BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE
April 18, 2012

IN RE:	)	
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COMPLAINT OF CONCORD TELEPHONE EXCHANGE, INC., HUMPHREYS COUNTY TELEPHONE CO., TELLICO TELEPHONE COMPANY, TENNESSEE TELEPHONE COMPANY, CROCKETT TELEPHONE COMPANY, INC., PEOPLES TELEPHONE COMPANY, WEST TENNESSEE TELEPHONE COMPANY, INC., NORTH CENTRAL TELEPHONE COOP., INC. AND HIGHLAND TELEPHONE COOPERATIVE, INC. AGAINST HALO WIRELESS, LLC, TRANSCOM ENHANCED SERVICES, INC. AND OTHER AFFILIATES FOR FAILURE TO PAY TERMINATING INTRASTATE ACCESS CHARGES FOR TRAFFIC AND OTHER RELIEF AND AUTHORITY TO CEASE TERMINATION OF TRAFFIC	)	**DOCKET NO. 11-00108**

ORDER

This matter came before Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on February 13, 2012, for consideration of the *First Amended Complaint* filed by a number of rural telephone companies (the "Complainants" or "RLECs")[1] against Halo Wireless, Inc. ("Halo")[2] and Transcom Enhanced Services, Inc. ("Transcom") (collectively, the "Respondents").

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[1] The Complainants are: Concord Telephone Exchange, Inc., Humphreys County Telephone Co., Tellico Telephone Company and Tennessee Telephone Company (collectively, "TDS"); Crockett Telephone Company, Inc., Peoples Telephone Company and West Tennessee Telephone Company, Inc. (collectively, "TEC"); North Central Telephone Coop., Inc. ("NCTC") and Highland Telephone Cooperative, Inc. ("HTC").

[2] The *First Amended Complaint* refers to Halo as "Halo Wireless, LLC" and "Halo Wireless, Inc." In its filings, Halo refers to itself as "Halo Wireless, Inc."

Travel of the Case

On July 7, 2011, the Complainants filed a *Complaint* against Halo, Transcom and "such other affiliated companies as are involved in the delivery of traffic"[3] to the Complainants, alleging that Respondents "have failed and refused to pay the applicable intrastate access charges"[4] due the Complainants. Halo and Transcom each filed a *Motion to Dismiss* on August 5, 2011. On August 10, 2011, Halo filed a *Suggestion of Bankruptcy* informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Texas (Sherman Division)" ("Bankruptcy Court").[5] Accordingly, Halo stated, "the automatic stay is now in place" and "prohibits further action against both [Halo] and Transcom in the instant proceeding."[6]

By letter filed on August 16, 2011, the Complainants informed the TRA that, because of the automatic stay, they would not be filing a response to Halo's *Motion to Dismiss*.[7] However, the Complainants filed a response to Transcom's *Motion to Dismiss* on August 16, 2011.[8]

On August 19, 2011, the Respondents filed a *Notice of Removal to Federal Court*, stating that this matter has been removed to the United States District Court for the Middle District of Tennessee, Nashville Division ("District Court") "pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure."[9] On November 8, 2011, the TRA received the

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[3] *Complaint*, p. 1 (July 7, 2011); *see also First Amended Complaint*, p. 1 (November 16, 2011).
[4] *Complaint*, p. 2 (July 7, 2011); *see also First Amended Complaint*, p. 2 (November 16, 2011).
[5] *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).
[6] *Id.* at 2.
[7] Letter from H. LaDon Baltimore to Chairman Eddie Roberson (August 16, 2011).
[8] *Response in Opposition to Motion to Dismiss Filed by Transcom Enhanced Services, Inc.* (August 16, 2011).
[9] *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).

Order of the District Court remanding this case to the TRA, which was entered by the District Court on November 3, 2011.[10]

On November 10, 2011, the Complainants filed a letter requesting that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 "for appointing a Hearing Officer and other action as necessary" and suggesting an expedited procedural schedule.[11] With the letter, the Complainants submitted copies of the District Court's Order remanding the case to the TRA, the District Court's Memorandum Opinion, an Order of the Bankruptcy Court granting a motion filed by TDS to determine that the automatic stay was not applicable to the Complaint, and an Order of the Bankruptcy Court denying the Respondents' motions for a stay pending appeal of the Bankruptcy Court's Order. On November 16, 2011, the Complainants filed a *Motion to Amend Complaint*, attaching a new *First Amended Complaint*.[12]

