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August 16, 2012

VIA OVERNIGHT MAIL

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

Re: BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky, Complainant v. Halo Wireless, Inc., Defendant
PSC 2011-00283

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of AT&T Kentucky's Brief.

Please let me know if you have any questions.

Sincerely,

Mary K. Keyer

Enclosures

cc: Parties of Record

1043750

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T KENTUCKY,	)	
	)	**Case No. 2011-00283**
Complainant,	)	
	)	
v.	)	
	)	
HALO WIRELESS, INC.,	)	
	)	
Defendant.	)	

AT&T KENTUCKY'S BRIEF

BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky" or "AT&T") respectfully submits its brief in support of its Complaint against Halo Wireless, Inc. ("Halo") for breaches of the Parties' interconnection agreement ("ICA").

INTRODUCTION

Prior to ceasing to do business as a result of conversion of its bankruptcy case to chapter 7 (see below), Halo did not provide service to any end user in Kentucky. Its sole source of revenue was Transcom Enhanced Services, Inc. ("Transcom"), a related entity that aggregated landline, non-local calls that originate on other carriers' networks (along with other calls) and delivered those calls to Halo. Halo, in turn, delivered the calls to AT&T Kentucky for termination to its end user customers and for transport to other carriers for termination to their end user customers. But Halo wrongfully refused to pay AT&T Kentucky (and other carriers) the access charges due for terminating the landline, non-local calls that Halo delivered. The only service Halo or Transcom provided to anyone was access-charge avoidance, and there is no way in which Halo's operations benefitted the consuming and using public.

AT&T Kentucky requests that the Public Service Commission of Kentucky ("Commission"), like the Tennessee Regulatory Authority ("Tennessee Authority" or "TRA"), the South Carolina Public Service Commission ("South Carolina Commission" or "SCPSC"), the Georgia Public Service Commission ("Georgia Commission" or "GPSC"), the Public Service Commission of Wisconsin ("Wisconsin Commission" or "PSCW"), and the Public Service Commission of Missouri ("Missouri Commission" or "MoPSC") find that Halo has breached its ICA with AT&T and grant the relief AT&T has requested.

Regarding Halo's bankruptcy, on July 19, 2012, the court presiding over Halo's bankruptcy converted the case from a Chapter 11 reorganization case to a Chapter 7 liquidation.

Ms. Linda S. Payne has been appointed as an interim chapter 7 trustee ("Trustee") for the Halo bankruptcy estate. On July 25, 2012, the Trustee requested that AT&T disconnect Halo's trunks in all states in which AT&T was providing service by August 1, 2012, and AT&T Kentucky has complied. These events, though significant, do not moot AT&T Kentucky's claims. For example, AT&T still needs a ruling by this Commission that Halo is liable for access charges so that it can perfect its claim for the amounts due in the bankruptcy court. In addition, even if the Trustee does not file a brief on behalf of Halo, as AT&T Kentucky believes she will not, Halo had an ample opportunity to present its case through its pre-filed testimony, and the Trustee could have filed a brief if she deemed such a filing appropriate. Accordingly, AT&T Kentucky urges the Commission to render a decision and issue a comprehensive opinion in this case in an expedited manner.

The evidence of Halo's breaches of the ICA is straightforward. The ICA requires Halo to send only wireless-originated calls to AT&T. It is undisputed, however, that a large percentage of the calls Halo sent to AT&T began on landline networks. Halo quibbles about the exact percentage of calls that started on landline networks, but the exact percentage makes no difference because: (i) Halo is not allowed to send *any* landline-originated calls to AT&T under the ICA, so even one such call is a breach (though in fact there are hundreds of thousands of such calls), and (ii) even when AT&T accounted for Halo's quibbles, the call records still showed that a substantial percentage of the calls originated on landline networks. And despite the terms of the ICA, Halo made no effort to stop sending these landline-originated calls.

Halo's only defense is its claim that every call Halo sent to AT&T should be deemed to have been originated by Transcom as a local, wireless call, even though most of the calls actually began on landline networks and are not local calls. As shown in AT&T Kentucky's testimony

and this brief, Halo's theory that Transcom originates every call it touches is baseless. Indeed, no one but Halo endorses it. The FCC has rejected Halo's theory, as have the state commissions in Tennessee, South Carolina, Georgia, Wisconsin, and Missouri. No one from Transcom dialed any of the calls that then went to Halo and AT&T. No one from Transcom took part in the conversations on those calls. Transcom had no relationship with the calling or called parties on any of those calls. Transcom was merely a middleman, not a call originator. Rather, these calls originated with the actual calling party, *i.e.*, the person who picked up a phone and dialed the number.

If Halo were allowed to launder calls and deem them transformed from landline to wireless and long-distance to local merely by having the calls pass through Transcom first, every carrier in the country could set up a similar arrangement, and no one would ever pay access charges. A landline-originated call from Beijing, China, to Frankfort, Kentucky, would be treated as a local wireless call as long as it passed through 150 feet of wireless connection between Transcom and Halo in Kentucky. That is the obvious consequence of Halo's theory that Transcom originates every call it touches, and it illustrates why that theory is invalid, how Halo has breached the ICA, and why Halo is liable for access charges on the non-local traffic it sent to AT&T Kentucky for termination to end users.

Halo further breached the ICA by inserting improper Charge Number information on all calls it sent to AT&T until the end of 2011, making it look like Transcom was responsible for all the calls and that all of the calls were local, even though they were not. Halo's only defense is the same erroneous theory that Transcom actually originates all the calls.

Finally, Halo has breached the ICA by refusing to pay for certain interconnection facilities it obtained from AT&T Kentucky. It is undisputed that Halo has ordered, obtained, and

used such interconnection facilities from AT&T under the ICA. Naturally, then, Halo must also be required to pay for them (although the bankruptcy court will determine the amount due).

For these reasons, and as explained further below, the Commission should hold that Halo has materially breached the ICA and grant the relief requested by AT&T Kentucky.

ARGUMENT

I. HALO BREACHED THE ICA BY SENDING LANDLINE-ORIGINATED TRAFFIC TO AT&T KENTUCKY.

A. The ICA Requires Halo to Send Only Wireless-Originated Traffic to AT&T Kentucky.

Halo purported to be a wireless carrier.[1] Based on this claim, Halo entered into a wireless ICA with AT&T.[2] Accordingly, the only traffic the ICA allowed Halo to send to AT&T Kentucky is traffic that originates on wireless equipment. The ICA states:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network. [Emphasis added].[3]

This "wireless traffic only" provision is important because wireless traffic and landline traffic are regulated differently. Most notably, the geographic areas used to determine whether traffic is local (and therefore subject to reciprocal compensation charges) or non-local (and therefore subject to access charges, which are higher) differs greatly for wireless and landline

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[1] Pre-Filed Testimony of Russ Wiseman ("Wiseman Testimony") at 5, line 8.

[2] Direct Testimony of J. Scott McPhee ("McPhee Direct") at 11, line 19 – 12, line 11; Exhibit JSM-4.

[3] *Id.* at 12, lines 18-24; Exhibit JSM-5.

traffic.[4] Wireless traffic is classified as local or non-local based on Major Trading Areas ("MTAs"), which are quite large. For landline traffic, on the other hand, calls are classified as local or non-local based on "local calling areas," which are much smaller.[5] There are only five MTAs in all of Kentucky, but more than 374 landline local calling areas.[6] Thus, there is a much greater likelihood that a wireless call will be "local" (also called "intraMTA"), and not subject to access charges, than there is for a landline call. For example, Louisville and Frankfort are within the same MTA, so that if a call is made from Louisville to Frankfort wirelessly, the call is subject to low reciprocal compensation rates; but if the same call is made as a landline call, it is between two different landline local calling areas, and so is subject to higher access charge rates.

All the trunks that Halo ordered to deliver traffic to AT&T Kentucky were trunks reserved for wireless traffic only.[7] Consistent with this, and assuming Halo was complying with the ICA, AT&T Kentucky billed Halo for termination as if all of Halo's traffic were wireless-originated, as the ICA required. Fairly quickly, however, AT&T Kentucky began to suspect that much of the traffic Halo was sending it originated on landline equipment, not wireless equipment.[8] It therefore appeared that Halo was breaching the ICA and engaging in an access charge avoidance scheme, which led to this complaint case.[9]

B. Halo Sent Large Amounts of Landline-Originated Traffic to AT&T Kentucky, Breaching the ICA and Unlawfully Avoiding Access Charges.

It is undisputed that Halo sent traffic to AT&T that starts on landline networks. Halo freely admits this. For example, Halo's President, Mr. Wiseman, acknowledges, "Most of the

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[4] McPhee Direct at 14, line 6 – 15, line 2.

[5] *Id.*

[6] *Id.* at 14, line 24 – 15, line 1.

[7] Direct Testimony of Mark Neinast ("Neinast Direct") at 9, lines 3-4.

[8] *Id.* at 9, line 11 – 10, line 6.

[9] *Id.*

calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN."[10] That alone proves a breach of the ICA. And as AT&T's call studies show, the extensive scope of the breach proves it was no accident.

AT&T analyzed the calls Halo sent to it during one-week periods in June 2011 and September 2011, and during a four-week period in January-February 2012.[11] AT&T began its analysis by identifying the Calling Party Number ("CPN") on each call received from Halo, *i.e.*, the telephone number of the person who started the call. AT&T then consulted the industry's Local Exchange Routing Guide ("LERG") and the North American Number Portability ("NANP") database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless.[12] Based on this, AT&T was able to determine how many landline-originated calls Halo was sending.[13] During the three periods reviewed, the call data showed that 89%, 67% and 69%, respectively, of the calls that Halo delivered to AT&T Kentucky originated as landline calls.[14] In other words, even though the ICA did not allow Halo to send AT&T Kentucky *any* landline-originated traffic, well over half of the traffic Halo sent to AT&T Kentucky was landline-originated.

Although the percentage of landline-originated calls is large and Halo admits to sending AT&T Kentucky calls that start on landline networks, Halo nevertheless quibbles about the

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[10] Wiseman Testimony at 32, lines 5-6. *See also* Rebuttal Testimony of J. Scott McPhee ("McPhee Rebuttal") at 2, lines 7-13; Rebuttal Testimony of Mark Neinast ("Neinast Rebuttal") at 6, line 14 – 8, line 2.

[11] Neinast Direct at 12, lines 3-7.

[12] *Id.* at 13, line 9 – 14, line 12.

[13] *Id.* at 14, lines 20-22.

[14] *Id.* at 18, lines 2 – 5; Exhibit MN-4.

details of AT&T's call analysis. Halo contends that some calls that originate from what appear to be landline numbers could, in some scenarios, actually originate from a wireless device. Based on this, Halo contends that CPNs are unreliable and cannot be used to identify the origination point or originating carrier on *any* of the calls Halo sent AT&T Kentucky.[15]

Halo is wrong. Halo presented no call analysis to support its claims, nor did it present any evidence of how much of the traffic it delivers (if any) originates on wireless devices with CPNs that the LERG shows as landline. Halo's failure to present any such evidence is telling, because Halo had access to all the same data AT&T used for its analyses. Furthermore, while there are some situations where CPN does not precisely identify the origination point or originating carrier of a call, those situations are the exception, not the rule.[16] Simply put, the data and methods AT&T used are the same data and methods that the entire industry uses today for determining what AT&T sought to determine.[17] There is no better way, and Halo does not suggest that there is. As the Tennessee Authority explained:

> The Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls, due to factors such as the advent of number portability and the growth of wireless and IP telephony. However, because of these technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data in the AT&T study are based upon common industry practices to classify whether traffic is originated on wireline or wireless networks.[18]

The Georgia Commission agreed. It stated, "The record also indicates that while telephone numbers are not infallible, they provide the best proxy for customer location in the

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[15] Wiseman Testimony at 27-32.

[16] Neinast Rebuttal at 19, lines 7-10.

[17] *Id.*

[18] Order, *BellSouth Telecommunications LLC d/b/a AT&T Tennessee v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Jan. 26, 2012) ("*Tennessee Halo Order*") (Neinast Exhibit MN-1), at 17.

absence of specific evidence on the customer's location. . . . The Commission finds that the call records relied upon by . . . AT&T constitute a reasonable proxy for the technology used and the physical origination point of the call. Although these records are not 100 percent accurate, no party offered persuasive evidence of a more reliable and feasible alternative."[19] Similarly, the South Carolina Commission concluded that "the data and methods AT&T used are the same data and methods that the entire industry uses today for determining what AT&T sought to determine. . . . There is no better way, and Halo does not suggest that there is."[20] The Missouri Commission reached the same result.[21]

AT&T Kentucky also proved that Halo's contentions would make no meaningful difference even if they were correct. AT&T assumed for the sake of argument that 100% of calls from Level 3 and Bandwidth.com (the two entities discussed in Halo's testimony) numbers were actually wireless-originated, and re-analyzed the call data based on that assumption. This was an overgenerous assumption.[22] Even with this assumption, the data still showed that between 59% and 84% of the traffic that Halo sent to AT&T Kentucky during the periods reviewed was landline-originated.[23]

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[19] Order on Complaints, *Complaint of TDS Telecom on behalf of its Subsidiaries against Halo Wireless, Inc. Transcom Enhanced Services, Inc. and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and for Expedited Declaratory Relief and Authority to Cease Termination of Traffic*, Docket No. 34219 (Ga. Pub. Serv. Comm'n July 17, 2012), at 6-7 ("*Georgia Halo Order*"), a copy of which is attached hereto as **Attachment 1**.

[20] Order Granting Relief against Halo Wireless, *Complaint and Petition for Relief of BellSouth Telecommunications LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Inc.*, Docket No. 2011-304-C (Pub. Serv. Comm. S. Car. July 17, 2012), at 9 ("*South Carolina Halo Order*"), a copy of which is attached hereto as **Attachment 2**.

[21] Report and Order, *Halo Wireless, Inc. v. Craw-Kan Telephone Cooperative, et al.*, File No. TC-2012-0331 (Pub. Serv. Comm'n of Missouri, Aug. 1, 2012), at 28 ("*Missouri Halo Order*"), a copy of which is attached hereto as **Attachment 3**.

[22] Neinast Direct at 18, lines 4-9.

[23] *Id.* at 18, lines 15-20; Exhibit MN-6.

In short, there is no doubt that much of the traffic Halo sent to AT&T Kentucky originated on landline networks. That materially breached the ICA.

C. Halo's Theory That Transcom Originates All Calls is Baseless.

Halo's only defense is its claim that all the calls it sent to AT&T Kentucky, regardless of who dialed the number or on what carrier's network the call began, should be deemed to have originated with Transcom. No one at Transcom dialed these calls and neither the calling party nor the called party on any call was a Transcom customer. Nevertheless, Halo contends that whenever a call passed through Transcom, that call was terminated and Transcom then originated a new, local, wireless call before the call reached Halo. To understand this theory, and its many flaws, we begin by explaining what Transcom is and the arrangement it had with Halo.

Although Halo and Transcom are technically separate companies, they are closely related. They have overlapping officers and overlapping ownership, and the largest individual stakeholder in both companies is the same person.[24] Transcom was Halo's only paying customer and the source of 100% of Halo's revenues nationwide.[25]

Halo and Transcom were also physically close. Both had equipment at a tower site in Paducah, Kentucky, and the arrangement between them worked as follows: Every call that came to Halo in Kentucky first passed from the carrier whose end user customer originated the call to Transcom (typically, indirectly through intermediate carriers) at one of its four switching stations (in Dallas, New York, Atlanta, and Los Angeles). Transcom then sent the call to its equipment at the Paducah tower site, where Transcom transmitted the call, wirelessly, for about 150 feet to

[24] McPhee Direct at 6, lines 7-13, and at 9, line 17 – 10, line 2.

[25] *Id.* at 7, lines 9-15.

Halo's equipment.[26] Halo then sent the call on to AT&T Kentucky's tandem switch for termination to an AT&T Kentucky end user or to be passed on to a third-party carrier for termination.[27] There is no technical reason for the 150-foot link between Transcom and Halo to be wireless. The same connection could be made much less expensively by using a short "CAT-5" cable, which would also increase service reliability.[28] It therefore appears that the only reason Halo spent the money to create a roundabout wireless connection with Transcom, rather than a short and direct wired connection, was so Halo could attempt to claim that all calls it passed to AT&T Kentucky were wireless and local, thereby avoiding applicable access charges.

To envision how a call flowed through this arrangement, assume a call begins with a girl picking up her landline phone in California and dialing her grandmother in Frankfort.[29] That landline call would travel across the country, eventually hit Transcom's equipment at the Halo/Transcom tower site in Paducah, Kentucky, travel wirelessly to Halo for 150 feet and then be handed off to AT&T Kentucky, which would terminate the call in Frankfort on its landline network, thus enabling the girl and her grandmother to talk to each other.[30] The call originated with the girl in California, who is the calling party, and is a non-local, landline-originated call, subject to access charges. According to Halo, however, when the girl's call reached Transcom's equipment at the tower site in Kentucky, Transcom terminated the call and then originated a new call to the grandmother that was both local and wireless, and, therefore, was only subject to reciprocal compensation charges. Halo makes this argument even though the calling party (the

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[26] Rebuttal Testimony of Raymond W. Drause ("Drause Rebuttal") at 6, line 4 – 7, line 3.

[27] *Id.* at 7, lines 3-4.

[28] *Id.* at 7, line 8 - 8, line 2.

[29] *See* Neinast Direct at 21, lines 2-11, and Exhibit MN-7.

[30] This scenario assumes that the grandmother is an AT&T Kentucky end user. If the grandmother were another carrier's end user, AT&T Kentucky would deliver the call to that third-party carrier for termination to its end user.

girl who started the call) had no relationship with Transcom, did not dial Transcom's number, has no idea Transcom was even involved with the call, and ends up talking to the person she dialed in the first place (her grandmother) without dialing any extra numbers or codes.[31]

The "logic" of Halo's "Transcom origination" theory runs as follows:

1. Transcom is an enhanced service provider ("ESP") under federal law.

2. As an ESP, Transcom is treated like an end user for purposes of access charges.

3. Therefore, Transcom must be treated as an end user for all purposes.

4. Since Transcom is treated as an end user, all calls must be deemed to terminate to Transcom and originate with Transcom.

5. Therefore, a call from California to Frankfort that is routed in the manner depicted in Neinast Exhibit MN-7 terminates with Transcom, which then originates a new, wireless call, which passes through Halo and then to AT&T Kentucky in the same MTA as Transcom.

6. Thus, the call that AT&T Kentucky receives from Halo originated wirelessly, with Transcom, and Halo is not breaching its ICA.

Halo's theory fails for at least four reasons: (1) the FCC and four state commissions, so far, have rejected it; (2) there is no authority for the proposition that ESPs originate every call they touch; (3) Transcom is not an ESP in any event; and (4) even if Transcom were an ESP and did originate calls, the purported "origination" occurs on Transcom's landline equipment, and the calls would therefore be landline-originated (in breach of the ICA) and non-local (and thus subject to access charges).

1. Every Regulatory Agency That Has Considered Halo's Theory Has Rejected It.

The FCC has rejected Halo's theory. In its recent *Connect America Order*,[32] the FCC singled out Halo *by name*, described Halo's arrangement of having traffic pass through a

[31] *See* Neinast Direct at 21, n.12.

[32] *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) ("*Connect America Order*").

purported ESP (*i.e.*, Transcom) before reaching Halo,[33] noted Halo's theory that calls in this arrangement are "re-originated" in the middle by Transcom, and flatly rejected that theory. The FCC's discussion at paragraphs 1003-06 is worth quoting in full:

> 1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as the "intraMTA rule," also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia,* on the proper interpretation of this rule.
>
> 1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.
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> 1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common Carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA." It further asserts that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle," this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very

[33] The FCC was well aware that Halo was arguing that Transcom is an ESP and therefore must be deemed to originate all calls that pass through it. Halo made this argument explicitly in its *ex parte* submissions to the FCC, which the FCC cited and relied on in the *Connect America Order* as describing Halo's position. *See Connect America Order*, nn. 2120-2122, 2128; McPhee Direct at 16, n.22; Exhibits JSM-7, JSM-8.

large amount of traffic. Responding to this dispute, CTIA asserts that "it is unclear whether the intraMTA rules would even apply in that case."

1006. We clarify that ***a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider.*** Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that ***the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.*** [Emphases added, footnotes omitted].

The FCC thus conclusively rejected Halo's theory that calls that begin with an end user dialing a call on a landline network are somehow "re-originated" and transformed into wireless calls simply by passing through Transcom. In fact, Halo concedes that the FCC rejected its theory; Halo witness Wiseman stated, "we acknowledge that the FCC ... apparently now believes ESPs ... do not originate calls."[34] The FCC said that a call is originated wirelessly only if the "calling party" – the person dialing the phone number – initiated the call through a wireless carrier. The majority of the calls Halo sent to AT&T Kentucky did not originate that way, as AT&T's call studies showed.

Agreeing with the FCC, the Tennessee Regulatory Authority ("TRA") also rejected Halo's origination theory earlier this year in a decision in favor of AT&T Tennessee on the identical issue.[35] Among other things, the TRA found that the FCC was aware of Halo's theory that Transcom originates (or re-originates) every call it touches, and rejected that theory.[36] The

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[34] Wiseman Testimony at 50, lines 15-16. Endowing a phrase in the first sentence of paragraph 1006 of the *Connect America Order* with a significance the FCC plainly did not intend, Halo has suggested that the FCC rejected its theory only "for purposes of the intraMTA rule," and not for purposes of the Parties' ICA. But the very purpose of the provision in the ICA that permits Halo to deliver traffic to AT&T Kentucky only if it originates on wireless equipment is to implement the intraMTA rule. Halo's notion that the FCC's ruling leaves open the possibility that the traffic at issue here originates with Transcom for purposes of the ICA, even though it does not originate with Transcom for purposes of the intraMTA rule, is desperately mistaken.

[35] *Tennessee Halo Order* at 15-17 (Neinast Exhibit MN-1).

[36] *Id.*

Georgia Commission specifically disagreed with Halo's re-origination theory, finding that such a communication "constitutes a single call."[37] And the South Carolina, Wisconsin, and Missouri Commissions reached the same result.[38]

2. ESPs Do Not Originate Every Call They Touch.

Even if Transcom were an ESP (which it is not, as shown below), there is no authority for Halo's contention that ESPs terminate every call they touch and then originate a new call. That is not surprising, because the argument defies common sense. If the girl in California picks up her landline phone, dials her grandmother in Kentucky, and they have a conversation, that is one call, not two calls. No new, separate call exists merely because the girl's call passed through Transcom's equipment somewhere along the way. The only call here is the call from the girl in California to her grandmother in Kentucky – after all, the girl did not call Transcom.[39]

Halo's theory rests on the idea that ESPs are deemed to be end users, and therefore (according to Halo) Transcom must be deemed to originate every call that passes through its equipment. Nothing in the law says that. To the contrary, the FCC has made clear that ESPs "are treated as end users *for the purpose of applying access charges*"[40] only, and "are treated as end users *for purposes of our access charge rules.*"[41] Thus, the "ESP exemption" is a legal

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[37] *Georgia Halo Order* at 7, 15.

[38] *South Carolina Halo Order* at 6; *Missouri Halo Order* at 28-29, 39-41; Final Decision, *Investigation into Practices of Halo Wireless, Inc., and Transcom Enhanced Services, Inc.*, No. 9594-TI-100, at 6-8 (Pub. Serv. Comm'n of Wis., July 27, 2012), at 6-7 ("*Wisconsin Halo Order*"), a copy of which is attached hereto as **Attachment 4**.

[39] As the GPSC put it, such a communication "constitutes a single call. In other words, Staff recommended that the Commission reject the argument that Transcom originates a second call when it hands the call off to Halo. The Commission adopts this Staff recommendation." *Id.* at 7.

[40] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶ 11 (2001) ("*ISP Remand Order*") (emphasis added, subsequent history omitted).

[41] *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987) ("*Northwestern Bell Order*"). Five years after it was issued, this decision was vacated as moot. 7 FCC Rcd. 5644 (1992). The decision still carries weight, however, as the FCC's explanation of the ESP exemption.

fiction that allows ESPs to be treated like end users *for the purpose of not having to pay access charges*. That does not mean an ESP could use this limited "end user" status to claim it "originates" calls that actually began when someone else picked up a phone and dialed a number. Transcom does not start the call (the calling party does), does not decide who will be called (the calling party does), and does not provide the voice content that the parties exchange on the call.[42] Moreover, the ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP, which means that any ESP exemption for Transcom would not apply to Halo anyway.[43]

The FCC has never held that an ESP "originates" calls that start elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle.[44] To the contrary, the FCC rejected Halo's theory that Transcom originates calls in the *Connect America Order* (¶¶ 1005-06). The FCC also rejected a similar two-call theory several years earlier. In that case, legacy AT&T (pre-BellSouth merger AT&T) provided a calling card service where, during call set-up, the calling party heard an advertisement from the retailer that sold the card. *AT&T*

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[42] As the South Carolina Commission concluded, "Halo has cited no authority supporting its claim that ESPs terminate every call they touch and then originate a new call." *South Carolina Halo Order* at 14.

[43] *Northwestern Bell Order*, 2 FCC Rcd. 5986, ¶ 21 (1987); *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 24, 42 (Ill. Comm. Comm'n Feb. 11, 2009) (the ESP exemption "exempts ESPs, and *only* ESPs, from certain access charges" and does not apply to carriers that transport calls for ESPs); *Pacific Bell Tel. Co. v. Global NAPs Cal., Inc.*, D.09-01-038, Order Denying Rehearing of D.08-09-027, at 11, 2009 WL 254838, at *5 (Cal. P.U.C. Jan. 29, 2009) ("the [ESP] exemption applies only to the ESP itself, not to the carrier of ESP traffic"); *In re Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas*, Order No. 16, Dkt., Nos. 06-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 868 *26-27 (Kan. Corp. Comm'n 2005) ("that [ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs and other customers"). Thus, regardless of Transcom's purported status, there is no basis for *Halo* to claim it is exempt from access charges on the toll traffic it has been sending to AT&T Kentucky.

[44] Halo claims that the FCC has found that ESPs – as end users – originate traffic even when they receive the call from some other end-point. Wiseman Testimony at 35, line 10 - 36, line 9. But Halo does not cite a single FCC decision, or any decision by any other entity, that actually holds this. Halo also tries to compare Transcom to an entity using a "Leaky PBX," as if it that legitimizes Halo's conduct. *Id.* at 38, lines 2-6. That comparison to a Leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo's and Transcom's current scheme – constituted a form of "access charge avoidance" that needed correction. *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 87 (1983). *See also* Neinast Rebuttal at 24, line 7 - 25, line 4. Simply put, the only time the FCC has actually addressed what Halo does is in the *Connect America Order*, where it rejected the identical argument Halo is making here.

Calling Card Order, 20 FCC Rcd. 4826, ¶ 6.[45] Legacy AT&T argued that this was an enhanced service and that the "first stage of the call," where the caller heard the advertisement, was "separate from the communication between the calling party and the called party," and therefore "created an endpoint" that "divided [the] calling card communication into two calls." *Id.* at ¶¶ 8, 23. The FCC rejected that view, finding that the communication with the purported enhanced service platform (the advertising message) did not "create an endpoint" and that communication of the advertising message was merely "incidental" to the single call the end user made. *Id.* at ¶ 23. Here, of course, there is no communication at all between Transcom and the calling or called party, so there is even less basis for claiming that Transcom creates an end-point or originates a new call. Indeed, AT&T Kentucky witness Mr. Drause explained that Transcom's equipment is not even *capable* of originating a call, for it does nothing more than convert IP data into a radio signal.[46]

Halo also tries to support its "Transcom origination" theory by citing *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), claiming that the court there functionally held that every ESP is an "origination" "end-point" on every call.[47] But the decision said nothing of the kind, and in any event has no bearing here. The FCC was well aware of the D.C. Circuit's *Bell Atlantic* decision when it issued the *Connect America Order*, but still rejected Halo's theory that all calls originate with Transcom. *Connect America Order*, ¶¶ 1005-06.[48] The court in *Bell Atlantic* also was not dealing with ESPs in general, but rather was dealing with Internet Service

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[45] Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005) (*"AT&T Calling Card Order"*), *aff'd, AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

[46] Drause Rebuttal at 10, line 5 - 17.

[47] Wiseman Testimony at 35, lines 1-18.

[48] The FCC also was well aware of the *Bell Atlantic* decision when it issued the *AT&T Calling Card Order*, which rejected the similar argument that a purported ESP must be deemed to be an origination "endpoint" on calls initiated by others. *AT&T Calling Card Order*, ¶¶ 8, 23.

Providers ("ISPs") in particular, so its discussion cannot be generalized to all purported ESPs. Transcom is not an ISP and Halo does not claim it is. Moreover, contrary to Halo's claim, the D.C. Circuit did not hold that ISPs are an origination "end-point." Rather, it merely remanded to the FCC to consider that alternative as a possible way to look at what those providers do, and on remand the FCC took a different path, so it never had to address the issue.[49]

In addition, Halo's assumption that the D.C. Circuit's discussion of Internet Service Providers in *Bell Atlantic* applies to every ESP is misplaced. For example, in the *AT&T Calling Card Order* the FCC rejected an attempt to compare the "enhanced" calling card service with calls to Internet Service Providers ("ISP-bound calls"). The FCC found that the services were not analogous, because while calls to ISPs "may consist of multiple communications," a call from a calling card user is different, because "the only relevant communication" in that situation "is from the calling card caller to the called party." *AT&T Calling Card Order*, ¶¶ 25-26. The same analysis applies here, where "the only relevant communication" is between the calling party and the called party.[50]

Halo relies heavily on decisions by bankruptcy courts during Transcom's bankruptcy proceeding several years ago for the proposition that Transcom is an ESP under federal law. Those decisions are irrelevant here. Only one of these decisions both involved an AT&T entity and actually held (incorrectly) that Transcom is an ESP.[51] That decision, however, was vacated

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[49] The GPSC rejected Halo's reliance on *Bell Atlantic* for similar reasons. *See Georgia Halo Order* at 8.

[50] When an ISP's customer seeks to establish a dial-up connection to the Internet, he or she dials the ISP's phone number. This is starkly different from the situation here, where the calling party does not dial Transcom's phone number, and does not even know that Transcom exists. Thus, even if one were to conclude that an ISP terminates its customer's call and then originates a further communication with the Internet, it by no means follows that Transcom performs a similar termination and origination.

[51] That decision is Exhibit 1 to the Pre-Filed Testimony of Robert Johnson ("Johnson Testimony"). The other decision, confirming Transcom's plan of reorganization, did not resolve any dispute between parties regarding whether Transcom was an ESP – much less whether all calls that pass through Transcom must be deemed to be wireless-originated – because that point was neither contested in the proceedings leading to that order, nor was it

on appeal and carries no precedential or preclusive effect here.[52] The Pennsylvania, Tennessee, South Carolina, Georgia, Wisconsin, and Missouri Commissions have already evaluated this same issue and found that the bankruptcy rulings have no preclusive effect.[53]

More fundamentally, even if Transcom were an ESP, and were deemed to be an end user for purposes of access charges, that would only make a difference in this case if Transcom were therefore deemed to originate (and transform to wireless) every call it touches, regardless of where or on what type of network the call began. None of the bankruptcy rulings addresses, much less decides, that origination issue, which means those decisions have no bearing on this case.

Finally, Halo has argued that even if Transcom is not an ESP, it still must be deemed to originate every call it touches. Halo claims that every entity must either be a common carrier or an end user, that Transcom is not a common carrier and therefore must be an end user, and therefore that Transcom originates every call it touches. Halo has failed to establish its premise, *i.e.*, that every entity involved in the world of communications must be either a common carrier or an end user. But even if Transcom were deemed to be an end user based on Halo's definitional word games, Halo's theory would still fail. While it is true that end users *can* originate calls, there is no legal or logical support for the idea that a purported end user must be deemed to originate every call it touches – especially when the call was started by someone else and all the purported "end user in the middle" does is pass the call along to Halo. Indeed, if Halo's theory were correct, it would mean an end to all access charges, since every carrier would

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necessary to the order. Accordingly, the order has no preclusive effect. *See*, RESTATEMENT (SECOND) OF JUDGMENTS, § 16 comment c.

[52] *See id.* at 1 (see notation in upper right-hand corner); *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008).

[53] *See Tennessee Halo Order* at 22, n.85 (also citing Pennsylvania order); *South Carolina Halo Order* at 19; *Georgia Halo Order* at 10; *Wisconsin Halo Order* at 6-7; *Missouri Halo Order* at 42-43.

simply have all its calls first pass through a purported "end user" in the same local area where the call will be terminated, and then claim that by passing through that "end user" every single call was originated as a local call.

3. Transcom is Not an ESP.

Even though Halo's theory fails regardless of whether Transcom is an ESP, the fact is that Transcom does not qualify as an ESP. To be an ESP, Transcom must provide an "enhanced service." The FCC defines "enhanced services" as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. § 64.702(a). In applying this definition, the FCC has consistently held that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in deciding whether a service is "enhanced" one must use the end user's perspective.[54] The FCC typically describes services that do not alter the fundamental character of the telephone service as "adjunct-to-basic," meaning they are not "enhanced services." *See AT&T Calling Card Order*, ¶ 16 & n.28.[55]

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[54] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

[55] Halo has argued that Transcom's service technically cannot be "adjunct-to-basic" because Transcom does not provide basic telephone service. That is both incorrect and misses the point. Even if Transcom does not provide basic telephone service, that does not mean it therefore must be deemed to provide an enhanced service. The "adjunct-to-basic" terminology is used to distinguish *any* service that does not change the fundamental character of the telephone service the end user is using, regardless of who provides that basic telephone service.

Transcom claims it provides enhanced service because it takes steps to minimize background noise on a voice call and inserts "comfort noise" during periods of silence so the parties do not think the call has been disconnected.[56] In other words, Transcom does not in any way alter or add to the content of any call. Rather, the parties still say their own words and that is all that gets transmitted. Transcom just tries to make the voice communications more clear. As AT&T Kentucky witnesses Neinast and Drause both explained, suppressing background noise and adding comfort noise are not "enhancements" to the underlying voice telecommunications service. They are merely the same type of call-conditioning that carriers normally provide, and have provided for some time, as an incidental part of voice service (*e.g.*, by using repeaters to boost a voice signal over long distances).[57]

The FCC's decisions likewise confirm that Transcom is not providing enhanced service. In the *AT&T Calling Card Order*, for example, legacy AT&T argued that a calling card service was "enhanced" because, during call set-up, the caller heard an advertising message from the retailer that sold the card and was given options to push buttons to do things other than complete the call (*e.g.*, buy more calling minutes on the calling card), and also because some of the transport of the call was over legacy AT&T's Internet backbone using Internet Protocol ("IP") technology. *AT&T Calling Card Order*, ¶¶ 6, 11-12. The FCC held that this service was not "enhanced" under FCC Rule 64.702. *Id.*, ¶ 16. As the FCC explained:

> Because the advertising message is ***provided automatically, without the advance knowledge or consent of the customer, there is no "offer" to the customer of anything other than telephone service, nor is the customer provided with the "capability" to do anything other than make a telephone call.***
>
> . . . We find that the advertising message provided to the calling party in this case is incidental to the underlying service offered to the card-holder and does not in

[56] Johnson Testimony at 14, line 3 - 16, line 7.

[57] Neinast Direct at 24, line 19 - 25, line 18; Drause Rebuttal at 12, line 15 - 14, line 5.

> any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call . . . .

AT&T Calling Card Order, ¶¶ 15-16 (emphasis added).

