling party is on one carrier network and the called party is on another carrier's network. Most networks today use some method of "signaling"[32] for this purpose. Traditional telephony networks use either "multifrequency signaling" (in which call control occurs "in band" and uses "pulses" or "tones" recognized and then used by the network) or a later "common control signaling" method known as "SS7."[33] The ERE rules recognize some of these signaling basics, albeit in a more rudimentary way.

81. More modern networks like Halo's use "Internet Protocol" ("IP") protocols – which operate differently, but contain similar information and perform roughly analogous functions – for call control. When an IP network must interoperate with a legacy SS7-based network, a form of "protocol conversion" must occur. A "signaling gateway" will identify the IP-based call control information that is necessary for an SS7-based network to set up or tear down a call, and "populate" the information in the appropriate SS7 "ISDN User Part" "Initial Address

---

[32] *See*, Definition of "Signaling" in 2007 ATIS "T-1" Glossary, ATIS-0100523.2007, © Alliance for Telecommunications Industry Solutions, 2007 [ANSI Standard], available at http://www.atis.org/glossary/definition.aspx?id=1556: Signaling. The use of signals for controlling communications. 2. In a telecommunications network, the information exchange concerning the establishment and control of a connection and the management of the network, in contrast to user information transfer. 3. The sending of a signal from the transmitting end of a circuit to inform a user at the receiving end that a message is to be sent.

[33] *See* NPRM and FNPRM, *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, FCC 11-13, ¶ 621, 26 FCC Rcd 4554, 4752 (Feb. 9, 2011) (rel. Mar. 2011) ("*2011 ICC NPRM*") ["A pathway across the PSTN is typically set up for PSTN calls using the Signaling System 7 (SS7) call signaling system, which is a separate, or "out of band," network that runs parallel to the PSTN. The SS7 system performs the function of identifying a path across the PSTN a dialed call can take after the caller dials the called party's telephone number. Once the SS7 system identifies a path across the PSTN, it signals the originating caller's network to notify it that a call path is available, and the call is established over the path. Technical content and format of SS7 signaling is governed by industry standards rather than by Commission rules, although Commission rules require carriers using SS7 to transmit the calling party number (CPN) to subsequent carriers on interstate calls where it is technically feasible to do so."].

Message" "parameter." The Internet community has devised a series of consensus documents and methods that guide this process.[34]

82. There has been much debate in the industry, and considerable litigation over the "rules" governing signaling between networks. The FCC's recent *2011 ICC NPRM* dedicated a number of pages to this debate, and the FCC has proposed new rules that would govern this very topic. Many incumbent carriers, however, are not willing to await FCC guidance. Further, many incumbent carriers – including the complainants – are dissatisfied with the operation of the current FCC rules regarding signaling and they consistently seek different state-level rules that inappropriately use telephone numbers to "rate" CMRS or IP traffic even though *federal* law says that is not permitted.

83. This is particularly so when it comes to CMRS traffic. The ILECs have sought state-level intervention, and have asked state commissions and even state legislatures to craft individual state rules imposing more detailed and onerous rules than those in effect and presently proposed by the FCC. The major debate between all sides relates to the extent to which "signaling" information, and particularly the "Calling Party Number" ("CPN") and the number assigned to the called party should be used to "rate" a call as "local" or "toll" and "intrastate" or "interstate."

84. The FCC – with repeated approval by the courts – has consistently recognized that telephone numbers cannot be reliably used as a "proxy" for the end point, and therefore the determinant for "rating" a call when "wireless" or "VoIP" technology is in use.[35] The FCC has

---

[34] *2011 ICC NPRM*, *supra* at ¶ 621 and note 946, ¶ 627 and note 966.

[35] *See* Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, ¶¶ 22, 26, 19 FCC Rcd 22404, 22418, 22421 (rel. Nov. 2004), *aff'd Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007). *See also*, Memorandum Opinion and Order, Global Crossing Telecommunications v. Southwestern Bell Telephone Co., Case No. 4:04-CV-00319-ERW (E.D. Mo., September, 12, 2006) (PACER Doc 53) [holding that

also held that state-level regulations over CMRS or "VoIP" would interfere with the FCC's national policy of unimpeded entry and uniform treatment.[36] The ILECs and states have often disagreed, however, and have tried to promulgate rules at the state level requiring specific and different practices relating to signaling "content," and then impose compensation consequences that conflict with FCC rules or decisions.