On November 17, 2011, Halo filed a *Motion to Abate*, in which Halo requested that the TRA "abate" this proceeding until conclusion of Halo's appeal of the Bankruptcy Court's October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit.[13] Also on November 17, 2011, Halo submitted a letter stating its objections to the procedural schedule proposed by the Complainants.[14] The Complainants responded to this letter on November 18, 2011,[15] and the Respondents replied to the Complainants' response on November 21, 2011.[16]

At the regularly scheduled Authority Conference held on November 21, 2011, the Authority voted unanimously to deny the *Motion to Abate*, to convene a contested case in this matter and to appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary

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[10] The District Court's Order was filed in this docket on November 10, 2011.
[11] Letter from H. LaDon Baltimore to Chairman Kenneth C. Hill (November 10, 2011).
[12] *Motion to Amend Complaint* (November 16, 2011).
[13] *Motion to Abate*, p. 4 (November 17, 2011).
[14] Letter from Steven H. Thomas to Chairman Kenneth C. Hill (November 16, 2011).
[15] Letter from H. LaDon Baltimore to Chairman Kenneth C. Hill (November 18, 2011).
[16] Letter from Steven H. Thomas to Chairman Kenneth C. Hill (November 21, 2011).

matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.[17]

Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter, at the conclusion of which the Hearing Officer directed the parties to file responses to the pending motions and to reconvene for a status conference on December 12, 2011.

On December 1, 2011, the Respondents filed their opposition to the Complainants' motion to amend their complaint,[18] and the Complainants filed their response to Halo's *Motion to Dismiss*.[19] The Complainants filed a reply to the Respondents' opposition to the motion to amend the complaint on December 8, 2011.[20] Also on December 8, 2011, Halo and Transcom filed replies in support of their motions to dismiss.[21]

At the status conference on December 12, 2011, the Parties argued the various pending motions. On December 16, 2011, the Hearing Officer denied the Respondents' motions to dismiss and granted the Complainants' *Motion to Amend Complaint*.[22]

The Parties submitted the pre-filed direct testimony of their witnesses on January 9, 2012, and their pre-filed rebuttal testimony on January 20, 2012.

THE HEARING

A Hearing in this matter was held before the voting panel of Directors assigned to this docket on January 23, 2012. The Hearing was publicly noticed by the Hearing Officer on

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[17] *Order Denying the Motion to Abate, Convening a Contested Case and Appointing a Hearing Officer* (December 19, 2011).
[18] *Opposition to Motion to Amend Complaint* (December 1, 2011).
[19] *Response in Opposition to Motion to Dismiss Filed by Halo Wireless*, LLC (December 1, 2011).
[20] *Reply to Opposition to Motion to Amend Complaint* (December 8, 2011).
[21] *Halo Wireless, Inc's Reply in Support of Motion to Dismiss* (December 8, 2011); *Transcom Enhanced Services, Inc.'s Reply in Support of Motion to Dismiss* (December 8, 2011).
[22] *Order Denying Motions to Dismiss* (December 16, 2011); *Order Granting Motion to Amend Complaint* (December 16, 2011). The Hearing Officer issued a *Notice of Hearing Officer's Ruling* on December 14, 2011, in advance of the respective Orders.

December 29, 2011 and January 19, 2012. Participating in the Hearing were the following parties and their respective counsel:

> **For the Complainants – H. LaDon Baltimore, Esq.,** Farris Mathews Bobango PLC, 618 Church Street, Suite 300, Nashville, TN 37219 and **Norman J. Kennard, Esq.,** Thomas Long Niesen & Kennard, 212 Locust Street, Suite 500, Harrisburg, PA 17101.
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> **For Halo Wireless, Inc. and Transcom Enhanced Services, Inc. – Paul S. Davidson, Esq.**, Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.** and **Troy P. Majoue, Esq.,** McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201 and **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Highway, Bldg. 2-235, West Lake Hills, TX 78746.

During the Hearing, the Authority heard testimony from Complainants' witnesses Thomas M. McCabe and Linda N. Robinson. Russ Wiseman and Robert Johnson testified for Halo and Transcom.

