BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

The Staff of the Missouri Public Service Commission, Complainant,	)	
vs.	)	File No. TC-2013-0194
Halo Wireless, Inc., and Transcom Enhanced Services, Inc. Respondents.	)	

TRANSCOM ENHANCED SERVICES, INC.'S
MOTION TO DISMISS

The Missouri Public Service Commission Staff (the "Staff") Complaint must be dismissed in its entirety because it seeks relief that cannot be granted. Alternatively, it should be dismissed in part, as explained below. *See* 4 CSR 240-2.070(7).

I. The Staff's Request for a Referral of Criminal Prosecution Against the Principals of Halo and Transcom is in Violation of Missouri Law.

The Staff has filed a Staff Complaint against Halo Wireless, Inc. ("Halo") and Transcom Enhanced Services, Inc. ("Transcom") that includes two prayers for relief from the Missouri Public Service Commission ("Commission"): "(1) Find that Halo, Transcom and the principals thereof are subject to the maximum penalties permitted by law; and (2) Refer this matter to both the Missouri Attorney General and the United States Attorney for prosecution of Halo, Transcom **and the principals thereof** for theft and for acting in concert to criminally defraud the recipient carriers of the millions of dollars in access charges that Halo and Transcom knew they owed, did not pay, attempted to conceal by the alteration of call records, in violation of state and federal law." (emphasis added).

The request by the Staff to obtain a criminal referral against the principals of Halo and Transcom must be dismissed because it is in violation of both Missouri law and Missouri public policy.

First, section 386.470 RSMo specifically prohibits the prosecution of any individual for any matter on which he or she has testified or provided documentary evidence before the Commission:

> No person shall be excused from testifying or from producing any books or papers in any investigation or inquiry by or upon any hearing before the commission or any commissioner, when ordered to do so by the commission, upon the ground that the testimony or evidence, books or documents required of him may tend to incriminate him or subject him to penalty or forfeiture, **but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence.** … *Id.* (emphasis added.)

Halo was a party to the proceeding that gave rise to the previous Commission Report and Order, File No: TC-2012-0331 ("Report and Order"), the subject matter of which involved many of the issues giving rise to the Staff Complaint at issue here. Transcom was not a party thereto, but provided testimony and documentary evidence in support of Halo.[1] Halo and Transcom will presumably be asked to do the same regarding the current Staff Complaint. As such, prosecution of their principals is expressly prohibited under section 386.470 RSMo.

The statute facilitates the work of the Public Service Commission by allowing (and sometimes compelling) individuals and corporations to produce testimony and evidence. It does not allow those individuals to assert their Fifth Amendment Rights under the United States

[1] While the Commission listed Transcom as a "party" in the Report and Order, Transcom was not a claimant or defendant in the matter nor did it seek to become a claimant.

Constitution.[2] As such, in order to conform with both the federal and state Constitutions, the statute prohibits criminal prosecution with regard to "acts, transactions, matters and things" upon which a person has provided testimony or documentary evidence. In other words, the statute allows the Commission to receive testimony that the Commission otherwise would not be able to obtain from an individual wishing to retain his or her state and federal right to refuse to self-incriminate. Without the statute, individuals would regularly refuse to testify before the Commission or produce documents to the Commission on the grounds that such testimony or production would tend to incriminate them. The statute entrusts tremendous power in the Commission by allowing it to compel testimony and the production of evidence that could not be compelled by any other government agency absent such statutory authority. The public policy of Missouri favors a forum where individuals can be forthcoming with information that is necessary for the Commission to conduct its business. The Commission, in turn, then has the best opportunity to protect the citizens of Missouri.

The Missouri Supreme Court clearly recognizes this broad grant of immunity from prosecution under the statute: "…Missouri does have several statutes which require witnesses to testify with respect to particular topics in return for immunity from prosecution, see, *e.g.*, sections 136.100.2, 386.470, and 409.407(e), RSMo 1986 (relating respectively to investigations by the director of revenue, the public service commission, and the commissioner of securities).…" *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 768 (Mo. banc 1987); *See also, State ex rel Nothum v. Walsh*, 380 S.W.3d 557 (Mo. 2012). The statute also clearly contemplates immunity for those who produce any "evidence, books, or records."

[2] *See also* Missouri Constitution, Art. I section 19.

The United States Constitution is the preeminent law of the United States. The first ten amendments to the Constitution, commonly referred to as the Bill of Rights, protect the liberty of individuals, and no fewer than four of those first ten amendments pertain to protecting individuals from the awesome power of the state to imprison individuals. The Bill of Rights in the Missouri Constitution largely mirrors, and supplements, the federal Bill of Rights. The Staff Complaint asks the Commission to take the extraordinary, if not unprecedented, step of urging the Missouri Attorney General or the United States Attorney to seek to imprison the principals of Transcom and Halo for what is, ultimately, a legitimate legal disagreement between Transcom and Halo on the one hand, and the ILECs on the other hand, over Transcom's and Halo's regulatory classification. The Commission should not stand for this gross abuse of power and prosecutorial overreaching, and should strike the request for a criminal referral from the Staff's pleadings.

Halo and Transcom and their principals have already and will continue to provide truthful and complete information before the Commission. It is disingenuous, and indeed unlawful, for the Staff to now seek referral for criminal prosecution against the principals of Halo and Transcom. Therefore, Transcom respectfully requests the Commission to dismiss the request by the Staff for a referral of criminal prosecution against the principals of Transcom and Halo.