85. For example, the South Dakota legislature passed a state statute imposing specific signaling and compensation requirements for all providers in that state. The statute applied regardless of whether a carrier had an interconnection agreement with any other carrier. The combined result of the signaling and compensation requirements functionally operated to overturn the FCC's 20.11 rules, as promulgated in the *T-Mobile Order*. The United States District Court for the District of South Dakota, Central Division, held that the state statute was preempted because it conflicted with the FCC's compensation rules and purported to adopt industry signaling practices that did not in fact exist. *Verizon Wireless (VAW) LLC v. Kolbeck*, 529 F. Supp. 2d 1081, 1095-1097 (D.S.D. 2007).

---

using originating number as geographic proxy for originating end-point of wireless calls when billing access to an IXC that serves CMRS providers is inappropriate because jurisdiction cannot be determined by "call detail" for wireless traffic; noting with approval FCC's use of serving tower in *Local Competition Order* and similar rule relating to USF obligations].

[36] *See Vonage* ¶¶ 22, 26, 19 FCC Rcd at 22418, 22421:

> 22. Were it appropriate to base our decision today on the applicability of Minnesota's "telephone company" regulations to DigitalVoice solely on the functional similarities between DigitalVoice and other existing voice services (as the Minnesota Commission appears to have done), we would find DigitalVoice far more similar to *CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues*. (emphasis added)
>
> 26. In the absence of a capability to identify directly DigitalVoice communications that originate and terminate within the boundaries of Minnesota, we still consider whether some method exists to identify such communications indirectly, such that Minnesota's regulations could nonetheless apply to only that "intrastate" usage such as voice calls between persons located in the same state. For example, assume Minnesota were to use DigitalVoice subscribers' NPA/NXXs as a proxy for those subscribers' geographic locations when making or receiving calls. If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.

86. The complainants complaints are premised on a set of state rules that they claim require Halo to take certain acts, engage in specific signaling practices, pay them access compensation despite 47 C.F.R. § 20.11(d) or pay transport and termination compensation in the absence of an agreement despite the FCC's holding in the *T-Mobile Order* that "no compensation" is due. *See* Alma Complaint Request for Relief F, I, N, O; BPS Complaint Request for Relief F, H, I, N. Indeed, the complainants assert that the state rule requires *Halo* to request interconnection rather than the other way around.[37] Alma Complaint, Request for Relief F, O; BPS Complaint ¶ 50-51, Request for Relief O. Halo has refused to capitulate to their state-level demands because those demands conflict with binding federal law and the *T-Mobile Order*. Halo brought an FCC complaint against several of the complainants and this issue – along with all the other FCC-exclusive issues – are before the FCC. The complainants have now brought a state-level complaint as a means to collaterally attack Halo's federal authorizations, to avoid the FCC's rules and to litigate their issues before their favorite forum even though the state commission completely lacks subject matter jurisdiction and personal jurisdiction over Halo.

87. Signaling is intrinsically related to "Interconnection" for purposes of §§ 251(a)(1) and (c)(2). It pertains to the way the physical connection "works." Therefore, if Halo and any of the complainants were to enter the § 252 process, the parties' signaling methods and practices, and the content that is populated in the various call control parameters, would be a legitimate open issue for determining the appropriate conditions that will apply for § 251(a)(1) and/or § 251(c)(2) *interconnection*. As noted previously, however, none of the complainants have ever done what is required to enter the § 252 process, however, because not a single one of them has

[37] The FCC expressly recognized and held that CMRS providers had no duty to request interconnection from ILECs under § 252 and that § 252 did not allow ILECs to request interconnection from CMRS providers. That is why the FCC used its separate and independent section 332 authority to allow ILECs to request interconnection and for the first time be able to force initiation of the § 252 process. *T-Mobile Order* ¶¶ 15-16 and associated notes.