FIRST AMENDED COMPLAINT

In their *First Amended Complaint*, the Complainants assert that TDS and TEC are public utilities under Tennessee law, with tariffs establishing rates, terms and conditions regarding the use of their network terminating to provide intrastate exchange access service.[23] NCTC and HTC provide intrastate access service pursuant to tariffs that identify the rates, terms and conditions applicable to their local exchange services and switched access services.[24] The Complainants state that they receive toll traffic from AT&T[25] tandems over common trunk groups, and that Halo has obtained access and connectivity to AT&T, and indirectly to the Complainants, by adoption of an interconnection agreement approved by the TRA.[26] The Complainants allege that the Halo traffic delivered to the Complainants is predominantly toll traffic to which access

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[23] *First Amended Complaint*, p. 7 (November 16, 2011).
[24] *Id.* at 4.
[25] BellSouth Telecommunications, LLC d/b/a AT&T Tennessee ("AT&T").
[26] *First Amended Complaint*, p. 8 (November 16, 2011).

charges apply, including both wireline long distance and wireless interMTA traffic.[27] The Complainants further allege that Halo has failed and refused to pay the Complainants for terminating Halo's traffic to their end-user customers according to the rates, terms and conditions set forth in the applicable tariffs.[28] The *First Amended Complaint* contains three counts:

Count I – Declaratory Ruling That Access Charges Apply to The Traffic Sent to the Complainants by Halo for Termination. The Complainants allege that Halo has acknowledged in Federal Communications Commission ("FCC") filings that it provides telephone exchange service and exchange access.[29] By demanding and using the Complainants' intrastate access services, Halo constructively ordered such access services from the Complainants, the terms and conditions of which are set forth in its intrastate access tariffs.[30] Therefore, the Complainants assert that the Authority should rule that intrastate wireline toll traffic and wireless interMTA traffic sent to them by Halo for termination to the Complainants' end-users is subject to intrastate access charges.[31]

Count II - Request a Cease and Desist Order Based on Halo's Provision of Telecommunications Service Without a Certificate of Authority. The Complainants assert that Tenn. Code Ann. § 65-4-201(b) requires that providers of telecommunications services, which includes the transport and delivery of wireline traffic to a local exchange company for termination, to obtain a Certificate of Convenience and Necessity ("CCN").[32] The Complainants allege that Halo has not been granted a CCN by the TRA, and should be ordered to cease and

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[27] *Id.*
[28] *Id.* at 7.
[29] *Id.* at 12.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 13.

desist from providing telecommunications services in Tennessee until the TRA holds a hearing on the matter.[33]

Count III - Request a Cease and Desist Order Based on Transcom's Provision of a Telecommunications Service Without a Certificate of Authority. The Complainants assert that Tenn. Code Ann. § 65-4-201(b) requires that providers of telecommunications services, which includes the transport and delivery of wireline traffic to a local exchange company for termination, to obtain a CCN.[34] The Complainants allege that Transcom has not been granted a CCN by the TRA, and should be ordered to cease and desist from providing telecommunications services in Tennessee until the TRA holds a hearing on the matter.[35]

Requested Relief

The Complainants request the Authority to: (1) open an investigation concerning the actions cited in the *First Amended Complaint*; (2) commence a contested case concerning these actions; (3) issue a Cease and Desist Order prohibiting Halo from providing telecommunications services in the State of Tennessee until such time as the TRA may hold a hearing on this matter; (4) issue a Cease and Desist Order prohibiting Halo and Transcom from providing telecommunications services in the State of Tennessee until such time as the TRA may hold a hearing on this matter; (5) declare that the toll traffic sent to the Complainants by Halo that originates and terminates in the State of Tennessee is subject to intrastate access charges; (6) authorize the Complainants to cease termination of traffic from Halo and Transcom to end-user customers of the Complainants and further order, direct and require AT&T to block all traffic from Halo and/or Transcom for termination to the Complainants' end-user customers as a result of Halo/Transcom's failure to pay all outstanding intrastate access charges due and payable.

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[33] *Id.*
[34] *Id.* at 14.
[35] *Id.*

Any costs incurred by AT&T to block this traffic shall be borne by Halo and/or Transcom; and (7) grant such other and further relief to which they may be entitled, including reasonable attorney's fees and costs.[36]

POSITIONS OF THE PARTIES

The Parties have set forth their arguments in full in the record of this docket and in the presentation of their cases at the Hearing. The following section is intended as a *brief* summary of the positions of the Complainants and Respondents in this matter.

Position of the Complainants

The Complainants state that Halo obtained access to AT&T and, hence, indirectly to the Complainants by adopting the interconnection agreement between BellSouth and T-Mobile, which was approved by the TRA on June 21, 2010 in Docket No. 10-00063.[37] The Complainants began receiving traffic from Halo in December 2010 via the common trunk groups that the Complainants maintain with AT&T.[38] The Complainants began invoicing Halo in accordance with their respective Interstate and Intrastate tariffs[39] during the March-April 2011 time frame,[40] which Halo disputed by claiming that the traffic in question was intraMTA[41] and for which it argued that Commercial Mobile Radio Service ("CMRS") providers like Halo are under no obligation to pay.[42] The Complainants determined through a traffic study that more than seventy percent of Halo's traffic was originated by traditional wireline carriers.[43] The Complainants assert that the fact that Halo claims to be a CMRS provider in one aspect of its operations does