II. The Staff has Failed to Cite any Authority for the Commission to Make a Criminal Referral.

The Commission's regulations require that the Staff clearly state the authority for the specific relief sought. 4 CSR 240-2.080(4) states: "Each pleading shall include a clear and concise statement of the relief requested, ***a specific reference to the statutory provision or other authority under which relief is requested,*** and a concise statement of the facts entitling the party to relief." (emphasis added). While the Staff makes allegations about the statutes it believes

Halo and Transcom and their principals have violated, none of them are criminal statutes.[3] Moreover, the Staff fails to cite a single statutory provision or other authority which empowers the Commission to make a criminal referral.

In addition to the untold damage that could be done by the threat of the denial of the personal liberty of the principals of Transcom and Halo, the reputational damage of the mere fact of making a criminal referral could be tremendous. Yet, though the Staff is willing to ask the Commission to make these tremendously serious allegations and involve law enforcement authorities, the Staff fails to cite even a single authority on which the Commission can rely to take these drastic measures. In the complete and utter absence of citation to a statute or other authority for making a criminal referral, the Commission should strike the request from the Staff's pleadings and dismiss the request by the Staff for a referral of criminal prosecution against the principals of Transcom and Halo.

III. Fraud and Deceit are not Elements of any of the Statutes the Staff has alleged that Transcom and Halo have Violated. The Staff is Using the Allegations of Fraud and Deceit as a Pretext to Elevate Allegations of a Purely Civil Nature to Support a Criminal Referral.

Central to the Staff's assertion of Count II is the allegation that Transcom and Halo violated section 392.140 RSMo. Section 392.140 RSMo is focused on the duty of telegraph and telephone companies to forward received dispatches to companies situated down the line. As such, 392.140 RSMo provides for the remedies prescribed in 392.130 RSMo for "neglect or refusal so to transmit and deliver," with the enumerated penalties "to be recovered with costs of suit by civil action by the person or persons or company sending or desiring to send such dispatch." Though neither statute contains an element of fraud and, moreover, though 392.130 RSMo provides for a civil remedy for violation of the statute, the Staff nevertheless uses

[3] The closest the Staff Complaint comes are allegations of "fraud" but that is likely civil fraud, not criminal fraud. These allegations are addressed below.

extremely inflammatory language such as "theft by deceit" and "criminally defraud" to urge the Commission to make a criminal referral of Transcom, Halo and their respective principals for what is essentially only an alleged civil violation.

For example, Paragraph 25 of the Staff Complaint asserts that Halo and Transcom "acted together" to violate "tariffs." Paragraph 26 alleges that they did so through "deceit."[4] While Transcom reasserts a categorical denial of these allegations, as a matter of law, even if Halo and Transcom did intend to deceive and/or defraud the ILECs, both the Staff Complaint and the record in TC-2012-0331 make clear that the alleged efforts to "mislead" the ILECs were wholly unsuccessful. As the Staff is aware, the ILECs have persistently and aggressively disagreed with Transcom for many years – to the point that they were never willing to accept the relevant federal court rulings and, instead, continued to contest Transcom's claimed status by denying the validity of the federal court orders and serially collaterally attacking them in actions against Transcom and its vendors. It is not enough to assert that someone *tried* to deceive; the pleader must also aver – and offer proof – that the alleged attempt to deceive was *successful*. Given the highly public nature of ILECs' continued disagreements with Transcom, it is improbable to assert that any "false representation" concerning Transcom's status or the regulatory classification of its traffic (i) actually persuaded the ILECS, (ii) that the ILECS accepted or believed it, or (iii) that the ILECS acted in reliance thereon. In short, the Staff simply cannot make out a case of fraudulent misrepresentation for either actual or constructive fraud.

[4] The "Wherefore" clause in the Staff Complaint also claims that Halo and Transcom tried to "deceive" the ILECs. Likewise, Paragraph 5 refers alleges that the two entities concocted a "scheme devised for the purpose of "defrauding telecommunications companies in Missouri" – apparently based on the assertion in Paragraph 17 that Halo "altered" its records. The allegation of an "alteration" is clearly not true. The practice, to which the ILECs objected, was proactively initiated by Halo on a good-faith basis to comply with an FCC proposed rule. It involved insertion of Transcom's Halo-assigned Billing Telephone Number in the Charge Number parameter of the SS7 ISUP Initial Address Message *signaling* along with, and in addition to, the original Calling Party Number in the CPN parameter. This is not a "record" *per se*. However, even if it such were fairly characterized as a "record", this insertion occurred when the so-called Halo "record" was initially created, and, as such, so it cannot be fairly characterized as an "alteration."

> The elements required to properly plead a claim of fraudulent misrepresentation based on constructive fraud are identical to those required for a claim of fraudulent misrepresentation based on actual fraud, with the exception of the fourth element. *Cottonhill Inv. Co*., 887 S.W.2d at 744. The essential elements to establish liability for fraudulent misrepresentation based on actual fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the representation being true; (8) his right to rely thereon; and, (9) the hearer's consequent and proximately caused injury. *Id*. (citations omitted). Unlike the fourth element of fraudulent misrepresentation based on actual fraud, to establish the fourth element of a claim of fraudulent misrepresentation based on constructive fraud, it is not necessary for the plaintiff to plead and prove that the defendant had knowledge of the falsity of his or her representation, but only that he or she was ignorant of its truth. *Id*.

