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June 5, 2012

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: Bellsouth Telecommunications, LLC v. Halo Wireless, Inc., 2011-00283

Dear Mr. Derouen:

Please find enclosed the original and ten (10) copies of Halo Wireless's Reply in Support of Partial Motion to Dismiss the Complaint against Halo Wireless.

Please let me know if you have any questions.

Sincerely,

Katherine W. Ross

Enclosures:

cc: All parties of record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF:	{	
	{	
BELLSOUTH	{	
TELECOMMUNICATIONS, LLC	{	
D/B/A AT&T KENTUCKY	{	
	{	
COMPLAINANT	{	**CASE NO. 2011-00283**
	{	
V.	{	
	{	
HALO WIRELESS, INC.	{	
	{	
RESPONDENT	{	

HALO WIRELESS, INC.'S
REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS

COMES NOW Halo Wireless, Inc. ("Halo") and files this its Reply in Support of Partial Motion to Dismiss ("Reply"), respectfully requesting that the Kentucky Public Service Commission (the "Commission") dismiss Counts I, II, and III[1] of the Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T") (the "Complaint").

A. INTRODUCTION

Just as this Commission is taking the "stock" Complaint of AT&T[2] seriously, Halo urges this Commission to take Halo's Partial Motion to Dismiss seriously. AT&T summarily contends that Halo's Partial Motion to Dismiss is frivolous, which is commonly defined as "not serious" or "of little weight or importance." To the contrary,

[1] In its Answer to the Complaint and Petition for Expedited Relief (the "Answer"), Halo conceded that the Commission does have jurisdiction over Count IV. Halo relies on its Answer to respond to Count IV. In this pleading, Halo addresses only its Partial Motion to Dismiss Counts I, II, and III.

[2] AT&T has now filed virtually the same complaint in over fourteen states – and counting.

Halo's Partial Motion to Dismiss asserts quite seriously that this Commission lacks jurisdiction to hear the issues necessitated by Counts I, II, and III of the Complaint. Indeed, for this Commission to hear the issues being brought against Halo, as a Chapter 11 Debtor and pursuant to the Bankruptcy Court for the United States District Court for the Eastern District of Texas, this Commission *must* first determine that it has jurisdiction.[3]

AT&T cites to what it claims are Halo's efforts to "prevent this Commission, and others, from reaching a decision on the merits," in introducing its argument to deny Halo's Partial Motion to Dismiss.[4] The argument is misplaced and does nothing more than allow AT&T to smear Halo's name, yet again.

Indeed, this proceeding is one of many actions taken or filed across the country by AT&T and over a hundred other similarly situated parties in the industry against Halo for the express purposes of contesting, and ultimately destroying, Halo's business and recovering access charges alleged to be due. Halo has consistently maintained that the various state commissions where AT&T and other similarly situated parties filed the vast majority of the initial complaints against Halo lack jurisdiction to adjudicate and make determinations on the regulatory classification of Halo and its high volume customer, Transcom Enhanced Services, Inc. ("Transcom") and their respective traffic.

As a result of these threshold jurisdictional issues and the possibility of conflicting judgments that threatened to destroy Halo's ability to continue its operations, Halo filed for bankruptcy protection with the express intention of consolidating all of the

[3] The Bankruptcy Court's Order Granting the Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and For Relief from the Automatic Stay is attached hereto as Exhibit A.

[4] AT&T's Response and Memorandum in Opposition to Halo's Partial Motion to Dismiss, p. 3.

proceedings against it in a single forum of proper jurisdiction that would decide the issues in the most time and cost efficient manner possible. However, AT&T and the other similarly situated parties have contested any attempts by Halo to consolidate these cases in a single forum, which could have decided all of the issues months ago. Thus, it is AT&T, and not Halo, who is responsible for the proliferation of proceedings and the waste of the parties' time and resources.

B. THIS COMMISSION LACKS THE JURISDICTION TO DETERMINE THE FEDERAL ISSUES NECESSARILY REQUIRED BY COUNTS I, II, AND III.

Although AT&T couches Counts I, II, and III as a simple breach of ICA dispute, Counts I, II, and III necessarily require the Commission to consider various federal issues, including: (1) whether Halo's traffic is commercial mobile radio service ("CMRS"); (2) whether Transcom is an enhanced service provider ("ESP"); (3) whether Transcom is a carrier; (4) whether Halo's federal license allows it to operate as it is in Kentucky. These issues are beyond the reach of the Commission, and therefore, Counts I, II, and III of the Complaint must be dismissed.