The same analysis applies to Transcom's service, which is even more invisible to the calling party. Transcom's involvement in the calls at issue here occurs "automatically, without the advance knowledge or consent of the customer [*i.e.*, the person making the call]" and Transcom does not provide any service to the calling party.[58] Nor does the calling party receive from Transcom (or from his or her own carrier) "anything other than [the capability to] make a telephone call." *AT&T Calling Card Order*, ¶¶ 16-17.

Moreover, the FCC noted that none of the packaging material for the calling card service in the *AT&T Calling Card Order* mentioned the purported enhancement of using the cards to listen to advertisements, which led the FCC to conclude that no enhancement or special capability was being "offered" to customers. *Id.* at ¶ 15. The same is true here, because none of Transcom's written marketing materials makes any mention of the purported "enhancements" that Transcom provides, there is no "offering" of any enhancement.[59] Indeed, until recently Transcom's website flatly stated that Transcom's "core service offering" is "Voice Termination Service," *not* any purported service enhancements.[60] And until recent changes made in response to AT&T's testimony, Transcom's website never mentioned any purported "enhancements" to service quality at all.[61] Likewise, the supposed "enhancements" are so incidental that they are not even mentioned in Transcom's contracts with its customers.[62] It is difficult to take

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[58] Johnson Testimony at 8, lines 2-3.

[59] McPhee Rebuttal at 4, line 20 - 5, line 2.

[60] *Id.* at 4, lines 9-15.

[61] *Id.* at 4, lines 16-20.

[62] *Id.* at 5, lines 3-8.

Transcom's claims about enhancing calls seriously when Transcom itself did not find them worth mentioning in its marketing materials, customer contracts, or website. At best, then, whatever Transcom does is merely "incidental" to the underlying telecommunications service provided by the calling party's carrier, and therefore does not qualify as an enhanced service. *AT&T Calling Card Order*, ¶ 16 & n.28.

The FCC's *IP-in-the-Middle Order* further shows why Transcom's service is not an "enhanced service." In that case, the FCC held that legacy AT&T's IP telephony service was not an enhanced service, finding that it "(1) use[d] ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate[d] and terminate[d] on the public switched telephone network (PSTN); and (3) under[went] no net protocol conversion and provide[d] no enhanced functionality to end users due to the provider's use of IP technology."[63] As the FCC put it, "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service," which means that the IP-in-the-middle service was not an enhanced service. *IP-in-the-Middle Order*, ¶ 15.

All of those things are also true of Transcom's service. The end users that make calls do not order a different service (indeed, they do not order any service from Transcom[64]); they do not pay different rates because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, "[f]rom the customer's perspective" – the perspective of the end user making the call – anything Transcom does is merely "incidental" to

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[63] *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 1 (2004) ("*IP-in-the-Middle Order*").

[64] Transcom does not serve any actual end users. Rather, it provides wholesale service to carriers and other providers. Thus, "Transcom does not deal with ultimate consumers [*i.e.*, end users] and does not provide any service to them. Transcom has no relationship with their distant third parties [*i.e.*, end users] at all." Johnson Testimony at 8, lines 1-3.

or "adjunct to" the underlying voice service provided by the caller's carrier, does not alter the "fundamental character" of that underlying service, and is therefore not an "enhanced service." *AT&T Calling Card Order*, ¶ 16.[65]

These are but a few examples of decisions holding that services offering much more to the calling party than Transcom's service does, still are not enhanced services. There are many others. *See* Order, *In the Matter of Federal-State Joint Board on Universal Service*, 22 FCC Rcd. 11811, ¶¶ 3, 6-9 (Wireline Competition Bureau, 2007) (applying same factors to find that a service providing "supplements to the information typically provided on a caller ID display," such as "advertisements, the time, date, and temperature, account balance, available talk time, and other customized messages" and other functionalities was not enhanced, but was merely "adjunct-to-basic," because the functionalities "do not in any way alter the fundamental character of that telecommunications service"); *The Time Machine*, 11 FCC Rcd. 1186, ¶ 40 (Common Carrier Bureau 1995) (provision of information regarding the time remaining on a calling card is "incidental to the provision of basic communications services, and therefore is not an enhanced service"); John T. Nakahata, *Regulating Information Platforms: The Challenge of Rewriting Communications Regulation From the Bottom Up*, 1 J. Telecomm. & High Tech. Law 95, 108 n.52 (2002) (noting that FCC has classified services such as "speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller ID, call tracing, call blocking,

[65] Further evidence that Transcom does not alter the "fundamental character" of the calls that pass through it on the way to Halo and AT&T Kentucky is that the calls still fit easily within the definition of "telecommunications" in 47 U.S.C. § 153(50). The definition states that "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content thereof." The calls at issue here, *e.g.*, a call from a girl in California to her grandmother in Frankfort, Kentucky, involve transmission "between or among points specified by the user" (the girl specifies her landline phone in California and her grandmother's phone in Frankfort), of "information of the user's choosing" (the voice communication with her grandmother), "without change in the form or content of the information as sent or received," since the words the girl speaks in California are the same words that reach her grandmother in Frankfort.

call return, repeat dialing and call tracking" as "adjunct-to-basic" service, not enhanced service).[66]

Consistent with the FCC precedent, five state commissions have now expressly ruled that Transcom's service is not an enhanced service. In a Pennsylvania case, a carrier called Global NAPs ("GNAPS") argued that Transcom was an ESP, making all the same claims that Transcom and Halo make here. The Pennsylvania Public Utilities Commission ("PUC") disagreed and held that Transcom is not an ESP, stating as follows:

> GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. [citation omitted] Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. . . . .
>
> In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above [the *AT&T Calling Card Order* and the *IP-in-the-Middle Order*], we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal

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[66] Halo has suggested that Transcom's service must be an enhanced service under the so-called "contamination" doctrine. Wiseman Testimony at 50, lines 4-6 and n.24. That doctrine does not apply here. The "contamination doctrine" is an FCC-created concept that applies to protocol processing services by value-added network service providers ("VANs"). The doctrine provides that when such carriers offer enhanced protocol processing services in conjunction with basic transmission service, the enhanced service component "contaminates" the basic service component and that such services, when combined with basic telephone service provided by the same carrier, "contaminate" the telephone service such that the entire service is treated as an "enhanced" service. *Independent Data Comms. Mfrs. Ass'n, Inc.*, 10 FCC Rcd. 13717, ¶ 18 (1995); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, n.52 (1986). Thus, in order for that doctrine to apply, the "contaminating" service must itself be an enhanced service under FCC Rule 64.702. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, ¶¶ 43-44 (noting that if some protocol processing services were defined as not being "enhanced" services, the contamination doctrine would no longer apply to the underlying basic service component). As shown in the text, however, Transcom's service is not an enhanced service under FCC Rule 64.702 and FCC precedent, so there is no "contamination" of anything.

> rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges.[67]

Similarly, in the Tennessee case that mirrored this case, the TRA held that Transcom is not an ESP. The TRA found that:

> Transcom only reduces background noise and inserts "comfort noise" in periods of silence so that those periods of silence are not mistaken for the end of a call. . . .The alleged "enhancements" that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. Carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of those processes are deemed "enhancements" in the sense of an ESP.[68]

Similarly, the Georgia Commission found that "Transcom is not acting as an ESP with regard to the traffic at issue in this [AT&T v. Halo] docket. . . . Transcom's service is . . . what is commonly referred to as 'call conditioning.' . . . Application of [the FCC] standard to the current case shows that Transcom is not providing an enhanced service."[69] The South Carolina Commission discussed the issue at length, and concluded that, based upon its thorough analysis, "Transcom does not qualify as an ESP."[70] The Wisconsin and Missouri Commissions reached the same result.[71] The Pennsylvania, Tennessee, Georgia, South Carolina, Wisconsin, and Missouri Commissions' analyses apply with equal force here, and this Commission should reach the same result: Transcom is not an ESP.

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[67] Order, *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, PA PUC Docket No. C-2009-2093336, 2010 WL 1259661, at 16-17 (Penn. PUC, Feb. 11, 2010).

[68] *Tennessee Halo Order*, at 21-22.

[69] *Georgia Halo Order* at 9-10.

[70] *South Carolina Halo Order* at 20-26.

[71] *Wisconsin Halo Order* at 6-7; *Missouri Halo Order* at 43-46.

4. Even If Transcom Originated Enhanced Traffic (And It Does Not), the Traffic Would Still Be Landline-Originated Traffic That the ICA Prohibits Halo From Delivering to AT&T Kentucky.

Halo's theory is that Transcom performs enhancements on the calls it receives from other carriers and then originates the purported enhanced traffic for delivery to Halo. For all of the reasons set forth above, Transcom neither performs enhancements nor originates traffic. Even if that were not the case, however, the purportedly enhanced traffic necessarily would originate from the same location that Transcom performed the "enhancements," namely, at the Transcom data centers in Atlanta, New York City, Los Angeles and Dallas, *not* at a tower site in Paducah, Kentucky. AT&T Kentucky witness Drause testified to that without contradiction.[72]

This is significant for two reasons. First, even if Transcom did originate enhanced traffic, such traffic would originate over landline (not wireless) facilities, and the ICA prohibits Halo from delivering landline-originated traffic to AT&T Kentucky. Second, traffic, whether wireline or wireless, that originates in Atlanta, New York, Los Angeles or Dallas and terminates in Kentucky is non-local traffic to which access charges apply. Most of the state commissions that have rejected Halo's position have not reached this point, but the one that did fully agreed with AT&T's analysis.[73]

II. HALO HAS BREACHED THE ICA BY SENDING INACCURATE CALL INFORMATION.

The exchange of accurate call detail information between interconnected carriers is essential. This information includes the phone number of the person that originated the call (the Calling Party Number, or "CPN") and, in some instances, a different number for the person or

[72] Drause Rebuttal at 11, lines 4-16; Exhibit RD-4.

[73] *South Carolina Halo Order* at 26-27.

entity that bears financial responsibility for the call (the Charge Number, or "CN").[74] A Charge Number might be used, for example, when a business has 100 different lines for its employees but wants all calls on those lines to be billed to a single number. In that situation, calls from those 100 lines would include call detail that shows both the CPN, for the actual line that originated the call, and the Charge Number, for the billing number that will be charged for the call.[75] When the call information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed.[76] Specifically, the CN is used to determine the jurisdiction and rating for the call – that is, whether the call is local or non-local, and therefore whether it is subject to reciprocal compensation or access charges.

The ICA requires call information like CPN and CN to be accurate so the Parties can accurately bill one another.[77] AT&T, however, discovered that until the end of 2011, Halo inserted inaccurate CNs – CNs that should not have been there at all – on every call that Halo sent to AT&T.[78] Specifically, Halo admits that it inserted a CN assigned to Transcom into the call record on every call it sent to AT&T.[79] Moreover, in every case the CN was local to (*i.e.*, in the same MTA as) the number the call was being terminated to, making the call appear to be local, and thus subject to reciprocal compensation rather than access charges – even when the call was not local.[80] For example, a call destined to Frankfort may begin in California and would therefore have a California CPN, but Halo would insert a CN that is local to Frankfort into the call information and thereby make the call appear to be local rather than long-distance.

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[74] Neinast Direct at 30, lines 13-20.

[75] *Id.* at 31, lines 1-13.

[76] *Id.* at 31, lines 14-17.

[77] McPhee Direct at 20, lines 3-14.

[78] Neinast Direct at 31, line 19 - 32, line 4.

[79] Wiseman Testimony at 52, lines 15-17.

[80] Neinast Direct at 32, lines 4-8.

There was no justification for Halo's insertion of a Transcom CN, because Transcom was not the financially responsible party on any of these calls. A CN is used when one party (say, an employer) takes financial responsibility for calls made by another party (say, its employee). Here, however, it is undisputed that there is *no* relationship between Transcom and any of the calling parties that made these calls,[81] and therefore Transcom is *not* the financially responsible party on any of these calls, because Transcom does not pay the phone bills for any of those calling parties. Halo therefore violated the ICA and industry practices for call information.

Halo tries to excuse its conduct with the same argument as on the origination issue, namely that Transcom should be deemed to originate all calls and therefore is financially responsible for them.[82] But Transcom does not originate calls, as shown above. Furthermore, Halo's theory makes no sense. If Transcom actually originated the call, as Halo claims, its number would have shown up in the CPN field (Calling Party Number), not the CN field. The CN field is only used when a party *other than* the party that originated the call will be financially responsible for the call. Consequently, Halo's theory that it inserted the Transcom CN to comply with its view of how the industry treats CN is not credible. As the FCC stated, the CN field "may not contain or be populated with a number associated with an intermediate switch, platform, or gateway," yet that is what Halo did. *Connect America Order*, ¶ 714. In addition, Transcom has no relationship with any of the individuals that actually originate any of these calls, and no reason – or authorization – to have Halo insert a CN to make Transcom financially responsible for these calls originated by strangers through their own separate carriers. Thus, as

[81] Johnson Testimony at 8, lines 1-3.

[82] Wiseman Testimony at 54, lines 4-11.

the Tennessee, South Carolina and Georgia Commissions all concluded, Halo's insertion of a Transcom Charge Number breached the ICA.[83]

Halo contends that its insertion of the Transcom CN caused no harm, but that is incorrect. Halo first claims there was no harm because the ICA says that AT&T will bill Halo for termination of wireless calls based on a factor for the percentage of calls to be treated as interMTA, rather than billing on a call-by-call basis.[84] That theory fails because the ICA allows that factor to be adjusted based on the actual traffic sent by Halo.[85] As noted above, the industry practice is to determine the local or non-local nature of the traffic based on the CN (when both CPN and CN are present). Inserting an inaccurate CN thus made it more difficult for AT&T Kentucky to evaluate Halo's traffic (and, indeed, AT&T Kentucky might never have discovered that the CN was inaccurate if it had not been investigating whether any of Halo's traffic was landline-originated).[86]

Halo also asserts there was no harm to AT&T because the call records that Halo sent to AT&T included the CPN as well as the CN, so AT&T still had the data needed to determine the call's actual starting point.[87] That, however, is akin to a burglar saying he cannot be convicted because he left behind fingerprints that allowed the police to identify him. It is true that, *once AT&T discovered* there was a need to investigate Halo's call information and undertook the cost and burden of conducting that investigation, AT&T was able to use the CPN to determine the true nature of the calls coming from Halo. That is why this complaint case exists. The point, however, is that AT&T had to conduct a special investigation to do that, because otherwise the

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[83] *Tennessee Halo Order*, at 18; *South Carolina Halo Order* at 28-31; *Georgia Halo Order* at 11.

[84] Wiseman Testimony at 52, lines 1-2, and at 54, lines 19-21.

[85] Neinast Rebuttal at 27, line 19 – 28, line 3.

[86] *Id.* at 27, lines 6-10.

[87] Wiseman Testimony at 53, lines 11-13.

industry practice is to treat CN as overriding the CPN. By inserting the inaccurate CN, then, Halo masked the true nature of the calls it was sending AT&T until AT&T did the detective work to unmask it. The only apparent reason for Halo's inserting the inaccurate CN was to make the long-distance landline calls that Halo sent to AT&T Kentucky appear to be local wireless calls, and therefore avoid access charges on what was actually non-local traffic.

This Commission, like the Tennessee, South Carolina and Georgia Commissions, should find that Halo improperly inserted Transcom's Charge Number in the call detail it provided to AT&T Kentucky.[88]

III. HALO IS BREACHING THE ICA BY REFUSING TO PAY FOR INTERCONNECTION FACILITIES PROVIDED BY AT&T KENTUCKY.

This issue is different from the two issues discussed above, for it involves a simple failure to pay for facilities provided by AT&T Kentucky under the ICA.

As noted earlier, Halo entered into a wireless ICA with AT&T, and wireless ICAs are somewhat different from landline ICAs.[89] One difference concerns cost responsibility for interconnection facilities. In a landline ICA, cost responsibility is typically determined by the point of interconnection ("POI"), in that the competitive local exchange carrier ("CLEC") typically is responsible for the facilities on its side of the POI and the incumbent local exchange carrier ("ILEC") typically is responsible for the facilities on its side of the POI.[90] Wireless ICAs are different. In a wireless ICA, cost responsibility for interconnection facilities is typically shared between the carriers and typically apportioned based on the amount of traffic sent by each carrier.[91] The Halo-AT&T ICA is a typical wireless ICA in this regard. Section V.B of the ICA

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[88] *See* fn. 84, *supra*.

[89] McPhee Direct at 12, lines 6-7.

[90] *Id.* at 23, lines 20-25.

[91] *Id.* at 23, lines 25-28.

requires AT&T and Halo to pay each other for interconnection facilities based on the proportion of the total traffic that each Party sends to the other, stating:

> BellSouth and Carrier will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement or the General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended from time to time. BellSouth will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of BellSouth originated Local traffic to Carrier's POI within BellSouth's service territory and within the LATA (calculated based on the number of minutes of traffic identified as BellSouth's divided by the total minutes of use on the facility), and Carrier will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic.[92]

Section VI.B.2.b, in turn, states:

> BellSouth will bill Carrier for the entire cost of the facility. Carrier will then apply the BellSouth originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by BellSouth to Carrier. Carrier will invoice BellSouth on a monthly basis, this proportionate cost for the facilities utilized by BellSouth.[93]

The apportioning of facilities costs applies for the entire facility between AT&T Kentucky's switch and Halo's switch.[94]

In order to interconnect with AT&T Kentucky, Halo has ordered and obtained interconnection facilities from AT&T Kentucky.[95] AT&T Kentucky has billed Halo for those facilities, but Halo has disputed those charges and refused to pay them.[96] As of March 31, 2012,

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[92] McPhee Exhibit JSM-4.

[93] *Id.*

[94] McPhee Direct at 25, lines 1-3.

[95] *Id.* at 22, lines 1-7.

[96] *Id.* at 22, lines 12-14.

more than $308,000 in charges for these facilities remained disputed and unpaid.[97] AT&T Kentucky is entitled to be paid for what it provided.

Halo's main defense is its theory that cost responsibility for interconnection facilities ends at the POI.[98] That might make sense if Halo had a landline ICA, but it does not. The ICA here uses the typical wireless ICA terms, where cost responsibility for interconnection facilities is based on proportional usage.[99] It is undisputed that 100% (or very close to 100%) of the traffic between the Parties comes from Halo, meaning Halo is responsible for 100% of the costs for the interconnection facilities that is has ordered from AT&T Kentucky, obtained from AT&T Kentucky, and used to send traffic to AT&T Kentucky.[100] AT&T Kentucky merely asks the Commission to declare that, under the ICA, Halo must pay for those facilities. The amount due will be worked out in bankruptcy court.

Halo offers two additional defenses, but neither is persuasive. First, Halo contends that trunking costs are to be shared proportionately under the ICA only when Halo uses AT&T-supplied facilities to get to the POI.[101] That is incorrect. As Section V.B of the ICA plainly states, the apportioning of trunking costs applies "if the Parties mutually agree upon a two-way trunking arrangement."[102]

Next, Halo contends that facilities costs are covered by reciprocal compensation charges.[103] That is dead wrong. Reciprocal compensation charges are per minute charges for the incremental costs incurred to transport and terminate traffic. Facilities charges, in contrast, are

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[97] *Id.* at 22, lines 13-14.

[98] Wiseman Testimony at 71, lines 9-12.

[99] McPhee Rebuttal at 17, line 13 - 20, line 15.

[100] *Id.* at 20, line 13 – 21, line 2.

[101] Wiseman Testimony at 74, lines 14-15.

[102] *See* McPhee Rebuttal at 22, line 21 - 23, line 2.

[103] Wiseman Testimony at 73, line 14 – 74, line 9.

non-usage sensitive recurring charges for the cost of the facilities themselves.[104] To the best of AT&T's knowledge, no one before has ever expressed the view that reciprocal compensation charges cover the cost of physical facilities.[105]

Halo admits that it ordered the facilities and trunk group elements for which AT&T Kentucky seeks payment.[106] There is also no dispute that AT&T Kentucky provided the facilities and trunk groups that Halo ordered.[107] Because the ICA clearly states that the costs of these interconnection facilities will be shared based upon each carriers' proportional use, and because Halo is responsible for 100% (or nearly 100%) of the traffic that has been exchanged between the Parties, Halo is 100% responsible for the costs of the facilities and trunk groups. Halo's failure to pay what it owes for these facilities and trunk groups is yet one more breach of the Parties' ICA.

IV. AT&T KENTUCKY IS ENTITLED TO RELIEF FOR HALO'S BREACHES OF ITS ICA.

As remedies for Halo's breaches of the ICA, AT&T Kentucky asks the Commission to grant the following relief, which was granted by the Tennessee, South Carolina, Georgia, Wisconsin, and Missouri Commissions in parallel cases[108]:

(a) Find that Halo has materially breached the ICA by: (1) sending landline-originated traffic to AT&T Kentucky, (2) inserting incorrect CN information on calls; and (3) failing to pay for facilities it has ordered pursuant to the ICA;

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[104] McPhee Rebuttal at 23, lines 10-12.

[105] *Id.* at 23, lines 7-8.

[106] *See id.* at 23, lines 15 – 18, quoting Wiseman Testimony at 73, line 14 – 74, line 9.

[107] McPhee Rebuttal at 23, lines 18-19.

[108] While not all of the commissions had occasion to address all the relief AT&T Kentucky seeks here, no state commission has denied any of the relief AT&T Kentucky requests.

(b) Find that as a result of these breaches (or any of them), AT&T Kentucky is excused from further performance under the ICA and may stop accepting traffic from Halo;[109]

(c) Find, without quantifying any specific amount due, that Halo is liable to AT&T Kentucky for access charges on the non-local traffic it has sent to AT&T Kentucky for termination to AT&T Kentucky's end users[110];

(d) Find, without quantifying any specific amount due, that Halo is liable to AT&T Kentucky for interconnection facilities charges that it has refused to pay to AT&T Kentucky; and

(e) Grant all other relief as is just and appropriate.

A. The Commission Should Authorize AT&T Kentucky to Discontinue Performance Under the ICA and Stop Accepting Traffic from Halo.

Halo's breach here – sending huge amounts of landline-originated traffic that the ICA does not allow – plainly defeats the core purpose of the ICA, which was to establish rates, terms, and conditions for *wireless-originated* traffic *only*. In addition, granting the relief AT&T Kentucky seeks will not run afoul of Halo's ongoing bankruptcy proceeding. Indeed, Halo has ceased doing business and the Trustee in the bankruptcy case already directed AT&T Kentucky to disconnect Halo's trunks and stop accepting traffic from Halo as of August 1, 2012.

B. The Commission Should Declare That Halo Is Liable to AT&T Kentucky for Access Charges on Non-Local Traffic Halo Delivered to AT&T Kentucky for Termination to AT&T Kentucky's End Users.

AT&T's federal tariff, filed with the FCC, requires Halo to pay access charges on the interstate traffic AT&T has terminated for Halo, and AT&T's state tariff, filed with this Commission, requires Halo to pay access charges on the intrastate non-local traffic that Halo has

[109] As information, the Trustee in Halo's Chapter 7 bankruptcy directed AT&T Kentucky to disconnect Halo's trunks and stop accepting traffic from Halo as of August 1, 2012, and AT&T Kentucky has done so.

[110] Although this case only involves AT&T and Halo, the same logic that makes Halo liable to AT&T for access charges on the non-local traffic that Halo sent to be terminated to AT&T end users would also make Halo liable for access charges to any third-party carrier that terminated non-local traffic for Halo to that carrier's end users.

sent to AT&T Kentucky for termination to AT&T Kentucky end users.[111] (Halo has also sent non-local traffic for AT&T Kentucky to pass to third-party carriers' for termination to those carriers' end users, though in that case Halo would owe access charges to those third-party carriers.) As demonstrated above, Halo has sent AT&T Kentucky interexchange traffic (both interstate and intrastate) that Halo has been misrepresenting as local, and thus subject only to reciprocal compensation charges instead of the higher access charges that apply to non-local traffic. AT&T Kentucky is *not* asking the Commission to determine how much Halo owes AT&T Kentucky, or how many minutes of access traffic Halo has sent to AT&T Kentucky. Rather, AT&T Kentucky only asks the Commission to rule that Halo owes AT&T Kentucky access charges on such access traffic as Halo has delivered and that AT&T Kentucky has terminated to AT&T Kentucky's end users. The court in Halo's bankruptcy case has made clear that this relief is permissible. That court has explained that the only limitation on the relief state commissions can grant for Halo's wrongdoing is that they should not issue relief involving "*liquidation of the amount* of any claim against the Debtor."[112] That is why AT&T Kentucky asks only for a ruling that Halo owes access charges to AT&T Kentucky for calls terminated to AT&T Kentucky end users in an amount that remains to be determined by the bankruptcy court.

Halo has argued that it cannot be required to pay tariffed access charges because, it claims, it technically did not receive access service precisely as it is defined in AT&T's tariffs. For example, Halo contends that it did not receive service from AT&T via a "Feature Group D" arrangement. Such arguments are a baseless smokescreen that exalts form over substance.

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[111] McPhee Direct at 19, lines 15 - 18.

[112] Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay, *In re Halo Wireless, Inc.,* Case No. 11-42464-btr-11 (Bankr. E.D. Tex., Oct. 26, 2011) (emphasis added), a copy of which is attached hereto as **Attachment 5**.

As shown above, Halo has sent landline-originated traffic to AT&T Kentucky in breach of the ICA. As also shown above, a large portion of that landline traffic is non-local in nature, and AT&T Kentucky terminated that traffic for Halo to its end users or delivered that traffic to third-party carriers for termination to their end users. Because the landline-originated traffic was not permitted by the ICA, there are no terms in the ICA defining the proper intercarrier compensation that Halo must pay to AT&T Kentucky or other carriers for terminating that traffic. It is obvious, however, that Halo must pay AT&T Kentucky and these other carriers *something* more than mere reciprocal compensation on the *non-local* traffic it sent to AT&T Kentucky for termination and delivery to other carriers for termination. ILECs are not required to terminate non-local calls for free, or at the low reciprocal compensation rates that apply to local traffic. And as the Commission well knows, when AT&T Kentucky terminates interexchange and interstate calls for other carriers, that is access service, and those carriers must pay the access rates in AT&T's access tariffs. Indeed, if Halo had been forthcoming up front, and acknowledged that it would be sending non-local landline traffic to AT&T, the Parties would have dealt with that in an ICA provision requiring Halo to pay tariffed switched access charges on that traffic or by simply having Halo sign up for service under the switched access tariff. The only reason that did not happen is Halo's insistence on erroneously claiming that all of its traffic was local, wireless traffic that originated with Transcom.

Not surprisingly, there is a legal doctrine that covers what Halo has done and that makes clear that Halo must pay AT&T Kentucky access charges for the non-local traffic sent by Halo for termination to AT&T Kentucky end users[113] – the "constructive ordering" doctrine. Under that doctrine, a carrier "constructively orders" service under a tariff, and therefore must pay the

[113] The same analysis would apply to make Halo liable to third-party carriers when Halo sent traffic to AT&T Kentucky to pass along to those third-party carriers for termination to those carriers' end users.

tariffed rate, if it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of services; and (3) does in fact receive such services.[114] The doctrine applies here.

First, there is no doubt that Halo "is interconnected [to AT&T] in such a manner that it can expect to receive access services." Halo interconnects to AT&T Kentucky under the ICA and agreed to pay access charges on at least some of the traffic it sent to AT&T Kentucky (assuming the traffic was all wireless).[115] Halo also knew it was sending traffic to AT&T Kentucky that started outside the MTA or local calling area where Halo was located and that interMTA and non-local traffic are subject to access charges.

Second, Halo "fail[ed] to take reasonable steps to prevent the receipt of [access] services." Indeed, Halo took *no* steps to prevent the receipt of access services. Halo never tried to stop Transcom from sending it landline-originated traffic that Halo knew (or should have known) began in other local calling areas or other states. *See AT&T Corp. v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995) (defendants constructively ordered service because they "have come forth with no showing that they acted in any way to control the unauthorized charging of AT&T ... calls to their system" by a hacker).

Third, Halo "did in fact" receive terminating access service from AT&T Kentucky. As shown throughout this brief and in the AT&T Kentucky testimony, Halo sent huge amounts of landline-originated non-local traffic to AT&T Kentucky and AT&T Kentucky terminated such traffic to its end users. The termination of long-distance traffic is the essence of terminating switched access service, and the long-established rates for such service are in AT&T's access

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[114] *Advamtel LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000) (*citing United Artists Payphone Corp. v. New York Tel. Co.*, 8 FCC Rcd 5563 at ¶ 13 (1993) and *In re Access Charge Reform*, 14 FCC Rcd 14221 at ¶ 188 (1999).

[115] ICA, Sec. VII.E (McPhee Exhibit JSM-4).

tariffs.[116] 47 C.F.R. § 69.2(b) (FCC defines "Access service" to include "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."). *See also* BellSouth Telecommunications Tariff F.C.C. No. 1, Sections 6.8.1 and 6.8.2; Bellsouth Telecommunications, Inc. Kentucky Access Services Tariff Sections E6.8.1, and E6.8.3. Those tariffed rates are the rates Halo must pay.

Given that Halo has received terminating access service from AT&T Kentucky, and under the law has "constructively ordered" that service for landline traffic it sent to AT&T Kentucky for termination to AT&T Kentucky end users, the Commission can and should hold that Halo is liable to AT&T Kentucky for access charges on all such long-distance landline traffic Halo has sent to AT&T Kentucky for termination to AT&T Kentucky end users. Furthermore, given that Halo has also received terminating access service from third-party carriers, and under the law has "constructively ordered" that service for all landline traffic it sent to AT&T Kentucky for delivery to these third-party carriers for termination to their end users, the Commission can and should hold that Halo is liable to any third party carriers for access charges on all such long-distance landline traffic Halo has sent to AT&T for delivery to these third-party carriers. The actual amount Halo must pay to AT&T Kentucky and to various third-party carriers is a matter for the bankruptcy court.

Halo also contends that the FCC held in the *Connect America Order* that Halo's service is merely transit service. Based on this, Halo seems to argue that it cannot owe terminating access charges to AT&T or other carriers. Halo is incorrect. The *Connect America Order* never held that Halo's service is transit service, much less that Halo is exempt from paying terminating access charges when it hands long-distance traffic to AT&T for termination or delivery to other

[116] To the extent AT&T Kentucky delivered Halo landline-originated non-local traffic to other carriers for termination to their end users, the Commission should find Halo liable to those carriers for such traffic under their applicable access tariffs.

carriers for termination. The issue in the *Connect America Order* was whether Transcom could be deemed to originate every call it touches and whether the calls Halo was handing to local exchange carriers ("LECs") should be treated as local or non-local.[117] The FCC used the term "transit" merely to point out that entities that simply pass calls on in the middle of the call path are not viewed as originating those calls – and that because Transcom did not originate the calls Halo was passing to other carriers for termination, those calls were not local (*i.e.*, not intraMTA) and therefore were not merely subject to reciprocal compensation charges.[118] Rather, as non-local calls, those calls are subject to terminating access charges.

In addition, Halo's *ex partes* to the FCC, which framed the issue there, never once argued that Halo was providing transit service to another carrier. Quite the opposite, Halo argued that it was merely sending locally originated, wireless traffic to ILECs and therefore only had to pay reciprocal compensation, rather than access charges.[119]

The Tennessee, Georgia, South Carolina, Wisconsin, and Missouri Commissions determined that Halo is liable to AT&T for access charges on the interstate and intrastate non-local landline traffic that Halo sent to the AT&T ILEC in each state for termination to that AT&T ILEC's end users.[120] This Commission should follow suit and rule that Halo is liable to AT&T Kentucky (or to other third party carriers as appropriate) for access charges on the interstate and interLATA access traffic it has sent to AT&T Kentucky for termination to AT&T Kentucky's end user customers (but not for delivery to third-party carriers, to which Halo would be liable for similar reasons).

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[117] *Connect America Order*, ¶¶ 1004-06.

[118] *Id.*

[119] McPhee Exhibits JSM-6 and JSM-7.

[120] *Tennessee Halo Order* at 22; *Georgia Halo Order* at 15; *South Carolina Halo Order* at 27; *Wisconsin Halo Order* at 6-8; *Missouri Halo Order* at 46-50.

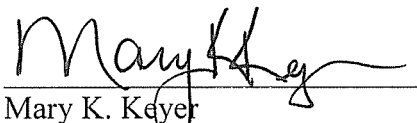
C. The Commission Should Declare That Halo Must Pay AT&T Kentucky for the Interconnection Facilities AT&T Kentucky Has Provided

There is no dispute that Halo ordered interconnection facilities from AT&T Kentucky and used those facilities to send traffic to AT&T Kentucky. The only question is whether Halo should have to pay for the use of that equipment. As shown above in section III, the ICA requires Halo to pay for those facilities based on proportional use, and Halo's proportional use is100% (or exceedingly close to it). The Commission therefore should declare that Halo must pay the amount due for those facilities, as the Tennessee, Georgia, and South Carolina Commissions did.[121] The specific amount that Halo must ultimately pay will be determined in bankruptcy court.

CONCLUSION

The Commission should find Halo in breach of its ICA with AT&T Kentucky and has constructively ordered and obtained switched access service from AT&T Kentucky, and grant AT&T Kentucky all the relief requested in Section IV above.

Respectfully submitted,



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[121] *Tennessee Halo Order* at 22; *South Carolina Halo Order* at 16; *Georgia Halo Order* at 15. The facilities issue was not part of the commission-initiated case in Wisconsin.

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In Re: Docket No. 34219; Complaint of TDS TELECOM on Behalf of its Subsidiaries Blue Ridge Telephone Company, Camden Telephone & Telegraph Company, Inc., Nelson Ball Ground Telephone Company and Quincy Telephone Company Against Halo Wireless, Inc., Transcom Enhanced Services, Inc. and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and For Expedited Declaratory Relief and Authority to Cease Termination of Traffic

ORDER ON COMPLAINTS

I. Background

A. TDS Telecom Complaint and Court Proceedings

On June 14, 2011, TDS TELECOM on behalf of its subsidiaries Blue Ridge Telephone Company, Camden Telephone & Telegraph Company, Inc., Nelson-Ball Ground Telephone Company, and Quincy Telephone Company (collectively "TDS Telecom") and, pursuant to O.C.G.A. §§ 46-2-20, 50-13-11, 46-5-45, 46-5-163(a), 9-4-1 *et. seq.* and Commission Utility Rule 515-2-1-.12, filed a Complaint against Halo Wireless, Inc. ("Halo Wireless"), Transcom Enhanced Services, Inc. ("Transcom"), and such other affiliated companies as are involved in the delivery of traffic to TDS Telecom for termination that have failed and refused to pay applicable access charges.

During the Commission proceeding, Halo filed a voluntary Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Texas, Case No. 11-42646, on August 8. Upon receiving notice of Halo's bankruptcy filing, the Commission decided during the August 9 evidentiary hearing to stay the proceeding as to Halo, solely, and that no findings of fact would be binding upon it. Then, Defendants, including both Halo and

Transcom, sought removal of this PSC action to federal district court in the Northern District of Georgia, Atlanta Division, Case No. 1:11-CV-2749.[1]

On August 22, the district court stayed this action before the Commission pending final disposition of the Texas bankruptcy claim. On October 26, the Texas bankruptcy court found that the Commission could render a decision on the regulatory matters before it. Although the bankruptcy court directed that the Commission could determine whether it has jurisdiction raised in TDS Telecom's complaint, whether Halo violated Georgia law, and whether TDS Telecom was entitled to its requested relief, TDS Telecom could not collect on any liquidated debt incurred without the bankruptcy court's express permission. The bankruptcy court denied Halo's motion to further stay the proceedings pending its appeal to the Fifth Circuit. On January 26, 2012, the district court remanded this action back to the Commission.

