

Tenth Circuit, but this new rule is still before the Commission. The FCC needs to decide whether it will persist in its efforts to impose common carrier duties on non-carriers under Title I, notwithstanding the intervening and post *Order* missive from the D.C. Circuit. While Transcom would prefer that the Commission accept what should now be obvious and adjust the rule to comply, a second and equally important purpose of the Request for Reconsideration was to preserve the right to seek review in the courts of the latest expansion of regulatory control over non-carriers, should the Commission choose to double down notwithstanding *Verizon*.

The Rural Associations⁵ want the Commission to hold that a small business waives the right to seek reconsideration (and review) of a rule in which it is “interested” from a legal perspective, if it does not spend all of its money on lawyers interceding in every rulemaking proceeding that may have an impact on the entity, to the point that the business must anticipate future decisions by the appellate courts. The Rural Associations’ position would erect an enormous regulatory barrier to entry in the communications market by any small business insurgent. That way leads to no competition. How convenient.

Transcom and other small companies cannot be in every FCC case that may end up somehow impacting the business, because almost all Commission cases do. Small businesses cannot engage in every rulemaking case on the docket, spend all of their precious small resources on legal fees, and consign all of their people to forever roam the halls of every floor in the Portals. If they did that they could not run a business.

The Commission should not interpret the Act and rules to require an insurgent to expend all of its precious resources for regulatory and litigation expense. One would hope that the FCC would prefer that people allocate their money to running a business and have a business plan

⁵ See Rural Associations’ Opposition pp. 6-7.

other than “law office with a switch out back.” The Rural Associations want a “gotcha” rule that effectively says no small business can participate in any aspect of the communications market unless all the money is spent on people roaming halls at the Portals and lawyers filing pleadings in innumerable cases merely to preserve the right to exist, with nothing left to provide service. That would be convenient to the incumbents’ cause, but it cannot be the law if there is to be meaningful competition by small business.

The rule adopted in this proceeding directly impacts Transcom because it imposes additional obligations and prohibitions on Transcom given the Commission’s treatment of Transcom as an “intermediate provider” who claims it is not a common carrier. Section 405(a)(1) says that if an entity was not a participant prior to rule promulgation then reconsideration is a prerequisite for a petition for review. Transcom did not participate and therefore had to touch this base.

Rule 1.429(b)(1) does not bar Transcom’s request for reconsideration.

(2) Rule 1.429(b)(2) was satisfied because the legal question was presented and disposed in the *Order*; the Commission should reconsider the disposition given *Verizon*.

The VON Coalition’s October 23, 2013 *ex parte* notice argued that the Commission lacked the statutory authority to impose rules of this sort on interconnected and non-interconnected VoIP providers. The *Order* directly addressed the Title I issue. Paragraphs 35-39 held that the Commission has Title I authority to impose Title II obligations on non-carriers – the very proposition rejected in *Verizon*. The legal question was fairly presented, so Rule 1.429(b)(2) is not a bar to Transcom’s Request for Reconsideration.

(3) The Commission should reconsider because the public interest requires re-evaluation given *Verizon*.

Rule 1.429(b)(3) provides that the Commission can reconsider a matter if the public interest requires. *Verizon* directly undercuts the primary rationale used in the *Order* to justify imposing Rule 64.2201(b) on entities that are not common carriers. The public interest demands that the Commission reconsider its *Order* in light of *Verizon*.

4. The Rural Associations' position would create a conflict between Rule 1.429(b) and Section 405(a).

The Rural Associations' interpretation would make Rule 1.429(b)(1) and (2) inconsistent with 47 U.S.C. §405(a)(1) and (2) as it pertains to rulemakings. Section 405(a)(1) and (2) are disjunctive. The Rural Associations' position on how 1.429(b)(1) and (2) should be interpreted would effectively make §405(a)(1) and (2) conjunctive. An entity impacted by a final rule that wants to seek review would be barred from doing so unless it had already spent lots of money participating in the notice and comment phase and raised everything prior to the order promulgating the rule.

That reading would virtually eliminate reconsideration as an option to an immediate petition for review, and further mean that a petition for review is foreclosed to a party that did not fully engage prior to rule promulgation if the issue was not already presented to the Commission by someone else.⁶ Reconsideration requests in rulemaking proceedings by entities that appear for the first time after initial promulgation would no longer be available. The Rural Associations are asking the FCC to read §405(a)(1) out of the statute.

⁶ As noted above, the legal issue was already presented in any event.

B. Transcom's entity-specific claim on regulatory classification was presented to show regulatory standing as an interested person; the Commission should not decide the adjudicatory question in this rule rulemaking.

The Rural Associations do not even try to argue that the Rule 64.2201(b) obligations are not common carrier in nature. They clearly are.⁷ *Verizon* directly holds that the FCC cannot apply common carrier obligations on entities that are not common carriers.

The Rural Associations assert that the Commission already decided that Transcom is not an "end user" in *Connect America*. They do not say it, but their argument implicitly accepts the carrier/end user binary construct. Here we agree. An entity is one or the other and there is no third category. If you are not a common carrier then you are an end user.

But their implicit claim that the FCC found that Transcom is a carrier (because according to them the Commission held Transcom is not an end user)⁸ is plainly unfounded. The Commission's brief before the Tenth Circuit expressly and correctly disclaimed a decision on that issue. *See* FCC Transcom Response Brief, p. 16 ("In any event, the FCC made no finding as to Transcom's ESP status, and its reading of the intraMTA rule did not depend on whether Transcom was an ESP."). FCC counsel went on to tell the court that "(n)othing in the Order precludes Transcom from purchasing telephone exchange service from Halo or any other carrier.⁹ The FCC's clarification of the intraMTA rule simply means that Transcom may no longer claim to 'originate' or 'terminate' a telephone call when it serves as an intermediate provider of routing service in the middle of the call." FCC Response to Transcom Principal Brief, p. 19 (emphasis added).

