IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 11-9900

IN RE: FCC 11-161

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

RESPONSE OF THE FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA TO THE PETITION FOR REHEARING EN BANC OF TRANSCOM ENHANCED SERVICES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

BACKGROUND 1

ARGUMENT 4

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664 (10th Cir. 1998)....6

Becker v. Bateman, 709 F.3d 1019 (10th Cir. 2013)....9

Coal. for Noncommercial Media v. FCC, 249 F.3d 1005 (D.C. Cir. 2001)....13

Echostar Satellite L.L.C. v. FCC, 704 F.3d 992 (D.C. Cir. 2013)....11, 12

Excel Corp. v. U.S. Dep't of Agric., 397 F.3d 1285 (10th Cir. 2005)....13

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009)....15

Gilmore v. Weatherford, 694 F.3d 1160 (10th Cir. 2012)....13

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)....14

Nat'l Exch. Carrier Ass'n v. FCC, 253 F.3d 1 (D.C. Cir. 2001)....9

Nw. Indiana Tel. Co. v. FCC, 872 F.2d 465 (D.C. Cir. 1989)....13

Oklahoma v. EPA, 723 F.3d 1201 (10th Cir. 2013)....5

Qwest Corp. v. FCC, 689 F.3d 1214 (10th Cir. 2012)....15

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988)....12

Sorenson Commc'ns, Inc. v. FCC, 659 F.3d 1035 (10th Cir. 2011)....10

Sprint Nextel Corp. v. FCC, 524 F.3d 253 (D.C. Cir. 2008)....13

United States v. Charley, 189 F.3d 1251 (10th Cir. 1999)....12

United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952) 13

Wilson v. Hodel, 758 F.2d 1369 (10th Cir. 1985) 13

STATUTES

47 U.S.C. § 153(16) 7

47 U.S.C. § 405(a) 4, 10

OTHER AUTHORITIES

10th Cir. Rule 35.1(A) 4

10th Cir. Rule 40.1(A) 4, 9

Fed. R. App. P. 35(b)(1)(A) 4

Fed. R. App. P. 35(b)(1)(B) 4

Fed. R. App. P. 40(a)(2) 4

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Pursuant to the panel's order dated July 10, 2014, respondents Federal Communications Commission ("FCC") and United States of America submit this response to the petition for rehearing en banc filed by Transcom Enhanced Services, Inc. ("Transcom"). As we explain below, Transcom has not come close to satisfying the stringent standard for rehearing of the panel's May 23, 2014 decision. *See In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). The Court therefore should deny Transcom's petition.

BACKGROUND

In the order on review, the FCC comprehensively reformed two of its largest and most complex regulatory programs: universal service and intercarrier compensation. *Connect America Fund*, 26 FCC Rcd 17663

(2011) ("*Order*") (JA at 390). Although the *Order* is more than 700 pages long, Transcom's principal claim in this case concerns just two paragraphs where the FCC clarified its "intraMTA rule," which defines when a wireless telephone call is "local" as opposed to "long-distance." *See Order* ¶¶1005-06 (JA at 768-69).[1]

In the proceeding below, Halo Wireless, Inc. ("Halo") claimed that the telecommunications traffic it received from Transcom – its business partner and sole customer – was locally originated wireless traffic (and was therefore exempt from access charges). *Order* ¶1005 (JA at 768-69). The record showed, however, that most of the phone calls Transcom handed off to Halo originated elsewhere as long-distance calls (and were therefore subject to access charges under applicable tariffs or contracts). As illustrated by Diagram 9 in the panel's opinion, Transcom and Halo routinely inserted themselves in the middle of the path of these calls. *See In re: FCC 11-161*,

[1] "MTA" stands for "Major Trading Area," the largest FCC-authorized license area for wireless carriers. *See* FCC Response to Transcom Principal Brief at 4 n.2. If a wireless call is "intraMTA" (*i.e.*, if it originates and terminates within the same MTA), it is considered "local." A wireless call that originates in one MTA and terminates in another is considered "long-distance." This distinction is significant for intercarrier compensation purposes. Providers of long-distance service must make payments – known as access charges – to the local carriers that originate and terminate long-distance calls. Local calls are subject to a different intercarrier compensation regime. *See* FCC Response to Transcom Principal Brief at 2-4.

753 F.3d at 1152 (slip op. at 94). Although Transcom and Halo helped route these calls, neither the parties placing the calls nor the recipients of the calls sought or were aware of Transcom's or Halo's involvement. FCC Response to Transcom Principal Brief at 15.

