

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of  
  
Rural Call Completion

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WC Docket No. 13-39

**TRANSCOM ENHANCED SERVICES INC. MOTION FOR RECONSIDERATION OF  
REPORT AND ORDER AND NEW RULE 64.2201(b)**

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## EXECUTIVE SUMMARY

The NPRM and the *Order* cited to and provided a partial quote from a Transcom October 17, 2011 submission as part of the “Rural Call Completion Workshop.” Transcom, however, was not a party to this rulemaking proceeding. As a consequence, and to preserve the right to judicial review, Transcom requests reconsideration of the decision to promulgate Rule 64.2201(b) as part of the *Order* insofar as that rule applies to “intermediate providers” that are not common carriers.<sup>1</sup>

The Commission’s latest decision to burden non-carriers with carrier obligations suffers several defects. First, new Rule 64.2201(b) would outlaw development, deployment and delivery of perfectly legitimate, potentially beneficial and non-harmful enhanced/information service products that meet future customer demand concerning receipt of signaling, tones and announcements prohibited by the new rule, or non-receipt of destination office signaling, tones and announcements the rule requires the ESP to deliver.

Second, the justifications stated by the Commission for asserting ancillary jurisdiction over non common carriers boil down to the argument that the Commission can assert ancillary jurisdiction over non-carrier end users (including ESPs) – and force them to assume a common carrier burden – as an aid to performance of the FCC’s Title II responsibilities over carriers. There is no limiting principle to this proposition.

Third, “ancillary jurisdiction” under Title I does not permit rules that prohibit ESPs from performing and providing enhanced/information functions, and precludes any regulatory imposition of common carrier duties on entities that are not common carriers. But that is exactly what Rule 64.2201(b) does. The FCC completely lacks authority to tell a non-carrier ESP to not

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<sup>1</sup> While Transcom continues to assert it is *not* an intermediate provider the Commission has disagreed. This Reconsideration will assume *arguendo* (but without waiver) that Transcom *is* an intermediate provider.

perform any given enhanced/information service function, and it cannot compel the ESP to assume the common carrier function of passing on some or all content without change.

On reconsideration the Commission must amend new Rule 64.2201(b) to state that it only applies to common carriers.



proceeding. As a consequence, and to preserve the right to judicial review, Transcom must – and hereby does – request reconsideration under 47 U.S.C. §405(a) and Rule 1.429(j).

If one assumes that Transcom is an “intermediate provider” as defined by Rule 64.1600(f) and new Rule 64.2101(e), then new Rule 64.2201(b) unlawfully deprives Transcom of its status as an enhanced/information service provider (“ESP”), and imposes common carrier regulation on Transcom. ESPs are end users. The Commission lacks the power to regulate end users – including those that are ESPs – especially when the regulation imposes a common carrier duty related to §201(b). The Commission should, on reconsideration, provide that Rule 64.2201(b) applies only to common carriers.

Transcom does not provide retail service to consumers. Transcom does not provide telecommunications.<sup>4</sup> Even if Transcom did provide telecommunications it would not be a provider of “telecommunications service” because Transcom is not a common carrier.<sup>5</sup> Although Transcom provides and supports IP Telephony, it does not provide “interconnected VoIP”

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<sup>4</sup> Two federal courts in four different decisions squarely held – after presentation of extensive evidence – that Transcom’s system routinely changes both the “form” and the “content” of “the information as sent and received.” The statute requires that the information must be “without change” in order for the transmission to constitute “telecommunications.” *See* 47 U.S.C. §153(50). Transcom reserves the right to – and does – change the content of the information it receives from customers and obtains elsewhere to deliver to customers. Transcom reserves the right to – and does – change some of the bearer “voice” related content and some of the signaling (“call control”) content, by using its advanced technology to do so as it deems necessary in its own business judgment. Transcom’s system acts on the content as the basis to perform some of its functions, and this often results in the replacement or deletion (more precisely a failure to wholly regenerate an exact duplicate) of content. Transcom’s system can and does generate *new* content, again for both bearer voice and call control information. As a matter of law, therefore, Transcom does not either offer or provide “telecommunications.” The issue in this matter is whether Transcom will be precluded from changing content *because of matter of regulatory compulsion*.

<sup>5</sup> Transcom has never held out as a common carrier. Transcom requires individual negotiations. Transcom reserves the right to refuse service. Transcom has differing terms as between its customers, and reserves the right to have – and does have – contract terms that would constitute unjust or unreasonable discrimination if Transcom were a carrier. Transcom develops individual products for discrete customers in response to actual or potential market demand, and the specifics of its services and prices vary amongst and between individual customers. The Commission is well aware that Transcom has vigorously defended its status as a non-carrier end-user, another strong indication that Transcom is not a common carrier because it shows that Transcom will not willingly submit to regulatory attempts to make it become one.

service as defined in Rule 9.3, nor does it provide “non-interconnected VoIP service” as defined by 47 U.S.C. § 153(36). This is so because, once again, Transcom does not serve retail end users. Transcom carefully selects the entities with whom it individually negotiates, and upon successful negotiation, contracts to provide enhanced/information services. The customer can then in turn use Transcom’s enhanced/information service as an input to the customer’s own output product.<sup>6</sup>

Transcom is not a carrier so it is by definition an end user under Rule 69.2(m). Transcom uses CPE (as defined by 47 U.S.C. §153(16)), and Transcom does not employ telecommunications equipment as defined in 47 U.S.C. §153(52). These provisions on their face clearly result in the conclusion that calls originate from and terminate to Transcom’s CPE, even though Transcom’s CPE may almost immediately “initiate a further communication” just like is the case with most ESP services.<sup>7</sup> Since calls originate from and terminate to Transcom’s CPE, Transcom cannot, as a matter of law, be an “intermediate provider” as defined in Rule 64.1600(f) and now Rule 64.2101(e).

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<sup>6</sup> The Commission and ILECs consistently try to define and characterize Transcom based on the services received by, and notional imputed expectations of, retail end users procuring telecommunications services. But Transcom does not serve retail end users and is not in privity with them. Transcom’s customer is another company which purchases Transcom’s enhanced/information service at wholesale to use as an input to the customer’s own service output. Transcom’s regulatory classification and status must, as a matter of law, be determined by the nature of the service that Transcom provides to Transcom’s direct customer, not by reference to what some retail end user one or more further links down the chain may receive or perceive. See *AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, 13 FCC Rcd 21585, 21587-21588, ¶6 (1998), *aff’d Virgin Islands Telephone Corporation v. FCC*, 198 F.3d 921, (D.C. Cir. 1999):

6. We disagree with Vitelco that the activities of AT&T-SSI’s customers are relevant to a determination of whether AT&T-SSI is a telecommunications carrier or a common carrier. As the Commission has previously held, the term “telecommunications carrier” means essentially the same as common carrier. It does not, as Vitelco suggests, introduce a new concept whereby we must look to the customers’ customers to determine the status of a carrier.

<sup>7</sup> See *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 6-7 (D.C. Cir. 2000).