"requested interconnection" and "invoked the negotiation and arbitration procedures contained in section 252 of the Act." *See* FCC rule 20.11(e).[38]

88. Further, and more importantly, the complainants want to use "signaling" information – again, an "interconnection" issue – for purposes of "rating" calls that the parties transport and terminate. Their case is largely based on the flatly incorrect proposition that the originating number can lawfully be used as a rating tool for CMRS traffic. This is not proper, particularly with regard to CMRS and IP traffic. FCC rules clearly recognize that the originating number contained in the CPN parameter is not a reliable proxy for actual physical location. That is why the FCC's rules use the base station or POI for originating location.

89. The attempted use of signaling information to rate calls for compensation purposes is also inconsistent with the fundamental distinction between "interconnection" and "compensation." The FCC's "interconnection" definition expressly says that "interconnection" does not include "transport and termination." Intercarrier compensation under § 251(b)(5) and § 252(d)(2) relates to the "transport and termination" of traffic. The complainants' attempt to secure state-level rules relating to signaling (part of interconnection, which is separate from compensation) as a means to overturn the FCC's compensation rules and the FCC's definitions and other rules, creates an unwarranted and unnecessary conflict. In particular, the complainants' attempt to use state-level rules relating to signaling as a means to overturn the FCC's "no compensation" regime from *T-Mobile* and to flip the obligation to "request interconnection" from the complainants over to Halo cannot be allowed. The entire set of demands made by the

[38] The BPS complainants in ¶ 50 misrepresent Halo's position on the date any request that Halo "submit to state arbitration" must be made. Halo has consistently advised the BPS ILECs (and the Alma ILECs) that this request is not a prerequisite for negotiations to begin. The request for consent is only required before any actual state arbitration filing if negotiations do not yield a complete agreement.

complainants in their state complaint are completely pre-empted by federal law. These are FCC-exclusive issues.

90. These signaling issues, like all the other issues, are already before the FCC in Halo's case against many of the complainants. If and when evidence is ever received by a forum with jurisdiction, the facts will show that Halo is signaling CPN without alteration. The facts will also show that beginning in mid-February Halo continued to signal CPN without alteration, but changed its practices to begin signaling Charge Number as well. The facts will show that Halo's signaling practices are perfectly in accord with all of the FCC's current rules and the practice change in February of 2011 was made in order to be compliant with the FCC's proposed phantom traffic rules, which were released on February 9, 2011. The complainants cannot be heard to protest when Halo is providing more information without altering the content of any information, or that Halo has proactively adjusted its practices to meet even the FCC's proposed rules.

91. If any state rule is construed to require actions inconsistent with the FCC's current rules and to prohibit a carrier from providing more information as a proactive effort to be consistent with the FCC's phantom traffic rules, then that state rule must fall under conflict preemption. The ERE rules do not apply; even if they do they cannot be read to prohibit Halo from following existing and proposed FCC rules, or punish Halo for following FCC rules.

E. STATE COMMISSIONS LACK JURISDICTION TO CONTEMPLATE WHETHER TO ORDER OR AUTHORIZE BLOCKING OF CMRS OR INTERSTATE TRAFFIC

92. The complainants request an "order" by the commission authorizing them to block Halo traffic. Alma and BPS Request for Relief P. They are asking the state commission to approve blocking of jurisdictionally interstate service, and they seek to deny Halo the benefits of

its *federal* right to interconnection as a CMRS provider. Any state order would be void. Further, any action by the complainants in reliance on such order would result in damages to Halo.

93. Halo's previously filed FCC Complaint (Exhibit 2) raised this issue on pages 8-10. The ILECs' Opposition to Halo's FCC Complaint (Exhibit 3) took the matter up on pages 11-13. Halo's FCC Response to the ILECs' Opposition (Exhibit 4) rebutted the ILECs' claims on pages 2-7. These issues are already before the FCC, and this commission should and must defer.

94. The complainants' current blocking and any additional blocking "approved" by some void order emanating from the commission does and will constitute a violation of federal law and FCC rules. Halo reiterates that the complainants' refusal to use the FCC 20.11(e) remedy, the disputes over whether the BPS complainants' putative efforts were compliant, and the complainants blocking are all FCC-exclusive issues that are already before the FCC.