The district court concluded that action before the Commission was not removable, citing similar rulings from three other district courts. The court determined that TDS Telecom's request to have the Commission issue cease and desist orders to prevent Defendants from acting in Georgia is clearly within the State's regulatory power. Further, as the court recognized, the Commission is expressly given jurisdiction to regulate telephone companies in Georgia. Finally, the district court found that because Halo removed this action prior to the Commission issuing an opinion, the court had no decision or interpretation to review. Consequently, the court granted TDS Telecom's motion to remand the action to the Commission.

B. AT&T Complaint

On February 3, 2012, BellSouth Telecommunications, LLC d/b/a AT&T Georgia ("AT&T Georgia"), filed a complaint as Intervenor against Halo. In its Complaint, AT&T Georgia alleges that Halo violated the parties' wireless interconnection agreement ("ICA") by "sending large volumes of traffic to AT&T Georgia that does not originate on a wireless network," even though such action is not authorized by the ICA. (AT&T Complaint, p. 1) AT&T also alleged that Halo altered or deleted call detail information. *Id.* at 4-5. Furthermore, AT&T alleged that Halo has refused payment of access charges on non-wireless originated traffic. *Id.* at 5-6. Finally, AT&T alleged that Halo has not paid for transport facilities provided under the parties' ICA. *Id.* at 6.

AT&T requested that the Commission find that it is excused from further performance under the parties' interconnection agreement as a result of these breaches, find that Halo is liable to AT&T for access charges on the interstate and interLATA landline traffic it sent to AT&T and find that Halo is liable for the cost of interconnection facilities it obtained from AT&T. *Id.* at 6-7.

[1] After a determination that the Atlanta suit involved the same parties and issues, it was transferred to Gainesville. In its final order, the district court consolidated the cases and addressed them collectively in granting TDS Telecom's motion to remand.

C. Halo's Partial Motion to Dismiss

On March 12, 2012, Halo moved to dismiss Counts I through III of AT&T's complaint. In its Motion, Halo made a preliminary statement that it has an FCC license to provide commercial mobile radio services ("CMRS"). (Motion, pp. 1-2). Halo also stated that it sells this service to Transcom Enhanced Services. *Id.* at 2. Courts of competent jurisdiction have previously ruled that Transcom is an enhanced service provider. *Id.* at 3. Halo asserted that state commission cannot undertake to interpret or enforce federal licenses. *Id.* at 6. The Commission denied Halo's Motion.

D. Hearings on Merits of Complaints and Post-Hearing Briefs

The Commission held evidentiary hearings on this matter on April 25-26, 2012. TDS Telecom presented the testimony of Thomas McCabe, Manager – State Government Affairs, Linda N. Robinson, Manager- Carrier Relations and Raymond Drause, Senior Wireless Engineer at McCall-Thomas Engineering Company. AT&T sponsored the testimony of Mark Neinast, Associate Director – Network Regulatory in AT&T's Network Planning and Engineering Department, and J. Scott McPhee, Associate Director – Wholesale Regulatory Policy & Support for Pacific Bell Telephone Company d/b/a AT&T California. Robert Johnson and Russ Wiseman, President and CEO of Halo, testified on behalf of Transcom and Halo respectively.

On May 29, 2012, the parties submitted post-hearing briefs. TDS Telecom requested the following relief:

1. Find that Halo is delivering toll traffic to the TDS Telecom Companies and that said toll traffic is subject to lawfully tariffed access charges;

2. Certify that finding to the Bankruptcy Court in Texas;

3. Find that Halo and Transcom are providing intrastate telecommunications service without authority from the Commission;

4. Order that Halo and Transcom immediately cease and desist operations in Georgia until the necessary and proper authority is obtained from the Commission;

Given that TDS Telecom, subtending the AT&T Tandem, is directly affected by the AT&T/Halo interconnection agreement, but is not a contractual party to that agreement, the companies also request that the Commission:

1. Issue an order providing that:

(a) Prior to providing non-CMRS telecommunications service in Georgia - e.g., the toll traffic delivery service that Halo currently provides in Georgia, Halo must order

from AT&T such trunk groups as are determined by AT&T to be necessary for the proper routing and recording of all traffic delivered by Halo to the AT&T tandems for termination on the TDS Companies' networks and cooperate with AT&T in the provisioning of such trunk groups; and

(b) Route traffic properly over the trunk groups that it has ordered from and have been provisioned by AT&T; and

(c) Transmit accurate calling party number, charge number and JIP for the calls it delivers to AT&T for termination on the TDS Companies' networks;

2. Issue an order requiring AT&T to immediately block all traffic delivered by Halo to the AT&T tandems for termination on the TDS Telecom Companies' networks, upon notice from the Commission, in the event that Halo fails to comply in any way with the Commission's orders issued in this docket;

3. Issue an order requiring Halo to pay all costs of AT&T, the TDS Telecom Companies and any third parties associated with the blocking of traffic in the event AT&T blocks traffic delivered by Halo to the AT&T Tandems for termination on the TDS Telecom Companies' networks pursuant to a Commission order; and

4. To the extent that Transcom and/or Halo do not comply with the Commission Order, commence legal action to enjoin Halo from providing unauthorized telecommunications services in Georgia, in the event that Halo fails to immediately cease and desist providing telecommunications services in Georgia until Halo has sought and obtained proper authority to provide telecommunications services in Georgia.

(TDS Brief, pp. 59-60).

In its Post-Hearing Brief, AT&T requested that the Commission grant the following relief:

(a) Find that Halo has materially breached the ICA by (1) sending landline-originated traffic to AT&T, and (2) inserting incorrect Charge Number information on calls;

(b) Find that as a result of these breaches (or either of them), AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo;

(c) Find, without quantifying any specific amount due, that Halo is liable to AT&T for access charges on the interstate and interLATA access traffic it has sent to AT&T;

(d) Find, without quantifying any specific amount due, that Halo is liable to AT&T for interconnection facilities charges that it has refused to pay to AT&T; and

(e) Grant all other relief as is just and appropriate.

(AT&T Brief, p. 28).

In their Joint Post-Hearing Brief, Transcom and Halo argued that the parties had not met their burden to show that access charges applied to the subject traffic. (Post-Hearing Brief, p. 28). In addition, the parties argued that Halo had not breached its agreement with AT&T. *Id.* Finally, the parties argued that neither a certificate of public convenience and necessity nor a certificate of authority was required for the services that they were providing. *Id.*

II. Jurisdiction

In its July 27, 2011 Order in Response to Objections to Jurisdiction, the Commission explained:

> It appears from the pleadings that have been filed thus far that the parties dispute the type of service that is being provided by Halo and Transcom, and the nature of the traffic that is being delivered to TDS Telecom. The jurisdictional determination may be dependent on the findings reached on these factual issues. Therefore, the Commission will proceed with the hearings on the TDS Complaint. Halo and Transcom may raise any jurisdictional objections in the context of the proceeding.

(July 2011 Order, p. 2). As will be discussed more fully below, the Commission finds that a significant portion of the traffic that Transcom and Halo delivered to TDS Telecom and AT&T was intrastate telecommunications service. The Commission has jurisdiction over this type of traffic pursuant to O.C.G.A. §§ 46-2-20, 46-2-21, and 46-5-160 through 174.

III. Findings of Fact and Conclusions of Law

The dispute relates to calls that are terminated on TDS Telecom's network and AT&T's network. Halo is directly interconnected with AT&T, and as a result, it is indirectly interconnected with TDS. When the calling party dials the phone number belonging to either a TDS Telecom or AT&T customer, the call is routed to Transcom, which then hands the call off to Halo. Halo then delivers the call to AT&T. If the dialed number belongs to a TDS customer, AT&T will then route the call to TDS for termination. Halo has an interconnection agreement with AT&T; however, it does not have an agreement with TDS Telecom. Accordingly, AT&T's

complaint involves Halo's alleged breach of the parties' interconnection agreement; whereas, TDS Telecom asserts that Transcom and Halo have constructively ordered access services from its applicable Commission-approved tariff. Despite this difference between the complaints filed by TDS Telecom and AT&T, many of the underlying questions of fact and law are the same.

The Staff recommended that the Commission find that once TDS Telecom and AT&T present a prima facie case that Halo is delivering traffic for termination that would otherwise be subject to access charges, that Halo and Transcom have the burden to demonstrate that the traffic is exempt from such charges. The Commission adopts this recommendation. This conclusion is consistent with the Commission's decision in Docket No. 21905,[2] in which the Commission reasoned that:

> Courts have found that the party raising the affirmative defense has the burden of proof. *Buist v. Time Domain Corporation*, 926 So. 2d 290, 296 (2005). Under this principle, GNAPs had the burden of proof to demonstrate the subject traffic was of such a nature as to preempt the Commission.

As discussed below, TDS and AT&T presented prima facie cases that Halo is delivering traffic for termination that would otherwise be subject to access charges, and Halo and Transcom did not rebut the prima facie cases.

The first question that the Commission will address is whether the methodologies employed by TDS Telecom and AT&T for determining the origin of the subject traffic are reasonable. The volume of Halo traffic that TDS Telecom received for termination increased substantially in December, 2010. TDS Telecom uses the EMI call detail records provided by AT&T to prepare the access bills sent to Halo. Staff recommended that use of the EMI records for billing is reasonable. It is consistent with industry practice to rely upon EMI records for this purpose. (Robinson Pre-filed Direct Testimony, pp. 6-7). The record also indicates that while telephone numbers are not infallible, they provide the best proxy for customer location in the absence of specific evidence on the customer's location. *Id.* at 8. On behalf of Halo, Wiseman testified that because of different technological offerings telephone numbers are no longer reliable indicators of the jurisdiction of the call for rating purposes. (Wiseman Pre-filed Direct Testimony, pp. 7-11). Although acknowledging that the calls described by Wiseman take place, Robinson testified that in her experience such traffic does not represent typical call flow. (Robinson Pre-filed Rebuttal Testimony, p. 8). Robinson testified that in her experience the phone numbers are an accurate indicator of the type of technology used to originate the call in the majority of instances. (Tr. 215-16). AT&T witness, Neinast, testified that call records he

[2] Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc. ("Global Naps")

relied upon were 90 percent accurate in determining the physical origination point of a landline call. (Tr. 485-86).

The Commission finds that the call records relied upon by TDS Telecom and AT&T constitute a reasonable proxy for the technology used and the physical origination point of the call. Although these records are not 100 percent accurate, no party offered persuasive evidence of a more reliable and feasible alternative. Moreover, the Commission is not relying on this evidence to determine that 100 percent of the traffic delivered to TDS Telecom or AT&T was interstate or interLATA landline traffic. Instead, the Commission finds as a matter of fact that a significant percentage of the subject traffic in this proceeding meets that description.

The Commission will next address specifically TDS Telecom's complaint. Once it is determined that a significant percentage of the calls in question are interstate or interLATA landline telecommunications traffic, it is necessary to address the applicability of TDS Telecom's tariffs. Staff recommended that the Commission find that the switched access service offerings in TDS Telecom's intrastate access tariffs apply to the traffic delivered by Halo. TDS Telecom has sought to collect toll charges under its Commission-approved intrastate access tariffs for the toll traffic delivered by Halo that originated and terminated in Georgia. TDS Telecom's intrastate access tariff defines the term "customer" to mean "any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users." Further, Staff recommended that the Commission find that Halo "constructively ordered" the switched access services set forth in TDS Telecom's intrastate access tariffs. The Commission adopts these Staff recommendations. In *Advamtel, L.L.C. v. AT&T Corp.,* 118 F.Supp.2d 680, 685 (E.D. Va. 2000), the Court articulated the constructive ordering doctrine, "under which a party 'orders' a carrier's services when the receiver of services (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services." The first component is met because Halo is directly interconnected with AT&T and indirectly interconnected with TDS Telecom. The second component is met because the record does not show that Halo took any steps to prevent the receipt of the switched access services. Finally, the record shows that the services Halo received from TDS Telecom most closely match the Feature Group D services from TDS Telecom's access tariff. (Tr. 157, 196-97).

Staff recommended that the Commission find that the communication that has been discussed above constitutes a single call. In other words, Staff recommended that the Commission reject the argument that Transcom originates a second call when it hands the call off to Halo. The Commission adopts this Staff recommendation. The relevance of this argument is that Halo and Transcom argue that Transcom is an enhanced service provider, and that calls originated by Transcom are exempt from access charges. Therefore, Halo and Transcom argue that it does not owe access charges on these calls because they are initiated by Transcom. Halo and Transcom base their argument, in part, on *Bell Atl. Tel. Cos. v. FCC,* 26 F.3d 1 (D.C. Cir. 2000), in which the Court concluded that the FCC did not adequately explain its bases for applying an "end-to-end" analysis for calls to internet service providers and remanded the matter

back to the FCC. This case does not support Halo and Transcom's position in this case that the call initiated by the dialing party is terminated when it reaches Transcom, and then Transcom initiates a second call. First, *Bell Atl.* involved internet service providers, and Transcom is not an ISP. Second, the *Bell Atl.* Court did not hold that the ISP originated a second call. Instead, it merely found that the FCC did not sufficiently explain its position.

Moreover, in its *Connect America Order,*[3] the FCC held the following:

> 1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common Carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA." It further asserts that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle," this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that "it is unclear whether the intraMTA rules would even apply in that case."
>
> 1006. We clarify that a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position. [Footnotes omitted].

In the above-paragraphs, the FCC is very clear that what Transcom and Halo are doing does not constitute originating the call. The Staff's recommendation on this point is consistent with the

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[3] *Connect America Fund,* FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011 (*"Connect America Order")*

recent decision of the Tennessee Regulatory Authority. Based on Halo's *ex parte* filings with the FCC, the TRA concluded that the FCC was aware of Halo's re-origination theory when it issued the *Connect America Order*. (McPhee Direct Ex JSM-9). The FCC has previously rejected similar ESP-origination theories. *See,* Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services,* 20 FCC Rcd. 4826 (2005) *aff'd, AT&T Corp v. FCC,* 454 F. 3d 329 (D.C.Cir. 2006).

Furthermore, TDS Telecom witness Drause, testified that the equipment that Transcom uses at its tower sites is not capable of originating a phone call. Transcom equipment might be used to transport a call, but unlike a wireless handset, it does not contain the intelligence necessary to actually originate a phone call on its own. (Tr. 250).

For all of the reasons discussed above, the Commission concludes that the calls at issue in this proceeding constitute a single call. The clear language of the FCC Order together with the factual testimony in the record supports the conclusion that the calls are not originated by Transcom. Therefore, even if Transcom was an ESP, it would not alter the Commission's conclusions with regard to its jurisdiction over the subject traffic, Transcom and Halo's liability with regard to the subject traffic, or the alleged breach by Halo of its interconnection agreement with AT&T. Furthermore, as discussed above, the evidence shows that a majority of the traffic at issue was originated through a landline provider and not a CMRS provider.

Now that it has been determined that the communications in question constitute a single call and that a significant portion of the traffic originated as traditional landline telecommunications service, the Commission must address whether the jurisdictional rating of a call may be impacted by any changes to the content in the middle of delivering the call. On this point, the Commission adopts the Staff's recommendations that the jurisdictional rating of the call is based on the beginning and end points of the call and that calls that are "IP-in-the-middle" are still subject to access charges. The Commission concludes that these recommendations are consistent with the Commission's Order Adopting in Part and Modifying in Part the Hearing Officer's Initial Decision in Global Naps.

In addition, Transcom has argued that it is exempt from access charges because it is an enhanced service provider. Given the Commission's finding that Transcom is not originating the call, regardless of Transcom's ESP status, it would owe access on the subject traffic as well as being in breach of its interconnection agreement with AT&T. Nevertheless, the Commission adopts Staff's recommendation to find that Transcom is not acting as an ESP with regard to the traffic at issue in this docket. In order to be acting as an "ESP," Transcom must be providing an "enhanced service," which is defined as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted

information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.

47 C.F.R. Section 64.702(a). In order to be an enhanced service, the FCC has held that the information provided cannot be merely incidental to the telecommunications service, but instead, it must be the "essential service provided." *AT&T 900 Dial-It Services and Third Party Billing and Collection Services,* File No. ENF-88-05, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3431, ¶ 20 (CCB 1989). The record reflects that Transcom's service is not the essential service provided, but is instead what is commonly referred to as "call conditioning." (Drause Rebuttal Pre-filed Testimony, pp. 17-18). Furthermore, the evidence shows that the calling party does not know about Transcom's involvement in the call. In *AT&T Calling Card,* the FCC held that an advertising message did not constitute an enhanced service because it was "provided automatically, without the advance knowledge or consent of the customer, there is no 'offer' to the customer of anything other than telephone service, nor is the customer provided with the 'capability' to do anything other than make a telephone call." (¶ 15). Application of this standard to the current case shows that Transcom is not providing an enhanced service.

The Commission adopts Staff's recommendation to conclude that AT&T is not barred from raising the issue that Transcom is not an enhanced service provider for the reasons set forth in its Order Denying Partial Motion to Dismiss. Although Halo and Transcom argue that the Commission only addressed that the issue of res judicata, and did not address collateral estoppel. Halo and Transcom argue that collateral estoppel does not require that the prior litigation involve the identical parties. However, the case law relied upon by the Commission does include identical parties as a requisite for collateral estoppel. *See, Body of Christ Overcoming Church of God, Inc. v. Brinson,* 287 Ga. 485, 486 (2010). Moreover, the identity of the parties was not the only criterion for collateral estoppel that this case failed to satisfy. The Commission also found that it was not the same cause of action. Finally, as stated above, because Transcom does not originate the subject traffic, the question of whether it is an enhanced service provider does not impact the resolution of the issues before the Commission.

Turning next to the specific counts in AT&T's Complaint, the Commission adopts Staff's recommendation to find that Halo is sending landline originated traffic to AT&T in breach of the parties' interconnection agreement. The agreement only allows Halo to send AT&T traffic that originates on wireless equipment. AT&T took the following steps to analyze whether the calls were landline or wireless originated:

1. For each call, [AT&T] first identified the 10-digit Calling Party Number ("CPN") of the calling party (which is one of the SS7 data fields on each call).

2. [AT&T] then looked in the Local Exchange Routing Guide ("LERG")[4] to find the carrier that holds the NPA-NXX code for that originating CPN.

3. Because telephone numbers can be ported (*i.e.*, transferred from one carrier to another), [AT&T] then looked at the Local Number Portability ("LNP") database to see whether the originating number had been ported to some carrier other than the one that owned the NPA-NXX.

4. At that point, [AT&T] knew who the originating carrier was. Based on the type of originating carrier (wireless or landline, as specified by the originating carrier in the LERG), [AT&T] also knew whether the call was a landline-originated call or a wireless-originated call.

5. [AT&T] could also determine, based on the end-points of the call and type of call, which intercarrier compensation rate should have applied (*i.e.*, reciprocal compensation or access charges). Our focus, however, was on whether traffic was landline-originated or wireless-originated.

(Neinast Pre-filed Direct Testimony, pp. 13-14).

The call data analyzed for three different periods using the industry's Local Exchange Routing Guide and the North American Number Portability database shows that 74%, 75% and 60% of the calls delivered to AT&T by Halo originated as landline calls. *Id.* at 14. Even though the percentages should be adjusted downward to account for the fact that the LERG will reflect certain types of numbers that have been assigned to services used by customers on wireless devices as being landline, the adjustment would not be substantial. Moreover, the parties' agreement does not allow Halo to send any landline traffic, and Halo has admitted to sending AT&T calls that originated on landline networks. (Wiseman Pre-filed Direct Testimony, p. 26).

The Commission adopts Staff's recommendation that the Commission find that Halo breached its interconnection agreement with AT&T by sending inaccurate call information. Call information includes the phone number of the person that originated the call, which is referred to as the Calling Party Number or "CPN." It also can include a different number for the person or entity that is financially responsible for a call, which is the Charge Number or "CN." Halo inserted Transcom's CN into the call record on every call it sent to AT&T, even though Transcom is not the party financially responsible for the call. (Tr. 317). This resulted in making the calls appear wireless and local, regardless of whether they actually were. *Id.*

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[4] The LERG is a national routing database that stores information necessary to properly route traffic throughout the United States. It displays, for each NPA-NXX, the carrier to which that NPA-NXX is assigned, the tandem switch for routing interexchange and local traffic, and other pertinent information.

The Commission adopts Staff's recommendation to find that Halo has refused to pay AT&T for interconnection facilities provided by AT&T. Cost responsibility is based on the amount of traffic sent by each carrier.

Staff also recommended that the Commission find that Halo is not providing CMRS to Transcom. Therefore, the Staff recommended that the Commission find that Halo is providing interexchange telecommunications service. The term "mobile station" is defined as "a radio-communication station *capable of being moved and which ordinarily does move.*" 47 U.S.C. § 153(34) (emphasis added). The evidence showed that the customer equipment used by Transcom and Halo is mounted on a pipe that is attached to a building near the base of the tower. The testimony of witness Drause demonstrated that it would not be realistic to provide mobile service using that equipment. (Tr. 249-53). Based on this testimony, the Commission adopts Staff's recommendation.

The Commission also adopts Staff's recommendation to find that Halo and Transcom are providing intrastate telecommunications service without the required certification, and, pursuant to its authority under O.C.G.A. § 46-5-45 and 46-5-163(a), to order Transcom and Halo to cease and desist the provision of intrastate telecommunications service unless and until they receive certificates to do so from this Commission. O.C.G.A. § 46-5-45 states:

> Whenever any person is engaged in or is about to engage in the construction, operation, or acquisition of any telephone line, plant, or system without having secured a certificate of public convenience and necessity as required by Code Section 46-5-41, any interested person may file a complaint with the commission. The commission may, with or without notice, make its order requiring the person complained of to cease and desist from such construction, operation, or acquisition until the commission makes and files its decision on the complaint or until the further order of the commission. The commission may, after a hearing conducted after the giving of reasonable notice, make such order and prescribe such terms and conditions with respect thereto as are just and reasonable.

O.C.G.A. § 46-5-163(a) provides:

> A telecommunications company including a telecommunications services reseller shall not provide telecommunications services without a certificate of authority issued by the commission. *The provisions of Code Section 46-5-45 shall apply in circumstances where a telecommunications company is providing telecommunications services without a certificate issued by the commission.*

(emphasis added). Halo and Transcom have been engaged in the operation of telephone plant, line and system and have been providing telecommunications services in Georgia. Neither company has received certification from this Commission.

The Commission adopts Staff's recommendation that the Commission find that Halo is not providing a transit service. Tandem transit traffic is the exchange of local traffic, but Halo is delivering interstate and intrastate toll traffic to AT&T, and indirectly to TDS Telecom. Halo's reliance on the Connect America Order is misplaced. The FCC stated that a carrier that provides a transit service is not the originating carrier for purposes of reciprocal compensation. (Connect America Order, ¶ 1106). The Order does not indicate that Halo is a transiting provider.

With regard to the specific relief sought by TDS Telecom and AT&T, Staff recommended the following:

A. TDS Telecom's Requested Relief:

1. Find that Halo is delivering toll traffic to the TDS Telecom Companies and that said toll traffic is subject to lawfully tariffed access charges;

   Staff recommended granting this requested relief.

2. Certify that finding to the Bankruptcy Court in Texas;

   Staff recommended granting this requested relief.

3. Find that Halo and Transcom are providing intrastate telecommunications service without authority from the Commission;

   Staff recommended granting this requested relief.

4. Order that Halo and Transcom immediately cease and desist operations in Georgia until the necessary and proper authority is obtained from the Commission;

   Staff recommended granting this relief.

5. Issue an order providing that:

   (a) Prior to providing non-CMRS telecommunications service in Georgia - e.g., the toll traffic delivery service that Halo currently provides in Georgia, Halo must order from AT&T such trunk groups as are determined by AT&T to be necessary for the proper routing and recording of all traffic delivered by Halo to the AT&T tandems for termination on the TDS Companies' networks and cooperate with AT&T in the provisioning of such trunk groups;

   (b) Route traffic properly over the trunk groups that it has ordered from and have been provisioned by AT&T; and

(c) Transmit accurate calling party number, charge number and JIP for the calls it delivers to AT&T for termination on the TDS Companies' networks;

Staff's recommendation with regard to AT&T's requested relief adequately addresses this request.

6. Transmit accurate calling party number, charge number and JIP for the calls it delivers to AT&T for termination on the TDS Companies' networks;

Staff's recommendation with regard to AT&T's requested relief adequately addresses this request.

7. Issue an order requiring AT&T to immediately block all traffic delivered by Halo to the AT&T tandems for termination on the TDS Telecom Companies' networks, upon notice from the Commission, in the event that Halo fails to comply in any way with the Commission's orders issued in this docket;

Staff's recommendation with regard to AT&T's requested relief adequately addresses this request.

8. Issue an order requiring Halo to pay all costs of AT&T, the TDS Telecom Companies and any third parties associated with the blocking of traffic in the event AT&T blocks traffic delivered by Halo to the AT&T Tandems for termination on the TDS Telecom Companies' networks pursuant to a Commission order; and

Staff recommended that the Commission deny this request.

9. To the extent that Transcom and/or Halo do not comply with the Commission Order, commence legal action to enjoin Halo from providing unauthorized telecommunications services in Georgia, in the event that Halo fails to immediately cease and desist providing telecommunications services in Georgia until Halo has sought and obtained proper authority to provide telecommunications services in Georgia.

Staff recommended that the Commission deny this request.

B. AT&T's Requested Relief:

1. Find that Halo has materially breached the ICA by (1) sending landline-originated traffic to AT&T, (2) inserting incorrect Charge Number information on calls, and (3) failing to pay for interconnection facilities;

2. Find that as a result of these breaches, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo;

3. Find that Halo is liable to AT&T for access charges on the interstate and interLATA landline traffic it has sent to AT&T;

4. Find that Halo is liable for the cost of interconnection facilities it has obtained from AT&T Georgia;

Staff recommended that the Commission grant AT&T's requested relief.

The Staff's recommendations with regard to the specific relief requested is consistent with its recommendations on the issues addressed previously in this Order. Therefore, the Commission adopts Staff's recommendation with regard to the relief requested by the parties for all of the reasons stated throughout the order.

IV. Ordering Paragraphs

WHEREFORE IT IS ORDERED, that the Commission has jurisdiction over the Complaints filed by TDS Telecom and AT&T.

ORDERED FURTHER, that that Halo and Transcom are providing intrastate telecommunications service without authority from the Commission. The Commission will certify this finding to the Bankruptcy Court.

ORDERED FURTHER, that Halo is delivering toll traffic to the TDS Telecom Companies and said toll traffic is subject to lawfully tariffed access charges

ORDERED FURTHER, that Halo and Transcom shall immediately cease and desist operations in Georgia until the necessary and proper authority is obtained from the Commission

ORDERED FURTHER, that Halo "constructively ordered" the switched access services set forth in TDS Telecom's intrastate access tariffs.

ORDERED FURTHER, that Halo has materially breached its interconnection agreement with AT&T by (1) sending landline-originated traffic to AT&T, (2) inserting incorrect Charge Number information on calls, and (3) failing to pay for interconnection facilities. As a result of these breaches, AT&T is excused from further performance under the parties' interconnection agreement and may stop accepting traffic from Halo;

ORDERED FURTHER, that Halo is liable to AT&T for access charges on the interstate and interLATA landline traffic it has sent to AT&T.

ORDERED FURTHER, that Halo is liable for the cost of interconnection facilities it has obtained from AT&T Georgia

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, oral argument, or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order(s) as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 17th day of July, 2012.

Reece McAlister
Executive Secretary

7-17-12
Date

Tim G. Echols
Chairman

7-17-12
Date

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2011-304-C - ORDER NO. 2012-516

JULY 17, 2012

IN RE:	Complaint and Petition for Relief of BellSouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Incorporated for Breach of the Parties' Interconnection Agreement	)))))	ORDER GRANTING RELIEF AGAINST HALO WIRELESS

This matter comes before the Public Service Commission of South Carolina ("Commission") on the July 29, 2011, filing by AT&T South Carolina (or "AT&T") of a Complaint against Halo Wireless, Inc. ("Halo"), alleging various breaches of the parties' interconnection agreement ("ICA"). AT&T South Carolina alleges that Halo has breached the parties' ICA by (1) sending non-wireless-originated traffic to AT&T South Carolina; (2) sending inaccurate call information to AT&T South Carolina; and (3) failing to pay for various interconnection facilities. AT&T South Carolina seeks various remedies for these alleged breaches, as discussed below.

Halo answered the Complaint on January 20, 2012 (after Halo removed the case to federal district court and the court then remanded the proceeding back to this Commission). Also on January 20, 2012, Halo filed a Partial Motion to Dismiss Counts I, II, and III of AT&T's Complaint. That Motion was denied on February 15, 2012. On February 27, 2012, Halo requested an abatement of the proceeding, and the Hearing Officer denied that request on March 1, 2012.

On April 18, 2012, the Commission held an evidentiary hearing on AT&T South Carolina's Complaint. AT&T South Carolina was represented by Patrick W. Turner, Esq., and J. Tyson Covey, Esq. Halo was represented by W. Scott McCollough, Esq., Jennifer M. Larson, Esq., and John J. Pringle, Jr., Esq. The Office of Regulatory Staff ("ORS") was represented by Nanette S. Edwards, Esq. The South Carolina Telephone Coalition ("SCTC") was represented by M. John Bowen, Jr., Esq. and Margaret M. Fox, Esq. AT&T South Carolina presented the testimony of J. Scott McPhee, Mark Neinast, and Raymond Drause. Halo moved to strike the AT&T South Carolina testimony on April 6, 2012, but the Hearing Officer denied that motion on April 11, 2012. Halo subsequently renewed its Motion to Strike all AT&T testimony at the hearing, and the ruling on the renewal of the Motion was held in abeyance. However, we hereby affirm the Hearing Officer and do once again deny the Motion to Strike.

Halo presented the testimony of Russell Wiseman and Robert Johnson. SCTC moved to strike portions of Mr. Wiseman's summary of his testimony, on the grounds that the summary went well beyond his prefiled testimony. Although we held the motion in abeyance at the hearing, we now grant the motion herein, holding that any portion of Mr. Wiseman's oral summary that was not taken specifically from the material in his prefiled testimony is hereby stricken. This is consistent with S.C. Code Ann. Section 58-3-140 (D) and 26 S.C. Code Ann. Regs. 103-845 (C).

The ORS presented the testimony of Christopher Rozycki at the hearing. The SCTC did not present a witness.

On June 15, 2012, the parties submitted post-hearing Briefs and Proposed Orders. We have carefully reviewed these submissions, the evidence of record, and the controlling law, and this Order sets forth our rulings.

I. FINDINGS OF FACT

1. Halo purports to be a wireless carrier. Tr. 354 (Wiseman Rebuttal).

2. Halo entered into a wireless ICA with AT&T South Carolina which provides, in pertinent part:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to [Halo]'s wireless network for wireless termination by [Halo]; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network. [Emphasis added]. Hearing Ex. 1 (Ex. JSM-5); Tr. 42 (McPhee Direct at 12).

3. Consistent with the provision quoted above, all of the trunks that Halo ordered to deliver traffic to AT&T South Carolina were trunks reserved for wireless traffic only. Tr. 175-76 (Neinast Direct at 9-10).

4. Halo has been sending traffic to AT&T South Carolina that starts on landline networks, and therefore does not start on wireless equipment. Hearing Ex. 1 (Ex. JSM-1 at 5-6); Tr. 326 (Wiseman Rebuttal at 19); Tr. 401-02 (Wiseman Cross-Examination); Tr. 512 (Rozycki Direct at 7). *See also* Tr. at 182 & Hearing Ex. 4 (Ex. MN-3). (AT&T South Carolina's analysis of the calls Halo sent to it during one-week periods in April 2011 and September 2011 showed that 64% to 67% of the calls that Halo delivered to AT&T originated as landline calls).

5. Halo sends long distance traffic to "downstream carriers" such as the rural LECs that are members of the SCTC, via an AT&T tandem switch. (McPhee Rebuttal at

13.) AT&T terminates approximately 52% of the traffic it receives from Halo, and delivers approximately 48% to other carriers for termination. (Exhibit MCN-3). The vast majority (84%) of the traffic delivered to other carriers is destined for the rural LECs like the SCTC's members. (McPhee Rebuttal at 14).

6. Halo and Transcom Enhanced Services, Inc. (Transcom") both have equipment at a tower site in Orangeburg, South Carolina. Tr. 259 (Drause Rebuttal at 4).

7. Every call that comes to Halo in South Carolina first passes from the carrier whose end user customer originated the call to Transcom (typically, indirectly through intermediate carriers) at one of its four switching stations (in Dallas, New York, Atlanta, and Los Angeles). *See* Tr. 315 (Wiseman Rebuttal at 8); Hearing Ex. 4 (Ex. MN-6) Tr. 38 (McPhee Direct at 8).

8. Transcom then sends the call to its equipment at the Orangeburg tower site, *see* Tr. 315 (Wiseman Rebuttal at 8); Hearing Ex. 4 (Ex. MN-6), where Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment. Tr. 262 (Drause Rebuttal at 7).

9. Halo then sends the call on to AT&T South Carolina's tandem switch for termination to an AT&T South Carolina end-user or to be passed on to a third-party carrier for termination. Tr. 260-61 (Drause Rebuttal at 5-6).

10. There is no relationship between Transcom and any of the calling parties that made these calls. Tr. 407-08 (ORS's cross-examination of Wiseman); Tr. 442 (Johnson Rebuttal at 10).

11. The ICA requires call information like Calling Party Number ("CPN") and Charge Number ("CN") to be accurate so the parties can accurately bill one another. Tr. 52-53 (McPhee Direct at 22-23) & Hearing Ex. 1 (Ex. JSM-4 at § XIV.G).

12. Until the end of 2011, Halo inserted a CN assigned to Transcom into the call record on every call it sent to AT&T. Tr. 338 (Wiseman Rebuttal at 31); Tr. 407 (Wiseman); Tr. 200 (Neinast Direct at 34).

13. In every case, the CN Halo inserted was local to (*i.e.*, in the same MTA as) the number the call was being terminated to. Tr. 200 (Neinast Direct at 34).

14. Section V.B of the ICA provides:

> [AT&T] and [Halo] will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement or the General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended from time to time. [AT&T] will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of [AT&T] originated Local traffic to [Halo]'s POI within [AT&T]'s service territory and within the LATA (calculated based on the number of minutes of traffic identified as [AT&T]'s divided by the total minutes of use on the facility), and [Halo] will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic. Hearing Ex. 1 (Ex. JSM-4).

15. Section VI.B.2.b of the ICA provides:

> [AT&T] will bill [Halo] for the entire cost of the facility. [Halo] will then apply the [AT&T] originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by [AT&T] to [Halo]. [Halo] will invoice [AT&T] on a monthly basis, this proportionate cost for the facilities utilized by [AT&T]. *Id.*

16. The apportioning of facilities costs applies for the entire facility between AT&T's switch and Halo's switch. Tr. 56 (McPhee Direct at 26).

17. In order to interconnect with AT&T, Halo has ordered and obtained various interconnection facilities from AT&T. Tr. 55 (McPhee Direct at 25).

18. AT&T has billed Halo for those facilities, but Halo has disputed those charges and refused to pay them. Tr. at 54 (McPhee Direct at 24).

19. As of the end of 2011, more than $172,000 in charges for these facilities remained disputed and unpaid. Tr. at 55 (McPhee Direct at 25).

II. CONCLUSIONS OF LAW

1. Transcom is not an Enhanced Service Provider.

2. Transcom does not originate any traffic that it sends to Halo in South Carolina.

3. Halo has materially breached the ICA by: (1) sending landline-originated traffic to AT&T, (2) inserting incorrect CN information on calls; and (3) failing to pay for facilities it has ordered pursuant to the ICA.

