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May 31, 2012

RECEIVED

JUN 01 2012

PUBLIC SERVICE
COMMISSION

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

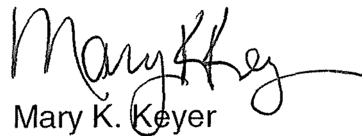
Re: BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky, Complainants v. Halo Wireless, Inc., Defendant
PSC 2011-00283

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of AT&T Kentucky's Memorandum in Opposition to Halo's Partial Motion to Dismiss.

Please let me know if you have any questions.

Sincerely,



Mary K. Keyer

Enclosures

cc: Parties of Record

1036313

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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

AT&T KENTUCKY'S MEMORANDUM IN OPPOSITION TO HALO'S PARTIAL MOTION TO DISMISS

AT&T Kentucky,[1] by its undersigned counsel, respectfully submits this Memorandum in Opposition to the Partial Motion to Dismiss filed by Halo Wireless, Inc. ("Halo"). The partial motion to dismiss is but the most recent in a long line of futile Halo efforts to forestall state commission adjudication of Halo's unlawful practices in proceedings that are plainly within state commission authority. Indeed, Halo's filing of such motions, and the denial of the motions, are now an established ritual in these cases: Halo files its frivolous motion to dismiss; the motion is briefed; the motion is denied; and the case moves forward. That has been the result in all eight state commissions that have considered Halo's stock motion to dismiss, and it should be the result here as well.

[1] BellSouth Telecommunications, LLC d/b/a AT&T Kentucky ("AT&T Kentucky").

AT&T Kentucky's Formal Complaint, filed July 26, 2011 ("Complaint"), alleges that AT&T Kentucky and Halo entered into an interconnection agreement ("ICA") that this Commission approved; that Halo has breached that ICA;[2] and that the Commission should grant AT&T Kentucky appropriate relief. The federal courts of appeals have repeatedly held that the federal Telecommunications Act of 1996 ("1996 Act") entrusts the interpretation and enforcement of ICAs to state commissions. The Commission's authority to interpret and enforce ICAs is recognized by statute in Kentucky, and this Commission has routinely exercised that authority. Halo's contention that AT&T Kentucky is actually asking the Commission to construe Halo's CMRS license and to decide matters within the FCC's exclusive jurisdiction are demonstrably false,[3] and the rest of Halo's arguments merely dispute the merits of AT&T Kentucky's claims and have no bearing on whether this case should proceed. Accordingly, AT&T Kentucky respectfully requests that the Commission deny Halo's Partial Motion to Dismiss.

Overview

Halo is relatively new and purports to be a small wireless carrier. By early 2011, however, numerous carriers across the country, including AT&T Kentucky and other AT&T incumbent local exchange carriers ("ILECs") began to realize that Halo was sending them large volumes of calls, all of which Halo represented as local wireless calls (intraMTA) and, therefore, subject only to reciprocal compensation rates rather than access charges. Based on their review of call data, several carriers, again

[2] Specifically, as AT&T Kentucky alleged in its Complaint, Halo has breached the ICA by: (1) sending traffic to AT&T Kentucky that is not "wireless originated traffic," as the ICA requires, but is instead, landline-originated intrastate intraLATA, intrastate InterLATA or interstate toll traffic for which switched access charges are due but have not been paid; (2) altering call detail information that is transmitted with the traffic that Halo sends to AT&T Kentucky's network; and (3) failing to pay for certain facilities ordered by Halo pursuant to the ICA.

[3] AT&T Kentucky's Complaint does not even mention any license the FCC may have granted to Halo, much less ask this Commission to interpret, enforce, alter, or even consider any such license.

including AT&T Kentucky and other AT&T ILECs, determined that much of the traffic Halo was sending them was not, in fact, wireless-originated (as required by the AT&T ILECs' ICAs with Halo) and was not local, and that Halo was engaged in an access charge avoidance scheme. Several AT&T ILECs, including AT&T Kentucky, therefore filed complaints against Halo with state public service commissions for breach of the parties' ICAs. Many other carriers, including a number of rural local exchange carriers ("RLECs"), likewise filed complaints against Halo before state commissions, based on similar claims about Halo's business practices.[4] More than 20 cases are currently pending against Halo in state commissions across the country.

Halo has done its utmost to try to prevent this Commission, and others, from reaching a decision on the merits (while in the meantime Halo continues to send millions of minutes of traffic each month to AT&T Kentucky and other carriers, for which Halo is not paying the applicable access charges). Yet Halo's delay tactics have failed at every turn. Halo began by filing for bankruptcy on the day before the first evidentiary hearing was scheduled to occur before a state commission (in Georgia) and by claiming that its bankruptcy filing stayed all the state commission proceedings. The bankruptcy court, however, held it did not. Halo then filed a motion asking the bankruptcy court to stay its ruling that the state commission proceedings can proceed, and the bankruptcy court denied Halo's motion.[5] Halo then asked the federal district court in Texas to stay the bankruptcy court's decision and enjoin the state commissions from going forward

[4] In Kentucky, the RLECs filed a complaint against AT&T Kentucky and AT&T Kentucky filed a third party complaint against Halo. *See Ballard Rural Telephone Cooperative Corporation, Inc., et al. v. BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky*, Case No. 2011-00199.

[5] Order Denying Motions for Stay Pending Appeal, *In re: Halo Wireless, Inc.*, Case No. 11-42464 (Bankr. E.D. Tex., Nov. 1, 2011) (**Exhibit A** hereto).

with the pending cases. That motion too was denied.[6] Finally, Halo asked the Fifth Circuit Court of Appeals for permission to appeal the bankruptcy court's decision directly to the Fifth Circuit, and to vacate that decision and stay the state commission proceedings while that appeal is pending. The Fifth Circuit allowed Halo to lodge its appeal directly with the Fifth Circuit (without objection from AT&T), but it denied Halo's request to vacate the bankruptcy court's decision and to stay the state commission proceedings.[7]

While all that was going on, Halo also improperly removed to 10 federal courts the state commission complaint cases that were then pending, erroneously claiming exclusive federal jurisdiction. The United States District Court for the Eastern District of Kentucky remanded the case initiated by AT&T Kentucky to this Commission.[8] Likewise, each of the nine other federal courts, to which Halo had removed cases brought by other AT&T ILECs, remanded the removed case (or cases) to the state commission from which Halo improperly removed it.[9] As arbitrators appointed by the

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[6] Order Denying Emergency Motion for Stay Pending Appeal, *In re: Halo Wireless, Inc., Halo Wireless, Inc. v. Sw. Bell Tel. Co.*, Case No. 4:11-mc-55 (E.D. Tex., Nov. 30, 2011) (**Exhibit B** hereto).

[7] Order, *Halo Wireless, Inc. v. Alenco Commc'ns, Inc., et al.*, Case No. 11-90050 (5th Cir. Feb 2, 2012) (**Exhibit C** hereto).

[8] Memorandum Opinion and Order, *BellSouth Telecommunications, LLC, d/b/a AT&T Kentucky v. Halo Wireless, Inc.* Case No. 3:11-cv-0059-DCR (E.D. Ky. April 9, 2012).

[9] Order, *Halo Wireless, Inc. v. TDS Telecommc'ns Corp.*, Civil Action No. 2:11-CV-158-RWS (N.D. Ga. Jan. 26, 2012); Memorandum, *BellSouth Telecommc'ns, Inc. v. Halo Wireless, Inc.*, No. 3-11-0795 (M.D. Tenn., Nov. 1, 2011); Order of Remand, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Case No. 4:11cv470-RH/WCS (N.D. Fla., Dec. 9, 2011); Order, *Alma Commc'ns Co. v. Halo Wireless, Inc., et al.*, Case No. 11-4221-CV-CA-NKL (W.D. Mo., Dec. 21, 2011); Order, *BellSouth Telecommc'ns, LLC v. Halo Wireless, Inc.*, Case No. 2:11-CV-758-WKW (M.D. Ala. Jan. 26, 2012); Order Granting Motion to Remand, *BellSouth Telecommc'ns, LLC v. Halo Wireless, Inc.*, C/A No. 11-80162-dd (Bankr. D. S.C., Nov. 30, 2011); Order of Remand, *Riviera Telephone Co. v. Halo Wireless, Inc.* Cause No. A-11-CV-730-LY (W.D. Tex. Feb. 15, 2012) (also, six substantively identical W.D. Tex. remand orders in complaint cases brought against Halo by other carriers); Order, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Civil Action No. 3:11cv579-DPJ (S.D. Miss. March 16, 2012); Order Allowing Motion to Remand, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, No. 11-00004-8-SWH (Bankr. E.D.N.C. March 5, 2012).

Public Utility Commission of Texas in a related case aptly stated, Halo's conduct is "procedural chicanery patently intended solely to delay."[10]

Further, in the other state commissions that finally started moving forward after the delay caused by Halo's removals, Halo filed motions to dismiss making the same arguments it makes here. All eight state commissions that have ruled on Halo's motions to dismiss (Tennessee, Wisconsin, South Carolina, Florida, Georgia, Illinois, Missouri and California) denied the motions.[11] In addition, the Staff of the Louisiana Public Service Commission ("LPSC") has recommended that the LPSC deny Halo's similar motion to dismiss there.[12] This Commission should deny Halo's motion to dismiss as well.

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[10] *See* Public Utility Commission of Texas Order No. 12, issued March 23, 2012 in Docket No. 40032 (Consolidated), attached hereto as **Exhibit D**, at p. 3.