The FCC rejected Halo's assertion that the transmission "of a call over a wireless link in the middle of the call path" somehow converted "a wireline-originated call into a [wireless]-originated call" for purposes of intercarrier compensation. *Order* ¶1006 (JA at 769). Instead, the agency clarified that, under its intraMTA rule, "a call is considered to be originated by a [wireless] provider" only if the "party initiating the call has done so through a [wireless] provider." *Id.*

Transcom challenged the FCC's interpretation of its intraMTA rule. The panel rejected this challenge, holding that the FCC had reasonably interpreted its rule. *In re: FCC 11-161*, 753 F.3d at 1152-53 (slip op. at 93-97).

Transcom also asserted that the FCC lacked authority to bar non-carriers from altering caller identification information and to prohibit call blocking by providers of certain forms of Voice over Internet Protocol ("VoIP") service. The panel concluded that these claims were waived because neither Transcom nor any other party had presented them to the

Commission. *In re: FCC 11-161*, 753 F.3d at 1153-54 (slip op. at 97-99) (citing 47 U.S.C. § 405(a)); *see also id.* at 1149-51 (slip op. at 86-92) (ruling that petitioner Voice on the Net also waived its challenges to the ban on call blocking by VoIP providers).

ARGUMENT

The standard for granting rehearing en banc is rigorous. That extraordinary procedure is reserved for cases in which "the panel decision conflicts with a decision of the United States Supreme Court or of [this] court," Fed. R. App. P. 35(b)(1)(A), or cases involving "one or more questions of exceptional importance." Fed. R. App. P. 35(b)(1)(B); *see also* 10th Cir. Rule 35.1(A) ("A request for en banc consideration is disfavored."). Similarly, the Court will not grant panel rehearing unless "a significant issue has been overlooked or misconstrued by the court." 10th Cir. Rule 40.1(A); *see also* Fed. R. App. P. 40(a)(2). Transcom has failed to justify rehearing under either of these demanding standards.

I. Before the panel, Transcom challenged the FCC's clarification that, under its intraMTA rule, the presence of a wireless transmission link in the middle of a call path does not convert a wireline-originated call into a wireless-originated call for purposes of intercarrier compensation. In affirming the FCC's reasonable interpretation of the rule, the panel found that

Transcom's alternative reading "overlooks the FCC's prior determination that a call 'terminates' only when the call reaches the called party." *In re: FCC 11-161*, 753 F.3d at 1153 (slip op. at 96). The panel's ruling is in keeping with the well-settled principle that the FCC's construction of its own rule is entitled to substantial judicial deference. *See Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013) ("[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

In its rehearing petition, Transcom claims that the panel overlooked a host of other issues. But none of those issues was briefed with sufficient clarity to have required the panel's consideration.

a. Transcom complains that the panel did not rule on its "contention that imposing exchange access charges on Transcom's traffic violates the Communications Act even if Transcom is an 'intermediate' point rather than a termination point for 'wireless' or 'wireline.'" Rehearing Petition at 11. Transcom asserts that it made this contention on pages 20-21 of its principal brief, but those pages do not include a single citation to the Communications Act, let alone a coherent claim that the agency violated the Act. As this Court has long recognized, "[a]rguments inadequately briefed in the opening brief

are waived." *In re: FCC 11-161*, 753 F.3d at 1137 (slip op. at 61) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998)). Typically, the Court does not consider arguments that are presented "without citation to authority or the record." *Adler*, 144 F.3d at 679.

b. Transcom also complains that the panel made no mention of Transcom's points "contesting the FCC's determinations for 'wireline' traffic." Rehearing Petition at 11. That omission was understandable. The word "wireline" appears just once in Transcom's principal brief – in a footnote citing an FCC order with "wireline" in its title. *See* Transcom Principal Brief at 47 n.104.

Although Transcom says (Rehearing Petition at 11-12) that it "clearly" raised wireline issues at pages 30-36 of its principal brief, the arguments made on those pages are opaque. Moreover, it is hard to see the relevance of Transcom's claim that "the Act does not permit a requirement that Transcom's LEC [local exchange carrier] vendors pay exchange access charges to other carriers for Transcom's traffic." Rehearing Petition at 13. The *Order* on review directly addressed only one of Transcom's vendors – Halo, which is a wireless carrier, not a local exchange (or "wireline") carrier. *See Order* ¶¶1005-06 (JA at 768-69).

c. Contrary to Transcom's assertion (Rehearing Petition at 12), the panel *did* address Transcom's argument that the FCC violated the statutory "distinction between carriers and end-users." The panel concluded that "Transcom has not pointed to any authority making its purported position as an enhanced service provider or an end-user relevant to the FCC's interpretation of the intraMTA rule." *In re: FCC 11-161*, 753 F.3d at 1153 (slip op. at 97). There is no reason to revisit this entirely sound conclusion.