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[36] *First Amended Complaint*, p. 15 (November 16, 2011).
[37] *Id.* at 8.
[38] *Id.*
[39] Linda N. Robinson, Pre-Filed Direct Testimony, p. 6 (January 9, 2012).
[40] Thomas M. McCabe, Pre-Filed Direct Testimony, p. 4 (January 9, 2012). The Complainants did not bill Halo access charges for any intraMTA CMRS-originated calls. *See* Linda M. Robinson, Pre-Filed Direct Testimony, p. 13 (January 9, 2012).
[41] MTA refers to the Major Trading Area, which is the local calling area for CMRS calls.
[42] Thomas M. McCabe, Pre-Filed Direct Testimony, p. 4 (January 9, 2012).
[43] Linda N. Robinson, Pre-Filed Direct Testimony, pp. 12-13 (January 9, 2012).

not mean that all of its traffic constitutes CMRS traffic;[44] rather, the type of service that Halo provides determines its regulatory classification.[45]

The Complainants allege that, although Halo contends that only interexchange carriers ("IXC") are subject to access charges, the FCC has clarified that calls between a Local Exchange Carrier and a CMRS provider that do not originate and terminate within the same MTA are subject to access charges, whether or not they are carried by an IXC.[46] Furthermore, according to the Complainants, the NECA tariff[47] does not limit the application of access charges to IXCs and CMRS providers:

> The term "Customer(s)" denotes any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users.[48]

Therefore, the Complainants claim that any entity that uses their access services is thereby an access customer regardless of whether the entity has requested such service.[49]

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[44] Thomas M. McCabe, Pre-Filed Direct Testimony, p. 14 (January 9, 2012).

[45] *Id.* at 10, citing from 47 CFR § 90.1309 ("Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. A licensee may render any kind of communications service consistent with the regulatory status in its license and with the Commission's rules applicable to that service.")

[46] Linda Robinson, Pre-Filed Rebuttal Testimony, pp. 2-3 (January 20, 2012), citing from *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, *Report and Order*, 11 FCC Rcd. 15499-16031 (1996) ("*Local Competition Order*"), fn. 2385 "[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 carriers; carrier [i.e. access] charges is defined by §69.5(b) of our rules." *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 RR 2d 1275, 1284-85 n.3 (1986).

[47] National Exchange Carrier Association, Inc. ("NECA") Tariff, FCC No. 5.

[48] Linda Robinson, Pre-Filed Rebuttal Testimony, p. 3 (January 20, 2012). Ms. Robinson adds: "The NECA interstate tariff was recently updated, effective December 29, 2011, to change the definition of 'Customer' to state '*...**including but not limited to End Users, Interexchange Carriers (ICs) and other telecommunications carriers or providers originating or terminating Toll VoIP-PSTN Traffic***.' (Emphasis added). This change is reflective of the fact that, under the current rules, access charges may apply to entities that do not meet the statutory definition of Interexchange Carrier." *Id.* at 3, fn. 4. The term "VoIP" refers to Voice Over Internet Protocol. The term "PSTN" refers to the Public Switched Telephone Network, which means the calls were originated on the landline network.

[49] *Id.* at 3.

The Complainants take issue with Halo's contention that Transcom is an Enhanced Service Provider ("ESP"). The Complainants allege that Transcom neither provides any services to the end-user nor identifies any enhancements that the end-user can discern.[50] The Complainants argue that the FCC has expressly rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network can be "re-originated" as wireless calls by passing through an ESP with wireless equipment in the middle of the call.[51] According to the Complainants, the FCC acknowledged Halo's claims and found that toll calls were not thus transformed.[52]

The Complainants include Transcom as a Respondent because they allege that Transcom and Halo are operating in concert, engaging in the practice of access arbitrage.[53] The Complainants assert that Transcom is a high volume least-cost routing carrier who must hand off the call for termination to avoid direct liability for access charges.[54] Transcom aggregates third-party toll traffic and hands it off to its affiliate Halo, which misrepresents the traffic as its own intraMTA CMRS traffic in order to avoid paying access charges.[55]

The Complainants also assert that the toll calls aggregated by Transcom and forwarded to Halo for delivery are a voice two-way communication, which would require certification by the

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[50] Thomas M. McCabe, Pre-Filed Direct Testimony, pp. 25-26 (January 9, 2012).
[51] *Id.* at 24-26.
[52] *Id.* at 27, citing *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up* (WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109), *Report and Order and Further Notice of Proposed Rulemaking*, ¶ 1005 (November 18, 2011) ("*Connect America Fund Order*").
[53] *Id.* at 18.
[54] *Id.* at 18-20.
[55] *Id.*