Droz v. Trump, 965 S.W.2d 436 (Mo. Ct. App. 1998).

The Staff alleges, but simply cannot show as a matter of law, that Transcom or Halo "knew" that Transcom was not an ESP, was not an end user, and was not entitled to purchase telephone exchange service from exchange carriers like Halo. The Staff has failed to prove that either or both of Transcom and/or Halo "knew" they were expressing a falsehood through any claimed representations, actions or deeds that Transcom was an ESP and that its traffic was access-exempt. While Transcom denies making any misrepresentations in such statements, even if these *were* misrepresentations, they were not intentional or "knowing" on the part of Transcom. Indeed, Transcom has continued – in the course of the activity surrounding the Commission Report and Order as well as in throughout its dealings with the ILECs – to assert its good faith basis for its repeated assertion that the activity conducted by Halo and Transcom were those of a federally licensed radio service provider and an enhanced service provider, respectively.

The Staff Complaint fails to allege all the required elements for actual or constructive fraud. The Staff has not averred, nor could the facts have supported, that the ILECs were

"mislead" into believing Transcom was an ESP. Instead, and as the record shows, the ILECs knew from the beginning that Transcom was Halo's customer, and from the beginning they actively and vocally disputed Halo's and Transcom's assertions. Thus, it is simply not possible to plead or prove the elements of fraudulent misrepresentation that: [(6)] the ILECs were *ignorant* of the "falsity" of any "representation"; [(7)] the ILECs relied on any such representation being true; [(8)] the ILECs had a "right" to rely thereon; and, [(9)] the ILECs' consequent and proximately caused injury was caused by a "false representation" that they believed and relied upon. The elements of fraud are conjunctive, rather than independent or disjunctive. The Staff Complaint does not plead all the required elements of actual or constructive fraud, nor could the Staff do so under the facts surrounding the activities of Halo and Transcom with the ILECs.

The Staff Complaint relies entirely on the Record and Order in TC-2012-0331. The Record and Order expressly states that fraud was not alleged, proven or found.[5] That proceeding cannot therefore, as a matter of law, support the claims in the Staff Complaint related to "fraud" or "deceit." While the Staff was ordered to conduct an "investigation" before bringing a Staff Complaint if they chose, the Staff Complaint does not represent that any "investigation" was conducted and it does not assert any new facts; the Staff merely proceeded to file the Staff Complaint, wholly relying on the prior proceeding. As such, the Commission must strike and dismiss all Staff Complaint allegations, references and claims relating to "fraud" and "deceit." Further, as a matter of law, the Staff's prayer for criminal referral, premised as it is on a finding of fraud on the part of Transcom and Halo, must be stricken.

[5] *Id.* at 65-66.

IV. Count I of the Staff Complaint Should be Dismissed because it Fails to Allege that Transcom or Halo "Knowingly" Disregarded a Legal Requirement to Obtain Certificates of Authority.

Many of the relevant and necessary facts arising from the current Staff Complaint were considered previously by the Commission in File No: TC-2012-0331. A central issue in the previous Report and Order concerned whether Halo and Transcom were telecommunications carriers. Halo and Transcom argued consistently and emphatically that (i) Transcom was an enhanced service provider ("ESP") and an End User and was not a common carrier providing intrastate telecommunications and (ii) Halo was a commercial mobile radio service ("CMRS") wireless carrier. Transcom, Halo and their respective principals believe, in good faith, that as an ESP and CMRS, respectively, the companies were outside Missouri's certification requirement. There is no evidence to support the Staff assertion that either of Halo or Transcom was "aware" that it was subject to section 392.410 RSMo.[6] To the contrary, the only evidence is that both entities firmly believed they were not. The record and Report and Order in TC-2012-0331 clearly do not support a claim by the Staff that Halo and Transcom and their principals "were aware of the requirement [that Transcom or Halo] obtain a certificate of authority…[and] they acted in knowing disregard of Missouri law."

The Commission is explicit in its Decision in that it needs additional information before it can reach a conclusion regarding certification:

> Additionally, the Staff, in its brief, states: "***Although this was not contained in the issues lists in this case***, the Staff wishes to make clear that Halo and Transcom were legally required to be certificated in Missouri prior to the transport of landline telephone calls." Consequently, the Commission will direct its Staff to complete an investigation into any unlawful actions by Halo and

[6] Transcom continues to assert that it does not provide any intrastate telecommunications service, is not a common carrier, is not a public utility, that its services are entirely jurisdictionally interstate and that Transcom is not subject to any Missouri certification requirement.

Transcom and to file a complaint seeking penalties if the results of Staff's investigation support such action.[7]

This language in TC-2012-0331 was the first official notice the Commission provided to Transcom, Halo or its principals that the Commission, as opposed to the Staff, believed that Transcom and Halo were subject to Missouri's certification requirements. The Commission's ruling in TC-2012-0331 was issued on August 1, 2012, and it purported to be effective on August 13, 2012. By that time, Halo and Transcom had already ceased doing business in Missouri, which means that the arrangements and facts before the Commission in TC-2012-0331 were and are no longer occurring. Further, the Report and Order expressly notes that the Commission had not made any determination, much less heard any assertion, of fraud by either of Halo or Transcom.[8] Likewise, the Commission did not at such time hold that certification was required for any period, because that issue was not on the issue list for the case. Instead, the Staff was directed to conduct an "investigation."[9]

V. Count I of the Staff Complaint Should be Dismissed Because it Fails to Allege all Required Elements and Facts Sufficient to Make a *Prima Facie* Case that Transcom or Halo were Required to Obtain Certificates of Authority.