4. As a result of these material breaches, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo.

5. Halo is liable to AT&T for access charges on the interstate and interLATA access traffic it has sent to AT&T (though we do not quantify any precise amount due, and find that that is an issue for Halo's bankruptcy proceeding).

6. Halo is liable to AT&T for interconnection facilities charges that it has refused to pay to AT&T (though we do not quantify any precise amount due, and find that that is an issue for Halo's bankruptcy proceeding).

III. DISCUSSION

A. HALO'S TRAFFIC

Halo purports to be a wireless carrier. Halo therefore entered into a wireless ICA with AT&T South Carolina. Tr. 42 (McPhee Direct at 12). The only traffic that the ICA allows Halo to send to AT&T is traffic that originates on wireless equipment. In an amendment entered at the same time as the agreement itself, the ICA states as follows:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on [AT&T's] network or is transited through [AT&T's] network and is routed to [Halo]'s wireless network for wireless termination by [Halo]; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to [AT&T]*** for termination by [AT&T] or for transit to another network. [Emphasis added]. Hearing Ex. 1 (Ex. JSM-5).

Consistent with the provision quoted above, all of the trunks that Halo ordered to deliver traffic to AT&T were trunks reserved for wireless traffic only. Tr. 175-76 (Neinast Direct at 9-10). The evidence, however, is undisputed that Halo has been sending traffic to AT&T South Carolina that starts on landline networks, and therefore does not start on wireless facilities. Halo admits this. Tr. 326 (Wiseman Rebuttal at 19) ("Most of the calls probably did start on other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN."); Tr. 401-02 (Wiseman Cross-Examination); Hearing Ex. 1 (Ex. JSM-1 at 5-6). The Office of Regulatory Staff ("ORS") recognized this as well. Tr. 512. (Rozycki Direct at 7) ("Much of the traffic Halo transports originated as wireline telephone calls.").

In addition, AT&T South Carolina analyzed the calls Halo sent to it during one-week periods in April 2011 and September 2011. Tr. 179 (Neinast Direct at 13). AT&T began its analysis by identifying the CPN on each call received from Halo, *i.e.*, the

telephone number of the person who started the call. AT&T then consulted the industry's Local Exchange Routing Guide ("LERG") and the North American Number Portability ("NANP") database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless. *Id.* at 179-82. Based on this, AT&T was able to determine how many landline-originated calls Halo was sending. *Id.* During the periods reviewed, the call data showed that 64% to 67% of the calls that Halo delivered to AT&T originated as landline calls. *Id.* at 182 & Hearing Ex. 4 (Ex. MN-3). In other words, even though the ICA did not allow Halo to send AT&T any landline-originated traffic, the evidence shows that about two-thirds of the traffic Halo sent to AT&T was landline-originated, and that breaches the ICA.[1]

Halo challenges AT&T's position in two ways. First, Halo contends that AT&T South Carolina's call analyses cannot be used, because it is not certain that every call that AT&T South Carolina treats as originating on a landline network necessarily did originate on a landline network. Specifically, Halo contends that some calls that originate from what appear to be landline numbers could, in some scenarios, actually originate from a wireless device. The scenario Halo relies on is a number that the LERG shows as being owned by Level 3 or Bandwidth.com, which identify themselves as landline carriers in the LERG, but that Level 3 or Bandwidth.com has assigned to Google or Skype, which have services that can be used by customers on wireless devices. Tr.

[1] "Downstream carriers" such as the SCTC's members are impacted as well. Halo sends long distance traffic to those carriers via an AT&T tandem switch. (McPhee Rebuttal at 13.) In fact, AT&T terminates approximately 52% of the traffic it receives from Halo, and delivers approximately 48% to other carriers for termination. (Exhibit MCN-3.) The vast majority (84%) of the traffic delivered to other carriers is destined for the rural LECs like the SCTC's members. (McPhee Rebuttal at 14).

333-35 (Wiseman Rebuttal at 26-28). Based on this, Halo contends that CPNs are unreliable and cannot be used to identify the origination point or originating carrier on any of the calls Halo sends AT&T. *Id.*

We reject Halo's argument. To begin with, the ICA does not allow Halo to send any landline-originated calls to AT&T South Carolina. Even one such call would be a breach. Yet Halo does not deny that it sends at least some landline-originated calls to AT&T South Carolina (except under its other argument, which we discuss below). In addition, the data and methods AT&T used are the same data and methods that the entire industry uses today for determining what AT&T sought to determine. *Id.* There is no better way, and Halo does not suggest that there is. *See* Order, *In re: BellSouth Telecommunications LLC d/b/a AT&T Tennessee v. Halo Wireless, Inc.*, Docket No. 11-00119 , at 17 (Tenn. Reg. Auth., Jan. 26, 2012) ("*Tennessee Halo Order*"), Hearing Ex. 1 (Ex. JSM-8). AT&T South Carolina also proved that Halo's contentions about Level 3 and Bandwidth.com numbers would make no meaningful difference even if they were correct. AT&T South Carolina assumed for the sake of argument that 100% of calls from Level 3 and Bandwidth.com numbers were actually wireless-originated and re-analyzed the call data based on that assumption. Even with this assumption, however, the data still showed that 57% to 59% of the traffic that Halo sent to AT&T was landline-originated. *Id.* at 185-86 & Hearing Ex. 4 (Ex. MN-5).

Halo's second argument, and the one on which it relies the most, is that every call it sends to AT&T South Carolina, regardless of where the call actually starts, should be deemed to be originate as a wireless (and local) call by Transcom at the tower in

Orangeburg, South Carolina where Trasncom hands traffic to Halo. Specifically, Halo contends that whenever a call passes through Transcom, that call is terminated and Transcom then originates a new, local, wireless call before the call reaches Halo. Tr. 329-32 (Wiseman Rebuttal at 22-25); Hearing Ex. 1 (Ex. JSM-1 at 5-9).

Halo and Transcom both have equipment at a tower site in Orangeburg, South Carolina, and the arrangement between them works as follows. Every call that comes to Halo in South Carolina first passes through Transcom's equipment at the Orangeburg tower site. *See* Tr. 315 (Wiseman Rebuttal at 8); Hearing Ex. 4 (Ex. MN-6). Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment. Tr. 262 (Drause Rebuttal at 7). Halo then sends the call on to AT&T South Carolina's tandem switch for termination to an AT&T South Carolina end-user or to be passed on to a third-party carrier for termination. Tr. 260-61 (Drause Rebuttal at 5-6).

To envision how a call flows through this arrangement, we can assume a call begins with a girl picking up her landline phone in California and dialing her grandmother in Columbia, South Carolina. *See* Tr. 189 (Neinast Direct at 23) & Hearing Ex. 4 (Ex. MN-6). That landline call would travel across the country, eventually hit Transcom's equipment at the Orangeburg tower, travel wirelessly to Halo for 150 feet and then be handed off to AT&T, which would terminate the call in Columbia on its landline network and thus enable the girl and grandmother to talk to each other. *Id.*

According to AT&T South Carolina, that call originated with the girl in California, who is the calling party, and is a non-local, landline-originated call, subject to landline access charges. According to Halo, however, when the girl's call reaches

Transcom's equipment in Orangeburg, Transcom terminates the call and then originates a new call to the grandmother that is both local and wireless, and, therefore, is only subject to reciprocal compensation charges. *Id.*; Tr. 315 (Wiseman Rebuttal at 8). Halo makes this argument even though it is undisputed that the calling party (the girl who started the call) has no relationship with Transcom, did not dial Transcom's number, has no idea Transcom is even involved with the call, and ends up talking to the person she dialed in the first place (her grandmother) without dialing any extra numbers or codes. Tr. 194 (Neinast Direct at 28); Tr. 407-08 (ORS cross-examination of Wiseman); Tr. 442 (Johnson Rebuttal at 10).

The logic of Halo's "Transcom origination" theory runs as follows:

1. Transcom is an enhanced service provider ("ESP") under federal law.

2. As an ESP, Transcom is treated like an end-user for purposes of access charges.

3. Therefore, Transcom must be treated as an end user for all purposes.

4. Since Transcom is treated as an end user, all calls must be deemed to terminate to Transcom and originate with Transcom.

5. Therefore, a call from California to Columbia that is routed in the manner discussed above terminates with Transcom, which then originates a new, wireless call, which passes through Halo and then to AT&T in the same MTA as Transcom.

6. Thus, the call that AT&T receives from Halo originated wirelessly, with Transcom, and Halo is not breaching its ICA.

We find that Halo's theory fails for at least four reasons: (1) the FCC (and TRA) have rejected it; (2) there is no authority for the proposition that ESPs originate every call they touch; (3) Transcom is not an ESP in any event; (4) even if Transcom did originate every call, they would still be landline originated calls (in breach of the ICA) and non-local calls that are subject to access charges (which Halo has yet to pay).

In its recent *Connect America Order*,[2] the FCC singled out Halo by name, described Halo's arrangement of having traffic pass through an alleged ESP (*i.e.*, Transcom) before reaching Halo,[3] noted Halo's theory that calls in this arrangement are "re-originated" in the middle by Transcom, and flatly rejected that theory. The FCC's discussion at paragraphs 1003-06 is worth quoting in full:

1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as the "intraMTA rule," also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia,* on the proper interpretation of this rule.

1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.

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[2] *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) ("*Connect America Order*").

[3] The FCC was well aware that Halo was arguing that Transcom is an ESP and therefore must be deemed to originate all calls that pass through it. Halo made this argument explicitly in its *ex parte* submissions to the FCC, which the FCC cited and relied on in the *Connect America Order* as describing Halo's position. *See Connect America Order*, nn. 2120-2122, 2128; Tr. 49-50 (McPhee Direct at 19-20) & Hearing Ex. 1 (Exs. JSM-6 and JSM-7).

1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA."[4] It further asserts that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle," this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that "it is unclear whether the intraMTA rules would even apply in that case."

1006. We clarify that ***a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider***. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that ***the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.*** [Emphasis added, footnotes omitted].

The FCC rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network are somehow "re-originated" and transformed into wireless calls simply by passing through Transcom. In fact, Halo concedes that the FCC rejected its theory. Tr. 314, 318-19, 324, and 330-31 (Wiseman Rebuttal at 7 n.1, 11-12, 17 n.11, and 23-24). The FCC said that a call is originated wirelessly only if the "calling party" – the person dialing the phone number – initiated the call through a wireless carrier. The

[4] The FCC cited two Halo *ex parte* filings for this description. *Connect America Order*, nn. 2120-22. Those make plain that the alleged ESP is Transcom. *See* Tr. 49-50 (McPhee Direct at 19-20) & Hearing Ex. 1 (Exs. JSM-6 and JSM-7).

majority of the calls Halo has been sending to AT&T South Carolina did not originate that way, as AT&T's call studies show.

Agreeing with the FCC, the Tennessee Regulatory Authority also rejected Halo's "Transcom origination" theory in a recent decision in favor of AT&T Tennessee on the identical issue. *Tennessee Halo Order* at 15-17. Among other things, the TRA found, based on Halo's *ex parte* filings in the *Connect America* case, that the FCC was aware of Halo's theory that Transcom originates (or re-originates) every call it touches, and has rejected that theory. *Id.* The TRA's decision sustaining AT&T Tennessee's claims is thorough and well-reasoned.

We further note that Halo's own testimony undermines its "Transcom origination" theory. On questioning by Commissioner Mitchell, Halo witness Mr. Wiseman acknowledged that Halo's theory is inconsistent with long-standing practice in the industry and common sense. Specifically, Commissioner Mitchell asked Mr. Wiseman about a call from one landline customer to another landline customer that is routed, in part, by a micro-radio transmission somewhere in the middle. Tr. 416. Mr. Wiseman testified "[t]he microwave [*i.e.*, wireless] link in that call would not make that call a wireless call." Tr. 417. Similarly, Halo's injection of a 150-foot wireless transmission in the middle of a call from a landline customer in California to a landline customer in Columbia does not make that call a wireless call.

Moreover, even if Transcom were an ESP, Halo has cited no authority supporting its claim that ESPs terminate every call they touch and then originate a new call. If the girl in California picks up her landline phone, dials her grandmother in South Carolina,

and they have a conversation, that is one call, not two calls. No new, separate call exists simply because the girl's call passed through Transcom's equipment somewhere along the way. Tr. 58 (Neinast Direct at 28); Tr. 442 (Johnson Rebuttal at 10). As Transcom witness Mr. Johnson stated, "a call has only one point of origination, which is the point at which the call originated. You can't change the call's point of origination." Tr. 472 (Johnson Rebuttal at 40). The only call in the scenario discussed above is the call from the girl in California to her grandmother in South Carolina – after all, the girl did not call Transcom. The "point at which th[at] call originated" is California, and California is therefore the "only . . . point of origination." *Accord*, Tr. 514 (Rozycki Direct at 9) ("Many of Transcom's so-called wireless/ESP transmissions first originated as traditional telephone calls and were directed to one and only one terminating telephone number. When the receiving party answered, one individual spoke with another individual, a voice communication occurred.").

Halo's theory rests on the idea that ESPs are deemed to be end-users, and therefore (according to Halo) Transcom must be deemed to originate every call that passes through their equipment. Tr. 329-32 (Wiseman Rebuttal at 22-25). But again, Halo cited no authority that actually supports its position. To the contrary, the FCC has made clear that ESPs "are treated as end-users *for the purpose of applying access charges*"[5] only and "are treated as end users *for purposes of our access charge rules.*"[6]

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[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶ 11 (2001) ("*ISP Remand Order*") (emphasis added, subsequent history omitted).

[6] *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987) ("*Northwestern Bell Order*"). Five years after it was issued, this decision was vacated as moot.

Thus, the "ESP exemption" is a legal fiction that allows ESPs to be treated like end users *for the purpose of not having to pay access charges*. That does not mean an ESP could use this limited "end-user" status to claim it "originates" calls that actually began when someone else picked up a phone and dialed a number. Transcom does not start the call (the calling party does), does not decide who will be called (the calling party does), and does not provide or alter the voice content that the parties exchange on the call (the calling and called parties do). Moreover, the ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP, which means that any ESP exemption for Transcom would not apply to Halo anyway.[7]

The FCC has never held that an ESP "originates" calls that started elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle.[8] To the contrary, the FCC rejected Halo's theory that Transcom originates calls in the *Connect America Order* (¶¶ 1005-06). The FCC also rejected a similar two-call theory several

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7 FCC Rcd. 5644 (1992). The decision still carries weight, however, as the FCC's explanation of the ESP exemption.

[7] *Northwestern Bell Order*, 2 FCC Rcd. 5986, ¶ 21 (1987); *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 24, 42 (Ill. Comm. Comm'n Feb. 11, 2009) (the ESP exemption "exempts ESPs, and *only* ESPs, from certain access charges" and does not apply to carriers that transport calls for ESPs); *Pacific Bell Tel. Co. v. Global NAPs Cal., Inc.*, D.09-01-038, Order Denying Rehearing of D.08-09-027, at 11, 2009 WL 254838, at *5 (Cal. P.U.C. Jan. 29, 2009) ("the [ESP] exemption applies only to the ESP itself, not to the carrier of ESP traffic"); *In re Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas*, Order No. 16, Dkt., Nos. 06-BTKT-365-ARB et al., 2005 Kan. PUC LEXIS 868 *26-27 (Kan. Corp. Comm'n 2005) ("that [ESP] exemption applies to the information service provider, not to carriers . . . that provide service to ESPs and other customers"). Thus, regardless of Transcom's alleged status, there is no basis for *Halo* to claim it is exempt from access charges on the toll traffic it has been sending to AT&T.

[8] Halo claims that the FCC has found that ESPs – as end users – originate traffic even when they receive the call from some other end-point. Tr. 329-32 (Wiseman Rebuttal at 22-25). But Halo does not cite a single FCC decision, or any decision by any other entity, that actually holds this. Halo also tries to compare Transcom to an entity using a "Leaky PBX," as if it that legitimizes Halo's conduct. *Id.* at 314-15. That alleged comparison to a Leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo's and Transcom's current scheme – constituted a form of "access charge avoidance" that needed correction. *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 87 (1983). *See also* Tr. 190-91 (Neinast Direct at 24-25). Simply put, the only time the FCC has actually addressed what Halo does is in the *Connect America Order*, where it rejected the identical argument Halo is making here.

years earlier. In that case, legacy AT&T (pre-BellSouth merger AT&T) provided a calling card service where, during call set-up, the calling party heard an advertisement from the retailer that sold the card. *AT&T Calling Card Order*, 20 FCC Rcd. 4826, ¶ 6.[9] Legacy AT&T argued that this was an enhanced service and that the "first stage of the call," where the caller heard the advertisement, was "separate from the communication between the calling party and the called party," and therefore "created an endpoint" that "divided [the] calling card communication into two calls." *Id.*, ¶¶ 8, 23. The FCC rejected that view, finding that the communication with the alleged enhanced service platform (the advertising message) did not "create an endpoint" and that communication of the advertising message was merely "incidental" to the single call the end user made. *Id.*, ¶ 23. Here, of course, there is no communication at all between Transcom and the calling or called party (*see* Tr. 442 (Johnson Rebuttal at 10)), so there is even less basis for claiming that Transcom creates an endpoint or originates a new call. Indeed, AT&T witness Mr. Drause explained that Transcom's equipment is not even *capable* of originating a call, for it does nothing more than convert IP data into a radio signal. Tr. 263 (Drause Rebuttal at 8). The ORS agrees that Transcom does not originate calls. Tr. 510 (Rozycki Direct at 5) ("Transcom cannot be classified as an originating or terminating end user").

Halo also tries to support its "Transcom origination" theory by citing *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), claiming that the court there functionally held that every ESP is an "origination" "endpoint" on every call. Tr. 314-15, 330-31

[9] Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 (2005) ("*AT&T Calling Card Order*"), *aff'd, AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006)

(Wiseman Rebuttal at 7-8, 23-24). But the decision does not support Halo, and in any event, has no bearing here. The FCC obviously was well aware of the D.C. Circuit's *Bell Atlantic* decision when it issued the *Connect America Order*, but still rejected Halo's theory that all calls originate with Transcom. *Connect America Order*, ¶¶ 1005-06.[10] The court in *Bell Atlantic* also was not dealing with ESPs in general, but rather was dealing with Internet Service Providers in particular, so its discussion cannot be generalized to all alleged ESPs. Transcom is not an Internet Service Provider. Moreover, contrary to Halo's claim, the D.C. Circuit did not actually hold that Internet Service Providers are an origination "endpoint." Rather, it merely remanded to the FCC to consider that alternative as a possible way to look at what those providers do, and on remand the FCC took a different path, so it never had to address the issue.

In addition, Halo's assumption that the D.C. Circuit's discussion of Internet Service Providers in *Bell Atlantic* applies to every ESP is misplaced. For example, in the *AT&T Calling Card Order* the FCC rejected an attempt to compare the "enhanced" calling card service with calls to Internet Service Providers ("ISP-bound calls"). The FCC found that the services were not analogous, because while calls to ISPs "may consist of multiple communications," a call from a calling card user is different, because "the only relevant communication" in that situation "is from the calling card caller to the called party." *AT&T Calling Card Order*, ¶¶ 25-26. The same analysis applies here, where "the only relevant communication" is between the calling party and the called party.

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[10] The FCC also was well aware of the *Bell Atlantic* decision when it issued the *AT&T Calling Card Order*, which rejected the similar argument that an alleged ESP must be deemed to be an origination "endpoint" on calls initiated by others. *AT&T Calling Card Order*, ¶¶ 8, 23.

Halo's testimony also discusses, at some length, certain decisions by bankruptcy courts during Transcom's bankruptcy proceeding several years ago. Halo relies on these rulings for the proposition that Transcom is an ESP under federal law. Tr. 321-24 (Wiseman Rebuttal at 14-17). Those decisions are irrelevant here. Only one of these decisions both involved an AT&T entity and actually held (incorrectly) that Transcom is an ESP. *See* Hearing Ex. 7 (Johnson Rebuttal, Ex. 1). That decision, however, was vacated on appeal and carries no precedential or preclusive effect here. *See id.* at 1; *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases).[11] The Pennsylvania and Tennessee commissions have already evaluated this same issue and found that the bankruptcy rulings have no preclusive effect. *See Tennessee Halo Order* at 22 n.85. We agree with the analysis in those orders and finds that the Transcom bankruptcy rulings do not affect any of the issues actually at stake in this case. Even if Transcom were an ESP, and deemed to be an end-user for purposes of access charges, that would only make a difference in this case if Transcom were therefore deemed to originate (and transform to wireless) every call it touches, regardless of where or on what type of network the call began. None of the bankruptcy rulings addresses, much less decides, that origination issue, which means those decisions have no bearing on this case.

Halo also has argued that Transcom still must be deemed to originate every call it touches even if it is not an ESP. Halo claims that every entity must either be a common carrier or an end-user, that Transcom is not a common carrier and therefore must be an

[11] The other decision, the one confirming Transcom's plan of reorganization, did not resolve any dispute between parties regarding whether Transcom was an ESP – much less whether all calls that pass through Transcom must be deemed to be wireless-originated – because that point was neither contested in the proceedings leading to that order, nor was it necessary to the order. Accordingly, the order has no preclusive effect. *E.g.*, RESTATEMENT (SECOND) OF JUDGMENTS, § 16 comment c.

end-user, and therefore that Transcom originates every call it touches. That theory has no merit even if Transcom were deemed to be an end-user. While it is true that end-users *can* originate calls, there is no legal or logical support for the idea that an alleged end-user must be deemed to originate every call it touches – especially when the call was started by someone else and all the alleged "end-user in the middle" does is pass the call along to Halo. Indeed, if Halo's theory were correct it would mean an end to all access charges, since every carrier would simply have all their calls first pass through an alleged "end-user" in the same local area where the call will be terminated, and then claim that by passing through that "end-user" every single call was originated as a local call. That would be absurd.

Finally, even though Halo's theory fails regardless of whether Transcom is an ESP, the fact is that Transcom does not qualify as an ESP. To be an ESP, Transcom must provide an "enhanced service." The FCC defines "enhanced services" as:

"services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a). In applying this definition, the FCC has consistently held that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in deciding

whether a service is "enhanced" one must use the end-user's perspective.[12] The FCC typically describes services that do not alter the fundamental character of the telephone service as "adjunct-to-basic," meaning they are not "enhanced services." *See AT&T Calling Card Order*, ¶ 16 & n.28.[13]

Transcom claims that it provides enhanced service because it takes steps to minimize background noise on a voice call and inserts "comfort noise" during periods of silence so the parties do not think the call has been disconnected. Tr. 449-50 (Johnson Rebuttal at 17-18). In other words, Transcom does not in any way alter or add to the content of any call. Rather, the parties still say their own words and that is all that gets transmitted. Transcom just tries to make the voice communications more clear. Tr. 497-98 (Johnson). As AT&T's Mr. Neinast explained, suppressing background noise and adding comfort noise are not "enhancements" to the underlying voice telecommunications service. They are merely the same type of call-conditioning that carriers normally provide, and have provided for some time, as an incidental part of voice service (*e.g.*, by using repeaters to boost a voice signal over long distances). Tr. 193-94 (Neinast Direct at 27-28); Tr. 220-22 (Neinast Rebuttal at 17-19).

The FCC's decisions likewise show that Transcom is not providing enhanced service. In the *AT&T Calling Card Order*, for example, legacy AT&T argued that a

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[12] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

[13] Halo has argued that Transcom's service technically cannot be "adjunct-to-basic" because Transcom does not provide basic telephone service. Tr. 384-85 (Wiseman Surrebuttal at 7-8). That is both incorrect and misses the point. Even if Transcom does not provide basic telephone service, that does not mean it therefore must be deemed to provide an enhanced service. The "adjunct-to-basic" terminology is used to distinguish *any* service that does not change the fundamental character of the telephone service the end-user is using, regardless of who provides that basic telephone service.

calling card service was "enhanced" because, during call set-up, the caller heard an advertising message from the retailer that sold the card and was given options to push buttons to do things other than complete the call (*e.g.* buy more calling minutes on the calling card), and also because some of the transport of the call was over AT&T's Internet backbone using Internet Protocol ("IP") technology. *AT&T Calling Card Order*, ¶¶ 6, 11-12. The FCC held that this service was not "enhanced" under FCC Rule 64.702. *Id.*, ¶ 16. As the FCC explained:

> Because the advertising message is provided automatically, without the advance knowledge or consent of the customer, there is no "offer" to the customer of anything other than telephone service, nor is the customer provided with the "capability" to do anything other than make a telephone call.. . . We find that the advertising message provided to the calling party in this case is incidental to the underlying service offered to the card-holder and does not in any way alter the fundamental character of that telecommunications service. From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call . . . .
> *AT&T Calling Card Order*, ¶¶ 15-16 (emphasis added).

We believe that the same analysis applies to Transcom's service, which appears to be even more invisible to the calling party. Transcom's involvement in the calls at issue here occurs "automatically, without the advance knowledge or consent of the customer [*i.e.*, the person making the call]" and Transcom does not provide any service to the calling party. Tr. 442 (Johnson Rebuttal at 10). Nor does the calling party receive from Transcom (or from their own carrier) "anything other than [the capability to] make a telephone call." *Id.*, ¶¶ 16-17.

The FCC also noted that none of the packaging material for the calling card service in the *AT&T Calling Card Order* mentioned the alleged enhancement of using the cards to listen to advertisements, which led the FCC to conclude that no enhancement or

special capability was being "offered" to customers. *AT&T Calling Card Order*, ¶ 15. The same is true here, because none of Transcom's written marketing materials makes any mention of the alleged "enhancements" that Transcom provides, so there is no "offering" of any enhancement. Tr. 222 (Neinast Rebuttal at 19). Halo witness Mr. Johnson conceded that the end-user making the call it not "allow[ed] ... the option of choosing enhancement or not enhancement." Tr. 495. We also find it significant that until recently Transcom's website stated that Transcom's "core service offering" is "Voice Termination Service," not any alleged service enhancements (Tr. 65 (McPhee Rebuttal at 4)); that until recently Transcom's website never mentioned any alleged "enhancements" to service quality (*id.* at 66); and that the alleged enhancements are so incidental that they are not even mentioned in Transcom's contracts with its customers. *See* Tr. 183 (Neinast Rebuttal at 17). It is difficult to credit Transcom's claims about offering enhanced services when Transcom itself did not find them worth mentioning in its marketing materials, customer contracts, or website.

The FCC's *IP-in-the-Middle Order* further shows why Transcom's service is not an "enhanced service." In that case, the FCC held that AT&T's IP telephony service was not an enhanced service, finding that it "(1) use[d] ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originate[d] and terminate[d] on the public switched telephone network (PSTN); and (3) under[went] no net protocol conversion and provide[d] no enhanced functionality to end users due to the provider's use of IP

technology."[14] As the FCC put it, "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service," which mean that the IP-in-the-middle service was not an enhanced service. *IP-in-the-Middle Order*, ¶ 15.

All of those things are also true of Transcom's service. The end-users that make calls do not order a different service (they do not order any service from Transcom (Tr. 442 (Johnson Rebuttal at 10[15])); they do not pay different rates because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, "[f]rom the customer's perspective" – the perspective of the end-user making the call – anything Transcom does is merely "incidental" to or "adjunct to" the underlying voice service provided by the caller's carrier, does not alter the "fundamental character" of that underlying service, and is therefore not an "enhanced service." *AT&T Calling Card Order*, ¶ 16.[16] *See also* Tr. 513-14 (Rozycki Direct at 8-9) (discussing same order).[17]

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[14] *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 1 (2004) ("*IP-in-the-Middle Order*").

[15] Transcom does not serve any actual end users. Rather, it provides wholesale service to carriers and other providers. Tr. 442 (Johnson Rebuttal at 10). Thus, "Transcom does not deal with ultimate consumers [*i.e.*, end users] and does not provide any service to them. Transcom has no relationship with their distant third parties [*i.e.*, end users] at all." *Id.*

[16] Further evidence that Transcom does not alter the "fundamental character" of the calls that pass through it on the way to Halo and AT&T is that the calls still fit easily with the definition of "telecommunications" in 47 U.S.C. § 153(50). The definition states that "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content thereof." The calls at issue here, *e.g.*, a call from a girl in California to a relative in Columbia, involve transmission "between or among points specified by the user" (the girl specifies her landline phone in California and her relative's phone in Columbia), of "information of the user's choosing" (the voice communication with her relative), "without change in the form or content of the information as sent or received," since the words the girl speaks in California are the same words that reach her relative in Columbia.

[17] Halo has suggested that Transcom's service must be an enhanced service under the so-called "contamination" doctrine. Tr. 331 (Wiseman Rebuttal at 24 n.20); Tr. 383 (Wiseman Surrebuttal at 6).

Consistent with the FCC precedent, two state commissions have now held that Transcom's service is not an enhanced service. In a Pennsylvania case, a carrier called Global NAPs ("GNAPS") argued that Transcom was as ESP, making all the same claims that Transcom and Halo make here. The Pennsylvania PUC disagreed and held that Transcom is not an ESP, stating as follows:

> GNAPs argues that Transcom's removal of background noise, the insertion of white noise, the insertion of computer developed substitutes for missing content, and the added capacity for the use of short codes to retrieve data during a call all constitute "enhancements" to the traffic that Transcom passes on to GNAPs. [citation omitted] Palmerton responds that the removal of background noise, the insertion of white noise, and the reinsertion of missing digital packets of an IP-enabled call in their correct location when all the packets of the call become assembled are essentially ordinary "call conditioning" functionalities that are "adjunct to the telecommunications provided by Transcom, not enhancements," and that similar call conditioning has been practiced for a very long time even in the more traditional circuit-switched voice telephony. . . . . In view of the evidence presented and the FCC's rulings in the two AT&T cases referenced above [the *AT&T Calling Card Order* and the *IP-in-the-Middle Order*], we find that Transcom does not supply GNAPs with "enhanced" traffic under applicable federal rules. Consequently, such traffic cannot be exempted from the application of appropriate jurisdictional carrier access charges.[18]

Similarly, in the recent ICA complaint case brought by AT&T Tennessee against Halo, the TRA held that Transcom is not an ESP. The TRA found that:

That doctrine does not apply here. The "contamination doctrine" is an FCC-created concept that applies to protocol processing services by value-added network service providers ("VANs"). The doctrine provides that when such carriers offer enhanced protocol processing services in conjunction with basic transmission service, the enhanced service component "contaminates" the basic service component and that such services, when combined with basic telephone service provided by the same carrier, "contaminate" the telephone service such that the entire service is treated as an "enhanced" service. *Independent Data Comms. Mfrs. Ass'n, Inc.*, 10 FCC Rcd. 13717, at ¶ 18 (1995); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, at n.52 (1986). Thus, in order for that doctrine to apply, the "contaminating" service must itself be an enhanced service under FCC Rule 64.702. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 1986 WL 291966, at ¶¶ 43-44 (noting that if some protocol processing services were defined as not being "enhanced" services, the contamination doctrine would no longer apply to the underlying basic service component). As shown in the text, however, Transcom's service is not an enhanced service under FCC Rule 64.702 and FCC precedent, so there is no "contamination" of anything.

[18] *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, PA PUC Docket No. C-2009-2093336, 2010 WL 1259661, at 16-17 (Penn. PUC, Feb. 11, 2010).

Transcom only reduces background noise and inserts "comfort noise" in periods of silence so that those periods of silence are not mistaken for the end of a call. . . .The alleged "enhancements" that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of those processes are deemed "enhancements" in the sense of an ESP.
Tennessee Halo Order, at 21-22.

The Pennsylvania and Tennessee Commissions' analyses apply with equal force here.

For all of the reasons stated, we find that Transcom is not an ESP. At best, whatever Transcom does is merely "incidental" to the underlying telecommunications service provided by the calling party's carrier, and therefore does not qualify as an enhanced service. *AT&T Calling Card Order*, ¶ 16 & n.28.[19]

Finally, we reject Halo's theory that Transcom performs certain purported "enhancements" on the calls it receives from other carriers and then "originates" the allegedly "enhanced" traffic for delivery to Halo. For all of the reasons set forth above, Transcom neither performs enhancements nor originates traffic. Even if that were not the case, however, the allegedly "enhanced" traffic necessarily would "originate" from the same location that Transcom performed the "enhancements," and Halo's own witness testified that these enhancements take place in Atlanta, Georgia.[20] So even if Transcom

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[19] We also find that even if Transcom were an ESP, the allegedly "enhanced" traffic necessarily would "originate" from the same location that Transcom performed the "enhancements," and Halo's own witness testified that these enhancements take place in Atlanta, Georgia. Tr. 493-94, 498. So even if Transcom did originate "enhanced" traffic, it would originate that traffic in Atlanta, Georgia over landline facilities (remember, the only wireless link in the entire call flow is the 150-foot wireless transmission that occurs in Orangeburg).

[20] On cross-examination by ORS, Halo witness Mr. Johnson explained how Halo and Transcom would handle a call that a Comcast end-user in Greenville placed over a landline device to an AT&T end user in Charleston. Tr. 493-94. Halo's witness testified that Comcast would deliver that call to Transcom in Atlanta, Georgia, and Transcom would then deliver that call to Halo. *Id.* On cross-examination by

did originate "enhanced" traffic, it would originate that traffic in Atlanta, Georgia over landline facilities (because the only wireless link in the entire call flow is the 150-foot wireless transmission that occurs in Orangeburg). This is significant for two reasons. First, even if Transcom did originate enhanced traffic, such traffic would originate over landline (not wireless) facilities, and the ICA prohibits Halo from delivering landline-originated traffic to AT&T. Second, traffic that originates in Atlanta and terminates in Columbia is non-local traffic to which access charges apply.

Based on the foregoing discussion, we find that Halo has materially breached its ICA by sending significant amounts of traffic to AT&T that is not originated on wireless equipment. The evidence also shows that much of this landline-originated traffic was non-local (interstate or interLATA) in nature, that AT&T terminated this traffic for Halo, but that Halo has not paid terminating access charges on such traffic. Because Halo has obtained and AT&T had provided the equivalent of terminating access service, Halo must be held responsible to pay the terminating access charges on that traffic, which are set forth in AT&T's tariffs. We understand that while we declare Halo to be liable for such charges, the actual amount due will be a matter for Halo's ongoing bankruptcy proceeding.

AT&T, Mr. Johnson testified that the "enhancements" Transcom purports to make to the call take place in Atlanta. Tr. 498. Transcom has three other switching stations in addition to the one in Atlanta (these other data centers are in New York, Los Angeles, and Dallas), Tr. 38 (McPhee Direct at 8), and it is conceivable that what Halo erroneously refers to as "enhancements" could take place at any of these data centers. Regardless of the data center at which the purported "enhancements" occur, however, a transmission that purportedly "originates" from that that data center would not be local to South Carolina.

B. CHARGE NUMBER ISSUE

The exchange of accurate call detail information between interconnected carriers is essential. This information includes the phone number of the person that originated the call (the Calling Party Number, or "CPN") and, in some instances, a different number for the person or entity that bears financial responsibility for the call (the Charge Number, or "CN"). Tr. 198-99 (Neinast Direct at 32-33). A Charge Number might be used, for example, when a business has 100 different lines for its employees but wants all calls on those lines to be billed to a single number. *Id.* In that situation, calls from those 100 lines would include call detail that shows both the CPN, for the actual line that originated the call, and the Charge Number, for the billing number that will be charged for the call. *Id.* When the call information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed. *Id.* at 199. Specifically, the CN is used to determine the jurisdiction and rating for the call – that is, whether the call is local or non-local, and therefore whether it is subject to reciprocal compensation or access charges.