While the panel did not expressly address "the related argument that the statute[ ] says that end-user CPE [customer premises equipment] is an end-point where calls originate and terminate for compensation purposes" (Rehearing Petition at 12), there was no need to do so given the panel's conclusion that such distinctions were not relevant for present purposes. The argument is baseless in any event. The Communications Act defines "customer premises equipment" as "equipment employed on the premises of a person (other than a carrier) to originate, *route*, or terminate telecommunications." 47 U.S.C. § 153(16) (emphasis added). By the Act's plain terms, such equipment need not be an end-point where calls originate or terminate. It can also be used to "route" calls from one point to another. Even assuming that Transcom's equipment qualifies as CPE, Transcom was

using its equipment to route calls that originated and terminated elsewhere. *See* FCC Response to Transcom Principal Brief at 5-7.

d. Transcom also asserts that the panel "overlooked Transcom's argument that the FCC illegally imposed common carrier status on Transcom for purposes of intercarrier compensation … and regulated end-users in ways not allowed by the Act." Rehearing Petition at 12 (citing Transcom Principal Brief at 27-36). But Transcom has never clearly explained how it thinks the *Order* "imposed common carrier status on" or otherwise "regulated" Transcom for intercarrier compensation purposes. Indeed, as Transcom admits, the *Order* does not even mention Transcom by name; it only specifically identifies Halo (Transcom's wireless vendor). Rehearing Petition at 4 (citing *Order* ¶¶1005-06 (JA at 768-69)). The *Order* does not impose intercarrier compensation regulations or common carrier status on Transcom.

e. Transcom complains that the panel did not address the argument that "exchange access cannot apply as a matter of law" to information service providers because they "do not provide telephone toll service and therefore do not receive exchange access." Rehearing Petition at 12-13 (citing Transcom Principal Brief at 35-36); *see also id.* at 21-22. The panel rightly refrained from addressing this issue because the *Order* said nothing about it.

Hence, "[t]here is … nothing for this court to review." *Becker v. Bateman*, 709 F.3d 1019, 1027 n.9 (10th Cir. 2013).

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It is not surprising that the panel decision did not discuss every specific claim that Transcom now says it raised. Many of the arguments in Transcom's principal brief were "difficult to decipher." FCC Response to Transcom Principal Brief at 15. Transcom's briefs presented the panel with a hodgepodge of largely undeveloped and inadequately explained claims. Under the circumstances, the panel was under no obligation to address arguments that Transcom did not present in a comprehensible manner. If a petitioner "has failed to make intelligible to the court any coherent argument in support of its substantive claim," it is not "the court's duty to identify, articulate, and substantiate a claim for the petitioner." *Nat'l Exch. Carrier Ass'n v. FCC*, 253 F.3d 1, 4 (D.C. Cir. 2001). Indeed, even if the panel had been obligated to respond to the issues that Transcom has inadequately briefed, panel rehearing would be appropriate only if the issues that the panel overlooked were "*significant*." 10th Cir. Rule 40.1(A) (emphasis added). Transcom has not identified a single significant issue that the panel decision failed to address.

II. Under section 405 of the Communications Act, the filing of a reconsideration petition with the FCC is "a condition precedent to judicial review … where the party seeking such review … relies on questions of fact or law upon which the Commission … has been afforded no opportunity to pass." 47 U.S.C. § 405(a); *see also In re: FCC 11-161*, 753 F.3d at 1149 (slip op. at 87); *Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1044 (10th Cir. 2011). The FCC argued that Transcom's challenges to the "call-identifying" and "no-blocking" rules were waived because no one presented those objections to the agency. FCC Response to Transcom Principal Brief at 21, 24-25. "Transcom responded, without explanation, by citing over 100 pages in the record." *In re: FCC 11-161*, 753 F.3d at 1154 (slip op. at 98) (citing Transcom Reply Brief at 23).