[11] Order Denying Motion to Dismiss, *BellSouth Telecomms., LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Dec. 16, 2011) (**Exhibit E** hereto); Order, *BellSouth Telecomms., LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Jan. 26, 2012, pp. 3-6) (**Exhibit F**); Order Denying Motions to Dismiss in Part With Prejudice and in Part Without Prejudice, *Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.*, No. 9594-TI-100 (Pub. Serv. Comm'n Wis., Jan. 10, 2012) (**Exhibit G**); Commission Directive, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc., for Breach of the Parties' Interconnection Agreement,* Docket No. 2011-304-C (Pub. Serv. Comm'n So. Car., Feb. 15, 2012) (**Exhibit H**); Order Denying Halo Wireless, Inc.'s Partial Motion to Dismiss, *Complaint and Complaint for Relief against Halo Wireless, Inc. for Breaching the Terms of the Wireless Interconnection Agreement, by BellSouth Telecommunications, LLC*, Docket No. 110234-TP (Fla. Pub. Serv. Comm'n, Mar. 20, 2012) (**Exhibit I**); Order Denying Partial Motion to Dismiss, *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*, Docket No. 34219 (Ga. Pub. Serv. Comm'n, May 9, 2012) (**Exhibit J**); Notice of Administrative Law Judge's Ruling, *Illinois Bell Tel. Co. v. Halo Wireless Inc.*, Docket No. 12-0182 (Ill. Comm. Comm'n, May 16, 2012) (**Exhibit K**); Order Regarding Motion to Consolidate, Motion to Dismiss and Motion to Dismiss AT&T Missouri's Counterclaim, Nos. TC-2012-0331 and TO-2012-0035 (Mo. Pub. Serv. Comm., May 17, 2012) (**Exhibit L**); Administrative Law Judge's Ruling Denying Halo Wireless, Inc.'s Partial Motion to Dismiss Counts I, II and III of AT&T California's Complaint, *Pacific Bell Tel. Co. d/b/a AT&T California v. Halo Wireless, Inc.*, Case 12-02-007 (Cal. Pub. Serv. Comm'n May 30, 2012) (**Exhibit M**).

[12] Commission Staff's Memorandum in Opposition to Halo Wireless Inc.'s Partial Motion to Dismiss Counts I through III (Apr. 20, 2012), *BellSouth Telecommc'ns, Inc. v. Halo Wireless, Inc.*, LPSC Docket No. U-32237 (**Exhibit N** hereto).

Standard for Motion to Dismiss

Conspicuously missing from Halo's Motion to Dismiss is any mention of the test Halo must meet in order to establish that dismissal is appropriate. Indeed, most of what Halo says in its motion is irrelevant to dismissal, because it is argument in support of Halo's position on the merits – and a motion to dismiss does not test the merits of the litigants' positions. The standard for a motion to dismiss is clear. A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action, and Halo can prevail on its motion only if it can show that even if the allegations of AT&T Kentucky's Complaint are true, the Complaint still fails to state a claim upon which relief may be granted. *E.g.*, *South Woodford Water Dist. v. Byrd*, 352 S.W.3d 340, 341 (Ky. App. 2011) ("A motion to dismiss for failure to state a claim upon which relief may be granted admits as true the material facts of the complaint. So a court should not grant such a motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved. . . . Accordingly, the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true. This exacting standard of review eliminates any need by the trial court to make findings of fact; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?"). Even a cursory review of the Complaint shows that AT&T Kentucky has alleged breaches of the parties' ICA and that this Commission has jurisdiction to adjudicate AT&T Kentucky's claims.

Argument

A. The Commission has Jurisdiction to Determine Whether Halo is Liable for Breach of its ICA.

AT&T Kentucky's Complaint includes four Counts. Count I alleges that Halo "is materially violating the Parties' ICA" by sending landline-originated traffic to AT&T Kentucky. Complaint ¶ 8. Count II alleges that Halo's insertion of incorrect Charge Number data in the call information it sends to AT&T Kentucky "materially breaches the ICA." *Id.* ¶ 12. Count III follows up on Counts I and II by asking the Commission to find that, because the landline-originated traffic sent by Halo is not permitted by the ICA and is (as the evidence will show) to a large extent interstate or interLATA traffic, such traffic is subject to applicable access charges. *Id.* ¶ 14. Count IV alleges that Halo has breached the ICA by failing to pay for interconnection facilities as required by the ICA. *Id.* ¶¶ 16-18.

Thus, AT&T Kentucky's claims are for breaches of the ICA and the consequences of such breaches. The federal courts of appeals have repeatedly held that the 1996 Act entrusts the interpretation and enforcement of ICAs to state commissions.[13] The FCC agrees.[14] So does the Kentucky Legislature.[15] This Commission, too, has recognized its authority to interpret and enforce interconnection

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[13] *E.g., Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278-81 (5th Cir. 2010); *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708, 713 (8th Cir. 2006); *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 317 F.3d 1270, 1277 (11th Cir. 2003); *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003); *Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 362-63 (6th Cir. 2003); *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999).

[14] *In the Matter of Starpower Commc'ns*, 15 FCC Rcd. 11277, at ¶ 7 (FCC, 2000).

[15] *See* KRS § 278.54611, which provides that the provision of commercial mobile radio services shall not be subject to state administrative regulation, states in subsection (2) that the statute does "not limit or modify . . . the commission's authority to arbitrate *and enforce* interconnection agreements." (Emphasis added.) *See also* KRS 278.542(1)(b) (Commission retains jurisdiction with respect to "[a]ny agreement or arrangement between or among ILECs and other local exchange carriers.").

agreements,[16] and has not hesitated to exercise this authority.[17] Indeed, Halo apparently recognizes that the Commission has authority to interpret and enforce interconnection agreements, because it has not moved to dismiss Count IV of the Complaint.

Finally, as noted above, in cases involving the same claims by other AT&T ILECs, the Tennessee, Wisconsin, South Carolina, Florida, Georgia, Illinois, Missouri and California commissions have already rejected the arguments Halo makes here, and the Staff of the Louisiana Public Service Commission has recommended denial of Halo's motion there. This law defeats Halo's Partial Motion to Dismiss.

Halo brazenly asserts that AT&T Kentucky does "not really seek an interpretation or enforcement of th[e] terms" of the ICA (Motion ¶ 1), and does "not actually seek an interpretation or enforcement of the ICA terms" (*id.* ¶ 2), but the Complaint shows that is exactly what AT&T Kentucky seeks. Complaint, ¶¶ 6-8; 10-12; 14; 16-18. Other state commissions in which AT&T filed substantially identical complaints agree.[18] Halo claims that AT&T Kentucky is actually seeking a ruling on "whether Halo is acting within and consistent with its federal license" (Motion ¶ 1), but that is patently false. The Complaint

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[16] *See* KPSC Order at 7, *In the Matter of: Joint Petitioners for Aribtration of an Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Communications Act of 1934* ("It is beyond dispute that state commissions are authorized to interpret and to enforce interconnection agreements which are approved pursuant to 47 U.S.C. § 252(e)(1).... The Commission finds that this Commission has primary jurisdiction over issues regarding the interpretation and implementation of interconnection agreements approved by this Commission.") (Sept. 26, 2005), *citing BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003).

[17] *See, e.g.,* KPSC Order at 3, 12 (Feb. 11, 2011), *dPi Teleconnect, Inc. v. BellSouth Telecommunications, Inc.,* Case No. 2005-00045 (dismissing complaint involving dispute over promotional credits arising under the parties' interconnection agreement and interpretation of the provisions therein).

[18] *E.g.*, Order Denying Motion to Dismiss, *BellSouth Telecomms., LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Dec. 16, 2011) (Exhibit E hereto), at 12 ("The complaint seeks interpretation of an interconnection agreement that was approved by the TRA"); Commission Directive, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc., for Breach of the Parties' Interconnection Agreement* (Pub. Serv. Comm'n So. Car. Feb. 15, 2012) (Exhibit H hereto) ("[A]ll of AT&T's claims relate to alleged breaches of contract of the interconnection agreement between the two companies").

never mentions Halo's license, much less seeks an interpretation of it.[19] Halo also contends that "AT&T is impermissibly and improperly seeking to have the Commission decide whether Transcom is 'really' an end user and ESP" (*id.* ¶ 2), but that, too, is false. AT&T Kentucky's Complaint does not mention Transcom or ask the Commission to decide anything about Transcom; in reality, it is *Halo* that attempts to defend the misconduct alleged in the Complaint by making assertions about Transcom. Finally, Halo claims that state commissions "cannot attempt to impose rate or entry regulation on wireless providers" (*id.*, ¶ 9), but AT&T Kentucky's Complaint does not raise that issue either. Halo has already entered the market, and AT&T Kentucky's Complaint does not take issue with any rates Halo may be charging to any of its customers. The question raised by AT&T Kentucky's Complaint is whether Halo has breached and is breaching the ICA it signed with AT&T Kentucky, and as explained above, the Commission clearly has jurisdiction and authority to resolve that question.

B. Halo's Factual Arguments Also Defeat its Motion to Dismiss.

Most of Halo's motion is devoted to disputing the ***factual*** allegations in AT&T Kentucky's Complaint. For example, Halo disputes at length AT&T Kentucky's allegation that Halo is breaching the parties' ICA by sending AT&T Kentucky landline-originated traffic, arguing that the traffic Halo is sending AT&T Kentucky actually originates from wireless equipment.[20] Similarly, Halo disputes AT&T Kentucky's allegation that Halo is breaching the ICA by altering call detail, arguing that it has in fact

[19] As noted above, the Tennessee Regulatory Authority ("TRA") denied Halo's identical motion to dismiss. The TRA received prefiled testimony from both parties, conducted a day-long evidentiary hearing, and, on January 23, 2011, after hearing oral argument, granted AT&T Tennessee the relief it requested. In the entire Tennessee proceeding, AT&T Tennessee offered no evidence concerning Halo's CMRS license, and there was no argument or debate about that license, or about the imposition of any rate or entry regulation on Halo – the matters that Halo erroneously claims AT&T Kentucky is seeking to raise. Nor will there be any such evidence, argument or debate in this proceeding - except to the extent that Halo itself may continue to try to lead the Commission to believe that that is what the case is about.

[20] Motion ¶¶ 13-21.

provided proper call detail.[21] AT&T Kentucky will prove in due course that its factual allegations are true. For present purposes, though, the point is that factual disputes are not a basis for dismissing a complaint; on the contrary, the very purpose of the proceeding that Halo desperately seeks to avoid is to determine the truth of the matter. As explained above, however, AT&T Kentucky's factual allegations must be taken as true for purposes of deciding Halo's Motion to Dismiss. *See supra* at 6. The existence of a factual dispute is precisely the reason that an evidentiary record is needed and Halo's motion to dismiss must be denied.

Moreover, in its landmark decision last November establishing the Connect America Fund, the FCC expressly considered and soundly rejected Halo's argument that the traffic at issue is wireless traffic, and it reaffirmed that the type of traffic Halo is delivering to AT&T Kentucky is actually landline-originated traffic. *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, FCC 11-161, 2011 WL 5844975, at ¶¶ 1005-06 (rel. Nov. 18, 2011) (singling out Halo by name and squarely rejecting Halo's theory that these landline-originated calls are somehow "re-originated" and thus converted from wireline to CMRS). Indeed, the FCC specifically found that such calls are not CMRS-originated for purposes of intercarrier compensation. *Id.* Thus, the FCC has underscored, in plain language, that Halo's argument has no merit – Halo cannot magically transform a landline call into a wireless call by purportedly "re-originating" that traffic.[22]

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[21] *Id.* at ¶¶ 22-35.