Halo has a valid and subsisting Radio Station Authorization ("RSA") from the FCC authorizing Halo to provide wireless service as a common carrier and to operate stations in the "3650-3700" MHz band. Halo has established 28 total registered base stations with the FCC's Universal Licensing System. The regulatory classification for Halo is defined and governed exclusively by *federal* law. The FCC has *exclusive* jurisdiction over wireless licensing, market entry by private and commercial wireless service providers and the rates charged for wireless services. The FCC has made it clear that decisions affecting federal telecom licensees like Halo, and their services, are not

entrusted to the state commissions because doing so is impractical and would make deployment of nationwide wireless systems like Halo's "virtually impossible."[5]

The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses because "a multitude of interpretations of the same certificate" will result.[6] The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued.[7]

If a state commission or AT&T believe that the federally-licensed entity is engaging in some "scheme" or "subterfuge" through its practices, the proper forum is the

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[5] The FCC has directly held on several occasions that even the possibility of state regulation and inconsistent burdens and obligations constitutes a barrier to entry and must be avoided. *See, e.g.*, Declaratory Ruling, *In the Matter of Public Service Company of Oklahoma Request for Declaratory Ruling*, DA 88-544, ¶ 24, 3 FCC Rcd 2327, 2329 (rel. Apr. 1988) (finding that "inconsistent state regulation" "would impede development of a uniform system of regulation for Commission licensees."); Second Report and Order, *In the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services; In the Matter of the Applications of Global Land Mobile Satellite, Inc.; Globesat Express; Hughes Communications Mobile Sattellite, Inc.; MCCA American Satellite Service Corporation; McCaw Space Technologies, Inc.; Mobile Satellite Corporation; Mobile Satellite Service, Inc.; North American Mobile Satellite, Inc.; Omninet Corporation; Satellite Mobile Telephone Co.; Sky-Link Corporation; Wismer & Becker/Transmit Communications, Inc.*, FCC 86-552, ¶ 40, 2 FCC Rcd 485, 491 (rel. Jan. 1987)(finding that "permitting states to impose their individual regulatory schemes over" an FCC licensee "would not only be impractical but would seriously jeopardize the operation of the system. Requiring the consortium to adhere to fifty potentially conflicting" standards "would render implementation" "virtually impossible.").

[6] "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action. * * * Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved." *Service Storage & Transfer Co. v. Com. of Va.*, 359 U.S. 171, 177 (1959).

[7] *Id.* at 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989). This Commission tried on at least one prior occasion to intrude on the FCC's exclusive jurisdiction over federal licensees by asserting regulatory authority over a wireless provider. The federal courts enjoined the Commission from enforcing its cease and desist order requiring that company to submit to state common carrier regulation by securing a certificate of convenience and necessity. *See Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm.*, 648 F.2d 1350 (5th Cir. 1981).

FCC. Similarly, if any state commission has a concern, its remedy is to petition the federal licensing body for relief.[8] Based on the relevant case law, Halo respectfully reminds the Commission that a state commission cannot take any action that would "amount to a suspension or revocation" of a federal license.[9]

Halo provides CMRS and it sells telephone exchange service to Transcom – Halo's high volume customer. Courts of competent jurisdiction have ruled that Transcom is an ESP *even for phone-to-phone calls* because Transcom changes the content of every call that passes through its system and also offers enhanced capabilities.[10] Three of those rulings occurred after the IP-in-the-middle order came out, and the relevant court duly considered that order and ruled that Transcom's service is not a telecommunications service, but an information service, even for calls that begin and end on the public switched telephone network ("PSTN"). The courts ruled that Transcom is an end user, not a carrier. Accordingly, as a CMRS, Halo is selling telephone exchange service to an ESP end user. All such calls received from Transcom within any particular MTA are terminated in that same MTA.

Counts I, II, and III of AT&T's Complaint necessarily require the Commission to consider the issues discussed above. Is Halo a CMRS provider? Is Transcom an ESP? Is Transcom a carrier? Does Halo's federal license permit it to operate in the way that it

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[8] *Service Storage*, 359 U.S. at 179.

[9] "Under these circumstances, it would be odd if a state could take action amounting to a suspension or revocation of an interstate carrier's commission-granted right to operate. ... It cannot be doubted that suspension of this common carrier's right to use Illinois highways is the equivalent of a partial suspension of its federally granted certificate." *Castle, Attorney General v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).