95. Blocking is an unjust and unreasonable practice under § 201(b). The complainants seek state-level permission to violate § 201(b) of the Communications Act by engaging in the unjust and unreasonable practice of blocking interstate traffic or CMRS traffic without advance permission by the FCC. This is obviously not something a state can or should do. The FCC has ruled that carriers cannot block interstate traffic absent specific FCC authorization and doing so is an unjust and unreasonable practice that violates § 201(b). *See, e.g.*, Declaratory Ruling and Order, *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC Docket No. 07-135, DA 07-2863, ¶¶ 5-6, 22 FCC Rcd 11629 (rel. June 28, 2007);[39] Memorandum Opinion and Order, *Telecommunications Research and Action Center and Consumer Action v. Central Corporation et al.*, File Nos. E-88-104, E-88-

[39] "...call blocking is an unjust and unreasonable practice under section 201(b) of the Act...Specifically, Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way."

105, E-88-106, E-88-107, E-88-108, DA 89-237, ¶¶ 12, 15, 4 FCC Rcd 2157, 2159 (1989) (Common Carrier Bureau).[40] Similarly, no state can grant permission for a LEC to refuse to interconnect (or to disconnect interconnection that exists pursuant to § 332(c)(1)(B)). A LECs' disconnection of a CMRS provider would violate § 201, because § 332(c)(1)(B) rests on and incorporates § 201.

96. Any block would also violate § 201(b) for a separate and different reason. As explained elsewhere, complainants assert that some of the traffic is "wireline originated" "toll" traffic. They claim the right to block passage of this traffic based on state law. The cited state rules and laws do not apply to this set of circumstances, but even if they did, they would be pre-empted given that the much of the traffic is jurisdictionally interstate[41] since it is processed by a base station located in Kansas. *See* BPS Complaint ¶ 57; Alma Complaint ¶ 28 (recognizing Halo Junction City, Kansas base station that serves the Kansas City MTA).

97. Blocking in this situation without advance FCC permission is also a violation of the FCC's rules implementing § 214 of the Communications Act (47 C.F.R. §§ 63.60(b)(5), 63.62(b) and (e) and 63.501). Part 63 rules address a carrier's desire to cease the interchange of traffic with another carrier, and that is precisely what would occur here. Under FCC rules, a carrier that wants to cease interchanging traffic must seek advance permission from the FCC to

---

[40] "After consideration of the arguments and evidence advanced by the parties to this proceeding, we are persuaded that the practice of call blocking, coupled with a failure to provide adequate consumer information, is unjust and unreasonable in violation of Section 201(b) of the Act...We find that call blocking of telephones presubscribed to the defendant AOS providers or other carriers is an unlawful practice. Accordingly, we order the complainants to discontinue this practice immediately. The complainants must amend their contracts with call aggregators to prohibit call blocking by the call aggregator within thirty days of the effective date of this Order."

[41] Halo is not at this point answering or raising any potential defenses or affirmative defenses. Halo is asserting lack of jurisdiction to decide whether the traffic is "not" interstate. Thus, Halo does not bear any burden of proof. Nor, strictly speaking, can the complainants be given the burden or opportunity to "prove" in this proceeding that the traffic is intrastate. The commission simply cannot consider any of this, for it lacks jurisdiction over the entire question of whether the traffic is "not interstate." In any event, even the complainants acknowledge that under their own theory at least some of the traffic is interstate. This commission cannot authorize blocking of interstate and/or CMRS traffic.

do so, and there are specific showings that must be made. *See, e.g.*, 47 C.F.R. § 63.60(b)(5), § 63.62(b) and (e), § 63.501. In this regard, the applicant must state whether any other carriers consent (§ 63.501(p)).[42] Halo does not so consent.

98. Any decision by the complainants to proceed with blocking under the auspices of a void state order would be a clear violation of these rules. The FCC would probably be interested in knowing what the state commission thinks about the topic, but a void state commission "order" could not possibly immunize the carrier from damages.