The Commission, however, disagrees with the proposition that Transcom is an end-point where calls originate and terminate for rating purposes. It rejected that assertion in *Connect America*.<sup>8</sup> The Commission held that traffic does not either originate from or terminate to Transcom's CPE. The FCC has – for whatever reason – abandoned the judicially approved “ESP/end user as rating end-point” theory as a means to support its efforts to increasingly treat ESPs as if they are IXCs (which are telecommunications carriers) in multiple respects, and gradually impose a growing set of common carrier obligations on them. To that end, the Commission chose – notwithstanding Transcom's end user status – to treat Transcom as an “intermediate provider” (e.g. an “entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic”).

Transcom does not intend to relitigate the matters decided in *Connect America Fund* in this proceeding. The *Connect America Fund* rules are presently on review at the Tenth Circuit.<sup>9</sup> Rather, Transcom's sole purpose is to challenge the one new rule promulgated in the *Order* that appears to apply to Transcom if one assumes Transcom is an intermediate provider.<sup>10</sup> Thus,

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<sup>8</sup> Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, ¶¶1005-1006, 26 FCC Rcd 17663, 18041-18042 (2011).

<sup>9</sup> For this reason, Transcom is not, for example, seeking reconsideration of new Rule 64.2101(e) since it merely incorporates the definition of “intermediate provider” contained in Rule 64.1600(f), which was adopted in *Connect America* and is now before the Tenth Circuit.

<sup>10</sup> Since Transcom is not “a local exchange carrier as defined in section 64.4001(e), an interexchange carrier as defined in section 64.4001(d), a provider of commercial mobile radio service as defined in section 20.3, a provider of interconnected voice over Internet Protocol (VoIP) service as defined in 47 U.S.C. § 153(25), or a provider of non-interconnected VoIP service as defined in 47 U.S.C. § 153(36) to the extent such a provider offers the capability to place calls to the public switched telephone network” it cannot ever be a “covered provider” as defined in new Rule 64.2101(c) – even if Transcom were to “make the initial long-distance call path choice for more than 100,000 domestic retail subscriber lines.” Since the reporting and retention rules applicable to a “covered provider” do not apply to Transcom they are not challenged here. New Rule 64.2201(a) does not apply to Transcom for the same reason. *See* new Rule 64.2201(a)(2). It also does not apply because Transcom does not convey anything to the “calling party” under the Commission's own theory of origination and termination points. Transcom conveys information to its direct customer. Even if the Commission had purported to apply the common carrier

while Transcom continues to assert it is *not* an intermediate provider the remainder of this Reconsideration will assume *arguendo* (but without waiver) that Transcom *is* an intermediate provider. Transcom will then show that the Commission cannot lawfully impose the common carrier regulations contained in new Rule 64.2201(b) on “intermediate providers” that are not common carriers.<sup>11</sup>

New Rule 64.2201(b) would prohibit Transcom from introducing potential and innovative new enhanced/information service based offerings that “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information.” The new Rule says that Transcom cannot “provide the subscriber additional, different, or restructured information,”<sup>12</sup> “offer[] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.”<sup>13</sup> Under the new rule Transcom cannot monitor the content of destination office supplied alert signals, audio tones or announcements and then apply computer processing to allow choices on a range of actions that might follow in response thereto. Transcom cannot offer services that would involve changing the content or suspending call processing in order to decide whether to drop the egress leg of the call and initiate a new egress leg to a different subscriber number. In either case the destination office’s alert signaling and tone/announcement<sup>14</sup> could,

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obligations set out in new rules 64.2101(c) and 64.2201(a) on Transcom they would be invalid for the same reasons as the one rule Transcom is challenging as illegal.

<sup>11</sup> The D.C. Circuit’s decision to vacate the FCC’s “net neutrality” rules because they imposed common carrier burdens on non carriers should weigh heavily on the disposition of the issues presented in this Motion for Reconsideration. *See Verizon v. FCC*, No. 11-1355, Slip op. (D.C. Circuit, January 14, 2014). That opinion is discussed below.

<sup>12</sup> *See* 47 C.F.R. §64.702(a) [definition of “enhanced service” (emphasis added)].

<sup>13</sup> *See*, 47 U.S.C. §153(24) [definition of “information service” (emphasis added)].

<sup>14</sup> The actual “Ring Back Tone” and the text of any aural announcement is usually, but not always, generated by the provider for the user that is initiating the communication. The information is generated after receipt of signaling cues, such as an ISDN Alerting or SS7 Address Complete Message (ACM) from

depending on the circumstances, be not regenerated to the Transcom customer at all, or it may be changed in some fashion prior to regeneration and then delivery.

## II. Argument.

Transcom seeks reconsideration of the decision to promulgate Rule 64.2201(b) insofar as it applies to “intermediate providers” that are not common carriers. The Commission’s “ancillary jurisdiction”<sup>15</sup> under Title I does not permit rules that prohibit ESPs from performing and providing enhanced/information functions, and precludes any regulatory imposition of common carrier duties on entities that are not common carriers. But that is exactly what Rule 64.2201(b) does.

### A. New Rule 64.2201(b).

New Rule 64.2001(b) is contained in a new Subpart W to Part 64:

#### **Subpart W—Ring Signaling Integrity** **§ 64.2201 Ringing Indication Requirements**

(a) A long-distance voice service provider shall not convey a ringing indication to the calling party until the terminating provider has signaled that the called party is being alerted to an incoming call, such as by ringing.

(1) If the terminating provider signals that the called party is being alerted and provides an audio tone or announcement, originating providers must cease any locally generated audible tone or announcement and convey the terminating provider’s tone or announcement to the calling party.

(2) The requirements in this subsection apply to all voice call signaling and transmission technologies and to all long-distance voice service providers, including local exchange carriers as defined in section 64.4001(e), interexchange carriers as defined in section 64.4001(d), providers of commercial mobile radio service as defined in section 20.3, providers of interconnected voice over Internet Protocol (VoIP) service as defined in 47 U.S.C. § 153(25),

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the destination office serving the called party. The aural/audio information an initiating user receives as a result of error messages may come from either end, depending on the circumstances. *See* Transcom October 17, 2011 letter, pp. 3-5.

<sup>15</sup> Transcom does not contest the finding on the first test for ancillary jurisdiction that “the Act covers the regulated subject” because it relates to “communications by wire or radio.” This issue here is whether the Commission has satisfied the second “reasonably ancillary” test.

and providers of non-interconnected VoIP service as defined in 47 U.S.C. § 153(36) to the extent such providers offer the capability to place calls to or receive calls from the public switched telephone network.<sup>16</sup>

(b) Intermediate providers must return unaltered to providers in the call path any signaling information that indicates that the terminating provider is alerting the called party, such as by ringing.

(1) An intermediate provider may not generate signaling information that indicates the terminating provider is alerting the called party. An intermediate provider must pass the signaling information indicating that the called party is being alerted unaltered to subsequent providers in the call path.

(2) Intermediate providers must also return unaltered any audio tone or announcement provided by the terminating provider.

(3) In this subsection, the term “intermediate provider” has the same meaning as in section 64.1600(f) of this chapter.

(4) The requirements in this subsection apply to all voice call signaling and transmission technologies.

(c) The requirements in subsections (a) and (b) apply to both interstate and intrastate calls, as well as to both originating and terminating international calls while they are within the United States.