[22] No state commission has been persuaded by Halo's reliance on the 2005 and 2006 bankruptcy court decisions that Halo calls the "ESP Rulings" (Motion ¶¶ 20, 45 *et seq.*), and for good reason. In the first place, and contrary to Halo's representations, none of the ESP Rulings held that Transcom was an end user, or that calls terminate with or originate with Transcom. Moreover, this Commission (and AT&T Kentucky) are no more bound by the ESP Rulings than the Commission (or Halo) is bound by the more recent and better reasoned decision of the TRA that Transcom is *not* an ESP, or by the ruling of the Pennsylvania Public Utility Commission that Transcom is not an ESP in *Palmerton Tel. Co. v. Global*

C. AT&T Kentucky's Complaint Does Not Request, and AT&T Kentucky Will Not Seek, Any Relief Beyond That Authorized by the Bankruptcy Court.

Of all the baseless arguments in Halo's motion, perhaps the most frivolous is the contention that the "Bankruptcy Stay prohibits consideration of any order to pay access charges."[23] In the order to which Halo refers, the court in Halo's bankruptcy case held that the automatic bankruptcy stay does *not* apply to state commission proceedings like this one, and that state commissions can determine "that the Debtor [Halo] has violated applicable law over which the particular state commission has jurisdiction."[24] The bankruptcy court further explained that state commissions should not issue relief involving "*liquidation of the amount* of any claim against the Debtor."[25] That does not mean, however, that state commissions cannot determine that Halo is liable for access charges in an amount that remains to be determined, which is what Count III of AT&T Kentucky's Complaint seeks.

NAPS South, Inc., et al., Docket No. C-2009-2093336, 2010 WL 1259661, at 16-17 (Penn. PUC, Feb. 11, 2010) (expressly stating that state commission was not bound by or persuaded by the ESP Rulings).

The earliest ESP Ruling on which Halo relies was vacated on appeal, and vacated rulings have no preclusive effect. *E.g.*, *Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) (collecting cases). And the ESP Ruling that confirmed 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 that proceeding nor necessary to the order. Accordingly, that finding has no preclusive effect either. *E.g.*, Restatement (Second) of Judgments, § 16 comment c. Perhaps most important, none of the ESP Rulings says that Transcom somehow originates or re-originates, and changes to wireless, every call that passes through it, for none of the decisions even addresses that issue. Accordingly, the ESP Rulings are irrelevant to the matters that are at issue here. If any decision is controlling in this case, it is the FCC's rejection in *Connect America Fund* of precisely the position that Halo asserts here.

[23] Motion, Section C at 17.

[24] *In re Halo Wireless, Inc.*, Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay, Case No. 11-42464-btr-11 (Bankr. E.D. Tex., Oct. 26, 2011) (emphasis added) (**Exhibit O** hereto).

[25] *Id.*

Conclusion

WHEREFORE, for the foregoing reasons, AT&T Kentucky respectfully requests that Halo's Partial Motion to Dismiss be denied.

Respectfully submitted,

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COUNSEL FOR BELLSOUTH TELECOMMUNICATIONS LLC D/B/A AT&T KENTUCKY

1036317

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 31st day of May 2012.

Russell Wiseman
President & CEO
Halo Wireless, Inc.
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Jennifer M. Larson
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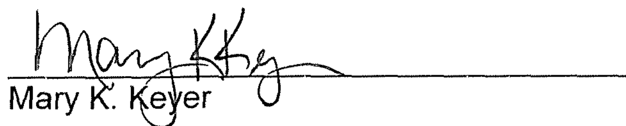

Mary K. Keyer

1029992

Exhibit A

EOD
11/01/2011

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

IN RE:	§	
	§	
HALO WIRELESS, INC.,	§	Case No. 11-42464
	§	(Chapter 11)
Debtor.	§	

ORDER DENYING MOTIONS FOR STAY PENDING APPEAL

Now before the Court are three motions to stay pending appeal (collectively, the "Stay Motions") filed by the debtor on October 28, 2011. Each of the Stay Motions consists of a request for a stay pending the resolution of the debtor's appeals from the Court's determination that regulatory proceedings currently pending before various state utility commissions are excepted from the automatic stay in bankruptcy pursuant to 11 U.S.C. § 362(b)(4). Because the Stay Motions are substantially identical and the appeals will essentially present the same issues for consideration, it is appropriate for this Court to consider the Stay Motions on a consolidated basis.

The Court has jurisdiction to consider the Stay Motions pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a). The Court has the authority to enter a final order regarding these contested matters since they constitute core proceedings as contemplated by 28 U.S.C. §157(b)(2)(A) and (O). This Court's jurisdiction is also reflected in the provisions of Federal Rule of Bankruptcy Procedure 8005.[2]

Under Federal Rule of Bankruptcy Procedure 8005, a court's "decision to grant or

[2] Federal Rule of Bankruptcy Procedure 8005 provides, in pertinent part, that:

> [A] motion for a stay of the judgment, order, or decree of a bankruptcy judge...or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court...reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the [Bankruptcy] Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

deny a stay pending appeal rests in the discretion of that court. However, the exercise of that discretion is not unbridled." *In re First S. Savs. Ass'n,* 820 F.2d 700, 709 (5th Cir. 1987). Rather, this Court "must exercise its discretion in light of what this court has recognized as the four criteria for a stay pending appeal." *Id.* The four criteria are: (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest. *Arnold v. Garlock, Inc.,* 278 F.3d 426, 439-42 (5th Cir. 2001); *In re First S. Savs. Ass'n,* 820 F.2d at 709. Each criterion must be met, and "'the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay.'" *Arnold,* 278 F.3d at 439 (quoting *In re First S. Savs. Ass'n,* 820 F.2d at 704).

The Court, having reviewed the debtor's Stay Motions, considered the legal arguments presented by the parties at the hearing on November 1, 2011, and reviewed the record in this case, finds and concludes that the debtor has not made a showing of irreparable injury absent a stay. The harms alleged by the debtor – *i.e.*, the cost of the proceeding before the state utility commissions and the potential for differing results amongst the commissions – are "part and parcel of cooperative federalism." *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010). On the other hand, the granting of a stay would substantially harm other parties by interfering with the state utility commissions' ability to regulate public utilities and by requiring creditors to continue providing services to the debtor in the future. Moreover, the granting of a stay would not comport with the public interest, including the policies underlying the concept of cooperative federalism and the interest of the public utility commissions, as the experts on the laws and rules governing the telecommunications/telephone industry, in regulating

the industry for the benefit of the users of the services.

With respect to the final element, the Court recognizes that it is difficult for the debtor to establish (in this Court) a substantial likelihood of success on the merits when this Court issued the underlying ruling. This case involves a serious legal question and, in light of the absence of controlling Fifth Circuit authority, there is a risk that this Court's decision could be reversed. The Court nonetheless finds that the debtor failed to sustain its burden to establish a substantial likelihood of success on the merits. Even if the debtor could be said to have presented a substantial case on the merits, the balance of the equities does not weigh heavily in favor of granting the stay when the Court's prior determination allows the debtor to raise its legal issues and arguments before the state utility commissions. Accordingly,

IT IS ORDERED, ADJUDGED and DECREED that the Stay Motions [Docket Nos. 176, 177 and 178] must be, and hereby is, **DENIED.**

Signed on 11/1/2011

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE

Exhibit B

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

IN RE:	§	
HALO WIRELESS, INC.	§	
	§	
	§	
HALO WIRELESS, INC.	§	Case No. 4:11-mc-55
	§	
v.	§	
	§	
SOUTHWESTERN BELL TELEPHONE	§	
COMPANY d/b/a AT&T Arkansas, et al.	§	

ORDER DENYING EMERGENCY MOTION FOR STAY PENDING APPEAL

Before the Court is Movant's Emergency Motion for Stay Pending Appeal of AT&T Order (Doc. No. 1). Upon order of the Court, Respondants filed an expedited response on Tuesday, November 29, 2011. Having considered the motion, the response, and the applicable law, the Court DENIES the motion. In view of this ruling, the hearing set for Thursday, December 1, 2011 is CANCELLED.

I. BACKGROUND

The underlying issue in this case involves technical questions arising out of the wireless telephone industry. Movant Halo Communications, Inc. and more than fifty of its competitors dispute the classification applicable to Halo and the services it provides. These classifications impact whether Halo is properly operating under its federally issued license and also what amount Halo must pay for access to the wireless network.

The underlying dispute involves multiple proceedings, including twenty state regulatory actions brought by Halo's competitors (respondents in this and the related appeals), a civil case pending before this Court (*Halo Wireless, Inc. v. Livingston Tel. Co.*, No. 4:11-cv-359), and a bankruptcy proceeding in the Eastern District of Texas, from which this appeal is taken. The issues at the heart of this appeal address questions of the interplay between these various proceedings and the authority and jurisdiction of the

federal and states entities involved.

Upon Halo's filing for bankruptcy protection on August 8, 2011, an automatic bankruptcy stay was imposed in the other proceedings listed above. But the bankruptcy court recently lifted the automatic stay as to the state regulatory actions, which allows those twenty actions to proceed.[1] Recognizing the lack of controlling precedent for its decision to lift the automatic stay, the bankruptcy court certified its decision for immediate appeal to the Fifth Circuit. Finally, the bankruptcy court denied Halo's motion to stay its order pending appeal. It is the last of these orders—the denial of the stay pending appeal—that is now under review by this Court.

II. LEGAL STANDARD

This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 158(a). The decision whether the grant a stay pending appeal is left to the sound discretion of the Court whose order is being appealed, in this case, the bankruptcy court. *Prudential Mortg. Capital Co., L.L.C. v. Faidi*, Nos. 10–20134,10–20423, 2011WL2533828, at *4 (5th Cir. Jun. 24, 2011) (per curiam). This Court reviews the bankruptcy court's decision for an abuse of discretion. *Id.; see also Webb v. Reserve Life Ins. Co.* (*In re Webb*), 954 F.2d 1102, 1103–04 (5th Cir. 1992) (stating that when reviewing the case, the "district court functions as an appellate court and applies the same standard of review generally applied in federal appellate courts.").