99. The state does not have jurisdiction over § 214 or the FCC's rules relating to the interchange of interstate and/or CMRS traffic. Any state order purporting to authorize the blocking of interstate and/or traffic would be void, and provide no basis for immunity if the complainants then proceed to block. While the FCC may consider the state commission's opinion, it has no binding effect. *Gray Lines Tour, supra* 824 F.2d at 815[43]; *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm.*,

[42] The applicant must also give notice to the involved state commission. 47 C.F.R. § 63.71(a). The state commission can presumably become a party to the FCC proceeding and comment on the application. These rules do not contemplate an applicant seeking a state regulator's permission to cease interchange of interstate traffic in the first instance.

[43] "The question, however, is not whether deference should be accorded a decision of the Nevada Commission. The question is one of jurisdiction. The issue which the ICC was called upon to decide was whether the Hoover Dam tours, as conducted by the interstate carriers, were within the scope of the operating authority the carriers held under their ICC certificates. The resolution of that question is within the jurisdiction of the ICC. State regulatory authorities may not assume the power to interpret the boundaries of federally issued certificates or to impose sanctions upon operations assertedly unauthorized by the federal certificate. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79, 3 L. Ed. 2d 717, 79 S. Ct. 714 (1959). The ICC is entitled to interpret, in the first instance, certificates it has issued. *Service Storage*, 359 U.S. at 177; *see also E.E.O.C. v. Children's Hospital Medical Center of Northern California*, 719 F.2d 1426, 1429 (9th Cir. 1983) ('the question of jurisdiction is, in the first instance, for the agency and not the courts'). The ICC correctly determined that it had jurisdiction to determine whether the Hoover Dam tours as conducted by ACT, Interstate and Happy Time were valid interstate operations within the scope of their ICC-issued certificates. The determination by the ICC that these interstate carriers were operating within the scope of their ICC certificates, notwithstanding the decision of the Nevada Commission, did not violate the policy statements contained within 49 U.S.C. § 10101."

648 F.2d 1350 (5th Cir. 1981).[44] The commission has no jurisdiction over the request to investigate Halo and "order" blocking based on the results of any investigation. The entire matter must be dismissed.

F. THE COMMISSION'S JURISDICTION UNDER STATE LAW

100. The commission is a state regulatory agency organized pursuant to the laws of Missouri.[45] As a state agency, the commission is wholly a creature of statute.[46] Its jurisdiction is limited to the specific persons and issues identified in its enabling legislation.[47] Although the commission's authority and jurisdiction can be modified by judicial interpretations of the enabling legislation, the commission may not expand its jurisdiction unilaterally or address matters or parties beyond the jurisdiction afforded to it by its enabling legislation.[48]

101. In other words, a state agency cannot adjudicate a dispute when it lacks statutory authority to support the assertion of jurisdiction over the specific persons who are involved in the

---

[44] "This Court, having considered the arguments of the parties, views the Mississippi Public Service Commission's application of Miss.Code § 77-3-3 (1972) to plaintiff Motorola as an illegal attempt to usurp jurisdiction to regulate communication activity that is preempted by the Federal Communications Commission. ... The FCC has exclusive jurisdiction to 'classify radio stations ... prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class ... encourage the larger and more efficient use of radio in the public interest ... (and) make such rules and regulations and prescribe such restrictions and conditions ... as may be necessary to carry out the provisions of this Act....' 47 U.S.C. § 303(a), (b), (g), (r) (1970)."

[45] *See* Mo. Ann. Stat. § 386.040.

[46] *See State ex rel. Missouri Cable Telecommunications Ass'n v. Missouri Pub. Serv. Comm'n,* 929 S.W.2d 768, 772 (Mo. Ct. App. 1996) (holding the PSC is a "creature of statute and limited thereby"); *See also State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n,* 585 S.W.2d 41, 49 (Mo. 1979) (affirming that since " it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted"); and *State ex rel. Kansas City v. Pub. Serv. Comm'n of Missouri*, 301 Mo. 179, 190, 257 S.W. 462, 462 (1923) (concluding "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the commission" is authorized by the statute).

[47] *See State ex rel. Kansas City*, 257 S.W. at 463; *See also State ex rel. Util. Consumers' Council of Missouri,* , 585 S.W.2d at 49 .