The ICA requires call information like CPN and CN to be accurate so the parties can accurately bill one another. Tr. 52-53 (McPhee Direct at 22-23) & Hearing Ex. 1 (Ex. JSM-4 at § XIV.G). Until the end of 2011, however, Halo inserted a CN assigned to Transcom into the call record on every call it sent to AT&T. Tr. 338 (Wiseman Rebuttal at 31); Tr. 407 (Wiseman); Tr. 200 (Neinast Direct at 34). In every case the CN was local to (*i.e.*, in the same MTA as) the number the call was being terminated to, making the call appear to be local, and thus subject to reciprocal compensation rather than access

charges – even when the call was not local. Tr. 200 (Neinast Direct at 34). For example, a call destined to Columbia may begin in California and would therefore have a California CPN, but Halo would insert a CN that is local to Columbia into the call information and thereby make the call appear to be local rather than long-distance. *See* Tr. 200 (Neinast Direct at 34) & Hearing Ex. 4 (Ex. MN-7).

We find that there was no justification for Halo's insertion of a Transcom CN, and that inserting it was a breach of the ICA, because Transcom was not the financially responsible party on any of these calls. A CN is used when one party (say, an employer) takes financial responsibility for calls made by another party (say, its employee). Here, however, it is undisputed that there is no relationship between Transcom and any of the calling parties that made these calls (Tr. 407-08 (ORS's cross-examination of Wiseman)); Tr. 442 (Johnson Rebuttal at 10)), and therefore Transcom is not the financially responsible party on any of these calls, because Transcom does not pay the phone bills for any of those calling parties. Halo therefore violated the ICA and industry practices for call information.

Halo tries to excuse its conduct with the same argument as on the origination issue, namely that Transcom should be deemed to originate all calls and therefore is financially responsible for them. Tr. 340 (Wiseman Rebuttal at 33). But Transcom does not originate calls, as we found above. Furthermore, the FCC has stated that the CN field "may not contain or be populated with a number associated with an intermediate switch, platform, or gateway," yet that is what Halo did. *Connect America Order*, ¶ 714. In addition, Transcom has no relationship with any of the individuals that actually originate

any of these calls, and no reason – or authorization – to have Halo insert a CN to make Transcom financially responsible for these calls originated by strangers through their own separate carriers. Thus, as the TRA recognized, Halo's insertion of a Transcom Charge Number breached the ICA. *Tennessee Halo Order*, at 18.

Halo contends that its breach of the ICA caused no harm to AT&T, but that argument has no merit. Halo first claims there was no harm because the ICA says that AT&T will bill Halo for termination of wireless calls based on a factor for the percentage of calls to be treated as interMTA, rather than billing on a call-by-call basis. Wiseman Rebuttal at 32. That theory fails because the ICA allows that factor to be adjusted based on the actual traffic sent by Halo. McPhee Rebuttal at 24 & Hearing Ex. 1 (Ex. JSM-4, § VII.D). As noted above, the industry practice is to determine the local or non-local nature of the traffic based on the CN (when both CPN and CN are present). Inserting an inaccurate CN thus made it more difficult for AT&T to evaluate Halo's traffic (and, indeed, AT&T might never have discovered that the CN was inaccurate if it had not been investigating whether any of Halo's traffic was landline-originated). Tr. 193-94 (Neinast Rebuttal at 27-28).

Halo also asserts there was no harm to AT&T because the call records that Halo sent to AT&T included the CPN as well as the CN, so AT&T still had the data needed to determine the call's actual starting point. Tr. 339 (Wiseman Rebuttal at 32). We disagree. It is true that, *once it discovered* there was a need to investigate Halo's call information and undertook the cost and burden of conducting that investigation, AT&T was able to use the CPN to determine the true nature of the calls coming from Halo. That

is why this complaint case exists. The point, however, is that AT&T had to conduct a special investigation to do that, because otherwise the industry practice is to treat CN as overriding the CPN. By inserting the inaccurate CN, then, Halo masked the true nature of the calls it was sending AT&T, in breach of the ICA.

C. INTERCONNECTION FACILITIES CHARGES

As noted earlier, Halo entered into a wireless ICA with AT&T, and wireless ICAs are somewhat different from landline ICAs. Tr. 42 (McPhee Direct at 12). One difference concerns cost responsibility for interconnection facilities. In a landline ICA, cost responsibility is typically determined by the point of interconnection ("POI"), in that the CLEC typically is responsible for the facilities on its side of the POI and the ILEC typically is responsible for the facilities on its side of the POI. *Id.* at 56. Wireless ICAs are different. In a wireless ICA, cost responsibility for interconnection facilities typically is shared between the carriers and typically apportioned based on the amount of traffic sent by each carrier. *Id.* The Halo-AT&T ICA is a typical wireless ICA in this regard. Section V.B of the ICA requires AT&T and Halo to pay each other for interconnection facilities based on the proportion of the total traffic that each party sends to the other, stating as follows:

> [AT&T] and [Halo] will share the cost of the two-way trunk group carrying both Parties traffic proportionally when purchased via this Agreement or the General Subscriber Services Tariff, Section A35, or, in the case of North Carolina, in the North Carolina Connection and Traffic Interchange Agreement effective June 30, 1994, as amended from time to time. [AT&T] will bear the cost of the two-way trunk group for the proportion of the facility utilized for the delivery of [AT&T] originated Local traffic to [Halo]'s POI within [AT&T]'s service territory and within the LATA (calculated based on the number of minutes of traffic identified as [AT&T]'s divided by the total minutes of use on the facility), and [Halo] will provide or bear the cost of the two-way trunk group for all other traffic, including Intermediary traffic. Hearing Ex. 1 (Ex. JSM-4).

Section VI.B.2.b, in turn, states:

[AT&T] will bill [Halo] for the entire cost of the facility. [Halo] will then apply the [AT&T] originated percent against the Local Traffic portion of the two-way interconnection facility charges billed by [AT&T] to [Halo]. [Halo] will invoice [AT&T] on a monthly basis, this proportionate cost for the facilities utilized by [AT&T]. *Id.*

The apportioning of facilities costs applies for the entire facility between AT&T's switch and Halo's switch. Tr. 56 (McPhee Direct at 26).

In order to interconnect with AT&T, Halo has ordered and obtained various interconnection facilities from AT&T. Tr. 55 (McPhee Direct at 25). AT&T has billed Halo for those facilities, but Halo has disputed those charges and refused to pay them. As of the end of 2011, more than $172,000 in charges for these facilities remained disputed and unpaid. *Id.* AT&T is entitled to be paid for what it provided.

Halo's main defense is its theory that cost responsibility for interconnection facilities ends at the POI. Tr. 365-74 (Wiseman Rebuttal at 58-67). That might make sense if Halo had a landline ICA, but it does not. The ICA here uses the typical wireless ICA terms, where cost responsibility for interconnection facilities is based on proportional usage. *See* Tr. 55-56 (McPhee Direct at 25-26). It is undisputed that 100% (or very close to 100%) of the traffic between the parties comes from Halo, meaning Halo is responsible for 100% of the costs for the interconnection facilities that is has ordered from AT&T, obtained from AT&T, and used to send traffic to AT&T. *Id.* at 56. We therefore declare that, under the ICA, Halo must pay for those facilities. We hold that the actual amount due will be left up to the bankruptcy court to determine in Halo's bankruptcy proceeding.

Halo's other defense relies on footnote 1 to Section IV.B of the ICA, which states as follows:

> On some occasions [Halo] may choose to purchases facilities from a third party. In all such cases [Halo] agrees to give [AT&T] 45 (forty five) days notice prior to purchase of the facilities, in order to permit [AT&T] the option of providing one-way trunking, if, in its sole discretion [AT&T] believes one-way trunking to be a preferable option to third party provided facilities. Such notice shall be sent pursuant to Section XXIX. In no event shall [AT&T] assess additional interconnection costs or per-port charges to [Halo] or its third-party provider should [Halo] purchase facilities from a third party, e.g. the same charges that [AT&T] would charge [Halo] should it provide the service.

Halo contends that this footnote means that if it obtains any interconnection facilities from a third party, it does not have to pay AT&T for any interconnection facilities, even the ones it admittedly obtains from AT&T. Tr. 391-92 (Wiseman Surrebuttal at 14-15). That position does not make sense and is not consistent with a plain reading of the footnote. Footnote 1 makes clear that if Halo obtains interconnection facilities from a third party, AT&T cannot continue to bill Halo for those same facilities. And AT&T has not billed Halo for any of the facilities Halo obtains from third parties. But footnote 1 cannot logically be read to mean that by obtaining interconnection facility A from a third party, Halo is somehow absolved for paying AT&T for interconnection facilities B, C, and D that it obtained from AT&T. Contracts should not be interpreted to reach such an absurd result.

IV. CONCLUSION

As remedies for Halo's breaches of the ICA, and to prevent further harm from continued breaches, the Commission makes the following findings and grants the following relief:

(a) Halo has materially breached the ICA by: (1) sending landline-originated traffic to AT&T, (2) inserting incorrect CN information on calls; and (3) failing to pay for facilities it has ordered pursuant to the ICA.

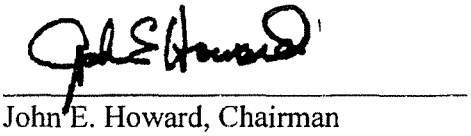
(b) As a result of these breaches, AT&T is excused from further performance under the ICA and may stop accepting traffic from Halo.

(c) Halo is liable to AT&T for access charges on the interstate and interLATA access traffic it has sent to AT&T (though we do not quantify any precise amount due, and we hold that that is an issue for Halo's bankruptcy proceeding).

(d) Halo is liable to AT&T for interconnection facilities charges that it has refused to pay to AT&T (and again, we do not quantify any precise amount due, and we hold that that is an issue for Halo's bankruptcy proceeding).

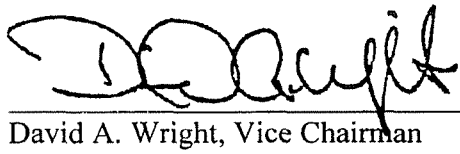
(e) This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



John E. Howard, Chairman

ATTEST:



David A. Wright, Vice Chairman
(SEAL)

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Halo Wireless, Inc.,	)	
	)	
Complainant,	)	
v.	)	
	)	
Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Alma Communications Company, d/b/a Alma Telephone Company, Choctaw Telephone Company, MoKan Dial, Inc., Peace Valley Telephone Company, Inc., and Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	**File No: TC-2012-0331**
	)	
Respondents.	)	

REPORT AND ORDER

Issue Date: August 1, 2012

Effective Date: August 13, 2012

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

Halo Wireless, Inc.,	)	
	)	
Complainant,	)	
v.	)	
	)	
Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, Alma Communications Company, d/b/a Alma Telephone Company, Choctaw Telephone Company, MoKan Dial, Inc., Peace Valley Telephone Company, Inc., and Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	**File No: TC-2012-0331**
	)	
Respondents.	)	

REPORT AND ORDER

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[1] The Craw-Kan Respondents include: Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Rock Port Telephone Company, Seneca Telephone Company, and Peace Valley Telephone Company, Inc.

[2] On June 22, 2012, Public Counsel filed its position statement and requested to be excused from the evidentiary hearing. That request was granted that same day. See EFIS Docket Entry No. 94, *Order*

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REGULATORY LAW JUDGE: Harold Stearley, Deputy Chief Regulatory Law Judge

Granting the Office of the Public Counsel's Motion to be Excused, issued June 22, 2012. EFIS is the Commission's Electronic Information and Filing System.

INTRODUCTION AND SUMMARY

This is a complaint case filed by Halo Wireless, Inc. ("Halo") against the Respondent local exchange telecommunications carriers ("LECs") providing local and exchange access service in the state of Missouri. The Respondents sought to block Halo's telecommunications traffic under the Missouri Public Service Commission's Enhanced Record Exchange (ERE) Rule upon allegations of three independent violations of the ERE Rule: (1) non-payment for compensable traffic, (2) improper delivery of interLATA wireline[3] traffic over the LEC-to-LEC network; and/or (3) failure to provide appropriate originating caller identification information. Halo's complaint seeks to prohibit the Respondents from blocking Halo's traffic under the ERE Rule.

As a part of its response to Halo's complaint, AT&T Missouri filed a counterclaim seeking to cease performance under its interconnection agreement ("ICA") with Halo, and thus in effect to block Halo's traffic, because Halo allegedly materially breached the terms of that agreement by delivering landline traffic. AT&T Missouri also seeks a finding that Halo is liable to AT&T Missouri for access charges on the interexchange landline traffic that Halo delivered to AT&T Missouri for termination to AT&T Missouri's end user customers.

This case was also consolidated solely for purposes of hearing with a complaint case, File No. TO-2012-0035, filed by a group of small rural LECs including Alma Telephone, et al.[4] seeking a Commission ruling that the effect of Halo's ICA with AT&T Missouri on other Missouri carriers is discriminatory and contrary to the public interest.

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[3] In this order, the terms "wireline" and "landline" traffic will be used interchangeably to describe calls that are both originated and terminated by landline customers. "Wireless traffic" describes calls that are originated by a wireless customer and terminated to a landline customer.

[4] The Alma Respondents include: Alma Communications Company d/b/a Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Inc.

In this order, the Commission finds and concludes that Halo has committed a material breach of the ICA with AT&T Missouri by delivering substantial amounts of landline-originated traffic and therefore authorizes and directs AT&T Missouri to immediately cease performance under the ICA with Halo. In addition, Halo is liable to AT&T Missouri for access charges on the interexchange landline traffic that Halo delivered to AT&T Missouri and that AT&T Missouri delivered to its end user customers.

The Commission also finds and concludes that Halo has violated the ERE Rule by: (1) failing to pay or, in AT&T Missouri's case, substantially underpaying the Respondents for compensable traffic, (2) improperly delivering interLATA wireline traffic over the LEC-to-LEC network; and (3) failing to provide appropriate originating caller identification information. Accordingly, this order authorizes and directs the Respondents to immediately begin blocking Halo's traffic pursuant to the ERE Rule.

Because this order grants the relief requested by the RLEC Respondents,[5] at this time the Commission does not need to address Alma, et al.'s claims in File No. TO-2012-0035 that the effect of Halo's ICA with AT&T Missouri has been discriminatory and contrary to the public interest.

BACKGROUND AND PROCEDURAL HISTORY

A. Historical Background of Halo Dispute

1. Prior Blocking of Halo Traffic

In late 2010 and early 2011, small rural LECs ("RLECs") in Missouri became aware that Halo was delivering what appeared to be landline-originated interexchange calls to their exchanges over the LEC-to-LEC network without an approved agreement and without

[5] The RLEC Respondents include both the Craw-Kan Respondents and the Alma Respondents. See Footnotes 1 and 4, *supra*.

paying the Commission-approved tariff rates for such calls.[6] Although Halo claimed that all of its traffic was intraMTA wireless traffic, another group of Missouri RLECs were suspicious of this claim because the amount of traffic Halo was delivering was disproportionately large for a new wireless carrier when compared to the amount of traffic they were receiving from established, national wireless carriers.

Several Missouri RLECs undertook their own analysis of Halo's traffic and found that a substantial portion of the traffic appeared to be landline-originated interexchange traffic.[7] Given the nature of this traffic and Halo's refusal to enter into negotiations to establish an interconnection agreement, in February of 2011 these Missouri RLECs commenced the blocking process for Halo's traffic under the ERE Rule for non-payment.[8] At that time, Halo filed a request with the FCC to address the blocking on an expedited resolution docket, but the FCC declined.[9] As a result, numerous other small RLECs blocked Halo's traffic in 2011 pursuant to the ERE Rule with the assistance of AT&T Missouri.[10]

2. MoPSC Complaint Case Proceedings

In June of 2011, nearly all of Missouri's small RLECs filed two complaint cases against Halo with the Commission. Among other things, those complaint cases sought a determination that Halo's traffic was subject to the appropriate intrastate access rates and

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[6] EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, p. 4; EFIS Docket Entry No.222, Alma et al Exhibit 1, Direct Testimony Molina, p. 5; EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit No. 1, pp. 4-7.

[7] EFIS Appeal Case No. AP11-00682, U.S. District Court for the Western District of Missouri, *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville, Missouri, et al.*, Docket Entry No. 1, Exhibit 12, pp. 2-3.

[8] EFIS Docket Entry No. 223, Alma et al Exhibit 2, Direct Testimony Loges, p. 7; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, p. 8.

[9] EFIS Appeal Case No. AP11-00682, *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville, Missouri, et al.*, Docket Entry No. 60, Suggestions in Support of Defendants Citizens Telephone Company of Higginsville, Missouri et al.'s Motion to Abstain or Dismiss, Attachment A, Letter from FCC Enforcement Bureau, dated June 6, 2011.

[10] *Id.*

the blocking provisions of the ERE Rule. The Commission dismissed those two cases without prejudice after Halo filed the instant complaint case. [11]

Alma et al. also filed a complaint case seeking a determination by the Commission that the transit provisions in Halo's ICA with AT&T Missouri were discriminatory and contrary to the public interest because they allowed Halo to use rural network facilities without an agreement or compensation arrangements. Craw-Kan et al. intervened in the case, designated as TO-2012-0035, which was consolidated with the instant case solely for purposes of hearing.

3. Federal Court Proceedings in Missouri

In response to the RLECs' Commission complaint cases, Halo filed two lawsuits against the RLECs in the United States District Court for the Western District of Missouri. On July 11, 2011, Halo filed the first federal lawsuit seeking a declaratory judgment that the issues related to Halo's activities and operations were within the exclusive jurisdiction of the FCC. Halo's lawsuit sought injunctive relief to prevent the Missouri RLECs from pursuing their claims before this Commission rather than the FCC. Halo's lawsuit was followed on August 11, 2011 by Halo's Suggestions of Bankruptcy and Notice of Stay. The RLECs filed their motions to dismiss on August 19, 2011. On August 22, 2011, Judge Gaitan issued an *Order* ruling that the case was not stayed by Halo's Bankruptcy because the Code's automatic stay does not apply to judicial proceedings, such as Halo's suit, "that were initiated by the debtor."[12] On September 6, 2011, shortly after Judge Gaitan's order was issued, Halo filed a notice of dismissal.

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[11] *Alma Tel. et al. v. Halo Wireless, Inc.*, File No. IC-2011-0385 and *BPS Tel. et al. v. Halo Wireless, Inc.*, File No. TC-2011-0404, *Order Dismissing Complaints without Prejudice,* issued April 25, 2012.

[12] EFIS Docket Entry No. 150, *Halo Wireless v. Citizens Telephone Co. of Higginsville, Mo. et al.*, Case No. 11-cv-00682, *Order*, p. 1.

On August 28, 2011, Halo filed notices of removal of the Missouri RLECs' Commission complaint cases to the Western District of Missouri in Case Nos. 11-cv-04218, 11-cv-04220, and 11-cv-04221. The RLECs filed motions to remand the cases to the Commission which were granted by Judge Laughrey on December 21, 2011. Judge Laughrey's *Orders* stated:

> The Commission has the authority to regulate the subject matter of this dispute, and the Court does not have jurisdiction over Plaintiff's claims until the Commission has rendered a decision for the Court to review. To the extent Defendant argues that Plaintiff's claims should first be decided by the FCC, this argument is mooted by the FCC's recent rulemaking decision rejecting Defendant's position and reaffirming that the power to regulate these issues lies with state agencies.[13]

4. Halo's Texas Bankruptcy Proceedings

On August 8, 2011, Halo filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Texas ("Texas Bankruptcy Court").[14] In the Texas Bankruptcy case, Halo sought a ruling that the multiple state public utility commission complaint proceedings against Halo were stayed by the bankruptcy proceedings. Halo also sought to transfer the Missouri Commission complaint proceedings to the Texas Bankruptcy Court and have them heard in a central adversary proceeding.

5. Texas Bankruptcy Court Order and Fifth Circuit Opinion

AT&T Missouri and the Missouri RLECs, along with many other similarly situated telephone companies, sought a ruling from the Texas Bankruptcy Court that proceedings before numerous state public utility regulatory commissions were not stayed by Halo's bankruptcy filing. The Texas Bankruptcy Court held an initial hearing on September 30, 2011, and it then made its findings of fact and conclusions of law on the record on October

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[13] EFIS Docket Entry No. 151, *BPS Telephone et al. v. Halo Wireless*, Case No. 11-cv-04220, *Order.*

[14] On July 19, 2012, the Texas Bankruptcy Court issued its *Order Converting Halo's Chapter 11 Case to Case under Chapter 7 of the Bankruptcy Code. See* EFIS Docket Entry No. 237.

7, 2011. The Texas bankruptcy court denied Halo's request and issued a ruling that the state public utility commission proceedings could continue under the regulatory power and proceedings exception to the bankruptcy code. Specifically, the bankruptcy court ruled that all state regulatory commission proceedings were excepted from the automatic stay under § 362(b)(4). The bankruptcy court then incorporated its findings of fact and conclusions of law in Stay Exception Orders entered on October 26, 2011, which Halo appealed on that same day.[15]

On June 18, 2012, the United States Court of Appeals for the Fifth Circuit affirmed the Texas Bankruptcy Court's ruling that the numerous actions involving Halo pending before state public utility regulatory commissions could move forward. The Fifth Circuit stated:

> A fundamental policy behind the police or regulatory power exception . . . is to prevent the bankruptcy court from becoming a haven for wrongdoers. . . . If Halo is permitted to stay all of the PUC proceedings, it will have used its bankruptcy filing to avoid the potential consequences of a business model it freely chose and pursued.[16]

Thus, the Fifth Circuit concluded that the Texas Bankruptcy Court's finding that the state commission actions were continued by governmental units was consistent with the statutory language of § 362(b)(4), and was in keeping with the policy for the exception. The Fifth Circuit also observed that the PUC proceedings were being used to enforce the police and regulatory power of the states.

6. FCC Connect America Fund Order

After receiving numerous written comments and several *ex parte* presentations from

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[15] EFIS Docket Entry No. 83, *In the Matter of Halo Wireless, Inc. v. Alenco Communications et al.*, United States Court of Appeals for the Fifth Circuit Case No. 12-40122, *Opinion*, pp. 5-6.

[16] EFIS Docket Entry No 83, *In the Matter of Halo Wireless, Inc. v. Alenco Communications et al.*, United States Court of Appeals for the Fifth Circuit Case No. 12-40122, *Opinion*, p. 26 (citations and quotations omitted).

Halo and many LECs, the Federal Communications Commission's (FCC) November 18, 2011 *Connect America Fund Order*[17] rejected Halo's arguments and found that Halo's practices did not convert landline calls into something else. Specifically, the FCC held, "[T]he 're-origination' of a call over a wireless link in the middle of a call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position."[18] Rather, the FCC clarified that the originating caller remains the appropriate reference point for purposes of intercarrier compensation, and Halo's arrangement did not transform the nature of the calls. Thus, the FCC expressly rejected Halo's "wireless-in-the middle" argument.[19]

B. Procedural History and Travel of the Instant Case

1. Halo Complaint to Dispute RLEC and AT&T Blocking Requests

In February and March of 2012, the RLEC Respondents notified Halo that Halo's traffic would be blocked pursuant to the Commission's Enhanced Record Exchange (ERE) Rule due to Halo's failure to pay for compensable traffic being delivered over the LEC-to-LEC network, improper delivery of interLATA wireline traffic over the LEC-to-LEC network, and/or failure to include appropriate originating caller identification. The RLEC Respondents also notified the Commission's Telecommunications Department as required by the ERE Rule and sought assistance from AT&T Missouri in implementing the block.[20] Subsequently, AT&T Missouri also notified Halo that AT&T Missouri would begin blocking

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[17] *In the Matter of the Connect America Fund*, WC Docket No. 10-90 et al., *Report and Order*, released Nov. 18, 2011.

[18] *Id.* at ¶1006.

[19] Halo appealed the FCC's *Order* as part of a consolidated proceeding in the United States Court of Appeals for the Tenth Circuit, but the FCC's *Order* as it relates to Halo has not been stayed.

[20] *See* EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Wilbert Direct, p. 7 and Ex. 6. EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Loges Direct Testimony, Alma Attachments A and B; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Molina Direct Testimony, Choctaw Attachments A and B, MoKan Attachments A and B.

Halo's traffic pursuant to the ERE Rule due to Halo's failure to pay AT&T Missouri the appropriate rate for its landline-originated traffic.[21] Both the RLEC Respondents and AT&T Missouri notified Halo of Halo's right to contest the blocks by filing a complaint with the Commission pursuant to the ERE Rule.

On April 2, 2012, Halo filed a complaint pursuant to the ERE Rules in response to the traffic blocking requests made by the RLEC Respondents and AT&T Missouri. Halo's complaint sought alternative forms of relief, the first of which was to stay the complaint proceeding until the Texas Bankruptcy Court ruled on the propriety of the blocking notices. Halo also contested, on numerous grounds, the propriety of the blocking notices as well as the Commission's authority to issue relief pursuant to the ERE Rules. Halo also requested expedited consideration of its complaint by the Commission.[22]

On April 3, 2012, the Commission issued an order giving notice of a contested case and directing expedited responses to Halo's request for a stay.[23] Also on April 3, 2012, AT&T Missouri filed notice that it had ceased its blocking preparations pending the Commission's decision in this case.[24]

On April 11, 2012, the Commission issued an order denying Halo's request to stay the proceedings pending resolution of issues before the Texas Bankruptcy Court. The Commission concluded that proceedings before state public utility commissions had not been stayed by the bankruptcy proceedings. The Commission observed that while Halo's bankruptcy may prevent the RLEC Respondents from ever being compensated for Halo's pre-bankruptcy traffic, bankruptcy law does not allow Halo to continue: (a) receiving service

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[21] EFIS Docket Entry No. 1, Halo April 2, 2012 Complaint, Exhibits A through D.

[22] EFIS Docket Entry No. 1.

[23] EFIS Docket Entry No. 3.

[24] EFIS Docket Entry No. 2.

and using RLEC Respondents' Missouri networks without payment, or (b) violating the Commission's ERE Rule.[25] The Commission also noted that the plain language of the bankruptcy code makes clear that the automatic stay does not apply to judicial proceedings initiated by the debtor.[26]

On May 1, 2012, the RLEC Respondents jointly filed a motion to consolidate this action with File Number TO-2012-0035, a complaint case filed by Alma, et al. seeking a determination that the ICA between AT&T and Halo was discriminatory and contrary to the public interest, which had been held in abeyance. On May 2, 2012, Craw-Kan, et al. filed a motion to dismiss, suggesting that Halo could not maintain its suit under Missouri law because Halo had failed to maintain its Certificate of Authority as a Foreign Corporation to operate in Missouri. On May 17, 2012, the Commission issued an order denying Craw-Kan et al.'s motion to dismiss Halo's complaint. The Commission's order granted the RLEC Respondents' motion to consolidate File Number TC-2012-0331 with File Number TO-2012-0035. Accordingly, the Commission reactivated File Number TO-2012-0035 and designated File Number TC-2012-0331 as the lead case.[27]

2. AT&T Counterclaim

AT&T Missouri filed an answer and counterclaim to Halo's complaint which included a formal complaint and request for declaratory ruling seeking an order excusing AT&T Missouri from further performance under its wireless ICA with Halo, based on Halo's material breaches of the ICA. AT&T Missouri alleged that the ICA does not authorize Halo to send AT&T Missouri traffic that does not originate on a wireless network. AT&T Missouri further alleged that Halo breached and is breaching the ICA by sending large volumes of

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[25] EFIS Docket Entry No. 30, p. 6.

[26] EFIS Docket Entry No. 30, p. 6.

[27] EFIS Docket Entry No. 55.

traffic that does not originate on a wireless network, in furtherance of an access charge avoidance scheme; and by failing to provide AT&T Missouri proper call information to allow AT&T to bill Halo for the termination of Halo's traffic. AT&T Missouri also sought an order finding that Halo owes AT&T Missouri the applicable access charges for the non-local landline traffic Halo has sent to AT&T Missouri (without determining any specific amount due).[28]

Halo responded with a motion to dismiss AT&T Missouri's counterclaim.[29] On May 17, 2012, the Commission issued an order denying Halo's motion to dismiss AT&T Missouri's counterclaim.[30]

3. Evidence and Contested Hearing

Halo, the RLEC Respondents, AT&T Missouri, and the Commission Staff ("Staff") all filed written testimony, and all parties except Halo filed an agreed issues list, list of witnesses, and order of cross-examination on June 21, 2012.[31] Halo filed its separate list of issues on June 22, 2012,[32] and all of the parties filed position statements on that same date.[33] On June 25, 2012, Halo filed objections and moved to strike substantial portions of the testimony filed by the witnesses for AT&T Missouri, the Respondent RLECs, and Staff. The evidentiary hearing was conducted on June 26-27, 2012.[34] Ultimately, Halo's

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[28] EFIS Docket Entry No. 45, *AT&T Missouri's Answer, Affirmative Defenses, Counterclaim and Motion for Expedited Treatment*, filed May 2, 2012.

[29] EFIS Docket Entry No. 52.

[30] EFIS Docket Entry No. 55.

[31] EFIS Docket Entry No. 87.

[32] EFIS Docket Entry No. 90.

[33] EFIS Docket Entry Nos. 92-93 and 95-97.

[34] Transcript, Volumes 2 through 5. In total, the Commission admitted the testimony of 17 witnesses and received 29 exhibits into evidence. Proposed findings of fact were filed on July 23, 2012. Reply Briefs were filed on July 30, 2012, and the case was deemed submitted for Commission's decision on that date when the Commission closed the record. "The record of a case shall stand submitted for consideration after the

objections to the other parties' testimony were overruled and its motions to strike were denied by the Commission on July 9, 2012.[35]

The post-hearing procedural schedule required the parties to file proposed orders with proposed findings of fact and proposed conclusions of law no later than July 23, 2012. On July 23, 2012, local counsel for Halo, Daniel Young, on behalf of himself and his colleague Louis Huber, notified the Regulatory Law Judge ("RLJ"), that he was not authorized by his client to proceed with the required filing. None of Halo's other attorneys made a filing on Halo's behalf or contacted the RLJ. And none of Halo's attorneys sought an extension of time, nor have they sought leave to withdraw. Halo did not avail itself of the opportunity to present additional argument to the Commission. The RLJ issued a notice with regard to Halo's failure to comply with this deadline. That notice will be attached to this order as Attachment A.

The final post-hearing procedural deadline was the deadline of July 30, 2012 for the filing of reply briefs. Halo did not file a reply brief, and because Halo had not filed a proposed order on July 23, 2012, the Respondents had no reason to file a reply brief.

FINDINGS OF FACT

An administrative agency, as fact-finder, receives deference when choosing between conflicting evidence.[36] In fact, the Commission "may disregard and disbelieve

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recording of all evidence or, if applicable, after the filing of briefs or the presentation of oral argument." Commission Rule 4 CSR 240-2.150(1).

[35] EFIS Docket Entry No. 210.

[36] *State ex rel. Missouri Office of Public Counsel v. Public Service Comm'n of State*, 293 S.W.3d 63, 80 (Mo. App. 2009).

evidence which in its judgment is not credible even though there is no countervailing evidence to dispute or contradict it."[37]

Appellate courts must defer to the expertise of an administrative agency when reaching decisions based on technical and scientific data.[38] And an agency has reasonable latitude concerning what methods and procedures to adopt in carrying out its statutory obligations.[39] Consequently, it is the agency that decides what methods of expert analysis are acceptable, proper, and credible while satisfying its fact-finding mission to ensure the evidentiary record, as a whole, is replete with competent and substantial evidence to support its decisions.[40]

Additionally, the Commission is entitled to interpret any of its own orders in prior cases as they may relate to the present matter.[41] When interpreting its own orders, and ascribing a proper meaning to them, the Commission is not acting judicially, but rather as a fact-finding agency.[42] Consequently, factual determinations made with regard to the Commission's prior orders receive the same deference shown in relation to all of the Commission's findings of fact. Indeed, even where there are mixed questions of law and

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[37] *Veal v. Leimkuehler* , 249 S.W.2d 491, 496 (Mo. App. 1952), citing to *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116-117, 220 S.W.2d 61, 65 (Mo. banc 1949).

[38] *Citizens for Rural Preservation, Inc. v. Robinett*, 648 S.W.2d 117, 128 (Mo. App. 1982), citing to *Smithkline Corp. v. FDA,* 587 F.2d 1107, 1118 (D.C.Cir.1978); *Cayman Turtle Farm, Ltd. v. Andrus,* 478 F.Supp. 125, 131 (D.C.Cir.1979).

[39] *Id.* citing to *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n,* 539 F.2d 824, 838 (2d Cir.1976), *vacated for mootness,* 434 U.S. 1030, 98 S.Ct. 759, 54 L.Ed.2d 777 (1978).

[40] *Id.*

[41] *State ex rel. Beaufort Transfer Co. v. Public Service Commission of Missouri*, 610 S.W.2d 96, 100 (Mo. App. 1980). *State ex rel. Missouri Pacific Freight Transport Co. v. Public Service Commission*, 312 S.W.2d 363, 368 (Mo. App. 1958); *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 366 (1937).

[42] *Id.*

fact, a reviewing court views the evidence in the light most favorable to the Commission's decision.[43]

Witness credibility is solely a matter for the fact-finder, "which is free to believe none, part, or all of the testimony.[44] The Commission finds that any given witness's qualifications and overall credibility are not dispositive as to each and every portion of that witness's testimony. The Commission gives each item or portion of a witness's testimony individual weight based upon the detail, depth, knowledge, expertise and credibility demonstrated with regard to that specific testimony. Any finding of fact reflecting the Commission has made a determination between conflicting evidence is indicative that the Commission attributed greater weight to that evidence and found the source of that evidence more credible and more persuasive than that of the conflicting evidence.

Bearing these evidentiary principles in mind, the Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact.

A. The Parties

1. Halo

Complainant, Halo Wireless, Inc., is a Texas corporation with its principal place of business at 2351 West Northwest Highway, Suite 1204, Dallas Texas 75220.[45] Halo holds a Radio Station Authorization granted by the FCC on January 27, 2009 providing a

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[43] *State ex rel. Coffman v. Pub. Serv. Comm'n*, 121 S.W.3d 534, 541-542 (Mo. App. 2003). See also *State ex rel. Inter-City Beverage Co., v. Mo. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. 1998).

[44] *State ex rel. Public Counsel v. Missouri Public Service Comm'n*, 289 S.W.3d 240, 247 (Mo. App. 2009).

[45] EFIS Docket Entry No. 1, *Halo Wireless, Inc.'s Formal Complaint in Response to Blocking Notices*, filed April 2, 2012.

nationwide, non-exclusive license qualifying Halo "to register individual fixed and base stations for wireless operations in the 3650-3700 MHz band."[46]

Halo was originally granted a certificate of authority to transact business as a foreign corporation in the State of Missouri by the Missouri Secretary of State on January 29, 2010. Halo's certificate of authority was administratively dissolved by the Secretary of State on August 25, 2010, for failure to file an annual report. Halo filed an Application for Reinstatement with the Secretary of State with the required Certificate of Tax Clearance from the Missouri Department of Revenue, Halo's Annual Registration reports for 2010, 2011, and 2012, and the required rescission fee.[47] The Secretary of State issued a Certificate rescinding the administrative dissolution on June 1, 2012.[48]

2. Transcom

Transcom Enhanced Services, Inc. ("Transcom") is a Texas corporation, with headquarters in Fort Worth, Texas. Transcom and Halo have "overlapping" ownership, with Scott Birdwell, the CEO, chairman and largest single individual owner of Transcom owning 50% of Halo. Russell Wiseman, the president of Halo, reports to a management committee of investor owners consisting of Scott Birdwell, Jeff Miller and Carolyn Malone. Mr. Miller and Ms. Malone serve as CFO and Secretary/Treasurer, respectively, of both Transcom and Halo.[49] Transcom is Halo's only paying customer and the source of 100% of Halo's revenues nationwide.[50]

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[46] EFIS Docket Entry No. 196, Halo Exhibit 2A; Halo Exhibit A, Wiseman Direct, p. 28.