Under the abuse of discretion standard, the district court must accept the bankruptcy court's findings of fact unless clearly erroneous and examine *de novo* the conclusions of law. *See Carrieri v. Jobs.com Inc.*, 393 F.3d 508, 517 (5th Cir. 2004); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d

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[1]The bankruptcy court limited the reach of the state regulatory bodies, noting that the order does not allow "liquidation of the amount of any claim against the Debtor" or "any action which affects the debtor-creditor relationship between the [Halo] and any creditor or potential creditor."

1303, 1307–08 (5th Cir. 1985); Fed. R. of Bank. P. 8013. Under the clearly erroneous standard, the court will only reverse if, after reviewing all of the evidence in the record, the court is "left with the definite and firm conviction that a mistake has been made." *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 565 (5th Cir. 1995) (quoting *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir. 1992)).

III. ANALYSIS

The Court has fully considered the bankruptcy court's order denying stay pending appeal. The bankruptcy court properly addressed and weighed each of the four relevant factors: (1) likelihood of success on the merits, (2) showing of irreparable injury if the stay is not granted, (3) whether the stay would substantially harm the other parties, and (4) whether the stay would serve the public interest. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439–42 (5th Cir. 2001). For the reasons stated below, the Court finds that the bankruptcy court did not abuse its discretion.

The bankruptcy court made several factual findings in considering Halo's motion to stay pending appeal. First, the bankruptcy court found that Halo would not suffer irreparable damage in absence of the stay. The bankruptcy court also found the requested stay would substantially harm the other parties and would not serve the public interest. Specifically, the bankruptcy court noted that a stay would demand the other parties to continue providing services to Halo, the debtor in the bankruptcy proceedings, and also would bind the hands of the state public utility commission, which are charged with regulating the telecommunications industry. Halo has not demonstrated that the bankruptcy court's factual findings are clearly erroneous, thus the Court will not disturb them on appeal.

Finally the bankruptcy court determined that Halo did not demonstrate a substantial likelihood of success on the merits. Halo's motion discusses in depth its potential for success before the Fifth Circuit. This Court recognizes—as did the bankruptcy court—that no Fifth Circuit precedent exists for the bankruptcy court's underlying decision. Halo suggests that this unresolved legal question eliminates the

need to seriously weigh the remaining factors. But the Fifth Circuit has been clear that all the factors must be considered. *See, e.g.*, *Ruiz v. Estelle*, 666 F.2d 854, 856–57 (5th Cir. 1982). Based on the balance of all four relevant factors, any potential for Halo's success on the merits (due to the unresolved question of law) is significantly outweighed by the other three factors.

IV. CONCLUSION

For the reasons stated above, the Court denies Movant's Emergency Motion for Stay Pending Appeal of AT&T Order (Doc. No. 1). It is further ordered that the hearing set for Thursday, December 1, 2011 is CANCELLED.

It is SO ORDERED.

SIGNED this 30th day of November, 2011.

MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

Exhibit C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-90050

In re: HALO WIRELESS, INCORPORATED,

Debtor

HALO WIRELESS, INCORPORATED,

Petitioner

v.

ALENCO COMMUNICATIONS INCORPORATED; ALMA COMMUNICATIONS COMPANY; BPS TELEPHONE COMPANY; BELLSOUTH TELECOMMUNICATIONS, L.L.C., doing business as AT&T Alabama; BIG BEND TELEPHONE COMPANY, INCORPORATED; BLUE RIDGE TELEPHONE COMPANY; BRAZORIA TELEPHONE COMPANY; CAMDEN TELEPHONE & TELEGRAPH COMPANY, INCORPORATED; CHARITON VALLEY TELECOM CORPORATION; CHARITON VALLEY TELEPHONE CORPORATEION; CHOCTAW TELEPHONE COMPANY; CITIZENS TELEPHONE COMPANY OF HIGGINSVILLE, MISSOURI; CONCORD TELEPHONE EXCHANGE, INCORPORATED; CRAW-KAN TELEPHONE COOPERATIVE, INCORPORATED; EASTEX TELEPHONE COOPERATIVE, INCORPORATED; ELECTRA TELEPHONE COMPANY, INCORPORATED; ELLINGTON TELEPHONE COMPANY; FARBER TELEPHONE COMPANY; FIDELITY COMMUNICATION SERVICES I, INCORPORATED; FIDELITY COMMUNICATION SERVICES II, INCORPORATED; FIDELITY TELEPHONE COMPANY; FIVE AREA TELEPHONE COOPERATIVE, INCORPORATED; GANADO TELEPHONE COMPANY; GOODMAN TELEPHONE COMPANY; GRANBY TELEPHONE COMPANY; GRAND RIVER MUTUAL TELEPHONE COMPANY; GREEN HILLS AREA CELLULAR; GREEN HILLS TELEPHONE CORPORATION; GUADALUPE VALLEY TELEPHONE COOPERATIVE, INCORPORATED; HILL COUNTRY TELEPHONE COOPERATIVE, INCORPORATED; HOLWAY TELEPHONE COMPANY; HUMPHREYS COUNTY

TELEPHONE COMPANY; IAMO TELEPHONE COMPANY; ILLINOIS BELL TELEPHONE COMPANY, doing business as AT&T Illinois; INDIANA BELL TELEPHONE COMPANY, INCORPORATED, doing business as AT&T Indiana.; INDUSTRY TELEPHONE COMPANY; K.L.M. TELEPHONE COMPANY; KINGDOM TELEPHONE COMPANY; LAKE LIVINGSTON TELEPHONE COMPANY, INCORPORATED; LATHROP TELEPHONE COMPANY; LE-RU TELEPHONE COMPANY; LIVINGSTON TELEPHONE COMPANY; MARK TWAIN COMMUNICATION COMPANY; MARK TWAIN RURAL TELEPHONE COMPANY; MCDONALD COUNTY TELEPHONE COMPANY; MICHIGAN BELL TELEPHONE COMPANY, doing business as AT&T Michigan; MID-MISSOURI TELEPHONE COMPANY; MID-PLAINS RURAL TELEPHONE COOPERATIVE, INCORPORATED; MILLER TELEPHONE COMPANY; MOKAN DIAL, INCORPORATED; NELSON-BALL GROUND TELEPHONE COMPANY; NEVADA BELL TELEPHONE COMPANY, doing business as AT&T Nevada; NEW FLORENCE TELEPHONE COMPANY; NEW LONDON TELEPHONE COMPANY; NORTEX COMMUNICATIONS COMPANY; NORTH TEXAS TELEPHONE COMPANY; NORTHEAST MISSOURI RURAL TELEPHONE COMPANY; ORCHARD FARM TELEPHONE COMPANY; OZARK TELEPHONE COMPANY; PACIFIC BELL TELEPHONE COMPANY, doing business as AT&T California; PEACE VALLEY TELEPHONE COMPANY, INCORPORATED; PEOPLES TELEPHONE COOPERATIVE, INCORPORATED; QUINCY TELEPHONE COMPANY; RIVERA TELEPHONE COMPANY, INCORPORATED; ROCK PORT TELEPHONE COMPANY; SANTA ROSA TELEPHONE COOPERATIVE, INCORPORATED; SENECA TELEPHONE COMPANY; SOUTHWEST TEXAS TELEPHONE COMPANY; SOUTHWESTERN BELL TELEPHONE COMPANY, doing business as AT&T Arkansas; STEELVILLE TELEPHONE EXCHANGE, INCORPORATED; STOUTLAND TELEPHONE COMPANY; TATUM TELEPHONE COMPANY; TELLICO TELEPHONE COMPANY; TENNESSEE TELEPHONE COMPANY; THE MISSOURI PUBLIC SERVICE COMMISSION; THE OHIO BELL TELEPHONE COMPANY, doing business as AT&T Ohio; TOTELCOM COMMUNICATIONS, L.L.C.; VALLEY TELEPHONE COOPERATIVE INCORPORATED; WEST PLAINS TELECOMMUNICATIONS, INCORPORATED; WISCONSIN BELL TELEPHONE, INCORPORATED doing business as Wisconsin, AT&T KANSAS; AT&T MISSOURI; AT&T OKLAHOMA; AT&T TEXAS; AT&T FLORIDA; AT&T GEORGIA; AT&T KENTUCKY; AT&T LOUISIANA; AT&T MISSISSIPPI; AT&T NORTH CAROLINA; AT&T SOUTH CAROLINA; AT&T TENNESSEE,

Respondents

Motion for Leave to Appeal
Pursuant to 28 U.S.C. § 158(d)

Before KING, JOLLY, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion for leave to appeal under 28 U.S.C. § 158(d) is GRANTED.

IT IS FURTHER ORDERED that the petition for writ of mandamus is DENIED.

IT IS FURTHER ORDERED that the motion to stay the bankruptcy proceedings pending appeal is DENIED.

Exhibit D

DOCKET NO. 40032
(Consolidated)

PETITION OF EASTEX TELEPHONE COOPERATIVE, INC., ET AL., FOR COMPULSORY ARBITRATION WITH HALO WIRELESS, INC., UNDER THE FEDERAL TELECOMMUNICATIONS ACT RELATING TO INTERCONNECTION RATES, TERMS AND CONDITIONS	§ § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

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ORDER NO. 12 REQUIRING HALO WIRELESS, INC. TO COMPLY SUBMIT ITS DPL TO PETITIONERS IN COMPLIANCE WITH ORDER NO. 8

Eastex Telephone Cooperative, Electra Telephone Company, Totelcom Communications, Peoples Telephone Cooperative, XIT Rural Telephone Cooperative, Big Bend Telephone Company, Alenco Communications, Mid-Plains Rural Telephone Cooperative, West Plains Telecommunications, Valley Telephone Cooperative, Ganado Telephone Company, North Texas Telephone Company, Southwest Texas Telephone Company, Five Area Telephone Cooperative, Brazoria Telephone Company, and Tatum Telephone Company, Livingston Telephone Company, Nortex Communications, Riviera Telephone Cooperative, Inc., Industry Telephone Cooperative, Inc., Guadalupe Valley Telephone Cooperative, Inc., and Hill Country Telephone Cooperative, Inc. (collectively, "Petitioners") filed petitions for compulsory arbitration with Halo Wireless, Inc. ("Halo") at the Commission at various points over the past year. On February 1, 2012, Docket Nos. 40032 through 40047 were consolidated into Docket No. 40032.[1] Subsequently, on March 19, 2012, the remaining dockets, Docket Nos. 39398, 39417, 39570, 39571, 39574, and 39635, were likewise consolidated into Docket No. 40032.[2]

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[1] *Petition of Eastex Telephone Cooperative, et al., for Compulsory Arbitration with Halo Wireless, Inc., Under the Federal Telecommunication Act Relating to Interconnection Rates, Terms and Conditions,* Docket No. 40032, Order No. 3: Consolidation of Dockets (Feb. 1, 2012).