The Staff asserts that Transcom, in particular, was required to obtain a certificate, but the Staff Complaint does not set out each of the mandatory elements to prove a violation of the certification requirement under section 392.410 RSMo. The only assertion is that Transcom "transmitted information by wire, radio, optical cable, electronic impulses, or other similar

[7] TC-2012-0331 Report and Order, page 68 (emphasis added).

[8] TC-2012-0331 Report and Order, page 66 states as follows: "In this case, no party has asserted a fraud claim against Halo or Transcom. Nor has any party sought a decision or ruling as to the state of mind of the creators and incorporators of Halo and Transcom. Therefore, the Commission makes no determination in this case as to whether Halo and Transcom were created for an illegal purpose."

[9] The Staff Complaint does not assert or reveal that there was any "investigation"; indeed Staff never did conduct any "investigation." The Staff Complaint, filed on October 16, 2012, a mere two and a half months after the TC-2012-0331 Report and Order, demonstrates an intent to rely entirely on the Report and Order and perhaps the record in TC-2012-0331. However, neither of the Report and Order nor the related findings in TC-2012-0331 allege, prove or make any finding of fraud, or of a failure to obtain certificates of authority on the part of Halo or Transcom.

means" (paragraph 21). These words constitute only a part of the definition of "telecommunications service" in section 386.020(54) RSMo. That is not sufficient. The Staff does not bother to negate any of the exceptions to that sole definition. The Staff does not allege any facts sufficient to demonstrate that Transcom is a "telecommunications company" under section 386.020(52) RSMo, but section 392.410 RSMo requires certification only if an entity is a "telecommunications company." Not all entities that could be said to provide "telecommunications service" must obtain a certificate. Virtually every business with any kind of communications equipment and customer-owned inside wire "transmits transmitted information by wire, radio, optical cable, electronic impulses, or other similar means", but they are not required to obtain a certificate unless they provide "service for hire, sale or resale within this state" – a limitation imposed by the definition of "telecommunications company." Section 386.020(52) RSMo.

The statutory requirement that the service be "for hire, sale or resale" before there is a certification requirement has great meaning and import. The case law in Missouri makes clear that these words require a demonstration that the entity is a "public utility" as defined in section 386.020(43) RSMo and, in turn, that the entity in issue has sufficiently held out to provide service "to the public" on uniform and nondiscriminatory terms. Importantly, the Staff has not pled that Transcom offered its services to the general public for hire, sale or resale. This Commission is well aware of the requirement that an entity must sufficiently hold itself out in a way that dedicates its service and property to public use before any state regulation or certification obligation attaches:

> '[T]he Public Service Commission is a body of limited jurisdiction and has only such powers as are expressly conferred upon it by the statutes and powers reasonably incidental thereto.'[FN174] As the Commission is an administrative agency with limited jurisdiction, 'the lawfulness of its actions

depends directly on whether it has statutory power and authority to act.'[FN175] Accordingly, the Commission 'has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature.'[FN176] In particular, the Commission 'cannot, under the theory of 'construction' of a statute, proceed in a manner contrary to the plain terms of the statute[.]' *Id.* 'When determining the statutory authorization for, or lawfulness of, a Commission order the courts do not defer to the commission, which has no authority to declare or enforce principles of law or equity.'[FN177]

In short, the Public Service Commission is a creature of statute and its jurisdiction is controlled by statute.[FN178] The commission is not a court. It is a creature of the Legislature. Its jurisdiction, powers, and duties are fixed by statute.[FN179] A basic tenet of administrative law provides that 'an administrative agency has only such jurisdiction or authority as may be granted by the legislature.'[FN180] If the Commission lacks statutory power, it is without subject matter jurisdiction, and subject matter jurisdiction cannot be enlarged or conferred by consent or agreement of the parties.[FN181]

Whether the Commission has jurisdiction over Folsom Ridge or the Association hinges on the statutory definition, and the state appellate courts' interpretations of that statutory definition, as to what constitutes a public utility subject to the control and regulation of the Commission.

…..

However, in addition to the plain reading of these statutes, Missouri's courts have further distinguished and defined what constitutes being a public utility. In *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, the Missouri Supreme Court held that for a company to be considered a public utility its services must be devoted to the public use.[FN184] The Court held that: 'The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that a business is in character and extent of operation such that it touches the whole people and affects their general welfare.'[FN185] Consequently, the Court articulated the test for determining if a company was devoting its services to the public use when it summarized and stated: 'The fundamental characteristic of a public calling is *indiscriminate* dealing with the general public.'[FN186] In a later case, the Court would further cement its interpretation holding that regardless if the statutes defining corporations falling under the jurisdiction of the Commission have expressly written the idea of the public use into them, it is nonetheless a requirement.[FN187]

FN174 *State ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044, 1046 (Mo. 1943); *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925, 928 (Mo. banc 1958).

FN175 *State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n*, 658 S.W.2d 448, 452 (Mo. App. 1983).

FN176 *State ex rel. Springfield Warehouse & Transfer Co. v. Pub. Serv. Comm'n*, 225 S.W.2d 792, 794 (Mo. App. 1949).

FN177 *State ex rel. Util. Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 47 (Mo. banc 1979).