Rule 64.2201(b) is designed to be a monitoring and enforcement tool supporting enforcement of §201(b) – which only applies to common carriers. Neither of the justifications stated by the Commission for asserting ancillary jurisdiction is sufficient. The first excuse is that non-carriers must be regulated because a rural ILEC “may” otherwise suffer “erroneous complaints.”<sup>17</sup> The second is that if the rule is not extended to non-carriers then carriers “could” avoid their carrier duties by contracting with non-carriers.<sup>18</sup> Both of these rationalizations are speculative; the *Order* does not cite to any examples of such things.<sup>19</sup> Regardless, they collectively boil down to the argument that the Commission can assert ancillary jurisdiction over

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<sup>16</sup> As noted, new Rule 64.2201(a) on its face does not apply to Transcom, and is therefore not challenged here. Any attempt to nonetheless apply the prohibitions and mandates in subsection (a) to Transcom would, however, be invalid for the same reasons as listed herein for new Rule 64.2201(b).

<sup>17</sup> *Order* ¶¶37, 117.

<sup>18</sup> *Order* ¶¶38, 117.

<sup>19</sup> *See Verizon v. FCC*, slip op *supra*, Silberman J concurring in part and dissenting in part, pp. 8-9 and note 8.

non-carrier end users (including ESPs) – and force them to assume common carrier burdens – in order to effectively perform the FCC’s Title II responsibilities over carriers.

There are several problems with the latest manifestation of the Commission’s ever expanding efforts to burden non-carriers with carrier obligations. Each is addressed below.

1. New Rule 64.2201(b) would outlaw development, deployment and delivery of potentially beneficial and non-harmful enhanced/information service products.

The regulatory compulsion with regard to signaling, tones and announcements would prevent a specially-designed ESP service that could electronically monitor destination office supplied signals, tones or announcements and then perform specialized pre-programmed actions desired by the customer based on the content of the signaling, tone or announcement.

Assume, for example, that the destination office sends an error message or audio announcement to the effect that “the number you have dialed ... has been changed” and the message or announcement goes on to state that “the new number is NPA/NXX-XXXX.” Transcom’s system could be programmed to monitor the content of the destination office supplied information and then take specialized action based on that content. In our example, Transcom’s system could, based on the fact that a different number has been provided, drop the initial egress attempt and initiate a new “further communication” to the “new number.” There would be no need to present the signal/audio announcement content to the customer; instead there would be a delay in processing<sup>20</sup> until the information is assimilated and acted on, and the second egress attempt is made to the new, replacement subscriber number.

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<sup>20</sup> It may make sense to supply some kind of signal, tone or other sound so that the communication is not abandoned due to the added post-dial delay that occurs during processing, the new attempt is initiated and the second egress attempt ultimately does result in destination office alerting. While some indication other than “audible ringing” would likely suffice, Transcom is concerned that any such activity would be taken as a violation of new Rule 64.2201(b)(1).

Or, assume that the announcement (or signaling equivalent) is that “the number you have dialed has been disconnected or is no longer in service.” Transcom’s system could be programmed to monitor the content of the destination office supplied information and then take specialized action based on that content. In our example, Transcom’s system could interpret the signaling message or audio tone/announcement and take that as a cue to drop the egress attempt, and perform queries to one or more databases or perhaps even on the Internet to try to match the old disconnected/out of service number with the now-obsolete subscriber name. A second set of queries could be performed to see if there is a new number associated with the same name. Transcom’s system could then initiate a new egress attempt to the second number. Once again, there would be no need to present the signal/audio announcement content to the customer; instead there would be a delay in processing<sup>21</sup> until the information is assimilated and acted on, and the second egress attempt is made to the new, replacement subscriber number.

Both of these examples illustrate perfectly legitimate potential enhanced/information service product offerings that could well provide positive benefits to society, and revenues and profits to the ESP. Neither of them would harm a rural ILEC or the public in any way.<sup>22</sup> They would be “privately beneficial to the customer and not publicly detrimental.”<sup>23</sup> Yet new Rule

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<sup>21</sup> Once again, in this second hypothetical situation there may a practical need to supply some kind of signal, tone or other sound so that the communication is not abandoned due to any additional post-dial delay that occurs during processing, the new attempt is initiated and the second egress attempt results in destination office alerting. And, again, while an indication other than “audible ringing” would likely suffice, Transcom is concerned that any such action would be taken as a violation of new Rule 64.2201(b)(1).

<sup>22</sup> Indeed, they may result in the rural ILEC securing additional compensation than it otherwise would. In both examples the original attempt would not complete. But either of these products might well lead to a completion following the second egress attempt. If the rural ILEC is the provider holding the number associated with second egress attempt then it would be entitled to compensation to the extent allowed by ICC rules.

<sup>23</sup> *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 268-269 (D.C. Cir. 1956). This case is, despite its age, still highly relevant to the issues at hand. Remember that Transcom – as a non-carrier ESP – is an *end user* and employs *CPE*. The new Rule restrains non-carrier ESP end users in the use of new

64.2201(b)(2) would prohibit them. There are certainly many more possible products involving use and manipulation of signaling, RBT and audio tones and announcements that some enterprising inventor may some day devise.

2. No limiting principle.

There is no limiting principle to the proposition that the Commission can impose common carrier duties on non common carriers as a tool for Commission enforcement of its Title II regulation of common carriers.<sup>24</sup> This argument would justify a rule requiring every retail residential end user to generate and retain written records of all their long distance calls and send quarterly reports to the FCC on a prescribed form listing each call, the time and duration and the calling and called number, along with a space to describe the quality of the call. That information would also give the Commission helpful information on rural call quality. This proposition would justify a rule requiring end users to *make and pay for* calls to rural areas, and then file a report indicating whether the call completed, indicate the substance of any audible tones they heard and state if the quality was satisfactory. That too would ensure that the Commission received information on rural call quality.<sup>25</sup>

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technologies and services occasioned by new CPE capabilities. *But see* 47 U.S.C. §153(a). Section 153(a) admittedly does not directly apply here because the Commission is the one opposing a new technology or service, but the policy expressed in that section and the inconsistent result that obtains from new Rule 64.2201(b) should lead to a serious pause for consideration.

<sup>24</sup> *Verizon v. FCC*, slip op. at 26-27; *see also* Silberman partial concurrence at 5-7.

<sup>25</sup> Transcom is not suggesting the FCC would actually do such a thing to every residential end user. The rationale used to support the rule, however, would equally support doing so. The Commission has decided to pick out a subset of end users (and the subset of end user ESPs that happen to be involved in “voice”) it believes are (or should be) regulated as if they are carriers notwithstanding their non-carrier status, merely because there is “voice” related content. The FCC has sequentially and serially imposed an increasing number of carrier burdens on them, gradually increasing their regulatory burden. We are sadly near the day where that there will be no meaningful difference in treatment between “providers” that are carriers and those that are not. The question presented here is whether the Commission has the power to so pervasively impose carrier burdens on non carriers.

The Commission's justification that when "voice" is involved the FCC must regulate non-carriers in order to effectively regulate carriers is ultimately a plea for unbridled, unbounded and plenary jurisdiction to do anything the FCC wants, to anyone, whenever there is a common carrier somehow involved in a "voice" communication. Ancillary jurisdiction, however, is not "unrestrained authority,"<sup>26</sup> It is not "a proxy for omnibus powers limited only by the FCC's creativity in linking its regulatory actions to" some part of Title II.<sup>27</sup> "The allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammelled freedom to regulate activities over which the statute fails to confer . . . Commission authority."<sup>28</sup> The notion that end users must suffer regulation so that the Commission can better exercise its authority over carriers "if accepted . . . would virtually free the Commission from its congressional tether."<sup>29</sup> The Commission, of course, can promulgate reasonable rules that help it perform its responsibilities, but it cannot do whatever it wants and then justify the action based on some loose claim that it will help performance. The Commission must articulate a basis that has some limiting principle and it has not done so here.