[2] *Petition of Eastex Telephone Cooperative, et al., for Compulsory Arbitration with Halo Wireless, Inc., Under the Federal Telecommunication Act Relating to Interconnection Rates, Terms and Conditions,* Docket No. 40032, Order No. 11 Consolidating Docket Nos. 39398, 39417, 39570, 39571, 39574, and 39635 with the Dockets Already Consolidated in Docket No. 40032 (March 19, 2012).

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I. Background

A. Proceedings Regarding the DPLs

In Order No. 4, the Arbitrators established a procedural schedule for this docket, including requiring the parties to submit a Joint Decision Point List (DPL) by February 13, 2012.[3] On February 13, 2012, the parties submitted their DPLs to the Arbitrators. The Arbitrators then issued Order No. 6 finding Petitioners' DPLs to be non-responsive.[4] The Arbitrators then held a prehearing conference on February 17, 2012, to discuss various issues in connection with the DPLs submitted by the parties and develop a set of workable procedures for creating a joint DPL document.

B. Order No. 8

After discussion with the parties, the Arbitrators vacated, with some limited exceptions, the existing procedural schedule for this docket. Working with the parties, the Arbitrators then set forth what they believed to be a clear and straightforward process for the parties to produce a DPL document in order to present the outstanding issues to be resolved in this arbitration and ensure the expeditious completion of their interconnection agreement. The Arbitrators then memorialized these procedures in Order No. 8.[5] In particular, Order No. 8 required Petitioners to first elect whether they wished to arbitrate the various dockets on the basis of a single DPL or multiple DPLs by March 9, 2012. On that date, the Petitioners elected to arbitrate a single DPL based on consolidated contractual language from Petitioners' various proposed contracts. Based on the Arbitrators' ruling in Order No. 8, therefore, this single DPL with the Petitioners proposed issues and contractual language became the template from which the parties would develop a joint DPL. Halo was then ordered to submit its proposed DPL language to Petitioners by March 19, 2012 so that it could be incorporated into the joint DPL. Recognizing the ongoing dispute

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[3] *Petition of Eastex Telephone Cooperative, et al., for Compulsory Arbitration with Halo Wireless, Inc., Under the Federal Telecommunication Act Relating to Interconnection Rates, Terms and Conditions,* Docket No. 40032, Order No. 4 Memorializing Prehearing Conference, Ruling on Motions to Dismiss and Establishing Procedural Schedule (Feb. 1, 2012).

[4] *Petition of Eastex Telephone Cooperative, et al., for Compulsory Arbitration with Halo Wireless, Inc., Under the Federal Telecommunication Act Relating to Interconnection Rates, Terms and Conditions,* Docket No. 40032, Order No. 6 Finding Petitioners' DPL Non-responsive and Ordering Petitioners to Refile (Feb. 14, 2012).

[5] *Petition of Eastex Telephone Cooperative, et al., for Compulsory Arbitration with Halo Wireless, Inc., Under the Federal Telecommunication Act Relating to Interconnection Rates, Terms and Conditions,* Docket No. 40032, Order No. 8 Memorializing Prehearing Conference, Vacating In Part the Existing Procedural Schedule and Adopting New Limited Procedural Schedule (Feb. 24, 2012).

between the parties over the scope of the prior negotiations between them, the Arbitrators further permitted parties to include any issue in the joint DPL that they claimed to be properly within the scope of this arbitration and allowed both parties to comment on their reasons for why those issues should properly be included or excluded.

II. Halo's Failure to Submit its DPL to Petitioners as Required by Order No. 8

Halo now claims that it cannot tender its DPL to Petitioners by the March 19, 2012 deadline and that further negotiations between the parties are somehow required by the above procedures.[6] This stage of the process does not require any negotiation between the parties. Rather, under these procedures, Halo was free to identify any issue, language or other element in Petitioners' DPL that it found objectionable or biased and then state its reasons and propose alternative language or issues in response. Further, if Halo believed Petitioners' issue lists to be unduly restrictive, Halo was equally at liberty to identify any potential "unresolved issues" it claimed should be addressed in this proceeding and then state its position within the DPL supporting their conclusion.[7] Petitioners in turn would have until March 26, 2012, to detail their position on these issues. The result would be a single DPL document that reflected both parties' arguments on all issues.

The Arbitrators reminded the parties at the prehearing conference and in Order No. 8 of their ongoing obligations to negotiate in good faith. We quote from that order again: "The Arbitrators will be carefully monitoring the behavior of the parties and will not tolerate any actions they perceive to be designed to delay unreasonably or frustrate the creation of an interconnection agreement between the parties in this proceeding."[8] While Halo readily professes its desire to negotiate in good faith, its unwillingness simply to tender its contractual language, list of issues and its statement of position within the deadlines established in Order No. 8, or at least seek an extension for good cause to do so, renders these words hollow. Rather, its actions smack of procedural chicanery patently intended solely to delay this arbitration. Simply put, Halo has failed to obey an order of the presiding officers in this proceeding.

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[6] At the February 17, 2012 prehearing conference, Halo explicitly agreed to the procedures set forth in Order No. 8.

[7] Order No. 8 at 2-3.

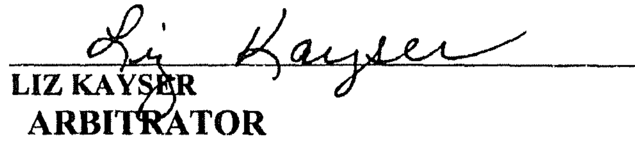
[8] Id. at 3.

Accordingly, the Arbitrators order Halo to submit its DPL to Petitioners by **5:00 p.m., Monday, March 26, 2012**. The parties are then ordered to submit a final joint DPL by **Monday, April 2, 2012**. As previously ordered, Halo is to use Petitioners contract as a template. If Halo disputes Petitioners' characterization of pending issues in the DPL, Halo should simply state its reasons for doing so. Halo is also free to propose alternative phrasing of the issues or new language within the DPL template. As previously ordered, Halo may also list any issues it believes were part of the negotiations that were not included by Petitioners in the DPL. Halo may also state its position supporting their inclusion. We emphasize again that neither party is being asked to accept the position of the other, only offer the foundation of their negotiating position for purposes of arbitrating an interconnection agreement in this docket. We see no legitimate reason for delay in doing so.

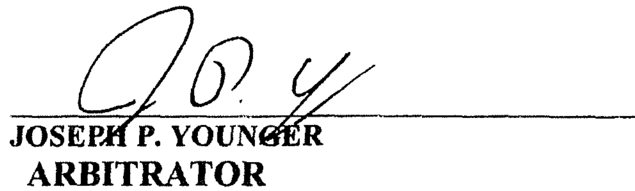
The original deadline for the parties to submit DPLs in this docket was February 6, 2012. The Arbitrators worked with the parties to overcome their initial difficulties, but cautioned both sides that further delays would not be tolerated. Accordingly, if there is any additional failure by Halo to comply with the Arbitrators orders and the Arbitrators find Halo to have further unreasonably obstructed this proceeding, the Arbitrators are inclined immediately to order a hearing pursuant to P.U.C. Inter. R. 21.71 to consider possible sanctions against Halo. These sanctions include but are not limited to (1) refusing to allow Halo to support or oppose designated claims or defenses in the DPL; (2) excluding evidence supporting Halo's claims; and (3) requiring Halo to pay the reasonable expenses and attorneys' fees incurred by Petitioners because of their sanctionable behavior.

SIGNED AT AUSTIN, TEXAS the 23rd day of March 2012.

PUBLIC UTILITY COMMISSION OF TEXAS



LIZ KAYSER
ARBITRATOR



JOSEPH P. YOUNGER
ARBITRATOR

Exhibit E

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, LLC dba AT&T TENNESSEE	)	**DOCKET NO. 11-00119**
	)	
v.	)	
	)	
HALO WIRELESS, INC.	)	

ORDER DENYING MOTION TO DISMISS

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("TRA" or "Authority") at a Scheduling Conference held on December 12, 2011 on the Motion to Dismiss filed by respondent Halo Wireless, Inc. ("Halo"). This matter is on remand to the TRA from the United States District Court for the Middle District of Tennessee. For the reasons stated below, the Motion is DENIED and this matter is set for further proceedings before the Authority as stated in the attached scheduling order.

Travel of the Case

On July 26, 2011, BellSouth Telecommunications, LLC dba AT&T Tennessee ("AT&T") filed a complaint in the TRA against Halo, requesting that the TRA issue an order "allowing it to terminate its wireless interconnection agreement ("ICA") with Halo based on Halo's material breaches of that ICA."[1] The complaint also states that AT&T "seeks an Order

[1] *Complaint*, p. 1 (July 26, 2011). This matter has considerable overlap with Docket No. 11-00108, which was filed by a number of rural local exchange carriers against Halo alleging improper conduct. Both dockets were removed to federal court and remanded, and in both the bankruptcy court's lifting of the automatic stay has returned the complaint to the TRA for adjudication. Certain documents that are relevant to this case are not contained in the docket file for it, but are contained in the file for Docket No. 11-00108. In this Order, the Hearing Officer takes

requiring Halo to pay AT&T Tennessee the amounts Halo owes" as a result of "an access charge avoidance scheme."[2] On August 10, 2011, Halo filed a Suggestion of Bankruptcy informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Eastern District of Texas (Sherman Division)."[3] Accordingly, Halo stated, "the automatic stay is now in place" and "prohibits further action against [Halo] in the instant proceeding."[4]

On August 19, 2011, counsel for Halo filed a notice of removal to federal court, which references a separate notice of removal and states that this matter has been removed "to the United States District Court for the Middle District of Tennessee, Nashville Division . . . pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure."[5] Thus, this case was removed to the District Court because of the bankruptcy proceeding. On November 10, 2011, the AT&T filed a letter informing the TRA that it may now hear this matter, the District Court having remanded it to the TRA and the Bankruptcy Court having lifted the automatic stay on a limited basis. AT&T requested that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 "for the purpose of convening a contested case and proceeding with the appointment of a hearing officer."[6] On November 17, 2011, Halo filed a Motion to Abate, in which Halo requested that the TRA "abate" this proceeding until conclusion of Halo's appeal of the Bankruptcy Court's October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit. On December 1, 2011, Halo filed a partial motion to dismiss the complaint, and AT&T filed its response to Halo's motion on December 8, 2011.