[48] *See State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n of State*, 658 S.W.2d 448 (Mo. Ct. App. 1983) (recognizing Public Service Commission is an "administrative agency with limited jurisdiction and lawfulness of its actions depends entirely on whether it has statutory power and authority to act, and where such authority is lacking, reviewing court may reverse"); *see also Missouri Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134 (Mo. Ct. App. 2009), reh'g and/or transfer denied (Feb. 2, 2010), opinion adopted and reinstated after retransfer (Sept. 24, 2010) (The "powers necessary or proper" clause of the Public Service Commission Law enables the Commission to carry out the functions specifically delegated to it by the legislature; it is not a license to engage in any conceivable activity for the protection of ratepayers).

dispute and over the specific subject matter raised by the dispute. However, under Missouri law, *in personam* jurisdiction over a party generally can be waived.[49] In order for a party to avoid waiver of *in personam* jurisdiction, objections to the tribunal's assertion of such jurisdiction must be timely raised by the relevant party.[50] When objections to the tribunal's subject matter and personal jurisdiction have been raised, the tribunal must determine the relevant jurisdictional facts and make a determination that is has both subject matter and personal jurisdiction before continuing with the proceeding or its rulings are void.[51] The scope of any tribunal's jurisdiction is governed first by the United States Constitution.[52] However, a tribunal's jurisdiction may be further governed by state legislation and judicial interpretation.[53]

102. As noted above, in the context of a state agency, the scope of its jurisdiction is limited by the agency's enabling legislation.[54] Thus, the state agency may assert *in personam* jurisdiction only over the specific classes of persons or entities that are identified by statute, as may be interpreted by the courts.[55] Because an agency's *in personam* jurisdiction is limited by statute, the mere fact that a person has routine contact with an agency is irrelevant to whether

---

[49] *See Health Enterprises of Am., Inc. v. Dep't of Soc. Services, State of Mo.*, 668 S.W.2d 185, 187 (Mo. Ct. App. 1984) (affirming that under Missouri law, "unlike personal jurisdiction, subject matter jurisdiction cannot be conferred or waived by agreement of the parties").

[50] *See Flair v. Campbell*, 44 S.W.3d 444, 454 (Mo. Ct. App. 2001) (holding that if a defendant's challenge to the personal jurisdiction of a tribunal is not timely raised in, or prior to, the Defendants' answer to a complaint, it is deemed to have been waived).

[51] *See Beach v. Dir. of Revenue*, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996) (holding that when subject matter jurisdiction is lacking, the "court may take no action other than to exercise its power to dismiss the action".); *Crouch v. Crouch*, 641 S.W.2d 86, 90 (Mo. 1982) (A personal judgment rendered by a court without personal jurisdiction over the defendant is void); *Ogle v. Dir. of Revenue*, 893 S.W.2d 403, 404 (Mo. Ct. App. 1995) (affirming that any action taken by a court "lacking subject matter jurisdiction is null and void").

[52] U.S. CONST. amend. XIV, § 1.

[53] *Missouri Pub. Serv. Comm'n v. Oneok, Inc.*, 318 S.W.3d 134, 137 (Mo. Ct. App. 2009) (holding that whether the Commission's actions are lawful "depends directly on whether it has statutory power and authority to act).

[54] *See Oneok, Inc.*, 318 S.W.3d at 137.

[55] *See State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n of State of Mo.*, 116 S.W.3d 680, 696 (Mo. Ct. App. 2003) (affirming that" the Commission has only those powers conferred either expressly or implicitly by statute as necessary to carry out the specifically-granted powers").

that person falls within the class prescribed by statute over which the agency can assert *in personam* jurisdiction.[56]

103. Unlike *in personam* jurisdiction, subject matter jurisdiction cannot be waived by consent of the parties.[57] Subject matter jurisdiction relates to the authority of the tribunal to address the particular issues raised by the dispute.[58] Any party or the tribunal may raise the issue of subject matter jurisdiction at any time.[59] When subject matter jurisdiction is brought into question, the tribunal must assure itself of its subject matter jurisdiction before it addresses any other matters in the proceeding, and if the tribunal finds that it does not have subject matter jurisdiction, then the only authority possessed by the tribunal is that authority necessary to immediately dismiss the action.[60]