FN178 *State ex rel. Smithco Transport Co. v. Public Service Commission*, 307 S.W.2d 361, 374 (Mo. App. 1957) (overruled on other grounds, 316 S.W.2d 6 (Mo. banc 1958)).

FN179 *State ex rel. Doniphan Tel. Co. v. Public Service Commission*, 369 S.W.2d 572, 575 (Mo. 1963).

FN180 Carr *v. North Kansas City Beverage Co*., 49 S.W.3d 205, *207 (Mo. App. 2001): Livingston *Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs*., 809 S.W.2d 153, 156 (Mo. App. 1991).

FN181 *Carr v. North Kansas City Beverage Co*., 49 S.W.3d 205, *207 (Mo. App. 2001): Livingston Manor, Inc. v. Dep't of Soc. Servs., Div. of Family Servs., 809 S.W.2d 153, 156 (Mo. App. 1991).

FN184 *State ex rel. M.O. Danciger & Company v. Public Serv. Comm'n*, 205 S.W. 36, 40 (Mo. banc 1918).

FN185 Id. at 41.

FN186 *Danciger*, 205 S.W. at 42. Following this same line of reasoning, the Missouri Supreme Court later held that an electric company selling electric energy to only one customer (a corporate entity) that had not devoted its property to any public use in any manner, was not a public utility and not subject to the jurisdiction of the Commission. *State ex rel. Buchanan County Power Transmission Co. v. Baker et al*., 9 S.W.2d 589, 591, 592 (Mo. banc 1928). Continuing in this same vein, the Court has held that a small rural exchange phone company serving approximately 41 customers provided service for its own members, not the general public, and was not a public utility subject to the jurisdiction of the Commission. *State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown*, 19 S.W.2d 1048, 1049 (Mo. 1929). This same company had one commercial line to Jefferson City, and to that extent only, it was found to be a public utility and the Commission had regulatory authority in relation to that single line. *Id*.

FN187 *Baker*, 9 S.W.2d at 591.

Cathy J. Orler, Complainant, v. Folsom Ridge, LLC, and Big Island Homeowners Water and Sewer Association, Inc., f/k/a Big Island Homeowners Association, Respondents In the Matter of the Application of Folsom Ridge, L.L.C., and Big Island Homeowners Water and Sewer Association, Inc., for an Order Authorizing the Transfer and Assignment of Certain Water and Sewer Assets to Big Island Water Company and Big Island Sewer Company, and in Connection Therewith Certain Other Related Transactions, Case No. WC-2006-0082, et al; Case No. WO-2007-0277, 2007 Mo. PSC LEXIS 791 (June 14, 2007).

Missouri has therefore essentially codified what is now known as the *NARUC* "common carrier" test. *See National Association of Regulatory Utility Commissioners v. FCC* (*NARUC I*) 525 F.2d 630, 642 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 999 (1976). In *NARUC I*, the D.C.

Circuit held that 'the characteristic of holding oneself out to serve indiscriminately is an essential element' of common carriage. *See* 525 F.2d at 640-642. Noting the doctrine's original use as imposing a greater standard of care upon carriers who held themselves out as offering to serve the public in general, the court went on to state:

> The rationale was that by holding themselves out to the public at large, otherwise private carriers took on a quasi-public character.… [I]t is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently." *Id.* at 641.

The court concluded by stating that an entity will not be a common carrier "where its practice is to make individualized decisions, in particular cases, where and on what terms to deal." *Id.*[10]

Two elements characterize a carrier as a public utility or common carrier: (1) the service is for hire, and (2) the carrier holds itself out to the public. If the terms of the carrier service are not negotiated on a case-by-case basis, but rather held out indiscriminately to all, the carrier is more likely to be deemed a common carrier. Courts and the FCC have consistently found these foregoing two elements to be necessary before regulatory requirements – such as certification – can attach. *See Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994)[11]; Memorandum Opinion, Declaratory Ruling, and Order, *In the Matter of Cox Cable Communications, Inc.*,

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[10] *NARUC v. FCC*, 533 F.2d 601, 608-610 (D.C. Cir. 1976) (*NARUC II*) added a separate mandatory criterion: to be a common carrier, one must allow customers to "transmit intelligence of their own design and choosing." Notably, in this case, there was no factual disagreement between the parties whether Transcom changed content; instead, the ILECs argued that there was not enough of a change to convert Transcom's telecommunications service into an enhanced service. The Commission essentially adopted this view. The problem is that Transcom is not a common carrier claiming that a specific service within its complete suite of services is exempted from regulation. The question was and still is whether Transcom is a carrier at all. The Commission did not conduct any kind of *NARUC I or II* analysis, because the question of certification was not before it. Staff now seeks a finding on certification, and therefore it must assert (and then prove) that Transcom has held out to the point it has dedicated to public use and that **Transcom's customers** (not some distant "Suzy" in California that is not Transcom's customer) can "transmit intelligence of their own design and choosing." The Staff Complaint does not allege either of these things.

[11] "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."