[10] The "ESP Rulings" were attached as Exhibits A, B, and D to Halo's Partial Motion to Dismiss; Notice of May 16, 2006 Order Confirming Plan of Reorganization for Transcom Enhanced Services and Motion to Dismiss.

does? These questions are beyond the purview of the Commission. Accordingly, Counts I, II, and III should be dismissed.

C. HALO'S TRAFFIC IS NOT WIRELINE-ORIGINATED, AND AS A RESULT, HALO DOES NOT OWE AT&T ANY ADDITIONAL SUMS FOR THE TERMINATION OF ITS TRAFFIC AND COUNTS I AND III SHOULD BE DISMISSED.

Halo is not in breach of the interconnection agreement ("ICA")[11] and AT&T is not entitled to "significant amounts of money"[12] from Halo for the traffic at issue here. In the ESP Rulings, Transcom was ruled an ESP *even for phone-to-phone calls*[13] because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities. The court directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user. The courts ruled that Transcom is an end user, not a carrier.

Halo is selling CMRS-based telephone exchange service to an ESP end user. All of the communications at issue originate from end user wireless customer premises

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[11] The ICA in issue was formed under the law and rules prior to the recent Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, WC Docket No. 10-90 et al., FCC 11-161 (rel. Nov. 18, 2011) (*USF/ICC Transformation Order*), *corrected by* Erratum (rel. Feb. 6, 2012), *modified by* Order on Reconsideration (FCC 11-189) (rel. Dec. 23, 2011) *clarified by* Order, DA-1247 (rel. Feb. 3, 2012), *pets. for review pending, Direct Commc'ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases), and subsequent clarifications and reconsiderations. Halo's Reply addresses the law as it stood when the parties entered into the ICA.

[12] AT&T's Complaint and Petition for Expedited Relief, p. 1.

[13] Transcom also has a very significant and growing amount of calls that originate from IP endpoints.

equipment ("CPE") (as defined in the Act, 47 U.S.C. § 153(14))[14] that is located in the same MTA as the terminating location. Therefore, contrary to AT&T's assertion in paragraph 9 of the Complaint, the traffic in issue *does* "originate[] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo's network, and ultimately handed off to AT&T for termination or transit over the interconnection arrangements that are in place as a result of the various ICAs.

AT&T's argument that the traffic is wireline-originated, and therefore, that Halo owes access charges for the traffic at issue rests on the faulty premise that Transcom is not an end user. But, AT&T is barred from asserting that Transcom is not an end user. Transcom and AT&T were directly involved in the ESP Rulings discussed above, and the court held – over AT&T's strong opposition – that Transcom is an ESP and end user, is not a carrier, and access charges do not apply to Transcom's traffic. This specific set of rulings was incorporated into the Confirmation Order in Transcom's bankruptcy case.[15] AT&T was a party and is bound by these holdings. AT&T is barred from raising any claim that Transcom is anything other than an ESP and end user qualified to purchase telephone exchange service from carriers, and cannot now collaterally attack the bankruptcy court rulings. Transcom's status as an end user is not subject to debate.

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[14] Stated another way, the mobile stations (*see* 47 U.S.C. § 153(28)) used by Halo's end user customers – including Transcom – are not "telecommunications equipment" as defined in section 153(45) of the Act because the customers are not carriers. Halo has and uses telecommunications equipment, but its customers do not. They have CPE.

[15] The Confirmation Order was attached to the Partial Motion to Dismiss as Exhibit D.

Once it is clear that Transcom is Halo's telephone exchange service end user customer, all of AT&T's contentions simply fail. End users originate calls. The calls at issue are "end user" calls, so AT&T's assertions are flatly incorrect and the claim is based on the impermissible and incorrect premise that Halo's customers are not "end users" purchasing telephone exchange service in the MTA. For these reasons, Counts I and III of the Complaint must be dismissed.

D. HALO DID NOT ALTER OR DELETE CALL DETAIL, AND THEREFORE, COUNT II OF AT&T'S COMPLAINT SHOULD BE DISMISSED.

Although AT&T did not address Halo's Motion to Dismiss Count II in its Response to Halo's Partial Motion to Dismiss, Halo reasserts that it did not change the content or in any way "manipulate" the address signal information that it ultimately populated in the Called Party Number ("CPN") parameter. Halo populated the Charge Number ("CN") parameter with the Billing Telephone Number of its end user customer – Transcom. AT&T alleges improper modification of signaling information related to the CN parameter, but the basis of this claim once again results from the assertion that Transcom is a carrier rather than an end user and runs counter to the ESP Rulings discussed above. Halo is exactly following industry practice applicable to an exchange carrier providing telephone exchange service to an end user, and in particular a communications-intensive business end user with sophisticated CPE.