104. The jurisdiction of a tribunal is a threshold matter that must be determined at the outset of the proceeding.[61] Even the Supreme Court of the United States must determine its own jurisdiction before it can proceed with a matter, and the rule is the same in Missouri.[62] By filing this Motion, Halo asserts its objections to the commission's assertion of either subject matter or personal jurisdiction over Halo as a threshold matter. This requires that the commission investigate its jurisdiction prior to taking any substantive action in this matter. Halo cannot be required to "answer" or set up defenses and counterclaims, and no hearing can be held "on the

---

[56] *See Oneok, Inc.*, 318 S.W.3d at 137-138.

[57] *See Health Enterprises of Am.*, 668 S.W.2d at 187.

[58] *See In re Marriage of Hendrix*, 183 S.W.3d 582, 588 (Mo. 2006) (affirming that subject matter jurisdiction is a tribunal's statutory authority to hear a particular kind of claim or dispute); *See also United Broth. of Carpenters & Joiners of Am., Dist. Council, of Kansas City & Vicinity v. Indus. Comm'n*, 352 S.W.2d 633, 635 (Mo. 1962) (affirming that it is the sole province of the legislature to establish "such a class of cases, and if none is established the provision that an appeal may be taken to this court is void and of no effect".)

[59] *See State Tax Comm'n v. Admin. Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. 1982) (stating that "lack of subject matter jurisdiction may be raised at any stage in the proceedings").

[60] *See Beach*, 934 S.W.2d at 318.

[61] *See Id.*

[62] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998).

merits" unless and until the commission has expressly found it does have subject matter jurisdiction over the action and personal jurisdiction over Halo.

105. Similarly, the Supremacy Clause of the United States Constitution[63] and Missouri law require that the Commission examine, as a preliminary matter, whether its exercise of jurisdiction is preempted under federal law before proceeding to the merits of the complainants' state law claims.[64] When, upon examination, the state law invoked conflicts with federal law, the state laws are preempted.[65] Thus, if the federal statute applies, there is no need to determine whether state law has been met.[66] Here, all of the issues raised by the complainants are preempted by Federal law because they fall within the express exclusive jurisdiction of the FCC. Thus, this entire proceeding under state law is preempted and must be dismissed in favor of the FCC.

106. Moreover, this tribunal is also required to examine its own jurisdiction before proceeding because a determination of whether this tribunal lacks jurisdiction and is preempted from acting on complainants' claims is determinative of whether complainants have failed to state a claim for which relief can be granted and whether their claims must be dismissed. Under Missouri law, consideration of a motion to dismiss for failure to state a claim for which relief can be granted must be based solely on the sufficiency of the facts appearing on the face of the petition.[67] The issue is not whether the plaintiff is entitled to a judgment in his favor, rather it is

---

[63] U.S. Const. art. VI, cl. 2

[64] *See Robertson Properties, Inc. v. Detachment of Territory from Pub. Water Supply Dist. No. 8 of Clay County*, 153 S.W.3d 320, 326 (Mo. Ct. App. 2005)(holding that when faced with a question of whether federal law preempts state law or state action, a tribunal must determine as a preliminary matter whether the letter of the federal law and the Congress' purposes and objectives are being followed).

[65] *See Robertson Properties*, 153 S.W.3d at 326.

[66] *See id.*

[67] *See Rychnovsky v. Cole*, 119 S.W.3d 204, 210 (Mo. Ct. App. 2003).

whether he is entitled to be heard on his claim.[68] Here, this tribunal must dismiss this case as a preliminary matter and before proceeding to examine the merits because the complainants' complaints on their face show that all of the issues raised fall within the exclusive jurisdiction of the FCC and therefore this tribunal cannot grant relief on the claims.