Authority.[56] Neither Halo nor Transcom is certificated to provide telecommunications services in Tennessee.[57]

Position of the Respondents

Halo asserts that it provides CMRS licensed under 47 U.S.C. § 332(c)(7)(C) that are therefore by definition CMRS calls.[58] If this position proves incorrect, then Halo argues that it provides unlicensed wireless services using devices that do not require individual licenses.[59] Halo maintains that none of its traffic is subject to access charges, because its end-user customer (Transcom) originates each call using wireless equipment capable of movement that connects with a Halo base station in the same MTA in which the call terminates.[60] Halo states that it is not acting as an IXC because Halo does not provide "telephone toll" as part of the call.[61]

Halo contends that the TRA cannot rely on the Complainants' traffic study, because the calling party's telephone number is an unreliable method of determining where a call started.[62] Nevertheless, Halo maintains that the location of the calling party is irrelevant, because ESPs like Transcom always receive calls that started somewhere else.[63]

Halo argues that it cannot be required to pay access charges to the Complainants because it did not seek to obtain access service, it was not directly interconnected with the Complainants, and it does not meet the Complainants' tariff definition of "customer" for any of the four switched access feature groups.[64]

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[56] *Id.* at 28-29.
[57] *Id.* at 15, 18.
[58] Russ Wiseman, Pre-Filed Direct Testimony, p. 5 (January 9, 2012).
[59] *Id.*
[60] *Id.* at 6. Halo relies on the *Local Competition Order*, ¶ 1043 and note 2485.
[61] *Id.* at 6.
[62] Russ Wiseman, Pre-Filed Rebuttal Testimony, pp. 18-22 (January 20, 2012).
[63] Russ Wiseman, Pre-Filed Direct Testimony, pp. 16-17 (January 9, 2012). Halo submits that the FCC itself has consistently recognized that ESPs – as end-users – "originate" traffic even when they received the call from some other end-point. It believes that is the purpose of the FCC's finding that ESPs systems operate much like traditional "leaky PBXs." *Id.* at 17, fn. 11.
[64] *Id.* at 29-30.

The Respondents argue that four federal court rulings have affirmed Transcom's status as an ESP.[65] In order to be "telecommunications," the information sent by the user must be the same as the information received by the other participants; any change in the information means that the communication is no longer "telecommunications."[66] Transcom asserts that it changes the form and content of calls by (1) increasing the audio level of the voice information relative to the other sounds;[67] (2) making the voice clearer and more understandable;[68] and (3) adding "comfort noise" to the gaps in conversation,[69] which prevents the parties from wrongly thinking that the call has been disconnected.[70] Transcom argues that "upon receiving a call," it proceeds to "originate further communication"[71] and therefore it cannot be subject to access charges on the services that it purchases from Halo.[72] Furthermore, the FCC prohibits states from regulating ESPs under common carrier or other economic regulation, unless the ESP is also a carrier and its ESP activities are wholly intrastate.[73]

Halo questions whether ¶¶ 1005-1006 of the *Connect America Fund Order* can be applied to traffic before December 29, 2011 and whether the FCC was addressing the topic in an adjudicatory rather than a legislative capacity.[74] Halo asserts that the FCC mistakenly quoted Halo as asserting that Transcom "re-originates" traffic; instead, Halo claims that Transcom uses Halo's service to "initiate a further communication."[75] Halo states that it concludes from ¶ 958 of the *Connect America Fund Order* that there must be a difference between the terms "re-

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[65] Robert Johnson, Pre-Filed Direct Testimony, p. 6 (January 9, 2012); Russ Wiseman, Pre-Filed Direct Testimony, p. 12 (January 9, 2012).
[66] Robert Johnson, Pre-Filed Direct Testimony, pp. 10-11 (January 9, 2012).
[67] *Id.* at 13.
[68] *Id.* at 14.
[69] *Id.* at 12-13.
[70] *Id.* at 14-15.
[71] Russ Wiseman, Pre-Filed Direct Testimony, pp. 15 and 21-22 (January 9, 2012).
[72] *Id.* at 11-13.
[73] *Id.* at 14.
[74] *Id.* at 31.
[75] *Id.* at 32.