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<sup>26</sup> *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706, 99 S. Ct. 1435, 59 L. Ed. 2d 692 (1979) ("*Midwest Video IP*"). The *Order* is obviously trying to invoke *United States v. Sw. Cable Co.*, 392 U.S. 157, 88 S. Ct. 1994, 20 L. Ed. 2d 1001 (1968) and *United States v. Midwest Video Corp.* ("*Midwest Video I*"), 406 U.S. 649, 92 S. Ct. 1860, 32 L. Ed. 2d 390 (1972). But it founders under *Midwest Video II*. The reason is that the specific rule in issue is not just simple regulation: it imposes common carrier duties, as explained below.

<sup>27</sup> *EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013).

<sup>28</sup> *National Asso. of Regulatory Utility Comm'rs v. Federal Communications Com.*, 533 F.2d 601, 618 (D.C. Cir. 1976) ("*NARUC IP*") (internal quotation marks and footnote omitted). *See also Comcast Corp. v. FCC*, 600 F.3d 642, 661 (D.C. Cir. 2010). In *Comcast* the court vacated the FCC's effort to regulate an ESP's network management practices as exceeding its statutory authority. Signaling is inherently related to network management.

<sup>29</sup> *Comcast*, 600 F.3d at 655.

3. Rule 62.2201(b) prohibits ESPs from performing enhanced/information functions and mandates assumption of a common carrier duty.

New Rule 64.2201(b) on its face prohibits enhanced/information service providers from engaging in enhanced/information service functions, and it then imposes the common carrier burden of requiring the ESP to transmit information generated by others, and of *the others' own choosing* rather than continuing to allow the ESP to transmit information of the *ESP's own choosing*. The Commission has imposed common carrier duties. This is clear from the Commission's own finding that the new rule relates to and will be used to enforce the §201(b) prohibition on unjust and unreasonable practices *by carriers*.

- a. Rule 62.2201(b) prohibits ESPs from performing enhanced/information functions.

The rule expressly prohibits alteration of information or generation of new information. It says the ESP *cannot* “employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information” or “provide the subscriber additional, different, or restructured information.”<sup>30</sup> It prohibits the ESP from “offering [] a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information.”<sup>31</sup> This is so because it prohibits any change to signaling or audio tones or announcements, prohibits generation of new or different signaling or audio tones or announcements and mandates that the signaling and audio tones and announcements supplied by other providers be passed on to the customer “unaltered” *i.e.*, “without change.” The rule on its face says that an ESP cannot perform or provide specific enhanced/information functions. The Commission is telling ESPs they *cannot be ESPs* in this regard.

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<sup>30</sup> See 47 C.F.R. §64.702(a) [definition of “enhanced service” (emphasis added)].

<sup>31</sup> See, 47 U.S.C. §153(24) [definition of “information service” (emphasis added)].

- b. Rule 62.2201(b) mandates assumption of a common carrier duty.

The rule mandates that the ESP assume a clear common carrier function. The mandate to transmit specific content has no exception or qualification. There is no flexibility whatsoever. It imposes *per se* common carriage obligations to transmit specific content regardless of the choice that would otherwise be made by the ESP, or even the customer.<sup>32</sup>

The seminal authorities on what constitutes “common carriage” are *NARUC I*<sup>33</sup> and *NARUC II*.<sup>34</sup> In *NARUC I* the D.C. Circuit cited to a previous Commission case and observed that indifferently transmitting information without change is a common carrier function:

“The fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . .” Report and Order, *Industrial Radiolocation Service*, Docket No. 16106, 5 F.C.C.2d 197, 202 (5 October 1966).<sup>35</sup>

*Industrial Radiolocation* is highly instructive. The service in that case “provides for the use of radio to determine speed, direction, position, and distance for purposes other than radionavigation and primarily in connection with geographical, geophysical, and geological activities.”<sup>36</sup> One issue was whether the service had to be offered on a common carrier basis. For this particular service the licensee’s system (rather than the subscriber to the service) generated much of the information communicated to the subscriber. The Commission held this specific attribute meant that radiolocation service could not be offered on a common carrier basis:

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<sup>32</sup> *Verizon v. FCC*, slip op. at 58-60.

<sup>33</sup> *National Asso. of Regulatory Utility Comm’rs v. Federal Communications Com.*, 525 F.2d 630 (D.C. Cir. 1976) (“*NARUC I*”).

<sup>34</sup> *National Asso. of Regulatory Utility Comm’rs v. Federal Communications Com.*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*”).

<sup>35</sup> *NARUC I*, 525 F.2d at 641 (emphasis added).

<sup>36</sup> *Industrial Radiolocation*, 5 FCC 2d 197 (¶1).

19. The Commission has held that the clear legislative intent of Congress in the enactment of the Communications Act of 1934 was that the common carrier regulatory provisions thereof should not apply to persons who are not common carriers in the ordinary sense of the term; that the fundamental concept of a communications common carrier is that such a carrier makes a public offering to provide, for hire, facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier and between such points and points on the systems of other carriers connecting with it; and that a carrier provides the means or ways of communication for the transmission of such intelligence as the customer may choose to have transmitted so that the choice of the specific intelligence to be transmitted is the sole responsibility or prerogative of the customer and not the carrier. *Frontier Broadcasting Co. et al. v. J.E. Collier et al.*, 24 F.C.C. 251 (1958). The aforementioned fundamental concept of a communications common carrier applies even though the public offering is limited to a special classification of service which restricts the customer's choice to intelligence permissible within such class of service offering. *Western Union Telegraph Co.*, 5 R.R. 1213 (1950); *Charles Edward Stuart*, docket No. 6553, file No. T5-Ph 526. *See also CATV and TV Repeater Services*, 26 F.C.C. 403, 428.

20. On the basis of the facts presented to the Commission in the comments herein, it appears clear that the radio facilities licensed in the radiolocation service are not used and cannot properly be used to transmit any intelligence of the design and choice of the subscriber to the service, and that the specific intelligence transmitted is and must be the sole responsibility and prerogative of the licensee and not the subscriber. We conclude, therefore, that the rendition of radiolocation service is not a Communications Common Carrier Service within the meaning of title II of the Communications Act.<sup>37</sup>

*NARUC II* also addressed the second criterion for common carrier status – transmission of customer-supplied information without change. In that case the court held that the nature of the specific service in issue was that information was transmitted without change:

With regard to the second common carrier prerequisite, the user's design and choosing of the intelligence to be transmitted, we have no difficulty determining from the very nature of the technology that in many if not most instances this requirement will be satisfied. Although the regulations require only a non-voice return capability, which would perhaps make possible transmissions of only a rudimentary sort, the content of the transmission (which may arise solely from the determination to transmit or not) may nonetheless be under the customer's control. We therefore hold that any two-way use of cable in which the customer explicitly or implicitly determines the transmission or content of the