107. The complainants ultimately contend that Halo is not acting pursuant to any federal authorization and is "merely" the complainants' "access customer."[69] This proposition, of course, can only be contemplated *after* a *federal* venue decides that the traffic in issue is "not" CMRS, or is "not" "non-access" under § 20.11(d), two determinations this commission completely lacks jurisdiction to determine. This commission certainly has no jurisdiction or power to "change" or "find an exception" to the FCC's binding rules on when CMRS traffic is subject to § 251(b)(5). Those rules and decisions tightly define and establish the regulatory "origination" point for CMRS traffic: the radio transmitter serving the CMRS customer or the POI, which for all Halo traffic is in the same MTA as the terminating location.[70] The complainants want this state commission to overturn, ignore or add an exception to this rule, but that is not within the commission's power, and the commission cannot grant this relief. In similar vein, the complainants want the state commission to expand the FCC's list of the "limited"

---

[68] *See Id. See also Halamicek Brothers, Inc. v. St. Louis County*, 883 S.W.2d 108, 110 (Mo.App. E.D.1994). (affirming that dismissal for failure to state a claim is proper where facts essential to recovery are not pled).

[69] As noted, the complaints repeatedly seek an order that Halo be ordered to compensate them "at the rates contained in their access tariffs." The commission has no jurisdiction over interstate traffic, or over any interstate tariffs. At best, any relief must be limited to intrastate traffic covered by the complainants' intrastate access tariffs. The problem, of course, is that the commission cannot "find" any intrastate traffic because it would have to find the traffic is "not interstate" and the commission lacks the power to decide that question. In any event, the complainants speak to "access rates" without even attempting to prove that their access tariffs apply. They do not, for example, identify the access service they are providing, or demonstrate that the tariffs can actually be read to cover any traffic based on the terms of the tariffs themselves. Halo insists that this issue cannot and should not be reached, but if it is somehow reached Halo will demand that the complainants prove that the arrangements in issue, and the traffic, does fall within the express terms of their intrastate access tariffs.

[70] *Local Competition Order* ¶ 1044 ["...For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party."].

circumstances when a CMRS provider will be deemed to be providing telephone toll, and therefore acting as an IXC.[71] The commission completely lacks any power to overturn FCC rules providing that intraMTA traffic (using the serving base station or POI as the originating point) is *not* telephone toll service subject to access charges, but is instead telephone exchange service subject to § 251(b)(5).

108. Setting aside the significant problem that the commission cannot reach the question of whether Halo is an access customer, and assuming *arguendo* that Halo is somehow occupying "customer" status *vis-à-vis* the complainants, the Missouri legislature did not see fit to turn the commission into a court, or to allow it to award damages payable from a customer to a regulated entity. The commission lacks the power to grant the relief requested in Requests for Relief L, M and N.

109. The commission has said that it has subject matter jurisdiction even when a public utility is attempting to raise a complaint regarding a CMRS provider that is not subject to the commission's regulatory authority.[72] As already indicated, the commission lacks subject matter jurisdiction, however, because it cannot grant the requested relief, and under *federal* law – as

---

[71] *See Local Competition Order* ¶ 1043 and note 2485, *supra*.

[72] Order Regarding Subject Matter Jurisdiction, *Northeast Missouri Rural Telephone Company v. Southwestern Bell Telephone Company*, Case No. TC-2002-57 (February 24, 2002), 2002 WL 535137 *2 (Mo.P.S.C.) (notes omitted):

> These cases were all initiated by the filing of complaints. The complaining parties are all telecommunications corporations and incumbent local exchange carriers. The complaining parties are all public utilities within the intendments of Missouri law, subject to regulation by the Missouri Public Service Commission. The respondents are either commercial mobile radio service providers or incumbent local exchange carriers. If the latter, then those respondents are also public utilities for the purposes of Missouri law, subject to regulation by this Commission. If the former, then the respondents are not public utilities and are not subject to regulation by this Commission.
>
> A complaint may be brought before this Commission by 'any corporation or person,' including regulated utilities, against 'any corporation, person, or public utility.' The language is very broad and is clearly intended to extend to entities not subject to Commission regulation. As long as at least one party, whether a petitioner or a respondent, is a public utility, the Commission has jurisdiction under the law. Thus, for example, the Commission has jurisdiction over disputes between public utilities and their customers and often hears such cases. According to the complaints filed in these cases, the respondents are all customers of the petitioners in that they originate or transport traffic intended for termination on the petitioners' networks, to petitioners' subscribers. The Commission has jurisdiction over the dealings of a public utility with its customers.