origination" and "originate a further communication."[76] Halo further asserts that the FCC never resolved whether VoIP is a telecommunication service or an information service, it never directly addressed the result when Halo's customer is an end-user and it never discussed whether Transcom is or is not a carrier.[77] Halo reasons that since the FCC characterized it as providing "transit," then it must be the "intermediary carrier" referenced in ¶ 1311 of the *Connect America Fund Order*.[78] Halo argues that because the FCC clarified that transit is non-access traffic, then even if this traffic is not intraMTA, then it is also not access.[79] Therefore, since the transit provider is not responsible for termination charges, then the originating carrier must be the responsible party.[80]

FINDINGS AND CONCLUSIONS

Jurisdiction

Throughout these proceedings, the Respondents have raised objections and challenged the jurisdiction of the Authority to consider this matter. For the reasons fully stated in the Hearing Officer's *Order Denying Motions to Dismiss*,[81] the Authority finds that it has jurisdiction to consider the *First Amended Complaint*.

The District Court, in its Order remanding this matter back to the Authority, also recognized the TRA's jurisdiction over this matter. The District Court explained:

> This action concerns tariffs which are enacted and approved by the TRA and required under Tennessee law. Plaintiffs contend that Defendants are violating state law, specifically Tenn. Code Ann. §§ 65-4-201 and 65-35-102. Plaintiffs state that it is *intrastate* charges which are in dispute herein. Under Tennessee law, the TRA "shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of [the Telecommunications Act of 1996]." Tenn. Code Ann. §

[76] *Id.*
[77] *Id.* at 32-33.
[78] *Id.* at 33.
[79] *Id.*
[80] *Id.* at 32-33.
[81] *Order Denying Motions to Dismiss* (December 16, 2011).

65-5-110(a). For these reasons, the Court finds that this matter should be remanded to the TRA.[82]

The Authority is mindful, however, of the restrictions placed upon these proceedings by the Order of the Bankruptcy Court. In an Order issued on October 26, 2011, the Bankruptcy Court ruled that "pursuant to 11 U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending TDS Proceedings."[83] However, the Bankruptcy Court further stated that

> any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:
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> A. liquidation of the amount of any claim against the Debtor; or
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> B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor.[84]

Therefore, nothing in this Order is intended to permit as part of these proceedings the liquidation of the amount of any claim against Halo or to affect the debtor-creditor relationship between the Parties beyond that permitted in the Bankruptcy Court's October 26, 2011 Order.

First Amended Complaint - Count I

The Complainants seek a finding that access charges apply to the traffic sent to the Complainants by Halo Wireless for termination. The Complainants contend that Halo, by demanding and using the Complainants' intrastate access services, constructively ordered such access services from the Complainants per the terms and conditions of the intrastate access tariffs.[85] Halo's position that it does not owe access charges is tenable only if it can demonstrate that all traffic is originated by its customer Transcom is intra-MTA. To show all traffic it sends

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[82] *Concord Telephone Exchange, Inc. v. Halo Wireless, Inc.*, Case No. 3-11-0796, M.D. Tenn., *Memorandum*, p. 4 (November 3, 2011) (*citations omitted*).

[83] *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of TDS to Determine Automatic Stay Is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement*, p. 2 (October 26, 2011).

[84] *Id.*

[85] *First Amended Complaint*, p. 12 (November 16, 2011).

is intra-MTA, Halo asserts that Transcom is an ESP, and thus an end-user, and that Halo utilizes wireless technology. In its Order in Docket No. 11-00119,[86] the TRA noted the FCC's rejection of Halo's position and ruled:

> The Authority has reviewed Halo's *ex parte* filings with the FCC in the *Connect America Fund* docket, where the description of Halo and Transcom's operations is the same as that which has been presented to the TRA in this proceeding. Indeed, reviewing the *ex parte* filings made by Halo makes it clear that the FCC was aware of Halo's assertion that it provided service to ESPs and used wireless technology. In the resulting *Connect America Fund Order,* the FCC addressed and rejected Halo's assertion that traffic from its customer Transcom is wirelessly originated. The *Connect America Fund Order* states:
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> > We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common Carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA." It further asserts that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle," this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that "it is unclear whether the intraMTA rules would even apply in that case."

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[86] *See In re: BellSouth Telecommunications, LLC dba AT&T Tennessee v. Halo Wireless, Inc.,* Docket No. 11-00119, *Order* (January 26, 2012). In Docket No. 11-00119, the TRA applied the FCC's decision that calls are not wirelessly re-originated by Transcom to determine that wireline telephone calls were delivered to AT&T by Halo. Per the interconnection agreement between AT&T and Halo, the delivery of wireline telephone calls was a breach of contract. In the instant proceeding, the Parties do not have an interconnection agreement with Halo but rather rely on intrastate access tariffs to define their business relationships. During deliberations in this docket at the Authority Conference held on February 13, 2012, the panel took administrative notice of the record in Docket No. 11-00119.