Halo did not provide this additional information to AT&T in order to deceive AT&T. Indeed, Halo's ICA with AT&T relies on traffic factors for billing, rather than call-by-call rating. So by inserting the CN, or not inserting the CN, billing is unaffected. Halo provided this additional information for its internal billing purposes, as the goal was

never to have only one high volume customer, and the additional information in the CN parameter would enable Halo to properly bill its high volume customers.

Because Halo did not alter or delete call detail, as alleged by AT&T in Count II, Count II should be dismissed.

WHEREFORE, PREMISES CONSIDERED, Halo Wireless, Inc. respectfully requests that Counts I, II, and III be dismissed. If and to the extent any count is not dismissed, AT&T's requests for relief must be denied.

Dated this 5th day of June, 2012.

Respectfully submitted,

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Attorneys for Halo Wireless, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply in Support of Partial Motion to Dismiss* was served via certified mail, return receipt requested, on the following counsel of record on this the 5th day of June, 2012:

COUNSEL FOR COMPLAINANT:

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Katherine W. Ross

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

In re:	§	Chapter 11
	§	
Halo Wireless, Inc.,	§	Case No. 11-42464-btr-11
	§	
Debtor.	§	

ORDER GRANTING MOTION OF THE AT&T COMPANIES TO DETERMINE AUTOMATIC STAY INAPPLICABLE AND FOR RELIEF FROM THE AUTOMATIC STAY [DKT. NO. 13]

Upon consideration of the *Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and For Relief from the Automatic Stay* [Dkt. No. 13] (the "AT&T Motion")[1], and it appearing that proper notice of the AT&T Motion has been given to all necessary parties; and the Court, having considered the evidence and argument of counsel at the hearing on the AT&T Motion (the "Hearing"), and having made findings of fact and conclusions of law on the record of the Hearing which are incorporated herein for all purposes; it is therefore:

ORDERED that the AT&T Motion is GRANTED, but only as set forth hereinafter; and it is further

ORDERED that, pursuant to 11 U.S.C. §362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 (the "Automatic Stay") is not applicable to currently pending State Commission Proceedings[2], except as otherwise set forth herein; and it is further

ORDERED that, any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion

[1] The Court contemporaneously is entering separate orders granting *The Texas and Missouri Companies' Motion to Determine Automatic Stay Inapplicable and in the Alternative, for Relief From Same* [Dkt. No. 31] and the *Motion to Determine the Automatic Stay is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement* [Dkt. No. 44] filed by TDS Telecommunications Corporation.

[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

and a decision in respect of such regulatory matters may be rendered; *provided however*, that nothing herein shall permit, as part of such proceedings:

A. liquidation of the amount of any claim against the Debtor; or

B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the "Reserved Matters"); and it is further

ORDERED that nothing in this Order precludes the AT&T Companies[3] from seeking relief from the Automatic Stay in this Court to pursue the Reserved Matters once a state commission has (i) first determined that it has jurisdiction over the issues raised in the State Commission Proceeding; and (ii) then determined that the Debtor has violated applicable law over which the particular state commission has jurisdiction; and it is further

ORDERED that the AT&T Companies, as well as the Debtor, may appear and be heard, as may be required by a state commission in order to address the issues presented in the State Commission Proceedings; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from the implementation and/or interpretation of this Order.

Signed on 10/26/2011

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

[3] The AT&T Companies include Southwestern Bell Telephone Company d/b/a AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, and AT&T Texas; BellSouth Telecommunications, LLC d/b/a AT&T Alabama, AT&T Florida, AT&T Georgia, AT&T Kentucky AT&T Louisiana, AT&T Mississippi, AT&T North Carolina, AT&T South Carolina and AT&T Tennessee; Illinois Bell Telephone Company d/b/a AT&T Illinois; Indiana Bell Telephone Company Inc. d/b/a AT&T Indiana; Michigan Bell Telephone Company d/b/a AT&T Michigan; The Ohio Bell Telephone Company d/b/a AT&T Ohio; Wisconsin Bell Telephone, Inc. d/b/a AT&T Wisconsin; Pacific Bell Telephone Company d/b/a AT&T California; and Nevada Bell Telephone Company d/b/a AT&T Nevada.