[47] EFIS Docket Entry No. 50, Halo Opposition to Craw-Kan Telephone et al.'s Motion to Dismiss the First Amended Complaint, filed May 11, 2012 at para. 2 and Ex. A.

[48] EFIS Docket Entry No. 82, Halo Notice of Filing of Certificate of Rescission, filed June 20, 2012.

[49] EFIS Docket Entry No. 72, Halo Exhibit A, Wiseman Direct, p. 8. EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, p. 10.

[50] EFIS Docket Entry No. 72, Halo Exhibit A, Wiseman Direct, p. 48. EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, p. 8.

3. AT&T Missouri

Respondent Southwestern Bell Telephone Company, d/b/a AT&T Missouri is an incumbent local exchange carrier ("ILEC") as defined in 47 U.S.C. § 251(h) with offices at 909 Chestnut Street, St. Louis, Missouri, 63101. AT&T Missouri is a "local exchange telecommunications company" and a "public utility," and is duly authorized to provide "telecommunications service" within the State of Missouri, as each of those phrases is defined in Section 386.020, RSMo 2000 in accordance with tariffs on file with and approved by the Commission.[51]

4. RLEC Respondents

Respondents Craw-Kan et al. and Alma et al. are all incumbent local exchange "telecommunications companies" providing "basic local telecommunications services" and "exchange access services," as those terms are defined by §386.020 RSMo, to customers located in their service areas pursuant to a certificates of service authority issued by the Commission and tariffs on file with and approved by the Commission.

5. The Office of the Public Counsel

The Office of Public Counsel ("Public Counsel") "may represent and protect the interests of the public in any proceeding before or appeal from the public service commission."[52] Public Counsel "shall have discretion to represent or refrain from representing the public in any proceeding."[53]

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[51] Following its June 26, 2007, Order in Case No. TO-2002-185 allowing Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri, to alter its status from a Texas limited partnership to a Missouri corporation, the Commission approved tariff revisions to reflect the new corporate name, Southwestern Bell Telephone Company d/b/a AT&T Missouri. *See, Order Granting Expedited Treatment and Approving Tariffs*, Case No. TO-2002-185, issued June 29, 2007.

[52] Section 386.710(2), RSMo 2000; Commission Rules 4 CSR 240-2.010(15) and 2.040(2).

[53] Section 386.710(3), RSMo 2000.

6. Commission Staff

The Staff of the Missouri Public Service Commission ("Staff") is a party in all Commission investigations, contested cases, and other proceedings, unless it files a notice of its intention not to participate in the proceeding within the intervention deadline set by the Commission.[54]

B. Halo and Transcom's Activities

1. Transcom

Transcom is a very high volume "least cost router" operating in the middle of long distance calls offering wholesale transport and termination using the cheapest available routing. Until recently, its company website represented its "core service offering" as "voice termination service," (which is the intermediate routing of telephone calls between carriers for termination to the carrier serving the called party) and stated that Transcom terminates "nearly one billion minutes per month." Transcom operates switches (or "data centers") in Dallas, New York, Atlanta and Los Angeles, where it accepts traditional circuit-switched traffic in Time Division Multiplexing ("TDM") format and in Internet Protocol ("IP") format. Transcom provides service to the largest Cable Multiple System Operators ("Cable/MSOs"), competitive LECs ("CLECs"), broadband service providers, and wireless carriers.[55]

2. Halo's ICA with AT&T Missouri

In June of 2010, Halo "opted-in"[56] to an existing ICA between AT&T Missouri and VoiceStream (now known as T-Mobile), which was filed with the Commission under VT-2010-0029. The Commission had previously approved the ICA in Case No. TO-2001-

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[54] Commission Rules 4 CSR 240-2.010(10), (21) and 2.040(1).

[55] EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, pp. 8-11. A copy of Transcom's webpage is filed under EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, Schedule JSM-3.

[56] Halo adopted the T-Mobile agreement as a most favored nation ("MFN") ICA pursuant to Section 252(i) of the Telecommunications Act of 1996.

489.[57] Pursuant to 4 CSR 240-3.513(4), Halo's adoption of the T-Mobile agreement was deemed approved upon its submission to the Commission.

There is also a provision in Halo's ICA with AT&T Missouri that allows Halo to transit traffic through AT&T Missouri for termination to Third Party Providers, such as RLEC Respondents. This "transit" provision provides in relevant part as follows:

> Carrier and SWBT shall compensate each other for traffic that transits their respective systems to any Third Party Provider . . . The Parties agree to enter into their own agreements with Third Party Providers.[58]

In Missouri, Halo has not entered into any agreements with RLEC Respondents for the traffic it transits through AT&T Missouri for termination to the RLEC Respondents.[59]

3. Halo's ICA Amendment

At the time Halo and AT&T Missouri executed the ICA, they also executed an amendment to the ICA which expressly limited Halo to sending only wireless-originated traffic to AT&T Missouri.

> Whereas, the Parties have agreed that this Agreement will apply *only* to (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) traffic that *originates through wireless transmitting and receiving facilities* before [Halo] delivers traffic to AT&T for termination by AT&T or for transit to another network.[60]

The Commission approved the Amendment on August 19, 2010 in Case No. IK-2010-0384.

4. Halo Agreements with AT&T ILEC Affiliates in Other States

Similar ICAs were adopted by Halo throughout most of the AT&T multi-state ILEC

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[57] EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, pp. 12-13. A copy of the AT&T/T-Mobile USA ICA and the Halo/AT&T MFN ICA are filed under EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, Schedule JSM-4.

[58] AT&T/Halo Interconnection Agreement, Section 3.1.3.

[59] *See* EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Wilbert Direct, p. 3.

[60] A copy of the Amendment to the Halo/AT&T MFN ICA is filed under EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, Schedule JSM-5, para. 1. (Emphasis added).

footprint. After the adoption of these agreements, it became evident to AT&T that Halo was sending landline traffic to AT&T Missouri as well as AT&T Missouri's affiliates in other states.[61] As a result, the AT&T affiliates in other states filed complaint cases against Halo with numerous state public utility commissions seeking to excuse those AT&T affiliates from further performance under the agreements with Halo due to Halo's material breaches.[62] Four of those state commissions have now rendered decisions, and all four (Georgia, South Carolina, Tennessee and Wisconsin) ruled in favor of the AT&T ILEC complainants, concluding that Halo breached its interconnection agreements with AT&T by delivering traffic to AT&T that is not wireless-originated and authorizing the AT&T affiliates to discontinue service to Halo. In addition, all four commissions ruled that Halo is liable for access charges on the non-local landline traffic Halo delivered to AT&T affiliates.[63]

C. Traffic Being Delivered by Halo and Transcom in Missouri

Transcom and Halo are operating in concert. Transcom is a very high-volume "least-cost router" operating in the middle of long distance calls. It aggregates third-party long distance traffic by selling its "voice termination service" and then hands the traffic off to Halo, which claims the traffic is wireless-originated intraMTA traffic.[64]

Transcom and Halo both have equipment at tower sites in Junction City, Kansas and Wentzville, Missouri, from which traffic is delivered for termination to AT&T Missouri and the RLEC Respondents.[65] Every call that comes to Halo for termination in Missouri first passes

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[61] *See* EFIS Docket Entry No. 219, AT&T Exhibit 3, Mark Neinast Direct, pp. 10, 13-14 and Schedules MN-4 and 5.

[62] EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, pp. 2-3.

[63] *See* EFIS Docket Entry No. 153, *Tennessee Halo Order*, at 22; EFIS Docket Entry No. 236, *Georgia Halo Order* at 15 and *South Carolina Halo Order* at 27. The Public Service Commission of Wisconsin has not yet issued its written order.

[64] EFIS Docket Entry No. 66, AT&T Exhibit 1, McPhee Direct, p. 11.

[65] EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp. 4-8.

from the carrier whose end-user originated the call to Transcom (typically, indirectly through intermediate carriers) at one of its four switching stations (or data centers) in Dallas, New York, Atlanta, and Los Angeles.[66] Transcom then sends the call to its equipment at the tower site where Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment.[67] Halo then sends the call on to AT&T Missouri's tandem switch for termination to an AT&T Missouri end-user or to be passed on to third party carriers, such as RLEC Respondents, for termination.[68] There is no technical reason for the 150 foot length between Transcom and Halo to be wireless. The same connection could be made much less expensively by using a short "CAT-5" cable, and using a cable would increase service reliability.[69]

For traffic that Transcom passes to Halo, Transcom does not originate the call (the calling party does), Transcom does not decide who will be called (the calling party does), and Transcom does not provide voice content that the calling and called parties exchange on the call. Transcom's equipment is not capable of originating a call; it simply converts IP data into a radio signal.[70]

1. Transcom's Involvement in the Calls

Transcom does not alter or add to the content of any call. The calling and called parties say their own words and that is all that gets transmitted. Transcom only tries to make the voice communications more clear by suppressing background noise and adding

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[66] EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, p 6.

[67] EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp 5-8.

[68] EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, p 7.

[69] EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp 6-9.

[70] EFIS Docket Entry No. 75, AT&T Rebuttal Testimony Drause, pp 8.

comfort noise. These call-conditioning efforts are similar to what other carriers normally provide, and have provided for some time, as an incidental part of voice service.[71]

None of Transcom's written marketing materials make mention of the "enhancements" that Transcom provides. Until recently, Transcom's website stated that Transcom's "core service offering" is "voice termination service," and it made no mention of any purported service enhancements. Similarly, these "enhancements" are not mentioned in Transcom's contracts with its customers.[72]

The end-users that originate and make calls do not order a different service (in fact, they do not order any service from Transcom); they do not pay different rates for their calls because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, from the customer's perspective (i.e., the calling party), any efforts Transcom undertakes to condition the call are merely incidental to the underlying voice service provided by the calling party's carrier and does not alter the fundamental character of the underlying service.[73]

2. Halo's Use of LEC-to-LEC Network

Halo has direct interconnections with certain AT&T Missouri tandem switches. All of the trunks that Halo ordered to deliver traffic to AT&T Missouri were trunks reserved for wireless traffic only.[74] AT&T Missouri and the RLEC Respondents maintain a jointly owned network of common trunks between the AT&T tandems and RLEC Respondents' central offices. This network is sometimes referred to as the "LEC-to-LEC Network" or the "Feature Group C Network." Halo has used its direct interconnections with AT&T Missouri

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[71] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 22; EFIS Docket Entry No. 221, AT&T Exhibit 5, Drause Rebuttal, p. 11.

[72] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 25-26,

[73] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 23-24,

[74] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 8,

to send traffic to AT&T Missouri customers. Halo has also used its interconnections with AT&T Missouri to deliver traffic indirectly over the common trunk groups between AT&T Missouri and the RLECs for termination to RLEC customers.[75]

3. AT&T and RLEC Traffic Studies

The traffic studies by AT&T Missouri and several of the RLECs demonstrate that Halo is delivering substantial amounts of wireline traffic, including interLATA[76] traffic, to AT&T Missouri and the RLECs.[77] AT&T Missouri analyzed the calls Halo sent to it during one-week periods in March 2011 and September 2011, and during a four-week period in February-March, 2012.[78] AT&T Missouri began its analysis by identifying the Calling Party Number (CPN) on each call received from Halo, i.e., the telephone number of the person who initiated the call. AT&T then consulted the industry's Local Exchange Routing Guide (LERG) and the North American Numbering Plan's (NANP) Local Number Portability (LNP) database to determine what kind of carrier (landline or wireless) owned that telephone number and whether the carrier that owned the number had designated it in the LERG as

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[75] *See* EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, p. 8; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, pp. 8-9; EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, p. 3.

[76] Missouri law defines "Local Access and Transportation Area" or "LATA" as a "contiguous geographic area approved by the U.S. District Court for the District of Columbia in United States v. Western Electric, Civil Action No. 82-0192 that defines the permissible areas of operations for the Bell Operating companies." Section 386.020(30) RSMo. Supp. 2011. The ERE Rule adopts 386.020's statutory definition of LATA and defines IntraLATA and Inter LATA traffic as follows:

(A) IntraLATA telecommunications traffic is telecommunications traffic originating and terminating within the same LATA.

(B) InterLATA telecommunications traffic is telecommunications traffic originating and terminating in different LATAs.

ERE Rule, 4 CSR 240-29.020(17).

[77] *See* EFIS Docket Entry No. 219, AT&T Exhibit 3, Mark Neinast Direct, pp. 13-14 and Schedules MN-4 and 5; EFIS Docket Entry No. 231, Craw-Kan et al. Exhibit 6, McDonald County Telephone Company witness Benjamin Jack Rickett Direct, p. 6 and Proprietary Ex. 5.

[78] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 11.

landline or wireless.[79] Based upon this, AT&T Missouri was able to determine how many landline originated calls Halo was sending.[80] During the three periods reviewed, the call data showed that 22%, 56% and 66%, respectively, of the calls that Halo delivered to AT&T originated as landline calls.[81]

AT&T's traffic study data for the individual RLEC Respondents also showed that Halo was delivering significant amounts of interMTA wireless traffic. For example, the AT&T Missouri traffic study indicates that only 9-15% of the traffic Halo sends to McDonald County Telephone Company (McDonald County) was local or intraMTA wireless traffic.[82] The majority of Halo's traffic to McDonald County (between 85-91%) was either interMTA wireless traffic or landline interexchange traffic – both of which are subject to the McDonald County's approved access tariffs.

A study that McDonald County witness Jack Rickett conducted in late March of 2012 also revealed that landline long distance calls being originated and routed to the interexchange carrier (IXC) "Feature Group D" network by customers in one McDonald County exchange were being delivered as "Halo Wireless" intraMTA wireless calls to landline customers in another McDonald County exchange.[83] Mr. Rickett's findings are consistent with a study done by another small rural Missouri LEC, which found that landline interLATA calls from its regulatory attorneys' offices in Jefferson City, Missouri (in the central Missouri "Westphalia" LATA) to that company's landline network in Higginsville,

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[79] *Id.* at 12.

[80] *Id.*

[81] *Id.* at 13.

[82] EFIS Docket Entry No. 231, Craw-Kan et al. Exhibit 6, Benjamin Jack Rickett Direct, p. 6 and Proprietary Ex. 5; *see also* EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, pp 8-9, Alma Attachments C-1 and C-2. 7; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, pp. 9-10, Choctaw Attachments C-1 and C-2, MoKan Attachments C-1 and C-2.

[83] Tr. 399, 401-2.

Missouri (in the western Missouri "Kansas City" LATA) had been routed from CenturyLink to Transcom and then delivered by Halo over the LEC-to-LEC network as an "intraMTA wireless" call.[84] These calls were clearly in-state, inter-LATA landline calls originated by the FGD protocol trunking arrangements, yet Halo delivered these calls over the LEC-to-LEC network as intra-LATA "wireless" calls and refused to pay the appropriate tariff rates.[85]

Halo has offered no traffic studies of its own to contradict the studies showing that substantial amounts of Halo's traffic originates on landline facilities. Rather, Halo concedes that some of the traffic it is delivering to AT&T Missouri and the RLECs originates on landline facilities.[86] Likewise, Halo has offered no traffic studies to contradict AT&T's traffic studies showing that substantial amounts of Halo's traffic are interLATA landline traffic. Halo has offered no traffic studies or evidence to contradict the RLEC analysis that Halo traffic had been originated by FGD protocol trunking arrangements.

Halo argues that CPN may not always identify a call's origination point. While there are some situations where CPN may not always identify the origination point or originating carrier of a call, those situations are the exception, not the rule. The data and methods AT&T used in its traffic studies are the same data and methods that the entire industry uses today for determining types of calls (i.e., landline or wireless) and jurisdiction of calls.[87]

4. Halo Traffic Included Landline-Originated and InterLATA Calls

The Commission finds that the AT&T Missouri and RLEC traffic studies are competent and substantial evidence demonstrating that Halo is delivering interexchange landline traffic to AT&T Missouri and the RLEC Respondents, of which a significant amount

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[84] EFIS Appeal Case No. AP11-00682, U.S. District Court for the Western District of Missouri, *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville, Missouri, et al.*, Docket Entry No. 1, Ex. 12.

[85] *Id.* (identifying landline calls from the central Missouri "Westphalia" LATA to the Kansas City LATA).

[86] EFIS Docket Entry No. 211, Halo Exhibit A, Wiseman Direct, p. 61.

[87] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 17.

is interLATA wireline traffic and all of which is subject to AT&T Missouri's and the RLEC Respondents' access tariffs. Halo has either failed to pay the lawful rates for this traffic (in the case of the RLEC Respondents) or paid significantly less than the lawful rate for substantial portions of its traffic (in the case of AT&T Missouri).

D. Halo was Billed by the RLEC Respondents but Did Not Pay

After reviewing the standard Category 11 billing records provided by AT&T Missouri as required by the Commission, each of the RLEC Respondents invoiced Halo for the Halo traffic being delivered for termination to RLEC Respondents' exchanges. In light of the fact that a substantial portion of the traffic appeared to be interexchange wireline calls, some RLEC Respondents billed Halo based on their Commission-approved intrastate access rates.[88] Another group of RLEC Respondents billed Halo invoices based upon their Commission-approved reciprocal compensation rates for "local" wireless traffic even though those companies did not agree that Halo's traffic was wireless.[89] In an effort to minimize its uncollectible write-offs, one RLEC Respondent billed Halo based on the FCC's interim transport and termination compensation rate of $0.004.[90]

The uncontroverted record in this case shows that Halo has delivered compensable traffic (either access traffic or local reciprocal compensation traffic) and Halo has refused to pay for any of the post-bankruptcy traffic it delivered and continues to deliver to the RLECs,

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[88] *See* EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, pp. 5-7; EFIS Docket Entry No. 222, Alma et al. Exhibit 3, Direct Testimony Molina, pp. 5-7.

[89] EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, p. 4 and Proprietary Ex. 2. In addition, Craw-Kan et al. provided Halo with a summary of their approved interconnection agreements with other wireless carriers as well as copies of traffic termination agreements with Cingular (now AT&T Mobility) and T-Mobile. Craw-Kan et al. offered to use the rates, terms, and conditions of these Commission-approved agreements as a starting place for negotiations. *Id.* at pp. 5-6. The Commission notes that it has approved agreements between the Respondent RLECs and all national wireless carriers.

[90] EFIS Docket Entry No. 227, Craw-Kan et al. Exhibit 2, Direct Testimony McCormack, p. 4 and Proprietary Ex. 2; Tr. 335-37; 47 CFR §51.715(3)(b)(3).

regardless of what rate is billed.[91] Accordingly, the Commission finds that Halo has paid nothing to date for the post-bankruptcy traffic it has delivered to the RLECs.

E. Halo Has Not Paid AT&T the Appropriate Rate

The Commission has found that Halo has sent landline-originated traffic to AT&T in breach of the ICA, despite AT&T Missouri's demands for Halo to cease sending such traffic.[92] A large portion of that landline traffic is non-local in nature, and AT&T terminated that traffic for Halo. AT&T's federal tariff, filed with the FCC, requires Halo to pay access charges on the interstate traffic AT&T has terminated for Halo;[93] and AT&T's state tariff, filed with this Commission, requires Halo to pay access charges on the intrastate non-local traffic AT&T has terminated for Halo.[94] AT&T demanded that Halo pay appropriate switched access charges on all Halo post-bankruptcy petition landline-originated interexchange traffic terminated to AT&T Missouri.[95] But Halo has refused to do so, instead paying only the reciprocal compensation rate under the ICA.[96]

The Commission finds that Halo has sent AT&T interexchange traffic (both interstate and intrastate) that Halo has been misrepresenting as local, and thus subject only to reciprocal compensation charges instead of the higher access charges that apply to non-

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[91] *See* EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, pp 5-7; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, pp. 5-7; EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, pp. 4-5; Ellington Telephone Company witness McCormack Cross-Examination, Tr. 331. Instead Halo insisted it owed the RLECs nothing, and would only pay the RLECs reciprocal compensation after the RLECs requested interconnection and interconnection agreements from Halo. *Id.*.

[92] EFIS Docket Entry No.217, McPhee Direct, Schedule 9.

[93] Southwestern Bell Telephone Company Interstate Access Service Tariff, F.C.C. No. 73, Section 6.9.

[94] Southwestern Bell Telephone Company Intrastate Access Services Tariff, P.S.C. Mo. No. 36, Sections 3.8, 6.11. *See also* EFIS #217, McPhee Direct, p. 20 - 21.

[95] EFIS Docket Entry No.217, McPhee Direct, Schedule 9.

[96] EFIS Docket Entry No.217, McPhee Direct, pp. 16-17.

local traffic. Accordingly, the Commission finds that Halo has failed to pay AT&T Missouri the applicable access rates for terminating Halo's landline originated interexchange traffic.

F. Originating Caller Information Violation

The exchange of accurate call detail information between interconnected carriers is essential. This information includes, among other things, the phone number of the person that originated the call (the Calling Party Number or CPN) and, in some instances, a different number for the person or entity that bears financial responsibility for the call (the Charge Number or "CN").[97] For example, a Charge Number might be used when a business has 100 different lines for its employees but wants all calls on those lines to be billed to a single number. In that situation, calls from those 100 lines would include call detail that shows both the CPN, for the actual line that originated the call, and the Charge Number, for the billing number that will be charged from the call.[98] When the call information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed.[99]

From approximately mid-February, 2011 until late December, 2011, Halo inserted Charge Numbers on every call it sent to AT&T Missouri.[100] In fact, Halo admitted that it inserted a CN assigned to Transcom into the call record on every call it sent to AT&T.[101] In every case, the CN was local (i.e., in the same MTA as the number the call was being terminated to), making the call appear to be local, and thus subject to reciprocal compensation. The industry practice is to determine the local or non-local nature of the

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[97] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, p. 28.

[98] *Id.*

[99] *Id.* at 29.

[100] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 28 - 29; Tr. 202.

[101] EFIS Docket Entry No. 211, Halo Exhibit A, Wiseman Direct, p. 66.

traffic based on the CN (when both CPN and CN are present). Thus, by inserting an inaccurate CN in the call record, Halo made it more difficult for AT&T Missouri and the RLEC Respondents to evaluate Halo's traffic and therefore bill the appropriate intercompany compensation for such traffic.[102]

There is no justification for Halo's insertion of a Transcom CN in the call record, because Transcom was not the financially responsible party on any of these calls.[103] The CN field is only used when a party other than the party that originated the call is financially responsible for the call. Transcom had no relationship with any of the individuals that actually originated these calls, and Transcom did not have an interconnection agreement with AT&T Missouri. Thus, there is no reason for Halo to insert a CN to make Transcom financially responsible for these calls.

G. AT&T and RLEC Blocking Requests Relied on Valid Violations

AT&T Missouri and the RLEC Respondents have complied with the procedural requirements of the ERE Rule in order to initiate blocking of Halo's traffic. The RLEC Respondents notified Halo of their intention to block Halo's traffic pursuant to the ERE Rule on February 22, 2012,[104] March 9, 2012,[105] and March 23, 2012[106] by means of a letter sent email and U.S. Certified Mail to Halo and a separate letter sent to AT&T Missouri. In their letter to Halo, the RLEC Respondents set forth the reasons they proposed to block Halo's traffic, the date on which blocking would commence and the steps Halo could take to

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[102] EFIS Docket Entry No. 220, AT&T Exhibit 4, Neinast Rebuttal, p. 25.

[103] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 24-26.

[104] Alma, Choctaw, and MoKan Dial. EFIS Docket Entry No. 223, Alma et al. Exhibit 2, Direct Testimony Loges, Alma Attachments A and B; EFIS Docket Entry No. 222, Alma et al. Exhibit 1, Direct Testimony Molina, Choctaw Attachments A and B, MoKan Attachments A and B.

[105] Craw-Kan et al. (except for Peace Valley Telephone); *see e.g.* EFIS Docket Entry No. 226, Craw-Kan et al. Exhibit 1, Direct Testimony Wilbert, Ex. 6.

[106] Peace Valley Telephone, EFIS Docket Entry No. 233, Craw-Kan et al. Exhibit 8, Direct Testimony Bosserman, Ex. 6.

prevent the blocking. In their letter to AT&T Missouri, the RLEC Respondents specifically requested AT&T Missouri as the originating tandem carrier to implement the block. Copies of these letters were also sent, as required by the rule, to the Manager of the Commission's Telecommunications Department.[107] Upon receipt of the RLEC Respondents blocking request, AT&T Missouri notified Halo of them, and of AT&T Missouri's obligation under the Commission's ERE Rules to comply with the RLEC Respondents' request, and informed Halo of the steps it could take to prevent the blocking from occurring.

AT&T Missouri also notified Halo of its intention to block Halo's traffic pursuant to the ERE Rule on March 19, 2011, by means of a letter sent by email and U.S. Certified Mail. In its letter, AT&T Missouri set forth the reasons it intended to block Halo's traffic, the date it would do so and the steps Halo could take to prevent the blocking. A copy of AT&T's letter was also sent to the Manager of the Commission's Telecommunications Department.[108]

CONCLUSIONS OF LAW

After consideration of the evidence and the findings set forth above, the Commission has determined that substantial and competent evidence in the record as a whole supports the following conclusions of law.

A. The Commission's Jurisdiction and Burden of Proof

The Respondent LECs are "telecommunications companies" and "public utilities" as those terms are defined by Section 386.020 RSMo. Supp. 2011. The Missouri LECs and their intrastate telecommunications networks are subject to the Commission's jurisdiction, supervision, control, and regulation as provided in Chapters 386 and 392 RSMo. Under Missouri law, the Commission has jurisdiction over intrastate telecommunications traffic and

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[107] EFIS Docket Entry No. 219, AT&T Exhibit 3, Neinast Direct, pp. 24-26.

[108] EFIS Docket Entry No. 1, Halo April 2, 2012 Complaint, Exhibits A through D.

the LEC-to-LEC network – the network at issue in this case – as well as the manner in which the LECs' lines and property are managed and operated. In particular, Section 386.320.1 obligates the Commission to assure that all calls placed on the LEC-to-LEC network, "including calls generated by nonregulated entities, are adequately recorded, billed, and paid for."[109]

Federal law authorizes the Commission "to impose, on a competitively neutral basis . . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."[110] The Federal Telecommunications Act "preserves a state's interconnection regulations [and] holds that the FCC may not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers.[111]

The Commission has the authority under 47 U.S.C. §252 to approve interconnection agreements negotiated under the Telecommunications Act. This authority includes the power to interpret and enforce the agreements the Commission has approved.[112]

Because Halo brought the complaint, it bears the burden of proof. The burden of proof is the preponderance of the evidence standard.[113] In order to meet this standard,

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[109] EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, June 15, 2005, p. 1377. *See also BPS Telephone et al. v. Halo Wireless*, Case No. 11-cv-04220, *Order Regarding Jurisdiction*, WDMo. Dec. 21, 2011. In response to Halo's attempted removal of the earlier RLEC complaint case to the U.S. Western District, Judge Laughrey concluded, "The Commission has the authority to regulate the subject matter of this dispute, and the Court does not have jurisdiction over Plaintiff's claims until the Commission has rendered a decision for the Court to review."

[110] 47 U.S.C. §253(b).

[111] EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, p. 1377, citing 47 U.S.C §251(d)(3).

[112] EFIS Docket Entry No. 175, *Southwestern Bell v. Connect Communs Corp.* 225 F.3d 942 (8th Cir. 2000)(The Act's "grant of power to state commissions necessarily includes the power to enforce the interconnection agreement."); EFIS Docket Entry No. 176, *Budget Prepay, Inc. v. AT&T*, 605 F.3d 273 (5th Cir. 2012)(State commissions have "power both to approve ICAs and to interpret and enforce their clauses.").

Halo must convince the Commission it is "more likely than not" that its allegations are true.[114] Similarly, AT&T Missouri bears the burden of proof for its counterclaim.

B. AT&T Missouri's Counterclaim and ICA Complaint

1. Halo Has Delivered Traffic to AT&T Missouri That Was Not "Originated through Wireless Transmitting and Receiving Facilities" as Provided by the Parties' ICA

The Commission finds that Halo has delivered traffic to AT&T Missouri that was not "originated through wireless transmitting and receiving facilities" as provided by the parties' ICA. The only traffic the ICA allows Halo to send to AT&T Missouri is traffic that originates on wireless equipment. The ICA states:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network.[115]

The evidence has shown that Halo has been sending large amounts of landline-originated traffic to AT&T Missouri. For example, Halo's President, Mr. Wiseman, acknowledges, "Most of the calls probably did start on the other networks before they came to Transcom for processing. It would not surprise me if some of them started on the PSTN."[116] That alone proves a breach of the ICA.

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[113] *Bonney v. Environmental Engineering, Inc.*, 224 S.W.3d 109, 120 (Mo. App. 2007); *State ex rel. Amrine v. Roper,* 102 S.W.3d 541, 548 (Mo. banc 2003); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. banc 1996).

[114] *Holt v. Director of Revenue, State of Mo.*, 3 S.W.3d 427, 430 (Mo. App. 1999); *McNear v. Rhoades*, 992 S.W.2d 877, 885 (Mo. App. 1999); *Rodriguez*, 936 S.W.2d at 109 -111; *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 685 (Mo. banc 1992).

[115] EFIS Docket Entry No. 217, AT&T Exhibit 1, J. Scott McPhee Direct Testimony, ("McPhee Direct"), p. 13, line 22 – 14, line 11; Schedule JSM-5. (Emphasis added.)

[116] EFIS Docket Entry No. 211, Halo Exhibit A, Russ Wiseman Direct Testimony ("Wiseman Direct"), p. 61, lines 10-11. *See also* EFIS Docket Entry No. 218, AT&T Exhibit 2, J. Scott McPhee Rebuttal Testimony ("McPhee Rebuttal"), p. 2, lines 1-7; EFIS Docket Entry No. 220, AT&T Exhibit 4, Mark Neinast Rebuttal Testimony ("Neinsast Rebuttal"), p. 6, line 1 - 7, line 13.

AT&T Missouri presented evidence of extensive studies it performed in which it analyzed the calls Halo sent to it during one-week periods in March 2011 and September 2011, and during a four-week period in February-March 2012.[117] AT&T Missouri began its analysis by identifying the CPN on each call received from Halo, i.e., the telephone number of the person who started the call.

AT&T Missouri then consulted the industry's LERG and the NANP LNP database to determine what kind of carrier (landline or wireless) owned that number and whether the carrier that owned the number had designated it in the LERG as landline or wireless.[118] Based on this, AT&T Missouri was able to determine how many landline-originated calls Halo was sending.[119] During the three periods reviewed, the call data showed that 22%, 56% and 66%, respectively, of the calls that Halo delivered to AT&T Missouri originated as landline calls.[120]

Halo has challenged these call studies contending that some calls that originate from what appear to be landline numbers could, in some scenarios, actually originate from a wireless device. Based on this, Halo contends that CPNs are unreliable and cannot be used to identify the origination point or originating carrier on any of the calls Halo sends AT&T Missouri.[121] The Commission disagrees. The data and methods AT&T Missouri used are the same data and methods that the entire industry uses today for determining

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[117] EFIS Docket Entry No. 219, AT&T Exhibit 3, Mark Neinast Direct Testimony ("Neinast Direct"), Direct, p.11, lines 1-6.

[118] *Id.* at 12, lines 8-16.

[119] *Id.* at 12, line 17 – 13, line 6.

[120] *Id.* at 13, line 22 – 14, line 4; Schedule MN-4.

[121] EFIS Docket Entry No. 211, Wiseman Direct at 56, line 16, *et. seq.*

what AT&T Missouri sought to determine.[122] As the Tennessee Regulatory Authority explained in a nearly identical case:

> The Authority acknowledges that a certain degree of imprecision can occur when analyzing the origin to individual telephone calls, due to factors such as the advent of number portability and the growth of wireless and IP telephony. However, because of these technical issues, the industry has developed conventions and practices to evaluate calls for the purpose of intercarrier compensation. The Authority finds that the methodology used to collect the data and the interpretation of the data in the AT&T study are based upon common industry practices to classify whether traffic is originated on wireline or wireless networks.[123]

Although Halo had access to all of the same data AT&T Missouri used for its analyses, Halo presented no call analysis to support its claims, nor did it present any evidence of how much of the traffic it delivers (if any) originates on wireless devices with CPNs that the LERG shows as landline. Based upon AT&T Missouri's call study data, the Commission concludes that Halo has been sending large amounts of landline-originated traffic to AT&T Missouri in violation of the parties' ICA.

Halo, however, contends that all the calls it sends to AT&T Missouri, regardless of how a call began or on what network, should be deemed to originate as wireless calls by Transcom, its affiliated high-volume (and only) customer in Missouri. Halo bases this contention on its claims that Transcom is an Enhanced Service Provider (because it claims to change the content of calls that pass through its system and claims to offer enhanced

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[122] *Id.*

[123] EFIS Docket Entry No.153, Order, *In re: BellSouth Telecommunications LLC d/b/a AT&T Tennessee v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Jan. 26, 2012) ("*Tennessee Halo Order*"), at 17. See also EFIS Docket Entry No.236, *In Re: Complaint of TDS TELECOM on Behalf of Its Subsidiaries Against Halo Wireless, Inc., Transcom Enhanced Services, Inc. and Other Affiliates for Failure to Pay Terminating Intrastate Access Charges for Traffic and for Expedited Declaratory Relief and Authority to Cease Termination of Traffic,* Order on Complaints, Docket No. 34219, pp. 6-7 (Georgia Pub. Serv. Comm. July 17, 2012) ("*Georgia Halo Order*").; and EFIS Docket Entry No.236, Order Granting Relief against Halo Wireless, *Complaint and Petition for Relief of BellSouth Telecommunications LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina v. Halo Wireless, Inc.*, Docket No. 2011-304-C , p. 9 (Pub. Serv. Comm. S. Car. July 17, 2012) ("*South Carolina Halo Order*").

capabilities); and that since Transcom is not a carrier, it is an end-user. Halo thus argues it is a CMRS carrier selling wireless telephone exchange service to an Enhanced Service Provider (ESP) end-user. On this basis, Halo asserts that whenever a call passes through Transcom, that call is terminated and Transcom then originates a new, local, wireless call (because the connection between Transcom and Halo is wireless) before the call reaches Halo.

From a technical perspective, the evidence shows that Halo and Transcom have set up a network arrangement employing two tower sites at which both Transcom and Halo maintain equipment that serves Missouri: one in Wentzville, Missouri, to serve the eastern portion of Missouri; and the other in Junction City, Kansas to serve the western portion of the Missouri. Every call that comes to Halo for termination in the eastern portion of the state first passes from the carrier whose end user customer originated the call to Transcom (typically, indirectly through intermediate providers) at one of its four switching stations (or data centers) in Dallas, New York, Atlanta, and Los Angeles.[124] Transcom then sends the call to its equipment at the Wentzville tower site, where Transcom then transmits the call, wirelessly, for about 150 feet to Halo's equipment.[125] Halo then sends the call on to AT&T Missouri's tandem switch for termination to an AT&T Missouri end-user or to be passed on to a third-party carrier for termination.[126] The tower site Transcom and Halo have established in Junction City, Kansas to serve the western portion of Missouri functions similarly.

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[124] *See* Tr. June 26, 2012, at 266, lines 3-20.

[125] EFIS Docket Entry No. 221, AT&T Exhibit 5, Raymond W. Drause Rebuttal Testimony ("Drause Rebuttal") at 6, lines 1-14.

[126] *Id.* at 6, line 14 – 7, line 2; Schedule RD-3.

The Commission has examined Halo's theory based upon which it claims that no violation of the ICA has occurred, the authorities Halo has cited, and the evidence of the network arrangements employed by Transcom and Halo. Upon this review, the Commission rejects Halo's theory, primarily based on the FCC's recent *Connect America Order*,[127] which the Commission finds dispositive.