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<sup>37</sup> *Radiolocation Service*, 5 F.C.C.2d at 202 (¶¶19-20) (emphasis added).

return message, satisfies this second prerequisite to common carrier status.<sup>38</sup>

Non carrier ESPs retain editorial control of, and make the determination on, the content of a transmission. ESPs retain the sole right to exercise business judgment on what content to transmit or not transmit, to the extent their computer-based systems allow – often in response to customer desires. They choose to alter or not alter. They can delete information and substitute it with other information, or simply not transmit at all. Any regulatory mandate that an entity transmit third-party content without change imposes *per se* common carriage.<sup>39</sup>

The D.C. Circuit has now vacated the Commission’s efforts to impose common carrier duties on “broadband Internet access providers.” The court held that mandated nondiscriminatory (“indifferent”) transmission of third party content is a common carrier burden that the FCC cannot impose on ESPs.<sup>40</sup> The court’s holding on common carriage is directly relevant. But there are several differences from that situation and the one at hand that even further support Transcom’s position. First, Transcom does not provide “Broadband Internet Access Service” – something that in very large part is (or should be) raw transmission and is therefore “telecommunications.” Transcom does not provide broadband access; it obtains raw transmission (telecommunications, basic service) from others to which it adds its own enhanced functionalities, with the result that the entire product is “contaminated.” There is no Transcom-provided transmission component that could be segregated from the other aspects of its service under some misguided and wrongly applied notion of “adjunct to basic” because the bottom line is that Transcom neither offers nor provides *any* basic service (and certainly no broadband transmission) to which the Transcom-specific functions could be arguably labeled as “adjunct.”

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<sup>38</sup> *NARUC II*, 533 F.2d at 610 (notes omitted, emphasis added).

<sup>39</sup> *Midwest Video II*, 440 U.S. at 700; *Verizon v. FCC*, slip op. at 55-56.

<sup>40</sup> *Verizon v. FCC*, *supra* (vacating the nondiscrimination and no blocking rules contained in 47 C.F.R. Part 8). *See especially* Slip op. at 47-49, 53-56.

Section 706 therefore cannot be used to impose *any* regulation on Transcom.

Second, unlike Broadband Internet Access providers, Transcom does not have any market power. Transcom is not a “gatekeeper” and has no “termination monopoly.”<sup>41</sup> More important, in the case at hand Transcom is attempting to **preserve** user choice, not interfere with it. Transcom’s efforts here are related to an attempt to honor a potential desire by a Transcom customer to receive content other than that mandated by the rule, or receive content prohibited by the rule. In other words, while Transcom reserves the complete right to exercise editorial discretion, Transcom is nonetheless trying to meet customer desires and choices with regard to the “network traffic” the Transcom customer seeks to receive, and see to it that Transcom’s customers can, consistent with Transcom’s overall editorial discretion, receive the content it desires. *C.f.*, 47 C.F.R. §§8.5(a) and 8.7.

The essence of a common carrier, in contrast to the fundamental attribute of an ESP, is that a common carrier transmits information (content) without change. An entity that reserves the right to – and does – change content or generate new content is not and cannot be a common carrier. Requiring that an entity transmit information without change is without a doubt an imposition of a common carrier duty.

New Rule 64.2201(b) prohibits ESPs from performing the enhanced/information function of generating new or different information and providing that new information to the customer. The rule effectively says an “intermediate provider” cannot be an ESP in this regard. The rule also mandates that an ESP set aside its ESP status and assume the common carrier mantle of transmitting information without change. The rule eliminates ESPs’ exemption from common carrier regulation and turns them into common carriers.

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<sup>41</sup> *C.f. Verizon v. FCC*, slip op at 38-43. The destination office provider, however, does have a termination monopoly. *See* Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 16 FCC Rcd 9923, 9934-9939, ¶¶28-40 (2001).

The Commission wholly lacks the authority to forcibly turn non-carriers into carriers and ESPs into telecommunications carriers. Nothing in the Act, whether in Title I or in Title II (or anywhere else) comes close to providing this power.

- B. The Commission's ancillary jurisdiction does not authorize promulgation of new rule 64.2201(b) insofar as it purports to apply to non-carriers.

The FCC is powerless to wield its ancillary jurisdiction where "there are strong indications that agency flexibility was to be sharply delimited."<sup>42</sup> Section 153(51) provides a clear indication that the Commission cannot impose common carrier duties on entities that are not common carriers.<sup>43</sup> It says that a carrier can be regulated as a carrier only insofar as it *is* a carrier. The courts have reversed prior FCC attempts to require even a carrier to offer a given service on a common carrier basis when it preferred to do so on a private basis, or to not offer the service at all:

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance. If the carrier chooses its clients on an individual basis and determines in each particular case "whether and on what terms to serve" and there is no specific regulatory compulsion to serve all indifferently, the entity is a private carrier for that particular service and the Commission is not at liberty to subject the entity to regulation as a common carrier. *NARUC II*, 533 F.2d at 608-09; *NARUC I*, 525 F.2d at 643. While the Commission may look to the public interest in fine-tuning its regulatory approach, it may not impose common carrier status upon any given entity on the basis of the desired policy goal the Commission seeks to advance. *NARUC I*, 525 F.2d at 644.<sup>44</sup>

This limitation as to obligations on entities that have both carrier operations and non-carrier operations also demonstrates that an entity that is not a carrier at all cannot be lawfully required to assume common carrier duties. The courts have confirmed this is so. The

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<sup>42</sup> *Midwest Video II*, 440 U.S. at 708.

<sup>43</sup> *See also* 47 U.S.C. §§153(11), (53).

<sup>44</sup> *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). *Southwestern Bell* involved only the first part of the common carrier test, and not the second. "Since the parties evidently agree that dark fiber customers transmit intelligence of their own design, we need only address the application of the first part of the *NARUC II* test." *Id.*

Communications Act “regulates telecommunications carriers, but not information service providers, as common carriers.”<sup>45</sup> The Commission has long recognized “Congressional intent to maintain a regime in which information service providers are not subject to Title II regulations as common carriers,”<sup>46</sup> The Commission’s attempt to regulate ESPs as common carriers “runs afoul of the statutory prohibitions on common carrier treatment.”<sup>47</sup>

Rule 64.2201(b) imposes common carrier regulations on non-common carriers, and it expressly prohibits ESPs from performing, providing and offering an enhanced/information function. This directly conflicts with the Act and thus cannot stand as an exercise of ancillary jurisdiction under *Midwest Video II*.<sup>48</sup>

### III. Conclusion and Request.

The Transcom filing cited in *Order* note 281 stated that Transcom has made the business decision to follow “industry” practices. Transcom’s current practice is to await destination office alerting signals even though this practice results in less revenue.<sup>49</sup> Although the Transcom filing made no specific representation about “error messages and recordings,”<sup>50</sup> Transcom has also, for now, made the business decision to pass destination office generated error signaling, audio tones and announcements without change.

Those decisions were made from a business perspective and not because of any regulatory compulsion. That is how it should be, and must be. It may well be that these practices are what customers want. If so, then responsible businesses like Transcom will continue them –

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<sup>45</sup> *NCTA v. Brand X Internet Services, Inc.*, 545 U.S. 967, 975 (2005); *Verizon v. FCC*, slip op at 8-9.

<sup>46</sup> Declaratory Ruling, *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5916 (¶41) (2007).