The panel, after carefully reviewing the 100 pages cited by Transcom, reasonably determined that "Transcom has failed to identify a single place … in which it alerted the FCC to its jurisdictional attack on the call-identifying rules." *Id.* (slip op. at 99). Similarly, the panel found nothing in the record that articulated a challenge to the FCC's authority to ban call blocking by VoIP providers. *Id.* at 1151, 1154 (slip op. at 91-92, 99). Consequently, in accordance with section 405, the panel properly concluded that Transcom's

challenges to the "call-identifying" and "no-blocking" rules had been waived. *In re: FCC 11-161*, 753 F.3d at 1149-51, 1153-54 (slip op. at 86-92, 97-99).

Transcom now maintains that the panel misapplied section 405. Rehearing Petition at 15-19. According to Transcom, "[e]ven if no party raised the issue" of whether the FCC had authority to adopt the call-identifying and no-blocking rules, section 405 was "satisfied" because the agency "expressly addressed and ruled on the question." Rehearing Petition at 16.

This argument provides no basis for rehearing because the panel never received an opportunity to consider it. Neither Transcom nor any other party made this argument in the briefs.[2] "It is axiomatic that '[p]etitions for rehearing … are permitted to enable parties to notify, and to correct, errors of fact or law on the issues *already presented*; they are not meant to permit

[2] In its rehearing petition (at 17), Transcom cites only one case that even arguably supports its proposed reading of section 405: *Echostar Satellite L.L.C. v. FCC*, 704 F.3d 992, 996 (D.C. Cir. 2013) ("Even if no other party brought the matter to the agency's attention, the FCC's independent contemplation of [an] issue satisfies §405's mandate."). Transcom did not cite *Echostar* in either its principal brief or its reply brief (after the FCC's brief argued that section 405 barred Transcom's challenge to the agency's authority). Voice on the Net cited *Echostar* in its reply brief (at 2), but for a different proposition. No petitioner argued to the panel that section 405 was satisfied by the FCC's "independent contemplation" of its authority to promulgate the challenged rules if no party in the proceeding raised any challenge to the agency's authority.

parties to assert new grounds for relief.'" *United States v. Charley*, 189 F.3d 1251, 1264 n.16 (10th Cir. 1999) (emphasis added) (quoting *Sierra Club v. Hodel*, 848 F.2d 1068, 1100-01 (10th Cir. 1988)).

In any event, the D.C. Circuit case on which Transcom bases this argument – *Echostar*, 704 F.3d at 996 – is distinguishable. That case addressed a situation where "the FCC devoted several pages of the Order to discussing" its authority to adopt the rule on review. *Id.* The court in *Echostar* reasoned that because the agency made more than a "cursory reference" to its authority, the Commission's "independent contemplation" of the issue was sufficient to preserve the issue for review under section 405. *Id.* Here, by contrast, the *Order*'s discussion of the FCC's authority that Transcom seeks to challenge amounts to one footnote on the "call-identifying" issue (*Order* n.1232 (JA at 623-24)), and one sentence and one footnote addressing the "no-blocking" issue (*Order* ¶974 & n.2043 (JA at 756)). Under *Echostar*, such a cursory discussion of the agency's authority is not enough to satisfy the requirements of section 405.

Furthermore, the panel's application of section 405 in this case is fully consistent with Supreme Court and Tenth Circuit precedent concerning administrative exhaustion. The Supreme Court has long held that "courts should not topple over administrative decisions unless the administrative

body not only has erred but has erred *against objection* made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (emphasis added). Section 405 codifies this principle. *See, e.g.*, *Nw. Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) (quoting *Tucker Truck Lines*). Recognizing the "[s]imple fairness" of this approach, this Court has consistently adhered to this basic principle of administrative exhaustion. *See Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012); *Excel Corp. v. U.S. Dep't of Agric.*, 397 F.3d 1285, 1296-97 (10th Cir. 2005); *Wilson v. Hodel*, 758 F.2d 1369, 1372-73 (10th Cir. 1985).[3]

The panel followed the same approach here. Finding no objections in the administrative record to the exercise of rulemaking authority that Transcom sought to challenge on appeal, the panel properly concluded – in accordance with Supreme Court and Tenth Circuit precedent – that Transcom's arguments were waived because the FCC received no

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[3] The D.C. Circuit has also followed this approach. *See, e.g.*, *Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 257 (D.C. Cir. 2008) ("The pith of the test is this: the argument made to the Commission must necessarily implicate[ ] the argument made to [the Court]." (internal quotation marks omitted)); *Coal. for Noncommercial Media v. FCC*, 249 F.3d 1005, 1009 (D.C. Cir. 2001) ("[o]nly a discussion offered in response to *someone's* argument – such as petitioner's, another party's, or a [dissenting] Commissioner's – qualifies" under section 405 as an opportunity to pass on an issue).