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administrative notice of the file in Docket No. 11-00108 and incorporates the Order in that case denying the Respondents' motions to dismiss, which is being filed contemporaneously herewith, as necessary by reference.

[2] *Id.*

[3] *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).

[4] *Id.* at 2.

[5] *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).

[6] Letter from Joelle Phillips to Chairman Kenneth C. Hill (November 10, 2011).

Consideration of This Matter During the November 21, 2011 Authority Conference

This matter came before the Authority at the regularly scheduled Authority Conference held on November 21, 2011. At that time, the Authority voted unanimously to deny the motion to abate and to convene a contested case in this matter and appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.

November 21, 2011 Scheduling Conference and December 12, 2011 Status Conference

Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter. This matter was reconvened before the Hearing Officer pursuant to notice on December 12, 2011, at which time the parties were heard on the pending motion. The parties were represented on both occasions as follows:

> **For BellSouth Telecommunications, LLC dba AT&T Tennessee – Joelle Phillips, Esq.**, 333 Commerce Street, Suite 2101, Nashville TN 37201.
>
> **For Halo Wireless, Inc. – Paul S. Davidson, Esq.**, Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.**, McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201 and **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Higway, Bldg. 2-235, West Lake Hills, TX 78746.

The District Court's Memorandum

In its November 1, 2011 Memorandum, the District Court stated:

> Recently the Bankruptcy Court held that the various state commission proceedings involving the Debtor (Defendant Halo Wireless) are excepted from the Bankruptcy Code's automatic stay, pursuant to 11 U.S.C. § 362(b)(4), so that the commissions can determine whether they have jurisdiction and, if so, whether there is a violation of state law. . . . The Bankruptcy Court held that the automatic stay does apply to prevent parties from bringing or continuing actions for money judgments or efforts to liquidate the amount of the complainants' claims.[7]

The District Court further stated:

[7] *BellSouth Telecommunications, Inc. v. Halo Wireless, Inc,* Case No. 3-11-0795, M.D. Tenn., *Memorandum*, p. 2 (November 1, 2011).

> Plaintiff argues that a claim for interpretation or enforcement of an ICA must be brought in the first instance in the state commission that approved the ICA in question. . . . Plaintiff argues that the jurisdiction of this Court is limited to determining rights under ICAs after final ruling from the state commission. . . . Defendant, on the other hand, contends that this action was properly removed under Section 1452(a) because the TRA proceeding is a "civil action" and that the TRA does not have jurisdiction because the claims implicate federal questions. . . . Defendant also asserts that the claims for relief fall within the Federal Communications Commission ("FCC") exclusive original jurisdiction.[8]

The District Court noted that although "[f]ederal district courts have jurisdiction to review certain types of decisions by state commissions," including decisions under the 1996 Telecommunications Act, "[h]ere, . . . there is no state commission determination to review."[9] The District Court's examination of the relevant federal law is instructive—and directly contrary to Halo's assumptions regarding jurisdiction—and is quoted here at length because of its relevance to this decision:

> The Telecommunications Act of 1996 ("the Act") requires that all ICAs be approved by a state regulatory commission before they become effective. State commissions such as the TRA have authority to approve and disapprove interconnection agreements, such as the one at issue herein. 47 U.S.C. § 252(e)(1). That authority includes the authority to interpret and enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *Millennium One Communications, Inc. v. Public Utility Comm'n of Texas*, 361 F.Supp.2d 634, 636 (W.D. Tex. 2005). Federal district courts have jurisdiction to review interpretation and enforcement decisions of the state commissions. *Id.; Southwestern Bell* at p. 480, 47 U.S.C. § 252(e)(6). Here, as noted above, there is no state commission determination to review.
>
> In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 772 (E.D. Va. 2011), the court held that federal district courts have federal question jurisdiction to interpret and enforce an ICA, pursuant to 28 U.S.C. § 1331. *Id. At 778; see also Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-79 (11th Cir. 2003)(federal courts have jurisdiction under Section 1331 to hear challenges to state commission order interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir. 2003)(federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

[8] *Id.* at 3-4.

[9] *Id.* at 4.

> Based on the reasoning in the above-cited cases, the Court finds that it has subject matter jurisdiction to hear this matter, pursuant to 28 U.S.C. § 1331 because the ICAs arise under federal law. As stated in *Verizon Maryland*, ICAs are federally mandated agreements and to the extent the ICA imposes a duty consistent with the Act, that duty is a federal requirement. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).
>
> The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action. Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what for a parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).
>
> The Third Circuit Court of Appeals has held that interpretation and enforcement actions that arise after a state commission has approved an ICA must be litigated in the first instance before the relevant state commission. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). A party may then proceed to federal court to seek review of the commission's decision. *Id.* Citing *Core,* a district court in Ohio has also held that a complainant is required to first litigate its breach-of-ICA claims before the state commission in order to seek review in the district court. *Ohio Bell,* 540 F.Supp.2d at 919-920 (citing cases from numerous district courts).
>
> On the other hand, in *Central Telephone,* the court held that a party to an ICA is not required to exhaust administrative remedies by bringing claims for breach of an ICA first to a state commission. *Central Telephone,* 759 F.Supp.2d at 778 and 786.
>
> The Court agrees with the reasoning of the *Core* and *Ohio Bell* opinions. The Act provides for judicial review of a "determination" by the state commission. Until such determination is made, the Court cannot exercise this judicial review. *See Ohio Bell,* 540 F.Supp.2d at 919. As the *Core* court stated: "a state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved." *Core,* 493 F.3d at 343 (citing *BellSouth Telecommunications,* 317 F.3d at 1278, n.9).[10]

On this basis, the District Court remanded the complaint to the TRA, noting that "[t]he Bankruptcy Court has held that the TRA action may proceed except to the extent the parties attempt to obtain and/or enforce a money judgment."[11]

The Bankruptcy Court's Order

In an Order issued on October 26, 2011, the Bankruptcy Court ruled that "pursuant to 11

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[10] *Id.* at 4-6.
[11] *Id.* at 6-7.

U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending State Commission Proceedings," including proceedings brought by AT&T.[12] The Bankruptcy Court further stated that

> any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such 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.[13]

AT&T's Claims

AT&T is an incumbent local exchange carrier ("ILEC") operating in Tennessee. As explained in its Complaint, AT&T seeks TRA adjudication of a dispute over alleged breach of an interconnection agreement between AT&T and Halo:

> AT&T Tennessee seeks an order allowing it to terminate its wireless interconnection agreement ("ICA") with Halo based on Halo's material breaches of that ICA. The ICA does not authorize Halo to send AT&T traffic that does not originate on a wireless network, but Halo, in the furtherance of an access charge avoidance scheme, is sending large volumes of traffic to AT&T Tennessee that does not originate on a wireless network, in violation of the ICA.
>
> As a result of this and other unlawful Halo practices, Halo owes AT&T Tennessee significant amounts of money – amounts that grow rapidly each month and that Halo refuses to pay. AT&T Tennessee brings this Complaint in order to terminate the ICA and discontinue its provision of interconnection and traffic transit and termination service to Halo. AT&T Tennessee also seeks an Order requiring Halo to pay AT&T Tennessee for the amounts Halo owes.[14]

AT&T explains the ICA as follows:

> The parties' ICA authorizes Halo to send only wireless-originated traffic to AT&T Tennessee. For example, a recital that the parties added through an amendment to the ICA when Halo adopted 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)

[12] *In re: Halo Wireless, Inc.*, Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay*, p. 1 (October 26, 2011). The Bankruptcy Court's Order is attached hereto.
[13] *Id.* at 2.
[14] *Complaint*, p. 1 (July 26, 2011).

> 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).

> Despite that requirement, Halo sends traffic to AT&T Tennessee that is not wireless-originated traffic, but rather is wireline-originated interstate, interLATA or intraLATA toll traffic. The purpose and effect of this breach of the parties' ICA is to avoid payment of the access charges that by law apply to the wireline-originated traffic that Halo is delivering to AT&T Tennessee by disguising the traffic as "Local" wireless-originated traffic that is not subject to access charges. By sending wireline-originated traffic to AT&T Tennessee, Halo is materially violating the parties' ICA.[15]

AT&T further alleges that Halo is altering or deleting call detail:

> The ICA requires Halo to send AT&T Tennessee proper call information to allow AT&T Tennessee to bill Halo for the termination of Halo's traffic. Specifically, Section XIV.G of the ICA provides:
>
> > The parties will provide each other with the proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.
>
> AT&T Tennessee's analysis of call detail information delivered by Halo, however, shows that Halo is consistently altering the Charge Party Number ("CN") on traffic it sends to AT&T Tennessee. This prevents AT&T Tennessee (and likely other, downstream, carriers) from being able to properly bill Halo based on where the traffic originated. That is, Halo's conduct prevents AT&T Tennessee (and likely other, downstream, carriers) from determining where the call originated (and thus whether it is interLATA or intraLATA or interMTA or intraMTA), and thus prevents AT&T Tennessee from using the CN to properly bill Halo for the termination of Halo's traffic.
>
> Halo's alteration of the CN on traffic it sends to AT&T Tennessee materially breaches the ICA. AT&T Tennessee respectfully requests that the Authority authorize AT&T Tennessee to terminate the ICA for this breach and to discontinue its provision of traffic transit and termination service to Halo, and grant all other necessary relief.[16]

These allegations are covered in Counts I through III of AT&T's Complaint, which conclude with a request that Halo be ordered to pay amounts owed under the ICA. In Count IV, AT&T alleges that "[p]ursuant to the ICA, Halo has ordered, and AT&T Tennessee has provided, transport facilities associated with interconnection with AT&T Tennessee."[17] AT&T further

[15] *Id.* at 3.
[16] *Id.* at 4-5.
[17] *Id.* at 6.

states that it "has billed Halo for this transport on a monthly basis pursuant to the ICA. Halo, however, has refused, with no lawful justification or excuse, to pay those bills."[18] Based on these allegations, AT&T "requests that the Authority declare that Halo must pay for the facilities it order from AT&T Tennessee."[19]

Halo's Motion to Dismiss

Halo has moved to dismiss Counts I, II, and III of the Complaint. In its Motion to Dismiss, Halo states:

> Halo is a commercial mobile radio service ("CMRS") provider. Halo has a valid and subsisting Radio Station Authorization ("RSA") from the Federal Communications Commission ("FCC") authorizing Halo to provide wireless service as a common carrier. AT&T has filed a complaint that it claims to be a post-ICA dispute. While the parties do have an ICA in Tennessee, Halo contends that AT&T's Counts I,II and III do not really seek and interpretation or enforcement of those terms. As explained further below, AT&T is impermissibly and improperly seeking to have the TRA decide whether Halo is acting within and consistent with its federal license. The TRA, however, lacks the jurisdiction and capacity to take up that topic.[20]

Halo further states:

> In addition, Halo sells CMRS-based telephone exchange service to Transcom Enhanced Services, Inc. ("Transcom"), Halo's high volume customer. As explained further below, AT&T's Counts I, II and III do not actually seek an interpretation or enforcement of the ICA terms. Instead, AT&T is impermissibly and improperly seeking to have the TRA decide whether Transcom is "really" an Enhanced/Information Service Provider, because if Transcom is an end user then there can be no dispute that the traffic in issue does "originate[ ] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The TRA, however, lacks the jurisdiction and capacity to take up the issue of whether Transcom is "really" an ESP because (1) AT&T is precluded as a matter of law from disputing Transcom's ESP status and (2) the issue is governed by federal law and only the FCC or a federal court may resolve it.