<sup>47</sup> *Verizon v. FCC*, slip op. at 4, 45-50, 61.

<sup>48</sup> *Midwest Video II*, 440 U.S. at 694-695, 700-708.

<sup>49</sup> Transcom October 17, 2011 letter pp. 3-4.

<sup>50</sup> Transcom October 17, 2011 letter p. 5.

because that is what customers want. But there is a huge difference between making a voluntary business choice to do (or not do) something because of customer desires and doing (or not doing) something because of a regulatory compulsion. In any event, the rule would expressly prohibit a change in practice in the future because of a market demand for development, deployment and delivery of beneficial and non-harmful enhanced/information services that act on signaling content and/or tones/announcements. But for the rule Transcom could freely change its policies and practices as necessary to offer a new product.<sup>51</sup>

If Transcom determines that there is a potential product and potential market demand for a service that involves changing, replacing or not delivering destination office supplied signaling or tones/announcements – such as the two potential offerings described above – then Transcom has the right to change its current policies as needed so it can develop, deploy, sell and deliver the new product. With all due respect, the FCC lacks the power or authority to tell Transcom that it cannot provide any given enhanced/information service or engage in any specific enhanced/information function.

“Industry standards” are fine things, to be sure, but the fact remains that many great inventions were part of a decision to *not* follow a standard by doing something else. A host of major advances have come from innovators that were not regulated (or, as with the incumbents, protected) and not under the thumb of some agency that has been busy promulgating stultifying rules codifying some “industry standard” as an absolute rule of conduct. The entrepreneur is willing to take a market risk. Over time truly successful innovations become standards of their own, or are incorporated into existing standards.

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<sup>51</sup> *Verizon v. FCC* cautions against instituting stultifying rules on non common carriers that would inhibit future development and deployment of services – even if they involve a change in practice by the ESP. Slip op. at 52-53.

Transcom is not a common carrier. It is an ESP, and thus “not regulated under title II of the Act.”<sup>52</sup> Transcom cannot be lawfully compelled to do, or not do, anything based on common carrier attributes. The Commission cannot lawfully prohibit Transcom from providing any particular enhanced/information service function and cannot compel Transcom to assume the mantle of a common carrier. The Commission cannot (and should not) presume to tell non-carriers that they may not devise new products and services relating to destination office signaling and tones/announcements. The Commission cannot prohibit Transcom from negotiating an individual contract with some customer to provide an enhanced/information service that leverages signaling and announcement/tone information, insofar as the service would change, not transmit or replace that content. The FCC lacks the authority to tell Transcom that it cannot provide enhanced/information service and must instead undertake a common carrier duty.

New rule 64.2201(b) wrongly imposes a specific common carrier obligation to transmit specific information, and it impermissibly prohibits Transcom from providing an enhanced/information service function that it otherwise could supply – if it chose to do so – but for the rule. Transcom objects to the mandate/prohibition because it imposes regulation that is outside the Commission’s jurisdiction and power.

The new rule is just another brick in the ever-growing wall of stultifying restrictions on ESPs that tell them they cannot be an ESP. The FCC continues to assign common carrier duties to non carriers. The Commission is wrongly trying to “manage competition” by attempting to eliminate perceived imperfections in how some providers have chosen to operate in the competitive space; it is incorrectly trying to use regulation to protect specific competitors – here the rural ILECs – by imposing hobbles on other heretofore unregulated providers in order to

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<sup>52</sup> See 47 C.F.R. §64.702(a).

inhibit the natural creative destruction that occurs in a competitive marketplace. It matters not that some wonk (or even a group of wonks) might believe the rules compelling and prohibiting certain actions are justified from a policy perspective. As shown above by the two example potential products, that is not necessarily true. What really matters is that the Commission has improperly attempted to substitute its judgment for that of individual *nonregulated* business owners in the marketplace.

If the FCC truly thinks that ESPs – or the subset of them that are involved in “voice” – should be common carriers, then please just do us all a favor: quit the piecemeal approach and come on out and say it. Then we can directly confront the intriguing question posed in *Arlington*<sup>53</sup> and it can be finally decided pending further Congressional directive. If the Commission believes that only common carriers should be allowed to participate in the “intermediate provider” market, then please be straightforward about it by promulgating a rule that so provides<sup>54</sup> and we can all figure out how to respond.

Congress determined that the market, not some beltway regulator, is the proper disciplining agent for enhanced/information service providers, and that the market rather than the Commission will be what rewards or punishes businesses for choosing to risk their capital in the competitive marketplace.<sup>55</sup> Congress decided that entrepreneurs in the enhanced/information service space should be freely allowed to invent and deploy new services and applications by risking their own capital and then either succeed or fail.

The FCC cannot do what it has done in this case, even if one accepts that the substantive action being compelled is subjectively, and in some circumstances, “the right thing to do” and

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<sup>53</sup> *City of Arlington v. FCC*, \_\_ U.S. \_\_, \_\_, 133 S. Ct. 1863, 1869, 185 L. Ed. 2d 941, 952 (2013).

<sup>54</sup> The obvious place to start would be 64.702(a), by proposing to amend or eliminate the last sentence.

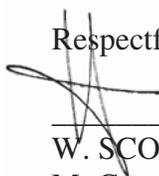
<sup>55</sup> See 47 U.S.C. §230(b).

the action being prohibited is sometimes “the wrong thing to do.” New Rule 64.2201(b) – insofar as it purports to apply to “intermediate providers” that are not common carriers – is without authority.

The Commission can surely remind common carriers that they cannot delete, replace or change the content of signaling information, audio tones and announcements; after all, a common carrier does not do such things because it is a common carrier and thus cannot change content. The Commission may well be correct that a *carrier* practice inconsistent with new Rule 62.2201(b) would violate §201(b). But that does not mean – indeed it cannot mean – that an ESP is, can or must be subject to the same standard. Section 201(b) does not apply to non carriers, and for good reasons. The FCC completely lacks the power and authority to tell a non-carrier ESP to not perform any given enhanced/information service function, and it cannot compel the ESP to assume the common carrier function of passing on some or all content without change.

Transcom requests reconsideration of the decision to promulgate new Rule 64.2201(b). On reconsideration the Commission must amend new Rule 64.2201(b) to state that it only applies to common carriers.

Respectfully Submitted,



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January 14, 2014

Counsel for Transcom Enhanced Services, Inc.

**Transcom Enhanced Services Inc. Motion for Reconsideration**

**Reconsideration Exhibit 1**

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October 19, 2011

Written Ex Parte; Via Electronic Filing

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington D.C. 20554

RE: *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Board on Universal Service*, CC Docket No. 96-45

Dear Ms. Dortch:

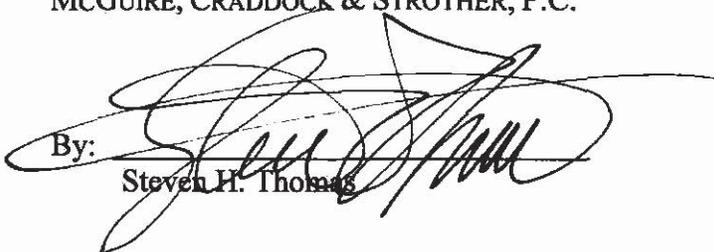
Pursuant to 47 C.F.R. § 1.1206 of the Commission's rules, Transcom Enhanced Services, Inc. ("Transcom") respectfully submits this written *ex parte* communication into the above-captioned proceedings.