"opportunity to pass" on those claims under section 405. No further review is warranted.

III. Transcom claims that the panel's decision to uphold the FCC's interpretation of the intraMTA rule conflicts with the Supreme Court's ruling in *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"), that "[i]f an entity is providing 'information service' rather than 'telecommunications service' then the FCC cannot impose common carrier obligations on that entity." Rehearing Petition at 20 (citing *Brand X*, 545 U.S. at 986-99). That ruling, however, has nothing to do with this case because the clarification of the intraMTA rule does not impose any common carrier obligations on Transcom.

Likewise, there is no merit to Transcom's claim that the panel's ruling is "inconsistent with the Supreme Court's *Brand X* holding that a party's regulatory classification as a carrier or information service provider is determinative of the party's rights, duties and obligations." Rehearing Petition at 20-21. It is hard to make sense of this vague assertion. If Transcom (a self-described "information service provider") means to suggest that information service providers are entitled to certain "rights" under the

intraMTA rule, it has yet to articulate a coherent theory to support that argument.[4]

Transcom also contends that the panel did not "deal with Transcom's showing" that the FCC's interpretation of the intraMTA rule "was an unexplained course-reversal" from past agency practice. Rehearing Petition at 24 (citing Transcom Principal Brief at 36-42). It asserts that Supreme Court and Tenth Circuit "precedent dictated that the panel remand for an explanation since the FCC failed to even acknowledge that it was abandoning prior policy." *Id.* at 25 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-17 (2009); *Qwest Corp. v. FCC*, 689 F.3d 1214, 1224-25 (10th Cir. 2012)).

Contrary to Transcom's contention, there was no "course-reversal" for the FCC to explain. Consistent with its original understanding of the intraMTA rule, the FCC clarified in the *Order* that a call originates with the party placing the call and terminates with the party being called. That reading of the rule is eminently reasonable, and the agency has never interpreted the rule any differently.

[4] Indeed, Transcom has never clearly described the service it provides. It may not even qualify as an information service (or "enhanced service") provider. *See* FCC Response to Transcom Principal Brief at 16 n.4.

Transcom argues that the FCC's clarification of its intraMTA rule amounted to an unexplained change in course from its policies to help VoIP providers to obtain telephone numbers through partnering arrangements with wireless carriers. Rehearing Petition at 24; *see* Transcom Principal Brief at 36-42. This contention is puzzling. There is no discernible connection between such number partnering arrangements and the intraMTA rule.

In an attempt to establish such a connection, Transcom speculates that the FCC's clarification of its intraMTA rule will hinder the ability of VoIP providers to obtain the telephone numbers they need to provide service to end users. Transcom Principal Brief at 40. But Transcom "does not provide" either "'interconnected VoIP' or 'non-interconnected VoIP' to retail consumers or businesses." *Id.* at 2. Consequently, it lacks standing to complain that the clarification of the intraMTA rule will harm VoIP providers. *See* FCC Response to Transcom Principal Brief at 25. In any event, there is no basis for Transcom's assertion that the clarification of the intraMTA rule will make it harder for VoIP providers to obtain telephone numbers. If that claim had any substance, one would expect that VoIP providers would have objected to the rule clarification. Yet not a single VoIP provider raised an objection. Only Transcom – which is not a VoIP provider

– mounted a legal challenge to the clarification. The panel correctly found no merit to that challenge.

CONCLUSION

The rehearing petition should be denied.

Respectfully submitted,

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August 7, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: FCC 11-161	NO. 11-9900

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and this Court's order dated January 15, 2014, I hereby certify that the accompanying Response of the Federal Communications Commission and the United States of America to the Petition for Rehearing En Banc of Transcom Enhanced Services, Inc. in the captioned case contains 3,451 words.

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CERTIFICATE OF DIGITAL SUBMISSION

I, James M. Carr, hereby certify that with respect to the foregoing:

(1) there are no required privacy redactions to be made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submission was scanned for viruses with Symantec Endpoint Protection, version 11.0.7200.1147, updated on August 7, 2014 and according to the program is free of viruses.

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11-9900

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: FCC 11-161

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on August 7, 2014, I electronically filed the foregoing Response of the Federal Communications Commission and the United States of America to the Petition for Rehearing En Banc of Transcom Enhanced Services, Inc. with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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