Halo offers the following in support of its claim that the TRA cannot exert jurisdiction over the complaint:

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[18] *Id.*
[19] *Id.*
[20] *Halo Wireless Inc.'s Partial Motion to Dismiss and Answer to the Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Tennessee*, p. 1 (December 1, 2011).

> On four separate occasions, courts of competent jurisdiction have ruled that Transcom is an Enhanced Service Provider ("ESP") *even for phone-to-phone calls* because Transcom changes the content of every call that passes through its system, often changes the form, and also offers enhanced capabilities (the "ESP rulings"). Copies of the ESP rulings have been attached to this submission as **Exhibits A-D.** The court directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user.[21]

And Halo offers the following to argue that because it is providing service to a purported ESP, it is not in violation of its interconnection agreement with AT&T:

> Halo is selling CMRS-based telephone exchange service to an ESP End User. All of the communications at issue originate from end user wireless customer premises equipment ("CPE") (as defined in the Act, 47 U.S.C. § 153(14)) that is located in the same MTA as the terminating location. The bottom line is that not one minute of the relevant traffic is subject to access charges. It is all "reciprocal compensation" traffic and subject to the "local" charges in the ICA. Further, and equally important, the ICA uses a factoring approach that allocates as between "local" and "non-local." Halo has paid AT&T for termination applying the contract rate and using the contract factor, AT&T cannot complain.[22]

Halo states that AT&T "wants the TRA and other commissions across the country to rule that Halo's service is 'not wireless' and 'not CMRS.'"[23] However, Halo argues, only the Federal Communications Commission ("FCC") has jurisdiction to make such determinations:

> The courts have agreed that state commissions cannot attempt to impose rate or entry regulation on wireless providers, and in particular, state commissions cannot issue "cease and desist" orders on wireless providers. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service Comm.*, 648 F.2d 1350 (5th Cir. 1981). Further, Halo has a *federally*-granted right to interconnect and the FCC has asserted "plenary" jurisdiction over CMRS interconnection and expressly pre-empted any state authority to deny interconnection. Declaratory Ruling, *In the Matter of The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, FCC 87-163, ¶¶12, 17, 2 FCC Rcd 2910, 2911-2912 (FCC 1987)("*RCC Interconnection Order*").
>
> . . .

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[21] *Id.* at 2.
[22] *Id.* at 3.
[23] *Id.*

The Supreme Court and several courts of appeals have consistently held that state commissions cannot undertake to interpret or enforce federal licenses because "a multitude of interpretations of the same certificate" will result. *See Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79 (1959). The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued. *Id.* At 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987) and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989). If a state commission or AT&T believes that the federally-licensed entity is engaging in some "scheme" or "subterfuge" through its practices, the proper forum is the FCC. Similarly, if any state commission has a concern, its remedy is to petition the federal licensing body for relief. *Service Storage*, 359 U.S. at 179. A state commission cannot take any action that would "amount to a suspension or revocation" of a federal license. *Castle, Attorney General v. Hayes Freight Lines*, 348 U.S. 61, 64 (1954).[24]

Halo also disputes the factual bases alleged in the Complaint:

Contrary to AT&T's assertion in paragraph 7 of the Complaint, the traffic in issue *does* "originate[ ] through wireless transmitting and receiving facilities before [Halo] delivers traffic to AT&T." The network arrangement in every state and every MTA is the same. Halo has established a 3650 MHz base station in each MTA. Halo's customer has 3650 MHz wireless stations – which constitute CPE as defined in the Act – that are sufficiently proximate to the base station to establish a wireless link with the base station. When the customer wants to initiate a session, the customer originates a call using the wireless station that is handled by the base station, processed through Halo's network, and ultimately handed off to AT&T for termination or transit over the interconnection arrangements that are in place as a result of the various interconnection agreements ("ICAs").

AT&T is apparently claiming that Halo is merely "re-originating" traffic and that the "true" end points are elsewhere on the PSTN. In making this argument, however, AT&T is advancing the exact position that the D.C. Circuit rejected in *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In that case, the D.C. Circuit held it did not matter that a call received by an ISP is instantaneously followed by the origination of a "further communication" that will then "continue to the ultimate destination" elsewhere. The Court held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." In other words, the D.C. Circuit clearly recognizes – and functionally held – that an ESP is an "origination" and "termination" endpoint for intercarrier compensation purposes (as opposed to *jurisdictional* purposes, which does use the "end-to-end" test).

The traffic here goes to Transcom where there is a "termination." Transcom then "originates" a "further communication" in the MTA. In the same way that ISP-bound traffic *from* the PSTN is immune from access charges

[24] *Id.* at 5-7.

(because it is not "carved out by § 251(g) and is covered by § 251(b)(5), the call *to* the PSTN is also immune.[25]

AT&T's Response

In response to the Motion to Dismiss, AT&T states that "AT&T Tennessee has come to the TRA because, as the evidence will show, Halo is engaged in conduct that Halo's ICA with AT&T Tennessee prohibits."[26] AT&T further states:

> The evidence will show that Halo's ICA prohibits Halo from delivering traffic that originates on wireline telephones, which makes sense given Halo's self-proclaimed status as a wireless carrier. Halo, however, has delivered large volumes of wireline-originated traffic to AT&T Tennessee, and it has attempted to disguise this traffic as wireless-originated traffic (by altering or withholding call-detail information). Halo's incentive for doing so is obvious – the charges for terminating the type of wireline-originated traffic that Halo actually sent are higher than the charges for terminating the wireless-originated traffic addressed by Halo's ICA. Halo's conduct, however, is prohibited by the ICA, and AT&T Tennessee is entitled to hold Halo in breach of the ICA.[27]

In response to Halo's argument based on the *Service Storage* case, AT&T states:

> Halo claims that AT&T Tennessee's complaint asks the TRA to construe licenses that only the FCC can construe. AT&T Tennessee's complaint does not ask the TRA to do any such thing. AT&T Tennessee's claims in no way depend upon the TRA finding or even considering whether Halo's actions violated its wireless licenses. Nothing in AT&T's complaint references Halo's FCC licenses, nor are those licenses in any way relevant to determining whether Halo breached its ICA (which was submitted to and approved by the Authority, not the FCC) by disguising wireline-originated traffic as wireless traffic. Thus, Halo's jurisdictional arguments rest on an inaccurate premise and are meritless.[28]

AT&T concludes:

> While AT&T Tennessee disagrees (and will present substantial evidence to prove its allegations), the dispute about whether the traffic is, or is not, wireline originated is a factual dispute. Factual disputes or factual denials are not a basis to dismiss a complaint. In fact, the existence of a factual dispute is precisely the reason that an evidentiary hearing is needed.[29]

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[25] *Id.* at 7-8.
[26] *AT&T Tennessee's Response to Halo's Partial Motion to Dismiss and Answer to Complaint*, pp. 1-2 (December 8, 2011).
[27] *Id.* at 1-2.
[28] *Id.* at 3.
[29] *Id.*

Discussion

"The sole purpose of a Tenn.R.Civ.P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint."[30] "[W]hen a complaint is tested by a Tenn.R.Civ.P. 12.02(6) motion to dismiss, [the tribunal] must take all the well-pleaded, material factual allegations as true, and [it] must construe the complaint liberally in the plaintiff's favor."[31] Taking "all the well-pleaded, material factual allegations" in the complaint "as true," the complaint raises claims that are squarely within the TRA's jurisdiction. The complaint seeks interpretation of an interconnection agreement that was approved by the TRA in Docket No. 10-00063 pursuant to 47 U.S.C. 252 and is subject to enforcement by the TRA.[32] Halo's protestations to the contrary are in complete conflict with the TRA's duties and authority under relevant law, as explained in detail in the District Court's November 1, 2011 Memorandum, and must be dismissed.[33] AT&T is entitled, if it can, to present evidence showing that the interconnection agreement between Halo and AT&T is being breached.

Halo also raises in this case an attempt to create an additional jurisdictional threshold based on the 1959 decision of the United States Supreme Court in *Service Storage & Transfer Co. v. Commonwealth of Virginia*[34] a case in which the Court considered a conflict between the Virginia State Corporation Commission's attempted exercise of jurisdiction over the intrastate truck traffic of a motor carrier and the fact that the carrier involved had been granted an interstate license by the Interstate Commerce Commission ("ICC"). For the reasons stated in the Hearing Officer's Order dismissing the motions to dismiss filed by Halo and its co-defendant in Docket

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[30] *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992).
[31] *Id.*
[32] "The agreement [between Halo and AT&T] and amendment thereto are reviewable by the Authority pursuant to 47 U.S.C. § 252 and Tenn. Code Ann. §§ 65-4-104 (2004) and 65-4-124(a) and (b) (2004), or in the alternative, under Tenn. Code Ann. § 65-5-109(m) (2009)." *See In re: Petition for Approval of the Interconnection Agreement and Amendment Thereto between BellSouth d/b/a AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063, *Order Approving the Interconnection Agreement and Amendment Thereto*, p. 2 (June 21, 2010).
[33] The District Court's Memorandum clearly reflects the fact that the District Court believes that the only posture in which this matter could come before it is *on appeal*, not by removal.
[34] *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171 (1959).

No. 00-00108, which is being issued contemporaneously herewith and which is incorporated herein by reference, Halo's reliance on *Service Storage* is without merit, and this case can go forward at the TRA under the limitations set by the Bankruptcy Court.

Accordingly, the Hearing Officer denies the Motion to Dismiss filed by Halo and sets this action for further proceedings in accordance with the attached procedural schedule.