After clearly describing the operations of Halo, including its use of wireless technology and relationship with Transcom, the FCC found that calls are not originated by Transcom and that wireline originated calls are not reclassified as wireless calls because of a wireless link in the middle of the call path. The FCC in the *Connect America Fund Order* continues:

> We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA 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 reciprocal compensation and we disagree with Halo's contrary position.

The Authority agrees with the FCC's rejection of Halo's assertions and finds 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 wireless-originated call for purposes of reciprocal compensation.[87]

Given this precedential ruling by the TRA, the Complainants need only demonstrate that Halo has delivered calls that should have properly been rated as intrastate access traffic to prevail on Count I.[88] The Authority finds that the traffic study provided by the Complainants' witness Linda N. Robinson demonstrates that Halo sent traffic to the Complainants for which intrastate access charges are due.[89] Halo does not deny that it is sending traffic that originated on the wireline PSTN, which would be subject to access charges unless originated in the local calling area. In response to the question, "Do you admit that some of the communications in issue actually started on other networks?" Halo's witness Russ Wiseman responds "Most of the calls probably did start on other networks before they came to Transcom for processing. It would not

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[87] *Id.* at 15-16 (*footnotes omitted*).

[88] It should be noted that Halo tries to mask the clarity of ¶¶ 1005-1006 of the *Connect America Fund Order* by focusing on a description of the term "transit" in ¶ 1311 of the same Order. The Authority finds that Halo's argument takes ¶ 1311 out of context and, instead, relies on the FCC's clear and unambiguous rejection of Halo's position as the basis for its decision.

[89] Linda N. Robinson, Pre-Filed Direct Testimony, RLEC Exhibit LR-3 (January 9, 2012).

surprise me if some of them started on the PSTN."[90] Although Halo does not deny it sends traffic that could be subject to access charges to the Complainants, Halo disputes the Complainants' traffic study. Halo's argument against the traffic study is that telephone numbers are an unreliable indictor of who originates a call if wireless or IP technology is used. Therefore, the Complainants' traffic study is sufficient to demonstrate that Halo has delivered at least some intrastate access traffic.

With the advent of number portability and the growth of wireless and IP telephony, the Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls. Given these valid technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data is based upon industry standards to classify whether traffic is originated on wireline or wireless networks and whether such calls are subject to payment of access charges. Further, such industry standards treat IP-originated traffic as originating from wireline facilities and should be rated accordingly.

The Authority further notes that the study conducted by the Complainants is similar to that which the Authority found sufficient in Docket No. 11-00119. The Complainants' witness Linda N. Robinson states that the "... steps described in the testimony of the AT&T witness are the same as I undertook in completion of the TDS analysis of Halo traffic data and use the same signaling records, databases and methodology for determining call jurisdiction and traffic type. This is not surprising as these are the steps that are commonly used within the industry."[91]

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[90] Russ Wiseman, Pre-filed Direct Testimony, p. 16 (January 9, 2012).
[91] Linda N. Robinson, Pre-Filed Direct Testimony, p. 15 (January 9, 2012).

Given the previous ruling by the Authority in Docket No. 11-00119 reaffirming the FCC's ruling that Transcom does not wirelessly re-originate traffic, and the Authority's finding that the traffic study presented by the Complainants is sufficient to demonstrate that Halo has delivered at least some intrastate access traffic, the Authority concludes that Halo has sent traffic to the Complainants for which intrastate access charges are due.

First Amended Complaint - Counts II and III

In Counts II and III of the *First Amended Complaint*, the Complainants allege that neither Halo nor Transcom has been granted a CCN by the TRA, and should be ordered to cease and desist from providing telecommunications services in Tennessee until the TRA holds a hearing on the matter. The Complainants assert that Tenn. Code Ann. § 65-4-201(b) requires that providers of telecommunications services, which includes the transport and delivery of wireline traffic to a local exchange company for termination, to obtain a CCN.[92]

The Authority finds that the Complainants have not met their burden of proof with respect to Counts II and III of the *First Amended Complaint*. Halo asserts it is a wireless carrier and the TRA lacks regulatory oversight of the wireless industry, including the requirement for certification. The Complainants allege that Halo is actually delivering traffic without utilizing its wireless facilities. However, to reach the conclusion that Halo is not truly a wireless carrier would require the Authority to speculate as to network routing in facilities in its Atlanta, Georgia and Transcom's Texas locations. The Complainants allege that Halo was delivering traffic before it received its FCC license. Such timing does not necessarily mean that Halo was using wired facilities; rather, it could mean that Halo was operating without requisite FCC authority.