The attached letter was submitted to William Dever in connection with the FCC's Rural Call Completion Workshop, held on October 18, 2011.

Respectfully submitted,

MCGUIRE, CRADDOCK & STROTHER, P.C.

By:

  
Steven H. Thomas

SHT/vwk  
Attachment

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October 17, 2011

**VIA EMAIL TO: [William.Dever@fcc.gov](mailto:William.Dever@fcc.gov)**

Mr. William Dever  
Chief, Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th St., S.W.  
Washington, DC 20554

Re: FCC Rural Call Completion Workshop.

Dear Mr. Dever:

Thank you for considering my client, Transcom Enhanced Services, Inc. ("Transcom"), as a possible participant in the FCC's Rural Call Completion Workshop (the "Workshop") scheduled for Tuesday, October 18, 2011. We were disappointed that the FCC now believes the ongoing litigation between Transcom and TDS (another Workshop participant) raises concerns about possible off-topic discussions. While I can understand the concern, it is difficult to understand how this concern translates into TDS remaining on the panel while Transcom is removed. As I mentioned in my conversation with you, the entire premise of the Workshop appears to center on pointing blame at companies the RLECs call "Least Cost Routers" ("LCRs"), and you said that the RLECs had identified Transcom as one of these LCRs. Aside from the basic point that every carrier today has an LCR engine, the entire logical construct that the LECs are advancing fails when applied to Transcom, because it simply is not true. Now Transcom will not be in a position to defend itself against any unwarranted or baseless attacks made during the Workshop, and therefore Transcom's only alternative is to anticipate such attacks and rebut them in advance. Please accept this letter and place it in the record.

As I mentioned in our telephone conversation, Transcom has not received any complaints from the RLECs about call quality. On the contrary, Transcom's enhanced services platform is highly-capable and does not cause any of the problems the RLECs are reporting. Transcom's system actually *improves* call quality and actively *prevents* the problems the RLECs attribute to "LCRs." Transcom's platform continuously monitors calls to ensure that they complete, both sides can hear each other clearly, and the audio quality is *superior* to what would have been achieved had Transcom's platform not been involved. Transcom's platform also offers enhanced functions and capabilities to end users that are not otherwise available

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Chief, Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
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from carriers. The bottom line is that if and to the extent any of the RLECs are attributing the "problems" they report to Transcom they are completely off the mark. The reality is far different than what they say at least insofar as Transcom is concerned.

The RLECs assert they experience the following types of problems:

- "Dead Air" issue where the calling party hears nothing after attempting to launch the call. This issue is largely attributed by the RLECs to call attempts that never reach the terminating network.
- "Ring Back Tone" issue where the calling party hears ring tone but there is no answer and they hang up. The RLECs also largely attribute this to call attempts that never reach their system.
- "One-Way Audio" issue where one party can hear the other, but the second cannot hear the first. The called phone rings and is taken off hook, but the audio portion is for some reason not discernible to one, the other, or both.
- Incorrect caller ID displayed to called party.
- "Error Message" issue where the caller receives incorrect or misleading message interceptions before call reaches tandem.
- FAXs do not work.

None of these complaints can be attributed to Transcom. Most of the problems are caused by the RLECs themselves because of their own actions and positions. Several RLECs have taken positive action to block calls they can identify as coming from Transcom's system; now they complain that calls are not completing and try to blame the "LCRs."

Transcom has been attacked by both ILECs and RLECs (collectively "LECs") repeatedly over the eight years of its existence. These LECs refuse to recognize that Transcom is an ESP even though it has four decisions by two separate courts expressly holding that Transcom is an ESP, is not a carrier and is exempt from exchange access. I doubt there is any other company in the country that has a more solid foundation for claiming the ESP exemption than does Transcom. Nonetheless, when Transcom seeks to purchase telephone exchange service from the LECs as an end user, the LECs refuse to provide this service. All of them reject Transcom's ESP status (despite the judicial decisions) and demand that Transcom waive its right to purchase telephone exchange service as an end user and instead purchase Feature Group D lines as if it were an IXC, and then (of course) pay access charges. The LECs refuse to directly connect with Transcom on any basis other than exchange access. Of course, none of them will even consider connecting to Transcom via IP using SIP trunks even though many

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Chief, Competition Policy Division  
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LECs now have IP-capable softswitches that could easily do so if they merely used these new switches to their full capability.

Transcom therefore must purchase connectivity through resellers, CLECs and other third parties rather than purchasing directly from the LECs. That necessarily means multiple providers will be in the call path. The requirement that a call traverse multiple networks and interconnection points necessarily increases the possibility that call quality problems will arise. This, however, is not at all attributable to Transcom because the bottom line is that Transcom's new technology works; the problem arises from other parties' legacy networks and the multiplicity of networks involved.

Several of the specific call quality issues raised by the RLECs are plainly not attributable to Transcom. Since Transcom is an end user it cannot connect to the ILEC tandem like carriers do. The ILECs are engaged in a boycott against Transcom on any basis other than exchange access, so Transcom cannot directly connect to them.

Dead Air Issue. The "Dead Air" Issue as described by the RLECs is actually either a misunderstanding or an intentional mislabeling of a different condition known as excessive Post Dial Delay (PDD). Any excessive PDD happens purely because of the ILECs' boycott of direct connection by non-IXC "LCRs" on any basis other than exchange access. The "LCRs" that attempt nonetheless to play by the rest of the rules laid out by the ILECs end up having to deal with PDD because of the multiple sequential routing decisions that follow.

PDD is the time between when the calling party finishes dialing and when Ring Back Tone (RBT) is provided. RBT lets the calling party know that the called party is being notified of the call. In traditional ISDN- and SS7-based networks, the accepted rules require that the calling party not receive RBT from their serving equipment until that equipment receives either an ISDN Alerting message or an SS7 Address Complete Message (ACM) from the terminating (or "destination") office serving the called party. In other words, the RLECs' own switch is the one that determines when RBT is supplied. These rules would work well if the ILECs would directly connect on a competitive basis with Transcom because PDD will be short enough that the calling party will not have to wait very long for RBT. The ILECs' boycott of any connection mechanism other than access, however, often means non-IXC "LCRs" will have to sequentially try one or more alternative paths to the RLEC. This necessarily drives up PDD and the calling party will hear a long period of "dead air" since it takes a long time to reach the destination office and obtain RBT. Transcom cannot control how much PDD a call may experience before it gets to Transcom's platform, but within its platform, Transcom implements strict PDD controls to minimize this very problem. If it appears there will be an unacceptable PDD before Transcom can arrange for completion, the call will be released back to the calling party's provider – and that provider will have to find a different route. Transcom's PDD quality practice actually costs Transcom revenue. It also means the calling

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and called parties are not able to enjoy Transcom's high-quality audio capabilities or its other enhanced features and functions. The ILECs – once again – bear the blame for all of this.