Commline, Inc. and Cox DTS, Inc.; Petition for Declaratory Ruling, ¶¶24-25 102 F.C.C.2d 110, 121 (1985)[12]

The Staff Complaint does not claim that Transcom is a "public utility." The jurisdiction of the Commission is limited to entities offering utility services for "public use". The Commission's jurisdiction does not extend to non-public transactions. *Hurricane Deck Holding Co. v. Public Service Comm'n,* 289 S.W.3d 260, 264-265 (Mo.App. W.D. 2009), citing *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm'n*, 205 S.W. 36, 38 (Mo. 1918) (stating that "Missouri's courts have consistently held that a company that supplies power or other services to customers on the basis of individual contracts without offering its services to the public at large is not acting as a public utility and is not subject to regulation by this Commission.") *In re Trigen-Kansas City Energy Corp.*, Case No. HM-2004-0618, 2004 WL 3159449 at * 4 (Mo. P.S.C. 2004); see also *Orler v. Folsom Ridge, LLC*, Case No. WC-2006-0082 et al.; Case No. WO-2007-0277, 2007 WL 2066385, at * 15 (Mo.P.S.C. 2007) (Stearley, J.); *Re Competition in IntraLATA Telecommunications Market; Re WATS Resale by Hotels/Motels*, Case No. TC-85-126, 77 P.U.R. 4th 1, [7] (Mo. P.S.C. 1986).

[12] "Commline claims that it deals on an individual basis with each potential customer, that it does not have set prices or terms and conditions and that, therefore, it is not a common carrier. No party brought forth evidence that Commline actually operates in a manner different than it claims. The evidence of the commenters on the other side amounts to little more than claims that Commline would like to sell its service to more customers and that if two customers did obtain the exact same service features, they would be charged the same price. An indiscriminate offering requires more than a desire to serve more customers, and the consequent actions taken in order to obtain more customers (*e.g.*, a willingness to discuss the services offered with any interested party). An indiscriminate offering includes an offering to provide service without negotiation of provision of the service on an individualized basis. It appears that Commline does conduct business through individualized negotiations and does not hold itself out to serve the public indiscriminately." … When comparing Commline's services to the Specialized Mobile Radio Service (SMRS) found to be non-common carrier in *NARUC I*, it appears that Commline's services have most of the attributes of non-common carriage that SMRS has. In *NARUC I*, the court found SMRS not to be common carriage because the service 'would involve the establishment of medium to long term relationships' with a fairly stable customer base and because the SMRS operators would make 'individualized decisions about the desirability and compatibility of serving new customers.' It appears that the Commline services also will tend to involve long term relationships and, since the service is somewhat specialized, it lends itself to individualized determinations as to the ability and desirability of serving new customers."

With regard to telecommunications companies, the "public use" requirement is also necessary to harmonize section 386.020 RSMo with the Federal Communications Act, and specifically, 47 U.S.C. Section 153(53)'s definition of "telecommunications service" as: "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."

Although the "public use" requirement is not explicit on the face of section 386.020 RSMo, it is incorporated into the statute as a matter of necessity:

> While the definitions quoted supra [of "electric plant" and "electrical corporation," found now at §§ 386.020(11) and (12),] express therein no word of public use, or necessity that the sale of the electricity be to the public, it is apparent that the words "for public use" are to be understood and to be read therein. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. The electric plant must, in short, be devoted to a public use before it is subject to public regulation.

Hurricane Deck, 289 S.W.3d at 264, quoting *Danciger*, 205 S.W. at 38.

To be found to be a "public utility" subject to the Commission's jurisdiction, there must be substantial evidence that services are "indiscriminately and reasonably made available to the general public…." *Osage Water Co. v. Miller County Water Auth., Inc.*, 950 S.W.2d 569, 574 (Mo.App.S.D. 1997); quoted in *Hurricane Deck*, 289 S.W.3d at 264.

On the other hand, where services are not available to the general public on indiscriminate terms, a business is not devoted to "public use" and is outside of the regulatory purview of the Commission. *Danciger*, 205 S.W. at 38; *State ex rel. Lohman & Farmers' Mut. Telephone Co. v. Brown*, 19 S.W.2d 1048 (Mo. 1929); *Peoples Tel. Exchange v. Public Service Commission*, 186 S.W.2d 531 (Mo.App. 1945).

Applying this standard, the Commission has found that a service is not a public utility subject to regulation where it (i) serves only a limited number of customers, under multi-year,

long-term individual contracts; (ii) does not makes it services generally available to the public; (iii) does not offer set prices to all willing buyers; and (iv) retains the sole discretion to refuse new customers for economic reasons. *In re Trigen-Kansas City, supra,* 2004 WL 3159449 at * 4 (Mo. P.S.C. 2004). Similarly, in *Virgin Islands Telephone Corp. v. F.C.C.,* 198 F.3d 921, 924 (D.C. Cir. 1999), the court affirmed an FCC finding that an undersea cable operator was not a common carrier because the operator:

> Will make available bulk capacity in its system to a significantly restricted class of users, including common carrier cable consortia, common carriers, and large businesses. Potential users are further limited because only consortia, common carriers, and large businesses with capacity in interconnecting cables or other facilities and, in many cases, operating agreements with foreign operators, will be able to make use of the cable as a practical matter.

Transcom offers its services to a discrete set of potential wholesale customers. Transcom has always reserved the right to serve or not serve at its discretion. Transcom negotiates individual contracts with each potential customer. Transcom has never "held out" as a carrier, or to indifferently serve. Nothing in the Staff Complaint pleads or asserts otherwise. The only "public" that is mentioned is the "end users" whose traffic first goes to Transcom's customers and are then handed off to Transcom for processing. Regardless, the legal test for common carriage depends on the vendor/customer relationship that is offered and established, not what third parties not in privity perceive or obtain downstream at the retail level. Both the FCC and the D.C. Circuit expressly rejected the proposition that a provider's status as common carrier *vel non* is determined based on anything other than the provider's relationship with potential and existing direct customers. *See* Memorandum Opinion and Order, *In the Matter of 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*, File No.