The evidence supporting the need for Transcom to obtain a CCN is also inconclusive. While it is clear that traffic that Transcom delivers does not qualify as an enhanced service, it is

[92] *First Amended Complaint*, p. 13 (November 16, 2011).

difficult to conclude from the evidence what activities Transcom actually performs. If for instance, Halo and Transcom were one corporate entity, their activities would look very similar to that of an interexchange carrier. That, however, is not the case as they are separate entities though they appear to be operating in concert.

Given the insufficiency of the evidence presented, the Authority denies Counts II and III of the *First Amended Complaint*. The Authority notes that its denial of these Counts does not preclude the TRA from investigating the activities of Halo and Transcom, and determining the need for either entity to obtain a CCN, upon the TRA's own motion in the future.

Transcom Is Not an Enhanced Service Provider

The FCC has established a bright-line rule that the "enhanced" service designation does not apply to services that merely "facilitate establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that a service is not "enhanced" when the service does not alter the fundamental character of the service *from the end-user's perspective*.[93] Thus, for example, the FCC has held that services are not "enhanced" when customers use the same dialing method for allegedly "enhanced" calls that they would for any other call,[94] or where the alleged "enhancement" was made "without the advance knowledge or consent of the customer" that placed the call and the customer is not "provided with the 'capability' to do anything other than make a telephone call."[95]

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[93] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

[94] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 15 (2004) ("*IP-in-the-Middle Order*").

[95] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, ¶ 16, n. 28 (2005) ("*AT&T Calling Card Decision*").

Halo's testimony fails to prove that Transcom is an ESP. Halo asserts that Transcom

> ... employs computer processing applications that act on the format, content, code, protocol or similar aspects of the received information. The platform will provide the customer additional, different, or restructured information. This is done by generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.[96]

However, despite the claim of computer processing of data, Transcom only reduces background noise and inserts "comfort noise" in periods of silence so that those periods of silence are not mistaken for the end of a call.[97] The Pennsylvania Public Utility Commission rejected a similar claim relating to Transcom's services, finding that "the removal of background noise" and "the insertion of white noise" do not make Transcom an ESP.[98] The alleged "enhancements" that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. Carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of these processes are deemed "enhancements" in the sense of an ESP.[99]

In addition to the decision of the Pennsylvania Public Utility Commission, the Complainants presented rulings by the Georgia Public Service Commission and the California Public Utilities Commission concerning the payment of access charges when ESPs are involved

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[96] Robert Johnson, Pre-Filed Direct Testimony, p. 12 (January 9, 2012).
[97] *Id.* at 12-13 and 14-15.
[98] *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, PA PUC Docket No. C-2009-2093336, 2011 WL 1259661, at 16-17 (Penn. PUC, March 16, 2010). ("We find that Transcom does not supply GNAPS with 'enhanced' traffic under applicable federal rules"). Note that the Pennsylvania Public Utility Commission specifically rejected the Transcom Bankruptcy Court's April 28, 2005 Memorandum Opinion finding Transcom to be an ESP on the basis that Transcom had indicated in that proceeding that it provided "data communications services over private IP networks (VoIP)." *Id.* The Authority is not persuaded by the Transcom bankruptcy court rulings regarding Transcom's status as an ESP.
[99] *Id.*

in calls.[100] The Complainants note that both Commissions ruled that Global NAPS, which is delivering traffic in the same manner that Halo is now, was liable for access charges for traffic it delivered from providers claiming to be ESPs.[101] In addition, the Authority set a precedent in Docket No. 11-00119, finding that Transcom is not an ESP. For these reasons, the Authority finds that Transcom is not an ESP.

IT IS THEREFORE ORDERED THAT:

1. Halo Wireless, Inc. is liable to the Complainants for access charges on the intrastate interLATA and intraLATA landline traffic it has sent to the Complainants. However, nothing in this Order is intended to permit as part of these proceedings the liquidation of the amount of any claim against Halo or to affect the debtor-creditor relationship between the Parties beyond that permitted in the *Order Granting Motion of TDS to Determine Automatic Stay Is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement*, issued by the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, in Case No. 11-42464-btr-11 on October 26, 2011. The Complainants may pursue further action for the collection of access charges in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, or other appropriate fora as permitted by that Court.

2. All other relief requested by the Complainants is hereby denied.

3. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen days from the date of this Order.

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[100] Thomas M. McCabe, Rebuttal Testimony, pp. 11-12 (January 20, 2012).
[101] *Id.*

4. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.

Kenneth C. Hill, Chairman

Sara Kyle, Director

Mary W. Freeman, Director