⁷ *See* Transcom Request for Reconsideration pp. 12-17.

⁸ *See* Rural Associations Opposition pp. 7-8.

⁹ This argument obviously accepts the possibility that Transcom could be an end user, since only end users can purchase telephone exchange service.

Transcom's Request for Reconsideration only raises the question whether the Commission will maintain its position post-*Verizon*, double down, and extend yet more common carrier rules on entities that claim non-carrier status pending an entity-specific adjudicatory determination on regulatory classification. Will the FCC, now that it has been schooled by the D.C. Circuit, continue to insist that it can impose a common carrier duty on an entity that disclaims common carrier status based on application of the "broad definition of 'intermediate provider' [which] includes not only telecommunications carriers, which are subject to regulation under Title II of the Communications Act, but also non-carriers"? FCC Tenth Circuit Response to Transcom Principal Brief, p. 21.

Transcom is not, in this rulemaking proceeding, directly asking for an entity-specific analysis as to whether Transcom is a carrier (and thus not an end user) or an end user (and thus not a carrier).¹⁰ As the Commission is certainly aware, Transcom's position before the Tenth Circuit is that any FCC determination on Transcom's specific and individual regulatory classification would have to occur in an adjudication and cannot be conducted as part of a general rulemaking.¹¹ Transcom Tenth Circuit Principal Brief pp. 42-45. Transcom is not asking

¹⁰ See Transcom Request for Reconsideration p. 4 ("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. 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.") The regulatory classification factual assertions and proof were made to establish administrative standing as an "interested person." The Rural Associations did not dispute any of these standing facts with any facts of their own. They simply (and incorrectly) argued that the Commission already decided that Transcom is not an end user. The Commission does not have to (and should not) decide whether Transcom is an end user or a common carrier; it should merely note that Transcom *claims* it is not a common carrier and is an end user ESP and has standing to raise the Title I issue.

If the Commission were to for some reason want to make an adjudicatory finding on Transcom's specific regulatory classification, it would have to rule in Transcom's favor. Transcom presented a *prima facie* case. The Rural Associations did not rebut that case in any way. Besides, they would have the burden of proving that Transcom *is* a common carrier. Transcom does not have to prove it is not, at least until someone makes some kind of factual showing to the contrary in this case.

¹¹ This is so because adjudicatory facts and findings are required about the particular entity involved. See *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994):

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

for adjudicatory findings in this rulemaking whether Transcom in particular is or is not a common carrier. The question is whether the Commission will, post *Verizon*, persist in its position that it can as a general matter impose common carrier regulations on entities that disclaim common carrier status by keeping Rule 64.2201(b) in its present form.

C. Transcom did identify specific services.

The Rural Associations' claim that "Transcom fails to identify any service it provides or will provide that is prohibited by the rule but that would produce benefits outweighing the public interest harms associated with false ring-back tones"¹² is flatly wrong. Transcom extensively provided two discrete examples.¹³ Counsel is authorized to state for the record that, but for the rule, Transcom would be very interested in offering both of those capabilities.¹⁴

D. Rule 64.2201(b) employs the overbroad definition of "intermediate provider."

The Rural Associations argue on Opposition pages 9-10 that "§ 64.2201(b) is easily distinguishable because the rule is limited to a certain classification of carriers and intermediate providers that are in a unique position to comply with the rule requiring that call originators only receive a ringing signal when the call has actually been connected to the terminating switch." The rule is not so limited. Rule 64.2201(b) applies to all "intermediate providers" as defined by Rule 64.1600(f), and that rule extends far beyond "carriers" and entities "that are in a unique

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.

¹² Rural Associations Opposition p. 8.

¹³ Transcom Request for Reconsideration pp. 8-10.

¹⁴ See *Verizon v. FCC*, 740 F.3d 623, 2014 U.S. App. LEXIS 680, *56, slip op at 37 (D.C. Cir. 2014). Verizon was allowed to establish constitutional and prudential standing through a counsel assertion of interest during oral argument on a petition for review. Transcom addressed the contemplated services in its Request for Reconsideration as part of an effort to show administrative standing.

position to comply with the rule requiring that call originators only receive a ringing signal when the call has actually been connected to the terminating switch.” Page 21 of the FCC’s appeal brief at the Tenth Circuit was quite explicit on this very issue:

... The rule defines “Intermediate Provider” as “any entity that carries or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic.” 47 C.F.R. §64.1600(f); see also *Order* ¶720 (JA at 624). This broad definition of “intermediate provider” includes not only telecommunications carriers, which are subject to regulation under Title II of the Communications Act, but also non-carriers.

The Rural Associations simply refuse to accept that the rule is overbroad is not limited in the fashion they suggest. The simple fact is that the definition of “intermediate provider” includes a huge number of non-carrier entities that have no idea they have been snared. A holding on reconsideration that the rule applies only to common carriers would bring the rule much closer to the interpretive universe the Rural Association describes.

E. Conclusion.

Transcom reiterates its request that the Commission reconsider its decision to promulgate new Rule 64.2201(b). Given *Verizon*, the Commission must reconsider and amend new Rule 64.2201(b) to state that it only applies to common carriers.

Respectfully Submitted,



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