Ring Back Tone Issue. The "RBT" Issue is probably related to the "Dead Air" Issue addressed immediately above. Some providers – including the carriers serving the calling party – might understandably become so frustrated with the loss of revenue and additional costs imposed by the competition-destroying practices of the ILECs that they decide to vary from industry practices relating to RBT. In an effort to try to keep calling parties on the line while the extended attempt to secure a through connection proceeds, a provider might choose to insert a self-generated RBT before actual receipt of the required signaling messages (ISDN Alerting message or SS7 ACM) from the terminating office. If the call ends up not successfully completing (and actual RBT does not come) the provider would then be forced to stop RBT and abandon the call attempt. Once again, however, Transcom does not employ this practice. Transcom continues to abide by the rules, but is nonetheless accused of improper business practices.<sup>1</sup>

One Way Conversations. Interestingly, the RLECs description of this call quality issue is an apt metaphor for the relationship between Transcom and the RLECs; it is a one-way conversation. They issue an exchange access diktat, and will not listen or consider any other possible result despite the clear mandate from Congress that ESPs be treated as End Users and that access charges are disfavored and must be eliminated. Regardless, the RLECs are the cause of and solution to this "one way conversation" issue as well. This "issue" stems from the asymmetrical, lower-quality connections non-carrier "LCRs" are forced to use as a result of the ILECs continued attempts to impose access on access-exempt traffic. These are definitely not "separate but equal" connections. And again, this might affect providers upstream from Transcom, but this is not an issue affecting Transcom since its platform monitors for issues like these and then Transcom removes them through application of its advanced processing that improves call quality.

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<sup>1</sup> At the same time, some carriers appear to break the rules with impunity. For example, in at least one prior situation another provider discovered that AT&T Wireless appeared to be violating a different signaling practice. When an AT&T Wireless customer was already on the phone and an additional call attempt was made, the line should have been signaled as "busy" through SS7, unless the AT&T Wireless user had the equivalent of Call Waiting or the call rolled over to voice mail. AT&T Wireless was instead sending a false ISUP Answer Message (ANM) - even though the call was not truly completed to the called party or delivered to voice mail. AT&T Wireless' network (or a node on the network that pretended to be the called party for signaling and bearer purposes) then played an audio sound resembling a busy tone in the bearer call path. The result was that while the calling party "heard" a busy signal, the "network" was tricked into thinking the call completed, even though it did not in fact complete. Such "false call completions" lead to interesting compensation results. Most intercarrier agreements consider any call in which SS7 ANM is returned – as AT&T Wireless was doing in this circumstance – to be a completed call. This practice would artificially increase reported "terminated" calls (and therefore revenue for "intraMTA" calls) for intercarrier compensation purposes. And – given the way many intercarrier compensation agreements work – it could also lead to an incorrect transport cost responsibility sharing factor for interconnection facilities. Finally, it would increase the number of minutes (and, of course, revenue) the ILEC could bill for transit it provides between unaffiliated carriers and affiliated wireless operations.

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**Caller ID Issue.** The RLECs consistently allege that Transcom is “altering” “Calling Party Number.” This is flatly false. One of the first firm policies Transcom instituted eight years ago was that it would not in any manner alter, manipulate or change the address signal content that belongs in the SS7 ISUP IAM CPN parameter. The RLECs repeatedly accuse, but never bother to try to prove. Instead, they just move on and repeat the lie somewhere else. They must cease their defamatory practices.

**Error Message Issue.** The RLECs do not provide much information about the specific error messages involved. Transcom therefore cannot address any technical causes. We will remind the Commission, however, that in the SS7 world the originating switching office – the network serving the calling party – is typically the one that generates error messages and recordings.

**FAX Issues.** FAX issues have existed since the introduction of FAX technology, which, like data modem technology, tries to squeeze digital data signals into a network built for analog voice. Faulty or legacy FAX machines, dirty analog lines, and poor analog-to-digital conversion in the network are the top causes of FAX issues today. Transcom’s platform is all-digital and purpose-built to support any kind of signal, which means none of these top causes appear on Transcom’s platform. In addition, Transcom detects and adapts to incoming FAX signals on the bearer path (something the RLECs cannot do) and actively ameliorates the impact that poor RLEC networks can have on FAX transmissions. The RLECs should be thankful that Transcom is out there cleaning up their FAXs rather than accusing Transcom of having “FAX Issues.”

Transcom’s platform can handle any type of FAX modulation method, including “Group 4” FAXs that require a digital 64kbps channel and T.38-based units that are designed to run on IP networks. The RLECs analog “TDM” networks cannot. To clarify these “FAX Issues” the Commission might inquire whether the RLECs can handle a reliable 33.6 kbps session. Two FAX machines that agree to use V34bis/QAM modulation would expect this data rate. It may even be that the RLEC network cannot reliably support 28.8 kbps V.34. It may be the RLECs still use technologies in the outside plant that impede full use of FAX machines.

There is a simple solution to this problem. The RLECs should suggest that their users subscribe to Internet FAX. They will receive their FAXs in the form of an email from a provider that can handle new technology. Of course, since the RLECs have successfully prevented other providers from obtaining a local presence it is often not possible to get a “local” number, so any other customers in the same local calling area would pay toll to send a “local” FAX. Transcom suspects while the RLECs would enjoy the higher toll revenue they would not support this simple alternative since it would mean the RLEC customer no longer needs a separate “FAX line.”

Mr. William Dever  
Chief, Competition Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
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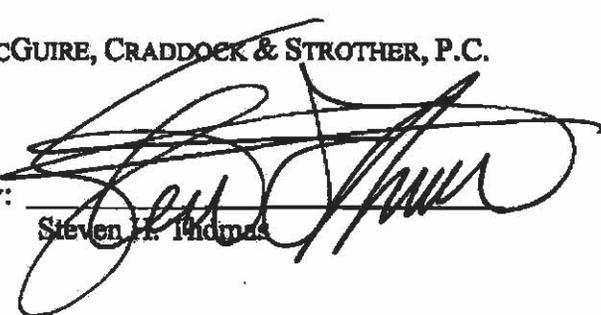
As mentioned previously, we do not understand why the FCC is only interested in hearing the LECs' perspective on these issues. Transcom was invited to be on the "solutions" panel, but then was uninvited, thus ensuring that only the positions of TDS and other LECs would be presented. The entire Workshop appears to be extraordinarily one-sided. If rural consumers indeed are experiencing call quality problems, then the search for proper technical solutions must involve cooperation and participation by all involved parties, not one-sided finger pointing. Transcom stands ready to participate and assist in identifying and resolving any actual problems that may exist.

On the other hand, the Commission should strongly consider whether these allegations of call quality problems are merely another attempt by RLECs to eliminate new technology competitors by ascribing blame where no blame is due. The solution to any real problems in this country's telecommunications infrastructure does not involve violating §§ 157, 254(k) and 257 by effectively barring market entry by entrepreneurs and information service providers through expansion of the access subsidy regime to ESPs, or rewarding the RLECs for their monopolistic and anti-competitive actions.

Thank you for giving this letter your consideration. Please let me know if Transcom can be of any further assistance in the FCC's investigation into rural call quality issues.

Sincerely yours,

McGUIRE, CRADDOCK & STROTHER, P.C.

By: 

Steven H. Thomas

SHT/vwk

cc: Jeff Goldthorp, Moderator, Causes and Effects Session (*Via Email*)  
Deena Shetler, Moderator, Solutions Session (*Via Email*)  
Myrva Charles, Competition Policy Division, Wireline Competition Bureau (*Via Email*)