The FCC singled out Halo by name, described Halo's arrangement of having traffic pass through a purported ESP (*i.e.*, Transcom) before reaching Halo,[128] noted Halo's theory that calls in this arrangement are "re-originated" in the middle by Transcom, and flatly rejected that theory:

> 1003. In the *Local Competition First Report and Order*, the Commission stated that calls between a LEC and a CMRS provider that originate and terminate within the same Major Trading Area (MTA) at the time that the call is initiated are subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. As noted above, this rule, referred to as the "intraMTA rule," also governs the scope of traffic between LECs and CMRS providers that is subject to compensation under section 20.11(b). The *USF/ICC Transformation NPRM* sought comment, *inter alia,* on the proper interpretation of this rule.
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> 1004. The record presents several issues regarding the scope and interpretation of the intraMTA rule. Because the changes we adopt in this Order maintain, during the transition, distinctions in the compensation available under the reciprocal compensation regime and compensation owed under the access regime, parties must continue to rely on the intraMTA rule to define the scope of LEC-CMRS traffic that falls under the reciprocal compensation regime. We therefore take this opportunity to remove any ambiguity regarding the interpretation of the intraMTA rule.
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> 1005. We first address a dispute regarding the interpretation of the intraMTA rule. Halo Wireless (Halo) asserts that it offers "Common Carrier wireless exchange services to ESP and enterprise customers" in which the customer "connects wirelessly to Halo base stations in each MTA." It further asserts

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[127] *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) ("*Connect America Order*").

[128] The FCC was well aware that Halo was arguing that Transcom is an ESP and therefore must be deemed to originate all calls that pass through it. Halo made this argument explicitly in its *ex parte* submissions to the FCC, which the FCC cited and relied on in the *Connect America Order* as describing Halo's position. *See Connect America Order*, nn. 2120-2122, 2128; (EFIS Docket Entry No. 217, McPhee Direct at 18 n.20; Schedules JSM-6, JSM-7).

that its "high volume" service is CMRS because "the customer connects to Halo's base station using wireless equipment which is capable of operation while in motion." Halo argues that, for purposes of applying the intraMTA rule, "[t]he origination point for Halo traffic is the base station to which Halo's customers connect wirelessly." On the other hand, ERTA claims that Halo's traffic is not from its own retail customers but is instead from a number of other LECs, CLECs, and CMRS providers. NTCA further submitted an analysis of call records for calls received by some of its member rural LECs from Halo indicating that most of the calls either did not originate on a CMRS line or were not intraMTA, and that even if CMRS might be used "in the middle," this does not affect the categorization of the call for intercarrier compensation purposes. These parties thus assert that by characterizing access traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the requisite compensation to terminating rural LECs for a very large amount of traffic. Responding to this dispute, CTIA asserts that "it is unclear whether the intraMTA rules would even apply in that case."

1006. We clarify that ***a call is considered to be originated by a CMRS provider for purposes of the intraMTA rule only if the calling party initiating the call has done so through a CMRS provider***. Where a provider is merely providing a transiting service, it is well established that a transiting carrier is not considered the originating carrier for purposes of the reciprocal compensation rules. Thus, we agree with NECA that ***the "re-origination" of a call over a wireless link in the middle of the call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position.***[129]

The FCC conclusively rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network are somehow "re-originated" and transformed into wireless calls simply by passing through Transcom. In fact, Halo concedes that the FCC rejected its theory; Halo witness Wiseman stated, "we acknowledge that the FCC ... apparently now believes ESPs ... do not originate calls."[130] The FCC said that a call is

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[129] *Connect America Order*, (Emphasis added and footnotes omitted).

[130] EFIS Docket Entry No. 211, Wiseman Direct at 31, lines 3-4. Endowing a phrase in the first sentence of paragraph 1006 of the *Connect America Order* with a significance the FCC plainly did not intend, Halo has suggested that the FCC rejected its theory only "for purposes of the intraMTA rule," and not for purposes of the parties' ICA. But the very purpose of the provision in the ICA that permits Halo to deliver traffic to AT&T only if it originates on wireless equipment is to implement the intraMTA rule. Halo's notion that the FCC's ruling leaves open the possibility that the traffic at issue here originates with Transcom for purposes of the ICA, even though it does not originate with Transcom for purposes of the intraMTA rule, is desperately mistaken.

originated wirelessly only if the "calling party" – the person dialing the phone number – initiated the call through a wireless carrier. The Commission concurs with this analysis.

In addition, the Commission finds that there is no technical reason for the 150-foot link between Transcom and Halo to be wireless. The same connection could be made much less expensively by using a short "CAT-5" cable, and using a cable would increase service reliability.[131] The Commission finds that the only reason Halo created a roundabout wireless connection with Transcom, rather than a short and direct wired connection, was so Halo could attempt to claim that all calls it passes to AT&T are wireless and local.[132] For the reasons set out above, the Commission rejects Halo's claim.

The Commission further concludes that there is no authority for Halo's claim that ESPs terminate every call they touch and then originate a new call. Nothing in the law says that. The FCC has made clear that ESPs "are treated as end-users *for the purpose of applying access charges*"[133] only and "are treated as end users *for purposes of our access charge rules.*"[134] The "ESP exemption" is a legal fiction that allows ESPs to be treated like end users *for the purpose of not having to pay access charges.*[135] An ESP cannot use this

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[131] *Id.* at 7, lines 3-17.

[132] *Id.* At hearing, counsel for Halo suggested that the wireless connection between Transcom and Halo could not eliminated by using a cable if the distance between the Transcom equipment and the Halo equipment were greater. *See* Tr. June 26, 2012, at 222, lines 4-7. That suggestion fell flat, for two reasons. First, a CAT-5 cable can carry IP voice packets more than 100 meters if a regenerator is used. *Id.* at 222, lines 8-15. Second, the wireless connection could be eliminated without even using a cable, by having the traffic transferred from Transcom to Halo within the Ethernet switch that Transcom and Halo share. *Id.* at 223, line 16 - 224, line 11.

[133] EFIS Docket Entry No. 238, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶ 11 (2001) ("*ISP Remand Order*") (emphasis added, subsequent history omitted).

[134] EFIS Docket Entry No. 126, *Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987) ("*Northwestern Bell Order*"). Five years after it was issued, this decision was vacated as moot. 7 FCC Rcd. 5644 (1992). The decision still carries weight, however, as the FCC's explanation of the ESP exemption.

[135] The Commission notes that the ESP exemption from access charges applies only to the ESP itself, not to any telecommunications carrier that serves the ESP, which means that any ESP exemption for Transcom

limited "end-user" status to claim it "originates" calls that actually began when someone else picked up a phone and dialed a number. Transcom does not start the call (the calling party does), does not decide who will be called (the calling party does), and does not provide the voice content that the parties exchange on the call. The FCC has never held that an ESP "originates" calls that started elsewhere and end elsewhere and merely pass through the ESP somewhere in the middle.[136] To the contrary, the FCC rejected Halo's theory that Transcom originates calls in the *Connect America Order*.[137] When a landline call is placed, for example from California to Missouri, that is one call, not two calls. No new, separate call exists merely because call passed through Transcom's equipment.

Halo's reliance on decisions by bankruptcy courts during Transcom's bankruptcy proceeding several years ago for the proposition that Transcom is an ESP under federal law is misplaced. Only one of these decisions both involved an AT&T entity and actually held that Transcom is an ESP.[138] That decision, however, was vacated on appeal and

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would not apply to Halo anyway. EFIS Docket Entry No. 126, *Northwestern Bell Order*, 2 FCC Rcd. 5986, ¶ 21 (1987); EFIS Docket Entry No. 240, *Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 24, 42 (Ill. Comm. Comm'n Feb. 11, 2009) (the ESP exemption "exempts ESPs, and *only* ESPs, from certain access charges" and does not apply to carriers that transport calls for ESPs). Thus, regardless of Transcom's purported status, there is no basis for *Halo* to claim it is exempt from access charges on the toll traffic it has been sending to AT&T.

[136] Halo claims that the FCC has found that ESPs – as end users – originate traffic even when they receive the call from some other end-point. But Halo does not cite a single decision by the FCC, or by any other authority, that actually holds this. Halo also tries to compare Transcom to an entity using a "Leaky PBX," as if it that legitimizes Halo's conduct. That comparison to a Leaky PBX is telling, because the FCC long ago recognized that leaky PBXs – just like Halo's and Transcom's current scheme – constituted a form of "access charge avoidance" that needed correction. EFIS Docket Entry No. 193, *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶ 87 (1983). *See also* EFIS Docket Entry No. 220, Neinast Rebuttal at 22, line 15 - 23, line 13. Simply put, the only time the FCC has actually addressed what Halo does is in the *Connect America Order*, where it rejected the identical argument Halo is making here.

[137] *Connect America Fund Order*, ¶¶ 1005-06. The FCC also rejected a similar two-call theory several years earlier in the *AT&T Calling Card Order*. EFIS Docket Entry No. 173, Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, ¶ 6 (2005) (*"AT&T Calling Card Order"*), *aff'd*, *AT&T Corp. v. FCC*, 454 F.3d 329 (D.C. Cir. 2006).

[138] That decision is Exhibit 1 to the Johnson Direct, EFIS Docket Entry No.212.

carries no precedential or preclusive effect here.[139] The Georgia,[140] Pennsylvania, South Carolina, Tennessee, and Wisconsin commissions have already evaluated this same issue and found that the bankruptcy rulings have no preclusive effect.[141] The Commission agrees.

The Commission further concludes that Transcom does not qualify as an ESP. To be an ESP, Transcom must provide an "enhanced service," which the FCC defines as:

> services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.[142]

In applying this definition, the FCC has consistently held that a service is not "enhanced" when it is merely "incidental" to the underlying telephone service or merely "facilitate[s] establishment of a basic transmission path over which a telephone call may be completed, without altering the fundamental character of the telephone service," and that in deciding whether a service is "enhanced" one must use the end-user's perspective.[143] The FCC

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[139] EFIS Docket Entry No. 212 at 1 (upper right-hand corner); EFIS Docket Entry No. 244, *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases).The other decision, the one confirming Transcom's plan of reorganization, did not resolve any dispute between parties regarding whether Transcom was an ESP – much less whether all calls that pass through Transcom must be deemed to be wireless-originated – because that point was neither contested in the proceedings leading to that order, nor was it necessary to the order. Accordingly, the order has no preclusive effect. *E.g.*, EFIS Docket Entry No. 245, RESTATEMENT (SECOND) OF JUDGMENTS, § 16 comment c.

[140] EFIS Docket Entry No. 236, *Georgia Halo Order,* pp. 3, 10. See also Georgia PSC May 9, 2012 Order Denying Partial Motion to Dismiss, pp. 3-4

[141] *See* EFIS Docket Entry No. 153, *Tennessee Halo Order* at 22 n.85; EFIS Docket Entry No. 236, *South Carolina Halo Order* at 19. The Public Service Commission of Wisconsin has not yet issued its written order.

[142] EFIS Docket Entry No. 246, 47 C.F.R. § 64.702(a).

[143] EFIS Docket Entry No. 247,*Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

typically describes services that do not alter the fundamental character of the telephone service as "adjunct-to-basic," meaning they are not "enhanced services."[144]

Transcom claims it provides enhanced service because it takes steps to minimize background noise on a voice call and inserts "comfort noise" during periods of silence so the parties do not think the call has been disconnected.[145] The Commission, however, finds that suppressing background noise and adding comfort noise are not "enhancements" to the underlying voice telecommunications service. They are merely the same type of call-conditioning that carriers normally provide, and have provided for some time, as an incidental part of voice service (*e.g.*, by using repeaters to boost a voice signal over long distances).[146]

The Commission finds that Transcom's involvement in the calls at issue here occurs "automatically, without the advance knowledge or consent of the customer [*i.e.*, the person making the call]" and Transcom does not provide any service to the calling party.[147] Nor does the calling party receive from Transcom (or from his or her own carrier) "anything other than [the capability to] make a telephone call."[148] The end-users that make calls do not order a different service (indeed, they do not order any service from Transcom);[149] they

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[144] *See* EFIS Docket Entry No. 173, *AT&T Calling Card Order*, ¶ 16 & n.28. Halo has argued that Transcom's service technically cannot be "adjunct-to-basic" because Transcom does not provide basic telephone service. That both is incorrect and misses the point. Even if Transcom does not provide basic telephone service, that does not mean it therefore must be deemed to provide an enhanced service. The "adjunct-to-basic" terminology is used to distinguish *any* service that does not change the fundamental character of the telephone service the end-user is using, regardless of who provides that basic telephone service.

[145] EFIS Docket Entry No. 212, Johnson Direct at 15, line 1 - 16, line 21.

[146] EFIS Docket Entry No. 219, Neinast Direct at 22, line 16 – 23, line 12; EFIS Docket Entry No. 221, Drause Rebuttal at 11, line 3 – 14, line 13.

[147] EFIS Docket Entry No. 212, Johnson Direct at 8, lines 7-11.

[148] EFIS Docket Entry No. 173, *AT&T Calling Card Order*, ¶¶ 16-17.

[149] Transcom does not serve any actual end users. Rather, it provides wholesale service to carriers and other providers. As Transcom's representative testified, "Transcom does not deal with ultimate consumers [*i.e.*,

do not pay different rates because Transcom is involved; and they place and receive calls in exactly the same way they would if Transcom did not exist. Thus, "[f]rom the customer's perspective" – the perspective of the end-user making the call – anything Transcom does is merely "incidental" to or "adjunct to" the underlying voice service provided by the caller's carrier, does not alter the "fundamental character" of that underlying service, and is therefore not an "enhanced service."[150]

None of Transcom's written marketing materials makes any mention of the purported "enhancements" that Transcom provides, so there is no "offering" of any enhancement.[151] Indeed, until recently Transcom's website flatly stated that Transcom's "core service offering" is "Voice Termination Service," *not* any purported service enhancements.[152] And until recent changes made in response to AT&T's testimony, Transcom's website never mentioned any purported "enhancements" to service quality at all.[153] The claimed "enhancements" are not even mentioned in Transcom's contracts with its customers.[154] At best, whatever Transcom does is merely "incidental" to the underlying telecommunications

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end-users] and does not provide any service to them. Transcom has no relationship with their distant third parties [*i.e.*, end-users] at all." EFIS Docket Entry No. 212, Johnson Direct at 8, lines 7-9.

[150] EFIS Docket Entry No. 173, *AT&T Calling Card Order*, ¶ 16. Further evidence that Transcom does not alter the "fundamental character" of the calls that pass through it on the way to Halo and AT&T is that the calls still fit easily with the definition of "telecommunications" in 47 U.S.C. § 153(50). The definition states that "telecommunications" means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content thereof." The calls at issue here, *e.g.*, a call from a girl in California to a relative in St. Louis, involve transmission "between or among points specified by the user" (the girl specifies her landline phone in California and her grandmother's phone in St. Louis), of "information of the user's choosing" (the voice communication with her relative), "without change in the form or content of the information as sent or received," since the words the girl speaks in California are the same words that reach her grandmother in St. Louis.

[151] EFIS Docket Entry No. 218, McPhee Rebuttal at 4, lines 7-19.

[152] *Id.* at 4, lines 1-6.

[153] EFIS Docket Entry No. 217, McPhee Direct at 9, lines 6-18.

[154] EFIS Docket Entry No.218, McPhee Rebuttal at 4, lines 16-19.

service provided by the calling party's carrier, and therefore does not qualify as an enhanced service.[155]

Consistent with FCC precedent, four state commissions have now expressly ruled that Transcom's service is not an enhanced service. For example, the Tennessee Regulatory Authority found:

> Transcom only reduces background noise and inserts "comfort noise" in periods of silence so that those periods of silence are not mistaken for the end of a call. . . .The alleged "enhancements" that Transcom claims it makes to calls that transit its network are simply processes to improve the quality of the call. Telecommunications networks have been routinely making those types of improvements for years and, in some cases, decades. Carriers have routinely incorporated equipment into networks that have, for example, expanded the dynamic range of a voice call to improve clarity. The conversion from analog to digital and back to analog has significantly improved call quality, yet none of those processes are deemed "enhancements" in the sense of an ESP.[156]

The Commission agrees and concludes that Transcom is not an ESP.

2. Halo Has Not Paid the Appropriate Compensation to AT&T Missouri as Prescribed by the Parties' ICA. Access Compensation Applies to Halo's Traffic

The Commission has found that Halo has sent AT&T and the LECs subtending its tandem switches large amounts of interexchange landline-originated traffic (both interstate and intrastate). Halo has contended that this traffic is local, and thus subject only to reciprocal compensation charges instead of the higher access charges that apply to non-local traffic. Halo has argued that it cannot be required to pay tariffed access charges because, it claims, it technically did not receive access service precisely as it is defined in

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[155] EFIS Docket Entry No. 173, *AT&T Calling Card Order*, ¶ 16 & n.28

[156] EFIS Docket Entry No. 153, *Tennessee Halo Order*, at 21-22. *See also* EFIS Docket Entry No. 236, *Georgia Halo Order*, pp. 9-10; and EFIS Docket Entry No. 236, *South Carolina Halo Order*, p. 6.

AT&T's tariffs. For example, Halo contends that it did not receive service from AT&T via a "Feature Group D" arrangement. The Commission disagrees.

AT&T's federal tariff, filed with the FCC, requires Halo to pay access charges on the interstate traffic AT&T has terminated for Halo, and AT&T's state tariff, filed with this Commission, requires Halo to pay access charges on the intrastate non-local traffic AT&T has terminated for Halo.[157] A tariff is a document which lists a public utility's services and the rates for those services. Once approved by the Commission, a tariff "becomes Missouri law and has the same force and effect as a statute enacted by the legislature."[158] The lack of terms in the ICA defining the proper intercarrier compensation that Halo must pay for terminating interexchange landline-originated traffic (because the landline-originated traffic was not permitted by the ICA) does not excuse Halo from compliance with lawful tariffs. When AT&T terminates interexchange and interstate calls for other carriers, that is access service, and those carriers must pay the access rates in AT&T's access tariffs. The Commission holds that Halo should be treated no differently.

Halo's claim that it has not ordered access service is unavailing. A carrier "constructively orders" service under a tariff, and therefore must pay the tariffed rate, if it (1) is interconnected in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of services; and (3) does in fact receive such services.[159] The doctrine applies here for three reasons.

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[157] EFIS Docket Entry No. 217, McPhee Direct at 20, line 16 - 21, line 2.

[158] EFIS Docket Entry No. 167, *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App. E.D. 1997).

[159] EFIS Docket Entry No. 255, *Advamtel LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000) (*citing United Artists Payphone Corp. v. New York Tel. Co.*, 8 FCC Rcd 5563 at ¶ 13 (1993) and *In re Access Charge Reform,* 14 FCC Rcd 14221 (1999) at ¶ 188).

First, Halo "is interconnected [to AT&T] in such a manner that it can expect to receive access services." Halo interconnects to AT&T under the ICA and agreed to pay access charges on at least some of the traffic it sent to AT&T (assuming the traffic was all wireless).[160] Halo also knew it was sending traffic to AT&T that started outside the MTA or local calling area where Halo was located and that interMTA and non-local traffic are subject to access charges. *Second*, Halo "fail[ed] to take reasonable steps to prevent the receipt of [access] services." Indeed, Halo took *no* steps to prevent the receipt of access services. Halo never tried to stop Transcom from sending it landline-originated traffic that Halo knew (or should have known) began in other local calling areas or other states and continues to knowingly accept that long-distance landline traffic and pass it to AT&T for termination today.[161] *Third*, Halo "did in fact" receive terminating access service from AT&T. The evidence shows Halo sent huge amounts of landline-originated non-local traffic to AT&T and AT&T terminated such traffic to its end-users. The termination of long-distance traffic is the essence of terminating switched access service, and the long-established rates for such service are in AT&T's access tariffs.[162]

Halo also contends that the FCC held in the *Connect America Order* that Halo's service is merely transit service and it cannot owe terminating access charges to AT&T or other carriers. Halo is incorrect. The *Connect America Order* never held that Halo's service is transit service, much less that Halo is exempt from paying terminating access

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[160] EFIS Docket Entry No. 217, McPhee Direct, Schedule JSM-4, ICA § 4.2.

[161] *See* EFIS Docket Entry No. *254, AT&T Corp. v. Community Health Group*, 931 F. Supp. 719, 723 (S.D. Cal. 1995) (defendants constructively ordered service because they "have come forth with no showing that they acted in any way to control the unauthorized charging of AT&T ... calls to their system" by a hacker).

[162] 47 C.F.R. § 69.2(b) (FCC defines "Access service" to include "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."). *See also* Southwestern Bell Telephone Company Access Service Tariff F.C.C. NO. 73, Section 6.9; P.S.C. Mo.-No. 36 Access Services Tariff Sections 3.8, 6.11. Those tariffed rates are the rates Halo must pay. EFIS Docket Entry No. 217, McPhee Direct, p. 21.

charges when it hands long-distance traffic to AT&T for termination. The issue in the *Connect America Order* was whether Transcom could be deemed to originate every call it touches and whether the calls Halo was handing to LECs should be treated as local or non-local.[163] The FCC used the term "transit" merely to point out that entities that simply pass calls on in the middle of the call path are not viewed as originating those calls – and that because Transcom did not originate the calls Halo was passing to other carriers for termination, those calls were not local (*i.e.*, not intraMTA) and therefore were not merely subject to reciprocal compensation charges.[164] The Commission concludes that as non-local calls, those calls are subject to terminating access charges.

Halo further contends that Transcom performs enhancements on the calls it receives from other carriers and then originates the purported enhanced traffic for delivery to Halo. As discussed above, the Commission has concluded that Transcom neither performs enhancements nor originates traffic. But even if it did, the Commission finds that the purportedly enhanced traffic necessarily would originate from the same locations that Transcom performed the "enhancements," namely, at the Transcom data centers in Atlanta, New York City, Los Angeles and Dallas, *not* at a tower site in Missouri.[165] Traffic, whether

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[163] *Connect America Order*, ¶¶ 1004-06. The Commission also notes Halo's *ex partes* to the FCC, which framed the issue there, never once argued that Halo was providing transit service to other carrier. Quite the opposite, Halo argued that it was merely sending locally originated, wireless traffic to ILECs and therefore only had to pay reciprocal compensation, rather than access charges. EFIS Docket Entry No. 217, McPhee Direct, Schedules JSM-6 and JSM-7.

[164] *Id.*

[165] *Id.* at 235, line 20 - 236, line 6 (" . . . So while I am not saying that there is an origination – or a further origination, I believe is the terminology that your witnesses are commonly using, they're claiming there's a further origination of the call that takes place. And if that further origination were to take place, then the point at which that was taking place would be back at the data center. It wouldn't be at the tower site"); and at 266, lines 206, line 3 – 267, line 14 (stating that Transcom's data centers are in Atlanta, New York City, Los Angeles and Dallas; that there is no wireless equipment at Transcom's data centers; and that a further origination at the data centers therefore would not be wireless). *See also id.* at 241, lines 10-18 (Q: Now, I believe what you are saying is that, well, if you want to get to where it might originate from Transcom, where it really originates is back at the data center, which is not there in the MTA, it's one of the four locations that are

wireline or wireless, that originates in Atlanta, New York, Los Angeles or Dallas and terminates in Missouri is non-local traffic to which access charges apply.

Given that Halo has received terminating access service from AT&T, and under the law has "constructively ordered" that service for all landline traffic it sent to AT&T, the Commission holds that Halo is liable to AT&T for access charges on the long-distance landline traffic Halo has sent to AT&T. The Commission notes that it is not making any determination how much Halo owes AT&T, or how many minutes of access traffic Halo has sent AT&T. The court in Halo's bankruptcy case has made clear that this relief is permissible, explaining that the only limitation on the relief state commissions can grant for Halo's wrongdoing is that they should not issue relief involving "*liquidation of the amount* of any claim against the Debtor."[166] The actual amount Halo must pay will be determined in bankruptcy court.

3. Halo Has Committed a Material Breach of Its ICA with AT&T Missouri, so AT&T Missouri Is Entitled to Discontinue Performance under the ICA

The Commission has concluded that only traffic the ICA allows Halo to send to AT&T is traffic that originates on wireless equipment. The ICA states:

> Whereas, the Parties have agreed that ***this Agreement will apply only to*** (1) traffic that originates on AT&T's network or is transited through AT&T's network and is routed to Carrier's wireless network for wireless termination by Carrier; and (2) ***traffic that originates through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T*** for termination by AT&T or for transit to another network. [Emphasis added].[167]

The Commission holds that this "wireless traffic only" provision is a material term of the ICA. It is important because wireless traffic and landline traffic are regulated differently.

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involved here? A: That's right. The call -- or the further communication would originate back at the data center.").

[166] EFIS Docket Entry No. 25, Exhibit B, Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay, *In re Halo Wireless, Inc.*, Case No. 11-42464-btr-11 (Bankr. E.D. Tex., Oct. 26, 2011) (emphasis added).

[167] EFIS Docket Entry No. 217, McPhee Direct at 13, line 22 – 14, line 11; Schedule JSM-5.

The geographic areas used to determine whether traffic is local (and therefore subject to reciprocal compensation charges) or non-local (and therefore subject to access charges, which are higher) differ greatly for wireless and landline traffic.[168] Wireless traffic is classified as local or non-local based on Major Trading Areas ("MTAs"), which are quite large. For landline traffic, calls are classified as local or non-local based on "local calling areas," which are much smaller.[169] For example, there are only four MTAs in all of Missouri, but more than 720 landline local calling areas.[170]

Having found the "wireless traffic only" provision material, the Commission holds that Halo's breach of it entitles AT&T to discontinue performance under the ICA and stop accepting traffic from Halo. When a party materially breaches a contract, or breaches the contract in a way so basic as to defeat the purpose of the contract, the other party is excused from further performance.[171] Halo's breach here – continuously sending huge amounts of landline-originated traffic that the ICA does not allow – plainly defeats the core purpose of the ICA, which was to establish rates, terms, and conditions for *wireless-originated* traffic *only.*

The Commission's granting this relief will not run afoul of Halo's ongoing bankruptcy proceeding. AT&T asked for and received the identical relief from the Tennessee Regulatory Authority,[172] and then discontinued service to Halo in light of the TRA's Order. Halo complained of this to the bankruptcy court, and the bankruptcy court rejected Halo's

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[168] EFIS Docket Entry No. 217, McPhee Direct at 15, line 1 – 16, line 13.

[169] *Id.*

[170] *Id.* at 16, lines 11-13.

[171] *E.g.*, EFIS Docket Entry No. 190, *Barnett v. Davis*, 335 S.W.3d 110, 112 (Mo. App. W.D. 2011) (noting "Missouri's first to breach rule, stated in *R.J.S. Security v. Command Security Services, Inc.*, 101 S.W.3d 1, 18 (Mo. App. W.D. 2003), [EFIS Docket Entry No. 191] which provides that 'a party to a contract cannot claim its benefit where he is the first to violate it.' A breach by one party will excuse the other party's performance, however, only if the breach is material. *Id.*").

[172] *See* EFIS Docket Entry No. 153, *Tennessee Halo Order* at 22

complaint.[173] The bankruptcy court found that the TRA "had jurisdiction to interpret and enforce the provisions of the interconnection agreement," that "[t]he TRA's ruling and Order regarding AT&T Tennessee's right to stop accepting traffic is within the TRA's police and regulatory powers and falls with[in] the exception to the automatic stay as found in this court's Courts 362(b)(4) Order," and that "[t]he TRA's determination that AT&T Tennessee may terminate the ICA is also within the TRA's authority and jurisdiction; however, prior to any termination, AT&T Tennessee must also comply with section 365 of the Bankruptcy Code."[174] The Commission grants AT&T similar relief here and notes that AT&T must similarly comply with Section 365.

C. Blocking Under the Missouri ERE Rule

1. The Missouri ERE Rule Applies to Halo's Traffic

a. History and Necessity of the ERE Rule

Staff witness William Voight was a primary drafter of the ERE Rule.[175] Mr. Voight testified that the rule was a necessary response to protect the LEC-to-LEC network from documented problems:

> The ERE rule . . . was established to avert incidences of unidentifiable, or phantom, traffic. The ERE rule was put into place to ensure all companies on the call-path were adequately compensated for use of their networks. Central to the goal of full and fair compensation was a requirement for tandem switch providers, such as AT&T Missouri and CenturyTel, to create billing records and for all companies to ensure calling party telephone number (CPN) information is provided and transmitted for all types of traffic. The ERE rule establishes a framework to help ensure: (1) CPN is transmitted on each call; (2) a record of the call is created and made available to terminating carriers; and, (3) carriers are paid for the use of their networks. If companies are not paid for use of their networks or if companies fail to transmit CPN or

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[173] EFIS Docket Entry No. 6, Exhibit 5, Order Denying Plaintiff's Request for Emergency Injunctive Relief, *In re Halo Wireless, Inc.* and *Halo Wireless, Inc. v. BellSouth Telecommunications, LLC,* Case No. 11-42464-btr-11/Adv. Proc. No. 12-04019 (Bankr. E.D. Tex., Feb 6, 2012)

[174] *Id.*, ¶¶ 2-4.

[175] Tr. 90, 446.

> otherwise disguise the jurisdiction of the call, the aggrieved company may request blockage of the offender's traffic.[176]

Staff's testimony is consistent with the ERE *Order of Rulemaking*, which recognized "extensive documentation of problems" experienced by RLECs.[177]

On June 15, 2005, after a rulemaking proceeding in Case No. TX-2003-0301, the Commission published and adopted the ERE Rule, which became effective July 30, 2005.[178] The intent of the ERE Rule was to adopt minimally invasive local interconnection rules necessary to address the complex processes and interests of those companies involved with traffic traversing the LEC-to-LEC network. In its *Order of Rulemaking*, the Commission rejected wireless carriers' contentions they were entitled to use the LEC-to-LEC network without regard to service quality, billing standards, or compensation. The Commission determined that the ERE Rule did not seek to regulate the business practices and customer-related activities of wireless carriers.

b. Commission Authority for Promulgating the ERE Rule

The Commission's *Order of Rulemaking* found no FCC rules addressing the disputes arising from traffic placed on the LEC-to-LEC network. On the contrary, the Commission observed that adoption of the ERE Rule was necessary and of particular importance to reduce compensation disputes and provide a forum for resolving such disputes when they occurred. The Commission concluded §386.320.1, RSMo, obligated the Commission to assure all calls, including calls generated by nonregulated entities such as wireless carriers, are adequately recorded, billed, and paid for. Federal law also authorizes the Commission

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[176] EFIS Docket Entry No. 224, PSC Staff Ex. 1, William Voight Direct Testimony, p. 3.

[177] EFIS Docket Entry No.139, *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, p. 1376

[178] EFIS Docket Entry No. 139, *ERE Order of Rulemaking*, Mo. Register, Vol. 30, No. 12, pp. 1373-1401. The separate sections of the ERE Rule are codified at 4 CSR 240-29.010-29.160.

to enforce "any regulation, order, or policy . . . that establishes access and interconnection obligations of local exchange carriers."[179]

Thus, the Commission has subject matter jurisdiction to resolve this complaint pursuant to §386.390.1 and 386.400 RSMo. even if Halo were considered a bona fide CMRS provider because there is an issue as to whether Halo is an access customer of AT&T Missouri and the RLEC Respondents.[180] Halo, by delivering such traffic to AT&T Missouri at AT&T Missouri's originating access tandems in the Kansas City, St. Louis, and Springfield LATA tandems has placed traffic on the LEC-to-LEC network as an originating and aggregating carrier. Halo has made itself financially responsible for its traffic that traversed the LEC-to-LEC network by the terms of its ICA with AT&T Missouri, and Halo has thereby brought itself within the jurisdiction of the state of Missouri under the ERE Rule.

c. The ERE Rule

The ERE Rule defines "the LEC-to-LEC network" as "that part of the telecommunications network designed and used by telecommunications companies for the purposes of originating, terminating, and transiting local, intrastate/intraLATA, interstate/intraLATA, and wireless telecommunications services that originate via the use of feature group C protocol . . ."[181] The origination, transit, and termination of traffic utilizing the LEC-to-LEC network is only allowed upon compliance with the ERE Rule.[182] The ERE

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[179] EFIS Docket Entry No. 139, ERE *Order of Rulemaking*, 30 MO Reg, No. 12, p. 1377, citing 47 USC 251(d)(3).

[180] *See* EFIS Docket Entry No. 140, *Order Regarding Subject Matter Jurisdiction*, Case No. TC-2002-57, Feb. 14, 2002.

[181] 4 CSR 240-29.010.

[182] 4 CSR 240-29.030(1).

Rule expressly prohibits certain actions and types of traffic from being placed on the LEC-to-LEC network:

(1) It prohibits the transmission of interLATA wireline traffic over the LEC-to-LEC network. 4 CSR 240-29.010 and 29.030(2);

(2) It prohibits the termination of traffic originated by or with the use of feature group A, B or D protocol trunking arrangements from being terminated on the LEC-to-LEC network. 4 CSR 240-29.030(3);

(3) It prohibits any traffic aggregator from placing traffic on the LEC-to-LEC network except as permitted by Chapter 29. 4 CSR 240-29.030(4);

(4) It prohibits any originating carrier or traffic aggregator from altering or failing to deliver originating caller information for landline-originated traffic placed on the LEC-to-LEC network. 4 CSR 240-29.040(1) and (5);

(5) It prohibits the alteration of record creation, exchange or billing processes currently in place for traffic carried by interexchange carriers using feature groups A, B, or D protocols. 4 CSR 240-29.030(5);

The ERE Rule also contains certain requirements for the creation and exchange of records:

(1) It contains provisions for the use of record creation that terminating carriers could utilize in preparing invoices to bill originating carriers of traffic placed on the LEC-to-LEC network. 4 CSR 240-29.080;

(2) It contains provisions for the exchange of records, invoices, objections to payment of invoices, and dispute resolution procedures for traffic placed on the LEC-to-LEC network. 4 CSR 240-29.090 and 29.100;

The ERE Rule includes blocking provisions as enforcement mechanisms:

(1) It allows AT&T Missouri as a transiting carrier to block traffic of originating carriers or traffic aggregators who failed to comply with the ERE Rule. 4 CSR 240-29.120;

(2) It allows the RLECs here, as terminating carriers, to request AT&T Missouri, as an originating tandem carrier, to block traffic of originating carriers or traffic aggregators. 4 CSR 240-29.130;

(3) It allows an originating carrier or traffic aggregator wishing to dispute a blocking request by either the transiting carrier or the terminating carrier to file a Complaint with the Commission to do so. 4 CSR 240-29.120 and 29.130.

d. The ERE Rule Governs the Missouri LEC-to-LEC Network

The ERE Rule was adopted to govern Missouri's LEC-to-LEC network and ensure the carriers that build and maintain the network receive adequate records and compensation for the traffic that traverses it. The rule was designed to require appropriate records and compensation for such traffic and prevent the sort of abuse Halo has employed. Halo argues that the ERE Rule unlawfully regulates CMRS or "enhanced service" providers. The Commission has already considered and rejected such arguments when it adopted the rule:

> [T]he Enhanced Record Exchange Rules do not regulate wireless carriers, as the Joint Wireless Carriers and Sprint suppose. Rather, what the rules would regulate is use of the LEC-to-LEC network—not the wireless carriers. We find that section 386.320.1, in particular, places an obligation upon the commission to assure that all calls, including calls generated by nonregulated entities, are adequately recorded, billed, and paid for. We reject Joint Wireless Carriers' apparent contention that nonregulated carriers may use the Missouri LEC-to-LEC network without regard to service quality, billing standards, and, in some instances, with an apparent disregard for adequate compensation.... We are not convinced that one carrier's most technological and efficient interconnection should extend to another carrier's financial loss without an agreement. Moreover, we would note [that] Section (d)(3) preserves a state's interconnection regulations. Specifically, this section holds that the FCC may not preclude the enforcement of any regulation, order, or policy of a state commission that establishes access and interconnection obligations of local exchange carriers. We find that the obligation we are imposing on incumbent local exchange carriers is a necessary interconnection obligation on incumbent carriers.
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> [W]e do not believe our rules conflict with federal law, because they have nothing to do with the relationship between a wireless carrier and its customers. Rather, our proposed rules have only to do with the terms and conditions that may be required by those who provide services *to a wireless carrier*, and in particular, transiting service. Our rules are not targeted to the practices of wireless carriers; rather, our rules are targeted to the practices of regulated local exchange carriers and the network employed by them—a matter that *is* under the jurisdiction of this commission. In particular, our proposed rules address use of the LEC-to-LEC network, especially that traffic which is transited to terminating carriers who are not a party to agreements

made between originating carriers (including but not limited to wireless carriers) and transiting carriers.[183]

Thus, the ERE Rule does not "regulate" wireless carriers or ESPs. Rather, the ERE Rule governs the type of traffic allowed on the Missouri LEC-to-LEC network and the way in which it is handled.

e. Halo Is Placing Telecommunications Traffic on the LEC-to-LEC Network via Its Interconnection with AT&T Missouri for Termination on AT&T Missouri's and RLEC Respondents' Networks

Halo's direct "wireless" interconnection with AT&T Missouri's tandem switches allows Halo to place traffic over the LEC-to-LEC network. Under its interconnection agreement with AT&T Missouri, Halo delivers traffic to AT&T Missouri over the LEC-to-LEC network for termination to AT&T Missouri end-user customers and also to the RLEC Respondents' end user customers (via the "transit" provisions in the ICA).

f. Halo is An "Originating Carrier" and "Traffic Aggregator" for Purposes of ERE Rule

Halo has delivered large volumes of traffic to AT&T Missouri for transmission on the LEC-to-LEC network. Significant amounts of Halo's traffic is landline interexchange traffic for which the LECs' access rates apply. Significant amounts of this landline traffic is interLATA traffic which is prohibited by the ERE Rule. Some of the other traffic is interMTA wireless traffic for which the LECs' access rates apply.