S-C-L-94-006, FCC 98-263, ¶6, 13 FCC Rcd 21585, 21587-21588 (rel. Oct. 1998), *aff'd Virgin Islands Tel. Corp. v. F.C.C.,* 198 F.3d 921 (D.C. Cir. 1999).[13]

The Staff Complaint does not sufficiently aver that Transcom is a "telecommunications company" required to obtain a certificate of authority pursuant to section 392.410 RSMo. The most egregious failure of pleading and proof is any averment that Transcom has held out to provide a service to the public whereby Transcom's customers can transmit intelligence of their own design and choosing. Thus, Count I must be dismissed because it does not contain sufficient averments to allege that Transcom is in fact a telecommunications company that must obtain a certificate under Missouri law.

Because Transcom, Halo and its principals had a good faith belief they did not need to be certificated and because the Staff failed to plead sufficiently, Count I of the Staff Complaint against Transcom and Halo should be dismissed.

VI. Count II of the Staff Complaint Against Transcom Should be Dismissed Because the Commission is not Entitled to Penalties Against Transcom or Halo under Section 392.130 RSMo.

The Staff Complaint makes many allegations in Count II against Halo and Transcom regarding the characterization of call traffic and payments allegedly owed other carriers by Halo and Transcom pursuant to the Staff's re-characterization of the call traffic, its mischaracterization of the evidence and even the Order in TC-2012-0331. Transcom specifically addresses and denies those allegations in its answer.

[13] Whatever it was that the "little Suzy" so often mentioned in the prior case may have received from her retail provider, all agreed she was not a Transcom customer. Her relationship with her provider has nothing to do with, and as a matter of law has no bearing on, whether Transcom is or is not a common carrier. All that matters is whether – like AT&T Submarine Systems – Transcom engages "in negotiations with each of its customers on the price and other terms which would vary depending on the customers' capacity needs, duration of the contract, and technical specifications (*e.g.*, transmission speeds, maintenance levels, reliability criteria, restoration ability, and warranty coverage)" which is the key to whether Transcom is offering to or does provide service "indiscriminately" and is or is not a common carrier. *AT&T Submarine Systems*, ¶8, 13 FCC Rcd 21588-21589. The Staff Complaint does not aver that Transcom has held out to, or does, offer to indiscriminately serve ***its customers***.

However, Count II fails on its face and must be dismissed. Count II specifically alleges that Transcom has failed to pay tariffed access charges related to interconnection agreements in violation of section 392.140 RSMo. Section 392.140 RSMo relates to a telecommunications company's duties to forward communications so that they are completed. The statute states in relevant part: "for omitting to do so the company or companies owning or operating such line or lines shall be severally liable to the penalty prescribed in section 392.130." *Id.* The penalties set out in section 392.130 RSMo relate to a failure of a telegraph or telephone company to, in essence, connect calls. It states that there is "a penalty of three hundred dollars for every neglect or refusal **so to transmit and deliver, to be recovered with costs of suit by civil action by the person or persons or company sending or desiring to send such dispatch."** *Id.* (emphasis added).

It is not alleged in the current Staff Complaint, nor was it ever alleged in the entirety of the record of TC-2012-0331 that Halo or Transcom had ever failed to "transmit and deliver" a call or transmission. The only fact at issue was and remains the regulatory classification of the entities and the traffic, and the contract and intercarrier consequences flowing therefrom. The case was brought by Halo under practical compulsion *because the ILECs were blocking, and were about to block even more*. The ILECs were the entities refusing to "transmit and deliver." There was no allegation, and no evidence, that either Transcom or Halo were refusing to "transmit" or "deliver." Indeed, the Staff now seeks penalties and a criminal referral because traffic **was** delivered from Halo to the ILECs, and because Halo and/or Transcom *did not* block the traffic.

Therefore, neither section 392.140 RSMo nor the penalty set out in section 392.130 RSMo for a violation of 392.140 apply to Transcom or Halo as a matter of law because the

violation and penalty are for failing to "transmit or deliver" rather than failing to pay.[14] Transcom notes, in any event, that it purchased service from Halo, delivered the traffic to Halo, and paid Halo. To the extent Transcom had any duties with regard to this statute (which Transcom denies), it wholly fulfilled them.[15] Moreover, even if sections 392.130 and 392.140 did apply to Transcom, the statute does not contemplate an action by the Commission. The statute specifically states that the remedy is "a civil action by the person or person or company sending or desiring to send such dispatch." *Id.*[16]

In addition to all of the above reasons why Count II must be dismissed, the allegations of knowledge and intent in that Count fly in the face of the Commission's record from the previous proceeding. In that previous proceeding, Transcom introduced evidence that on four separate occasions courts of competent jurisdiction held that Transcom is an ESP and end user. The courts held that Transcom is not a common carrier or telecommunications carrier, which necessarily means that neither the states nor the FCC can regulate Transcom as a common carrier, or punish Transcom for not submitting to common carrier style regulation. The courts expressly held that Transcom was entitled to purchase telephone exchange service from an exchange carrier (*e.g.*, an LEC or CMRS provider), and was not required to directly purchase tariffed exchange access or directly or indirectly pay exchange access charges. In other words, Transcom had been told by a competent tribunal on four separate occasions that it was not guilty

[14] Count II does not assert that **Transcom** was or is individually required to purchase intrastate exchange access from any ILEC under the ILECs' tariffs or was or is directly obliged to directly pay any intrastate exchange access charges to any ILEC. Nothing in the entire Staff Complaint asserts or implies that Transcom ordered or received intrastate exchange access service from the ILECs as the ILECs' "access customer" under any theory.