By delivering traffic to the AT&T Missouri tandems, Halo is acting as an originating carrier (a carrier that "is responsible" for originating telecommunications traffic that traverses the LEC-to-LEC network). Halo argues that it is neither an originator nor aggregator of traffic under the ERE Rule.[184] The Commission disagrees and concludes

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[183] EFIS Docket Entry No. 139, ERE *Order of Rulemaking*, 30 MO Reg, No. 12, p. 1377.

[184] EFIS Docket Entry No. 211, Wiseman Direct, p. 33.

that Halo has acted as both an originator and aggregator of traffic by placing telecommunications traffic on the LEC-to-LEC network. Halo has employed its direct connection with AT&T Missouri to place traffic on the LEC-to-LEC network, making Halo directly "responsible for originating telecommunications traffic that traverses the LEC-to-LEC network" as defined by 29.020(29). Moreover, Halo also concedes that it is placing telecommunications traffic on the LEC-to-LEC network "on behalf of another carrier" (Transcom) and thus meets the definition of an aggregator under 29.020(3).

Halo suggests that it is a "transiting" carrier somehow exempt from the Missouri law. Under the ERE Rule, however, only originating tandem carriers perform a transit function when they transport traffic properly comporting with the ERE Rule over the LEC-to-LEC network to the end office of another LEC. Halo's claim it is "transiting" Transcom's traffic to AT&T Missouri is neither contemplated nor permitted by the ERE Rule. Under the ERE Rule, by delivering the traffic in dispute to AT&T Missouri's originating tandem, Halo is acting as both an originator and aggregator of the traffic for purposes of the ERE Rule.

g. Halo's "CMRS license" Has No Consequence

Transcom is routing large volumes of wireline interexchange and interMTA wireless voice calls to its affiliate, Halo. Halo then delivers those wireline and interMTA wireless calls to AT&T Missouri for completion (i.e. "termination") to AT&T Missouri's customers and the RLEC Respondents' customers. Although these voice calls employ the facilities and services of RLEC Respondents, Halo has refused to compensate the RLEC Respondents for these calls even where Halo has been billed at the RLEC Respondents' lowest reciprocal compensation rates.

Halo argues that it has a CMRS license which grants it federal authority and prohibits the Commission from regulating its activities.[185] The evidence indicates Halo has been issued a Radio Station Authorization.[186] There is no evidence that any of the traffic in question was originated by *mobile* wireless customers of Halo. The insertion of a "wireless link" in the call paths did not involve wireless equipment that was capable of moving and ordinarily did move. Under the evidence, it is not clear that any traffic which is the subject of this case was Halo CMRS traffic. Rather, the evidence establishes that the majority of Halo's traffic is wireline-originated interexchange traffic. Regardless of the nature of Halo's license, and regardless of whether Halo may operate as a CMRS provider, Halo has improperly placed interexchange landline traffic and interMTA wireless traffic on the LEC-to-LEC network.

The FCC's *Connect America Fund Order*[187] rejected Halo's arguments and found that Halo's practices did not convert landline calls into something else. Specifically, the FCC held, "[T]he 're-origination' of a call over a wireless link in the middle of a call path does not convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal compensation and we disagree with Halo's contrary position."[188]

Therefore, the Commission's determination that Halo has violated the ERE Rule is based upon Halo's actual operations and improper use of the LEC-to-LEC network in Missouri rather than Halo's claimed status as a CMRS provider. The ERE Rule was established to address and prevent such improper activity.

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[185] EFIS Docket Entry No. 72, Halo Exhibit A, Wiseman Direct, pp. 26-28.

[186] Halo Exhibits 2 and 2A.

[187] *In the Matter of the Connect America Fund,* WC Docket No. 10-90 et al., *Report and Order,* released Nov. 18, 2011.

[188] *Id.* at ¶1006.

2. Halo Has Placed InterLATA Wireline Telecommunications Traffic on the LEC-to-LEC Network

The record demonstrates and the Commission concludes that Halo has delivered large volumes of telecommunications traffic via the LEC-to-LEC network to AT&T Missouri for termination to AT&T Missouri customers and for termination to the customers of Craw-Kan et al. and Alma et al. As previously discussed, AT&T Missouri's traffic studies demonstrate that significant proportions of the Halo traffic were originated as landline calls. This traffic terminated to landline customers of AT&T Missouri, Craw-Kan et al., or Alma et al., and thus were landline to landline interexchange calls.

The Commission further concludes that AT&T Missouri's traffic studies demonstrate that significant proportions of these landline to landline calls were interLATA in jurisdiction, as the calls originated in LATAs that were different than the LATAs in which the calls terminated. Halo's delivery of interLATA landline to landline calls to AT&T Missouri on the LEC-to-LEC network violated 4 CSR 240-29.010 and 4 CSR 240-29.030(2) of the Commission's ERE Rule. In addition, interLATA landline to landline calls were originated by or with the use of Feature Group D protocol trunking arrangements, and Halo's delivery of such calls to AT&T Missouri on the LEC-to-LEC network violated 4 CSR 240-29.030(3).[189]

3. Halo Has Failed To Compensate the RLEC Respondents for Traffic it is Delivering to Them for Termination Pursuant to Halo's Interconnection Agreement with AT&T Missouri

As the Commission has previously concluded, significant portions of the Halo traffic were landline to landline interexchange calls. To the extent these landline interexchange calls were originated in one state and terminated to another state, they are subject to the

[189] Tr. 399, Re-Cross of Craw-Kan et al. witness for McDonald County Telephone, Jack Rickett.

interstate access tariffs and charges of the Respondents. To the extent these landline interexchange calls originated in Missouri and terminated in Missouri, they are subject to the Missouri intrastate access tariffs and charges of the Respondents.[190]

The Commission also concludes that AT&T Missouri's traffic studies demonstrate that significant proportions of the Halo traffic were originated as wireless calls by customers of Commercial Mobile Radio Service providers other than Halo. This traffic terminated to landline customers of AT&T Missouri, Craw-Kan et al., and Alma et al., and thus were wireless to landline calls. Whether wireline or wireless, and whether local or interexchange, all of the traffic Halo delivered to AT&T Missouri and the RLEC Respondents is "compensable traffic" pursuant to 4 CSR 240-29.020(8) ("telecommunications traffic that is transited or terminated over the LEC-to-LEC network, for which the transiting and/or terminating carrier is entitled to financial compensation.")

AT&T Missouri's traffic studies further demonstrate that significant proportions of these wireless to landline calls were interMTA in jurisdiction, as the calls originated in MTAs that were different than the MTAs in which the calls terminated. To the extent the wireless to landline interMTA Halo calls originated in one state and terminated in another state, they are subject to the interstate access tariffs of the Respondents. To the extent the wireless to landline interMTA calls originated in Missouri and terminated in Missouri, they are subject to the intrastate access tariffs of the Respondents.[191]

By sending landline interexchange traffic, and by sending wireless interMTA traffic, Halo has used its direct interconnection with AT&T Missouri, and its indirect interconnections with Craw-Kan et al. and Alma et al. in a manner such that Halo knew it

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[190] See e.g. EFIS Docket Entry No. 143, *BPS Telephone Company et al. v. Voicestream Wireless Corp.*, Case No. TC-2002-1077, *Report and Order*, issued Jan 27, 2005, pp. 14-15.

[191] *Id.* at pp. 16-17.

would receive terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al. Halo intended to receive terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al. Halo did in fact receive terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al. Thus, as the Commission has previously concluded, Halo constructively ordered terminating exchange access services from AT&T Missouri, Craw-Kan et al., and Alma et al.

Halo has refused to pay AT&T Missouri its terminating exchange access tariff rates for this non-local Halo traffic terminating to AT&T Missouri. Halo has only paid AT&T Missouri its reciprocal compensation rate set forth in the Halo-AT&T interconnection agreement. Halo has also refused to pay Craw-Kan et al. or Alma et al. anything for this non-local Halo traffic terminating to Craw-Kan et al. and Alma et al. By failing to pay AT&T Missouri, Craw-Kan et al., and Alma et al., terminating exchange access tariff rates for this non-local Halo traffic, Halo violated the provisions of 4 CSR 240-29.090 and 29.100.

4. Halo Did Not Deliver Appropriate Originating Caller Identification

The Commission's ERE Rule defines originating caller identification as the "10 (10-digit) telephone number of the caller who originates the telecommunications that is placed on the LEC-to-LEC network. This feature is also known as Caller ID, Calling Number Delivery (CND), Calling Party Number (CPN), and Automatic Number Identification (ANI)."[192] In other words, originating caller identification is the calling party number or CPN of the end user who places the call. As the Commission has previously concluded, the traffic Halo is placing on the LEC-to-LEC network does not originate with its customer Transcom but with the end user who actually initiated the call. Therefore, the Commission concludes that the appropriate originating caller identification to be included in the calls

[192] 4 CSR 240-29.020(28).

Halo is putting on the LEC-to-LEC network for delivery to Respondents is the CPN of the calling party who initiated the call.

The Commission's ERE Rule also prohibits carriers that use the LEC-to-LEC network from substituting any number other than the telephone number of the end user responsible for originating the call:

> The originating telephone number shall be the telephone number of the end user responsible for originating the telephone call. Under no circumstances in Sections (1), (2), (3), (4) and (5) above shall any carrier substitute an originating telephone number other than the telephone number of the end user responsible for originating the telephone call.[193]

In this case, it is clear, and Halo admits, that for a period of time beginning in approximately mid-February, 2011 through late December, 2011, it was placing a Charge Number that it assigned to Transcom in the record for each call delivered to AT&T Missouri for termination on the LEC-to-LEC network. As the Commission previously found when the call record information includes both a CPN and a CN, the CN overrides the CPN and controls how the call is categorized and billed. By inserting the inaccurate CN, Halo masked the true nature of the calls it was sending to AT&T Missouri and RLEC Respondents. It was only after AT&T Missouri and several RLECs conducted special, time-consuming, and expensive analyses that the true nature of the calls was discovered.

The Commission concludes the only apparent reason for Halo's insertion of the inaccurate CN in the call record was to make the long distance landline calls that Halo sent to AT&T Missouri appear to be local wireless calls, and therefore avoid access charges for what was actually non-local traffic. Therefore, by inserting an inaccurate CN in the call record, Halo has violated the Commission's ERE Rule prohibiting a carrier from substituting

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[193] 4 CSR 240-29.040(6).

an originating telephone number other than the telephone number of the end user responsible for originating the telephone call. 4 CSR 240-29.040(6).

5. Blocking of Halo's Traffic in Accordance with the ERE Rules

Blocking or disconnection from the network is the appropriate remedy under the ERE Rule (as well as longstanding legal precedent) for customers, including other carriers, that do not pay their bills. The right to block calls or disconnect service for failure to comply with Commission-approved tariffs has been consistently upheld by the Missouri Court of Appeals.[194] Similarly, the FCC has explained, "the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties."[195] The Georgia Public Service Commission, South Carolina Public Service Commission, Tennessee Regulatory Authority, and Public Service Commission of Wisconsin have all granted similar relief -- authority to stop accepting traffic from Halo.[196]

The Commission observes that blocking of Halo's traffic over the LEC-to-LEC network is a limited remedy that does not prevent Halo from using alternative methods to deliver traffic to Missouri carriers. Rather, blocking under the ERE Rule only prevents Halo's traffic from being transited through the AT&T tandem over Feature Group C (FGC)

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[194] *See e.g.* EFIS Docket Entry No. 169, *State ex rel. Tel-Central of Jefferson City, Inc. v. Public Service Comm'n*, 806 S.W.3d 432, 435 (Mo. App. 1991)("To hold otherwise would mean that a telephone company would be required to serve every customer so long as service was requested whether the customer paid the bill or not."); EFIS Docket Entry No. 165, *Sprint Spectrum v. Missouri PSC*, 112 S.W.3d 20, 26 (Mo. App. 2003)("We disagree that the Act prohibits blocking the traffic of a carrier in default of applicable tariff provisions, such as failing to pay approved rates. . . . It is well established that telephone companies may discontinue service to a customer in default of a tariff, as long as proper notice is given.").

[195] EFIS Docket Entry No. 169, *In the Matter of Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone Company of Missouri*, File No. E-87-59, *Memorandum Opinion and Order*, 4 FCC Rcd 8338, rel. Nov. 29, 1989, ¶9. This FCC decision was affirmed by the U.S. Court of Appeals for the D.C. Circuit in *Tel-Central of Jefferson City, Missouri, Inc. v. FCC*, 920 F.2d 1039 (D.C. Cir. 1990)(concluding that United Telephone Company "was authorized to disconnect Tel-Central's lines for nonpayment of charges.") [EFIS Docket Entry No.170].

[196] EFIS Docket Entry No. 153, *Tennessee Halo Order*, 22; EFIS Docket Entry No. 236, *Georgia Halo Order* at 15 and *South Carolina Halo Order* at 34. The Public Service Commission of Wisconsin has not yet issued its written order.

trunks on the LEC-to-LEC network. The ERE Rule specifically allows Halo to use other methods to deliver traffic:

> In all instances of traffic blocking, originating carriers and traffic aggregators may utilize alternative methods of delivering the blocked traffic to terminating carriers. Such methods may include interconnection agreement negotiations with terminating carriers for transiting traffic, direct interconnection with terminating carriers, or contracting with interexchange carriers for traffic delivery.[197]

Thus, the ERE's blocking provisions are reasonable limitations which generally prohibit carriers from sending interexchange traffic on FGC trunks unless otherwise approved by the Commission.

As the Commission has previously concluded, Halo has violated the provisions of the ERE Rule that prohibit altering originating caller information, that prohibit interLATA landline to landline traffic from being placed on the LEC-to-LEC network, that prohibit the placement of traffic originated by or with the use of Feature Group D protocol trunking arrangements on the LEC-to-LEC network, and that prohibit Halo from failing to pay the appropriate compensation for the traffic it placed on the LEC-to-LEC network.

As a result of these violations, the Commission concludes that blocking of Halo traffic terminating to AT&T Missouri is appropriate pursuant to 4 CSR 240-29.120. Further, as a result of these violations, the Commission concludes that blocking of Halo traffic terminating to Craw-Kan et al. and Alma et al. is appropriate pursuant to 4 CSR 240-29.130.

6. No Claim or Finding of Fraud

At the conclusion of the evidentiary hearing, Commissioner Kenney invited the parties to address his questioning of Staff witness Voight as to whether Transcom was

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[197] ERE Rule, 4 CSR 240-29.130(1).

created for the purpose of avoiding having to pay access charges and, if so, whether that is illegal or merely a permissible clever strategy.[198]

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.

Regardless of why the two companies were created, Halo and Transcom's access compensation avoidance strategy did not permit Halo to lawfully avoid the payment of exchange access compensation due on the traffic in question. It does not matter who created Transcom or Halo, or whether they were created as part of a clever strategy whose goal was the avoidance of payment of access charges. Under the law applicable to the facts of this case, it is the nature of the traffic, and the originating and terminating locations of the calls, that determine whether exchange access is owed.

As the Commission has found above, the landline traffic at issue was interexchange traffic subject to exchange access compensation. The Halo/Transcom strategy to convert landline calls into two separate calls by insertion of a "wireless in the middle" link did not convert the landline calls into intraMTA wireless calls. These calls remained interexchange landline calls subject to exchange access compensation.

Similarly, the interMTA wireless traffic at issue was also subject to exchange access compensation. The Halo/Transcom strategy to convert wireless calls into two separate calls by insertion of the "wireless in the middle" link did not convert interMTA calls into intraMTA calls. These calls remained interMTA wireless calls subject to exchange access compensation.

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[198] Transcript Volume 4, pp. 492-495 and 509-510.

D. Alma et al.'s ICA Complaint

Alma et al. also filed an Application seeking rejection of the transit provisions of Halo's interconnection agreement with AT&T Missouri, as implemented, pursuant to 47 USC 252 (e) (2). As grounds therefore, Alma et al. alleged that the implementation of the transit provisions in Halo's interconnection agreement with AT&T Missouri were contrary to the public interest because they allowed Halo to use rural network facilities without an approved agreement and compensation arrangements in place, and that as a result unlawful discriminations were caused. Craw-Kan et al. intervened in the case, designated as TO-2012-0035. Case number TO-2012-0035 was consolidated with the instant case TC-2012-0331.[199]

The Commission has decided that Halo's actions constituted a material breach of its interconnection agreement with AT&T Missouri. The Commission has also decided that Halo's actions violated the provisions of the ERE Rule. The Commission has authorized and directed AT&T to discontinue the termination of Halo traffic to AT&T Missouri, and to Craw-Kan et al., and to Alma et al. because of such breach and violations. Halo's traffic will no longer terminate to AT&T Missouri, to Craw-Kan et al., or to Alma et al. As the Commission's decision in this order obviates the need to consider the relief requested in TO-2012-0035, no decision is necessary to be rendered by the Commission in TO-2012-0035.

[199] EFIS Docket Entry No. 55, *Order Regarding Motion to Consolidate, Motion to Dismiss, and Motion to Dismiss AT&T Missouri's Counterclaim*, issued May 17, 2012, p. 4 (recognizing that a single hearing could be utilized to decide both cases and that the relief ordered this case may eliminate the need for additional relief to be ordered in TO-2012-0035).

Final Decision

In making this decision, the Commission has considered the positions and arguments of all of the parties. After applying the facts, as it has found them, to the law to reach its conclusions, the Commission has independently and impartially reached the following final decision. Halo has failed to meet its burden to prove its allegations by the preponderance of the evidence. AT&T Missouri, on the other hand, has met its burden to proof the allegations within its counterclaim by the preponderance of the evidence. The substantial and competent evidence in the record as a whole supports the conclusion that Halo has violated the Missouri Enhanced Records Exchange Rule and materially breached its interconnection agreement with AT&T Missouri.

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

THE COMMISSION ORDERS THAT:

1. The Commission's "Notice Regarding Communication and Post-Hearing Procedural Schedule," issued on July 24, 2012, shall be attached to this order and designated Attachment A.

2. Halo Wireless, Inc.'s ("Halo") complaint is denied.

3. Southwestern Bell Telephone Company, d/b/a AT&T Missouri's ("AT&T Missouri") counterclaim is granted.

4. Halo has materially breached its interconnection agreement with AT&T Missouri by sending landline-originated traffic to AT&T Missouri. As a result of this breach, AT&T Missouri is excused from further performance under the parties' interconnection agreement and may stop accepting traffic from Halo.

5. Halo violated the Missouri ERE Rule by failing to pay AT&T Missouri and the RLEC Respondents the applicable access rates for terminating Halo's landline originated interexchange traffic and interMTA wireless originated traffic; failing to deliver appropriate originating caller identification as required by the Rule; and transmitting interLATA wireline traffic over the LEC-to-LEC network. AT&T Missouri is therefore authorized to block Halo's traffic terminating to AT&T Missouri and to the RLECs pursuant to the ERE Rule.

6. Halo is liable, without quantifying any specific amount due, to AT&T Missouri and the RLEC Respondents for access charges on the interstate and intrastate access traffic Halo has sent to AT&T Missouri and the RLEC Respondents. The precise amount due will be an issue for Halo's bankruptcy proceeding.

7. To the extent the record citations and legal arguments in "AT&T Missouri's Brief in Support of Its Proposed Findings of Fact and Conclusions of Law," which was filed on July 23, 2012, supplement the findings of fact and conclusions of law in this order, it is incorporated by reference as if fully set forth. This filing shall be attached to this order as Attachment B.

8. To the extent the record citations and legal arguments in "Staff's Initial Brief," which was filed on July 23, 2012, supplement the findings of fact and conclusions of law in this order, it is incorporated by reference as if fully set forth. This filing shall be attached to this order as Attachment C.

9. The Staff of the Missouri Public Service Commission shall complete an investigation into any unlawful actions by Halo Wireless, Inc. and Transcom Enhanced Services, Inc. and file a complaint seeking penalties if the results of Staff's investigation support such action.

10. This Report and Order shall become effective on August 13, 2012.[200]

11. This file shall be closed on August 14, 2012.

BY THE COMMISSION

Steven C. Reed
Secretary

(S E A L)

Gunn, Chm., Jarrett, Kenney, and
Stoll, CC., concur.

Stearley, Deputy Chief Regulatory Law Judge

[200] Because of the nature of Halo's ongoing violations, the Commission finds good cause to exercise its discretion and set the date for this order to take effect in less than 30 days. The Commission has the authority to make an order effective in less time than the 30-day statutory period described in Section 386.490.3, RSMo 2000. *Harter v. Missouri Public Service Comm'n*, 361 S.W.3d 52, 57 (Mo. App. 2011).

PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation into Practices of Halo Wireless, Inc., and Transcom Enhanced Services, Inc. 9594-TI-100

FINAL DECISION

This is the Final Decision in the Commission's investigation of Halo Wireless, Inc. (Halo), and Transcom Enhanced Services, Inc. (Transcom), and the practices of those two entities in Wisconsin.

The participating parties are listed in Appendix A.

Introduction

The Commission opened this matter on its own motion to investigate the practices of Halo Wireless, Inc. (Halo), and Transcom Enhanced Services, Inc. (Transcom). The Notice of Proceeding, dated October 20, 2011, specifically notes that the Commission "is investigating the amount and type(s) of traffic that Halo and Transcom are terminating in Wisconsin and the payments that Halo and Transcom are (or are not) making to Wisconsin terminating carriers." The Notice identified Halo and Transcom as parties;[1] it also named Wisconsin Bell, Inc., d/b/a AT&T Wisconsin (AT&T), and the TDS Telecom incumbent local exchange carriers (ILECs)[2] and TDS Metrocom, LLC (together, TDS) as parties. Later, party status was also granted to the Wisconsin State Telecommunications Association, Inc. (WSTA), the Wisconsin Rural Local

[1] Halo and Transcom are affiliated entities.
[2] There are 21 TDS ILECs in Wisconsin. See PSC REF#: 155242.

Exchange Carriers[3] (the RLECs), and the twelve CenturyLink incumbent local exchange carriers (ILECs) operating in Wisconsin (CenturyLink).

A Notice of Prehearing Conference was issued on November 9, 2011, and a Prehearing Conference was held on November 23, 2011, at which an Issues List was created.[4] On December 2, 2011, Halo and Transcom filed a written reply to the eight issues on that issues list (see PSC REF#: 156596).

On November 18, 2011, Halo and Transcom each filed a Motion to Dismiss. The RLECs, TDS, and AT&T submitted responses to the Motions to Dismiss on December 5 and December 6, 2011. On December 13, 2011, Halo and Transcom filed replies in support of their Motions to Dismiss. At its open meeting of January 5, 2012, the Commission denied the Motions to Dismiss, some parts with prejudice and some without prejudice.[5]

Hearings were held in Madison on February 28 and 29, 2012, and March 28, 2012. Halo and Transcom, AT&T, the RLECs and TDS filed initial briefs on March 26, 2012, and reply briefs on April 9, 2012.

The Commission considered this matter at its open meeting of July 12, 2012.

Findings of Fact

1. Halo and Transcom are Texas corporations. They have some common owners and officers, and they have some commonly-located facilities in various locations across the United States. Halo and Transcom provide facilities and services to each other.

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[3] Thirteen rural ILECs and competitive local exchange carriers (CLECs) filed jointly. See PSC REF#: 155214.
[4] Administrative Law Judge Michael Newmark issued a Prehearing Conference Memorandum on November 29, 2011, which includes the Issues List. See PSC REF#: 156329.
[5] At page 4 of that Order Denying Motions to Dismiss (PSC REF#: 158138), the Commission stated, ". . . the procedural and notice arguments or claims raised in the motions are denied with prejudice. The substantive aspects related to jurisdiction are denied without prejudice."

2. Halo has not been certified in Wisconsin as a telecommunications utility, an alternative telecommunications utility, or a telecommunications carrier. Halo has a Radio Station Authorization license from the Federal Communications Commission (FCC) for operation in the 3650-3700 MHz band.

3. Transcom has not been certified in Wisconsin as a telecommunications utility, an alternative telecommunications utility, or a telecommunications carrier.

4. Halo provides what it calls "High Volume Service" to Transcom. Transcom is Halo's only customer and only source of revenues. Halo has no consumer customers in Wisconsin and has no paying consumer customers anywhere else.

5. Halo leases a tower site in New Glarus, Wisconsin. Halo also leases a tower site at Danville, Illinois. Calls that are terminating in Wisconsin are routed through Halo facilities at one of these two tower locations. Halo delivers calls that it has received via Transcom to an AT&T tandem switch in the same Major Trading Area[6] (MTA) as the Halo tower. From that tandem, calls are forwarded to the local central offices of AT&T or of other ILECs or CLECs for final delivery to end user customers of those ILECs or CLECs. Neither Halo nor Transcom has paid terminating access charges for those calls.

6. Halo has an interconnection agreement (ICA) with AT&T. Part of that ICA states:

> Whereas, the Parties have agreed that this Agreement will apply only to . . . (2) traffic that originates through wireless transmitting and receiving facilities before Carrier (Halo) delivers traffic to AT&T for termination by AT&T or for transit to another network.

[6] MTAs have been established by the FCC for use in the wireless telecommunications market. MTAs are generally much larger geographically than traditional telephone exchanges. (See Ex.–PSCW Staff–Evenson–5 (PSC REF#: 158439).) The New Glarus tower is in MTA 20; the Danville tower is in MTA 3.

7. Whether landline or wireless, calls that originate in one local calling area and terminate in another local calling are subject to access charges.

8. Traffic that does not originate on wireless transmitting and receiving facilities is not subject to the Halo-AT&T ICA.

Conclusions of Law

1. The Commission has the requisite jurisdiction and discretion under Wis. Stat. §§ 196.02(1) and (7), 196.016, 196.04, 196.203, 196.212, 196.219, 196.37, 196.39, 196.44, 196.499, 47 USC §§ 251 and 252, and relevant case law, to determine the character of the operations of Halo and Transcom, to classify the nature of their traffic subject to access charges, to determine that certification is required for Halo and Transcom for the traffic conveyed, to authorize AT&T to terminate service under an interconnection agreement with Halo, to order specific remedies, to affirm its prior motion rulings, and to otherwise act or refrain from acting as set forth herein.

2. Notwithstanding Wis. Stat. § 196.199(1), the Commission has jurisdiction under Wis. Stat. §§ 196.01(12w), 196.016, 196.04, and 196.40, to approve and enforce interconnection agreements in which one party is a commercial mobile radio service (CMRS) provider.

Opinion

Transcom delivers traffic, which it receives from its upstream customers (other providers), to Halo. Halo delivers that traffic downstream to AT&T, at various tandem switches, for ultimate delivery to the central offices of various ILECs (or CLECs) for termination to those

companies' end users. As the calls traverse the Transcom and Halo networks, they are handled at various points by various Halo or Transcom facilities in many different locations.

The way Halo has structured its network is fundamental to the case, as is the manner in which the calls are handled between Halo and Transcom. Halo and Transom claim that the calls at issue in this proceeding are originated by Transcom via wireless equipment at a Halo leased tower site. Halo takes these calls from Transcom in one MTA and delivers those calls to an AT&T tandem switch in that same MTA. Asserting it is a CMRS provider, Halo claims that such intraMTA wireless calls are local and thus not subject to carrier access charges.[7]

Transcom claims to be an Enhanced Service Provider (ESP) and thus not subject to paying access charges on the calls that it delivers to Halo. Halo and Transcom contend that Transcom is an end user. Since it is not a carrier, there is no basis to apply access charges to the traffic that Transcom handles.

AT&T, TDS, and the RLECs reject the notion that the Halo-transmitted traffic originates from Transcom at the Halo tower sites. Rather, they argue that the calls originate with other end users at any of many locations around the country, and they simply traverse the Transcom and Halo networks en route to the intended terminating end users. Even Halo noted, "Most of the calls probably did start on other networks before they came to Transcom for processing."[8]

AT&T, TDS, and the RLECS also take the position that not all the traffic that Halo sends to the AT&T tandem, and then beyond, is wireless traffic. By examining call records, these parties note that large volumes of calls (millions of calls per month)—in some instances, the

[7] For intercarrier compensation purposes, intraMTA wireless calls are considered to be local calls, and thus, per FCC rules, not subject to carrier access charges. If calls originate in one MTA and terminate in another MTA, those calls are interMTA calls and would not be considered to be local.
[8] Per Halo's President, Russ Wiseman, at Wiseman-Tr. Vol. 1-Rebuttal 24. See PSC REF#: 159682.

majority of calls—come through the Halo and Transcom networks from numbers that can reasonably be concluded to have a wireline or landline origin.

TDS and the RLECs argue that much of this traffic should be subject to access charges since it is not wireless originated. AT&T argues that because it is not all wireless traffic, Halo is in breach of the AT&T-Halo ICA. As such, that traffic does not qualify for the intraMTA exemption from access charges, and it is not traffic that can properly be sent to AT&T under the AT&T-Halo ICA.

The other parties also reject Transcom's claim to be an ESP that is subject to an access charge exemption. Although Transcom relies on some decisions in bankruptcy courts that it is an ESP,[9] the other parties dispute that these are applicable or relevant. They also disagree that Transcom in fact offers any "enhancement" of the calls that it handles.

If the view of Halo and Transcom was correct, that is, if the calls at issue here were originated by Transcom at the Halo tower sites, if the calls were in fact all wireless calls originated in the same MTA in which they were terminated, and if the calls were enhanced by Transcom, then the positions espoused by Halo and Transcom would have validity. But saying it is so does not make it so. Halo and Transcom simply do not alter the fundamental nature of the traffic by passing it through a 150 foot wireless link. The Commission concludes that the substantial evidence presented by the other parties clearly outweighs and overrides the factual and legal arguments of Halo and Transcom:

- Calls are being originated in locations outside the MTA in which they are terminated;
- Not all calls are being originated on a wireless basis;

[9] See the cited cases at Ex.–Transcom–Johnson–1-4. See PSC REF#s: 159675-159678.

- The handling of the calls by Transcom and the handing of those calls to Halo over a short wireless link do not constitute the termination and re-origination of those calls by Transcom; and
- There is no credible basis to consider that the actions performed on this traffic in the Transcom facilities constitute enhancements that qualify or legitimize Transcom as an ESP.

These conclusions lead the Commission to other conclusions.

First, Halo is in breach of the AT&T-Halo ICA because not all the traffic at issue here is traffic "that originates through wireless transmitting and receiving facilities before Carrier (Halo) delivers traffic to AT&T for termination by AT&T or for transit to another network." AT&T may take action to remedy this ICA violation.

Second, Transcom is not an ESP.

Third, much of the traffic at issue here is not intraMTA wireless traffic, and it is thus subject to terminating access charges. The Commission is not determining specifically which providers are owed compensation or the amount of such compensation. At this time, that matter is appropriately within the purview of ongoing bankruptcy court proceedings or other appropriate forums.

Fourth, the nature of the business being performed by Halo and Transcom in Wisconsin makes those entities subject to certification in Wisconsin. Accordingly, Halo and Transom must cease and desist from operations in Wisconsin until certified. If they do not cease and desist within 30 days of the date of this Final Decision, the Commission will take other remedial actions to enforce compliance.

Other matters were raised and argued in this proceeding, but are not subject to specific proscription or prescription herein. The issue of the relationship of the Halo and Transcom entities and the concept of "piercing the corporate veil" need not be parsed further nor ruled on in this Final Decision. In addition, the matter of allegedly deficient or disguised call detail records and the replacement of the charge number in call records are not issues that must be addressed in this Final Decision in order to conclude this investigation. This Final Decision also need not and does not address other proffered remedies as to the establishment of trunk group requirements. No inference relating to the merits (or lack thereof) shall be drawn from the Commission's decision to not address these issues.

Order

1. This Final Decision will be effective one day after its date of mailing.

2. Transcom, for the purposes of the calls at issue in this proceeding, is held not to be an ESP.

3. Due to Halo's breach of the AT&T-Halo ICA, AT&T may take actions to remedy this violation, including the suspension of AT&T performance under the ICA and/or termination of the ICA.

4. Traffic, as examined on this record, that originates before it reaches Transcom and that is not intraMTA wireless, is traffic subject to access charges. Traffic that Transom sends to Halo at the Halo-leased tower sites is not originated by Transcom at that point.

5. Halo and Transcom require certification in Wisconsin to continue operation. Absent certification, they shall cease and desist from operations in Wisconsin within 30 days from the

date of mailing of this Final Decision. If Halo and/or Transcom continue to operate in Wisconsin after 30 days, the Commission shall proceed with other enforcement actions.

6. Jurisdiction is retained.

Dated at Madison, Wisconsin, this 27th day of July, 2012.

By the Commission:

Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

Docket 9594-TI-100

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.[10] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

[10] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

Docket 9594-TI-100

APPENDIX A

This proceeding is a contested case under Wis. Stat. ch. 227. Therefore, in order to comply with Wis. Stat. § 227.47, the following persons who appeared before the agency are considered parties as defined by both Wis. Stat. § 227.01(8) and Wis. Admin. Code § PSC 2.02(6), (10), and (12), for purposes of any review under Wis. Stat. § 227.53.

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TDS METROCOM, LLC, and
WISCONSIN STATE TELECOMMUNICATIONS ASSOCIATION
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EOD
10/26/2011

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.

CERTIFICATE OF SERVICE – PSC 2011-00283

I hereby certify that a copy of the foregoing was served on the following individuals by mailing a copy thereof via U.S. Mail, this 16th day of August 2012.

Russell Wiseman
President & CEO
Halo Wireless, Inc.
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Jennifer M. Larson
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Mary K. Keyer

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