[15] The foregoing is not an admission in any way the Halo violated the statute or is subject to the penalty. To the contrary, the point here is that this Commission lacks jurisdiction to prosecute an alleged violation of this statute or seek to recover the penalty in its own name, and they do not apply in any event.

[16] The section 392.130 RSMo "penalty" is paid in two-third parts to the civil private plaintiff and in one-third part to the "school fund of the county in which the suit was instituted." In contrast, section 392.360 RSMo penalties – which apply to violations of sections "392.190 to 392.530" and "any order or decision or any direction or requirement of the commission" – go "to the state of Missouri."

of the very transgressions asserted by the ILECs in the prior case and now the Staff in the Staff Complaint. Thus the record in the prior case clearly shows that both Transcom and Halo, and all of their principals, had a good faith, rational and reasonable basis for their contentions. The Staff fails to identify any evidence that Transcom, Halo or any of their principals had any reason to believe, prior to the Commission's proceeding or other contemporaneous and disputed litigation, that either of them was in violation of any legal obligation of any kind, nor can the Staff point to any such evidence, for it does not exist. Prior to the Commission's previous action, Transcom had been operating for nearly a decade as an ESP, had relationships with multiple vendors across the country in its capacity as an ESP, and did not pay access charges on any of that traffic. Transcom made clear in its contracts that it was an ESP and that it did not pay access charges. Despite multiple litigations in which vendors claimed that Transcom was subject to direct or indirect access charges, not once was any ruling entered in any venue that Transcom was subject to state common carrier regulation, or required to directly pay access charges. Although this Commission did rule in August, 2012 that Transcom was not an ESP – after expressly disagreeing with the federal court decisions on which Transcom and Halo reasonably relied for the opposite proposition – even then this Commission did not rule that Transcom is a public utility, held out to indiscriminately provide telecommunications "to the public," had any obligation to seek a PSC certificate, or had any direct obligation to subscribe to tariffed exchange access or directly pay exchange access charges to the ILECs.

Prior to Transcom's relationship with Halo, every tribunal of competent jurisdiction before which Transcom presented evidence and argued the merits ultimately agreed with Transcom that it was an ESP and an End User, had every right to purchase telephone exchange service as an end user, and was not subject to regulation as a telecommunications carrier or

treatment as one. The Staff cannot point to any evidence that would support its claims of knowledge or intent.

There is no evidence that either Transcom or Halo "knew" or "should have known" the prior decisions were incorrect, or had any intent other than to in good faith advance and then defend the same position that had previously won the day. Regardless, it is unreasonable to claim that Transcom and Halo could not validly rely on the prior decisions, and are subject to sanction for relying in good faith on the federal court decisions, and vigorously resisting all efforts to collaterally attack them in non-judicial actions.

VII. The Commission Must Dismiss Count I Because it Lacks the Jurisdiction or Power to Independently Assess Halo's and Transcom's Claims of Exemption from State Entry/Exit Regulation as a Result of Federal Law. The FCC has the Plenary Exclusive Power to Decide the Federal Exemption Question that is a Prerequisite to Deciding the State Law Certification Question.

The prior case, TC-2012-0331, involved interpretation and enforcement of the Halo/AT&T ICA and whether access compensation was owed by Halo. The issue of whether certification was required was not on the issue list and was not decided. Report and Order, TC-2012-0331, p. 68. The Staff now seeks to have the Commission (i) determine that Halo and Transcom were required, pursuant to section 392.410 RSMo, to obtain a certificate of authority and (ii) assess penalties for their failure to secure state certificates. Both Halo and Transcom claim to be immune from state entry/exit and economic/rate regulation because of federal law. Specifically, Halo claims its activities were within its federal radio station authorization and that state entry/exit/rate regulation is preempted by §332(c)(3). Transcom, in turn, claims it is an ESP and exempt from state common carrier entry/exit/rate regulation because the FCC preempted state entry/exit common carrier regulation as part of the *Second Computer Inquiry*. Transcom recognizes that the Commission has previously stated its opposition to this proposition, which, if accepted, would result in the Commissions's lack of jurisdiction over a

determination as to whether Transcom failed in any state certification obligations. A full explanation of law and the facts concerning this issue may be found at Halo Wireless, Inc.'s Formal Complaint in Response to Blocking Notices filed on 04/02/12 in MO PSC Case No. TC-2012-0331 at pp. 9-12, ¶¶ 29-35; pp.30-33, ¶¶ 89-94 and Motion to Dismiss filed on 7-25-11 in both MO PSC Case Nos. IC-2011-0385 and TC-2011-0404 at p. 3, ¶41; pp. 17-28 ¶¶46-68.

VIII. Conclusion and Prayer

For all the foregoing reasons, Counts I and II of the Staff Complaint fail as a matter of law and must be dismissed. In the alternative, the Commission must strike individual claims and counts that fail to state a claim, are not consistent with procedural rules, or outside the Commission's power to adjudicate in the first instance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following via electronic mail or certified and regular mail on this 15th day of April, 2013.

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