IT IS THEREFORE ORDERED THAT:

1. The Motion to Dismiss filed by Halo Wireless, Inc. Services, Inc. is denied.

2. This matter shall proceed in accordance with the procedural schedule that is being issued simultaneously herewith.

IT IS SO ORDERED.

Kenneth C. Hill, Hearing Officer

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.

Exhibit F

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 26, 2012

IN RE:	)	
	)	**DOCKET NO.**
BELLSOUTH TELECOMMUNICATIONS LLC D/B/A AT&T	)	**11-00119**
TENNESSEE V. HALO WIRELESS, INC.	)	

ORDER

This matter came before Chairman Kenneth C. Hill, Director Sara Kyle and Director Mary W. Freeman of the Tennessee Regulatory Authority ("Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on January 23, 2012 for consideration of the *Complaint* filed by BellSouth Telecommunications, LLC d/b/a AT&T Tennessee ("AT&T") against Halo Wireless, Inc. ("Halo") and Halo's *Motion to Dismiss Complaint With Prejudice.*

TRAVEL OF THE CASE

On July 26, 2011, AT&T filed a *Complaint* against Halo, pursuant to 47 U.S.C. § 252 and TRA Rule 1220-1-2-.02, requesting that the TRA issue an order "allowing it to terminate its wireless Interconnection Agreement ("ICA") with Halo based on Halo's material breaches of that ICA."[1] The *Complaint* also states that AT&T "seeks an Order requiring Halo to pay AT&T Tennessee the amounts Halo owes" as a result of "an access charge avoidance scheme."[2] On August 10, 2011, Halo filed a Suggestion of Bankruptcy informing the TRA that "on August 8, 2011 Halo filed a voluntary petition under Chapter 11 of Title 11 of the United States Code in the

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[1] *Complaint*, p. 1 (July 26, 2011).
[2] *Id.*

United States Bankruptcy Court for the Eastern District of Texas (Sherman Division)" ("Bankruptcy Court").[3] Accordingly, Halo stated, "the automatic stay is now in place" and "prohibits further action against [Halo] in the instant proceeding."[4]

On August 19, 2011, Halo filed a notice of removal to federal district court, which references a separate notice of removal and states that this matter has been removed to the United States District Court for the Middle District of Tennessee, Nashville Division ("District Court") "pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure."[5] On November 10, 2011, AT&T filed a letter informing the TRA that it may now hear this matter, the District Court having remanded it to the TRA and the Bankruptcy Court having lifted the automatic stay on a limited basis. AT&T requested that this matter be placed on the agenda for the Authority Conference scheduled for November 21, 2011 "for appointing a Hearing Officer and other action as necessary."[6] On November 17, 2011, Halo filed a *Motion to Abate*, in which Halo requested that the TRA "abate" this proceeding until conclusion of Halo's appeal of the Bankruptcy Court's October 26, 2011 Order to the United States Court of Appeals for the Fifth Circuit.

At the regularly scheduled Authority Conference held on November 21, 2011, the Authority voted unanimously to deny the *Motion to Abate* and to convene a contested case in this matter and appoint Chairman Kenneth C. Hill as Hearing Officer to handle any preliminary matters, including entering a protective order, ruling on any intervention requests, setting a procedural schedule, and addressing other preliminary matters.[7] Immediately following the Authority Conference, the Hearing Officer convened a scheduling conference in this matter.

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[3] *Suggestion of Bankruptcy*, p. 1 (August 10, 2011).
[4] *Id.* at 2.
[5] *Notice of Removal to Federal Court*, p. 1 (August 19, 2011).
[6] Letter from Joelle Phillips to Chairman Kenneth C. Hill (November 10, 2011).
[7] *Order Denying Motion to Abate, Convening a Contested Case and Appointing a Hearing Officer* (December 19, 2011).

On December 1, 2011, Halo filed *Halo Wireless, Inc.'s Partial Motion to Dismiss and Answer to the Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Tennessee* ("*Partial Motion to Dismiss*"), and AT&T filed its response to Halo's motion on December 8, 2011. The Hearing Officer heard arguments from AT&T and Halo (collectively, "the Parties") on the *Partial Motion to Dismiss* on December 12, 2011, and issued an order denying the *Partial Motion to Dismiss* on December 16, 2011.[8] The Parties submitted pre-filed direct testimony of their witnesses on December 19, 2011, and pre-filed rebuttal testimony on January 3, 2012. In addition, the Parties submitted pre-hearing memoranda on January 6, 2012.

MOTION TO DISMISS COMPLAINT WITH PREJUDICE

After business hours on Friday, January 13, 2012, Halo filed *Halo Wireless, Inc.'s Notice of May 16, 2006 Order Confirming Plan of Reorganization of Transcom Enhanced Services and Motion to Dismiss Complaint With Prejudice* ("*Motion to Dismiss Complaint With Prejudice*"). At the beginning of the Hearing on January 17, 2012, Chairman Hill addressed the *Motion to Dismiss Complaint With Prejudice*, giving AT&T an opportunity to respond and setting the matter for consideration during the January 23, 2012 Authority Conference. AT&T filed *BellSouth Telecommunications, LLC dba AT&T Tennessee's Response to Halo Wireless, Inc's Motion to Dismiss Complaint With Prejudice* ("*Response*") on January 19, 2012.

As more fully explained in the discussion of AT&T's *Complaint* below, Halo's business plan is centered on their assertion that Transcom Enhanced Services, Inc. ("Transcom") is an Enhanced Service Provider ("ESP"). In its *Motion to Dismiss Complaint With Prejudice,* Halo requests that the TRA dismiss AT&T's *Complaint* with prejudice on the grounds that during

[8] *Order Denying Motion to Dismiss* (December 16, 2011).

Transcom's 2005 bankruptcy proceeding,[9] BellSouth/AT&T Corporation were creditors/parties in interest.[10] In the Transcom Bankruptcy Court's April 28, 2005 Memorandum Opinion, the Court concluded that "[Transcom]'s service is an enhanced service, not subject to payment of access charges."[11] Some of the creditors appealed the April 28, 2005 order to the United States District Court for the Northern District of Texas, Dallas Division ("Transcom District Court"), but the Transcom District Court dismissed the appeal as moot and vacated the bankruptcy court's Order and Memorandum Opinion.[12] However, the Transcom Bankruptcy Court entered an order on May 16, 2006 confirming Transcom's bankruptcy plan.[13] In this Confirmation Order, the Transcom Bankruptcy Court again stated that Transcom's services are not subject to access charges, but rather qualify as information services and enhanced services that must pay end-user charges.[14] No creditor appealed the May 16, 2006 Order.[15] Halo argues that because this Confirmation Order is binding, AT&T cannot challenge Transcom's status as an ESP.[16] In addition, Halo asserts that *res judicata* or collateral estoppel bars the claims that have been litigated in the bankruptcy court.

To assert a *res judicata* defense, a party must establish: 1) the parties must be identical in both suits; 2) the prior judgment must have been rendered by a court of competent jurisdiction; 3) there must have been a final judgment on the merits; and 4) the same cause of action must be involved in both cases.[17] Halo claims that these standards are satisfied because 1) BellSouth was a party to the Transcom bankruptcy case and litigants who have a close and significant relationship (e.g. Transcom/Halo) satisfy the "identical parties" test; 2) the Transcom Bankruptcy Court had

[9] Transcom filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, ("Transcom Bankruptcy Court") on February 18, 2005 in Case No. 05-31929-HDH-11 ("Transcom bankruptcy"). *See Motion to Dismiss Complaint With Prejudice*, p. 2, ¶ 3 (January 13, 2012).
[10] *Motion to Dismiss Complaint With Prejudice*, p. 2, ¶ 4 (January 13, 2012).
[11] *Id.* at 3, ¶ 7.
[12] *Id.*
[13] *Id.* at 4, ¶ 10.
[14] *Id.*
[15] *Id.* at 4, ¶ 11.
[16] *Id.* at 6, ¶ 14.
[17] *Id.* at 6, ¶ 17, *citing Osherow v. Ernst & Young, LLP* (*In re Intelogic Trace, Inc.*), 300 F.3d 382, 386 (5th Cir. 2000).

jurisdiction over the 2006 Confirmation Order; 3) the 2006 Confirmation Order is final; and 4) the two actions are based on the same nucleus of operative facts, because the primary issue in both proceedings is whether Transcom provides enhanced services.[18]

Collateral estoppel precludes a party from litigating an issue already raised in an earlier action if: 1) the issue at stake is identical to the one involved in the earlier action; 2) the issue was actually litigated in the prior action; and 3) the determination of the issue in the prior action was a necessary part of the judgment in that action.[19] Halo asserts that 1) AT&T's *Complaint* confronts the authority with an identical issue to that raised in the 2006 Transcom Bankruptcy Court's Confirmation Order, i.e. that Transcom is an ESP not subject to access charges; 2) the issue was litigated in 2006 in the Transcom bankruptcy proceeding; and 3) the determination that Transcom is an ESP was a necessary part of the Confirmation because if it were not, the Plan would not have been feasible and the Confirmation would have been denied.[20]

AT&T opposes the *Motion to Dismiss Complaint With Prejudice* on the grounds that the Motion is at odds with the Federal Communications Commission's ("FCC") *Connect America Fund* Order.[21] AT&T argues that none of the Transcom bankruptcy court proceedings or other earlier proceedings cited by Halo is binding on either AT&T or the Authority.[22] None of the Transcom Bankruptcy Court orders states or suggests that Transcom actually is an end-user, and none of them implies or says anything about the termination or origination of calls.[23] Rather, an ESP is treated as

[18] *Motion to Dismiss Complaint With Prejudice*, pp. 7-8, ¶¶ 18-26 (January 13, 2012).
[19] *Id.* at 10, ¶ 28, *citing Petro-Hunt, L.L.C. v. U.S.*, 365 F.2d 385, 397 (5th Cir, 2004).
[20] *Id.* at 10-11, ¶¶ 27-30.
[21] *Response*, p. 1 (January 19, 2012); *See Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, WC Docket Nos. 10–90, 07–135, 05–337, 03–109; GN Docket No. 09–51; CC Docket Nos. 01–92, 96–45; WT Docket No. 10–208; FCC 11–161, __ FCC Rcd __ ("*Connect America Fund Order*") (November 18, 2011).
[22] *Response*, p. 3 (January 19, 2012).
[23] *Id.* at 4.

an end-user for the purpose of being exempted from access charges, nothing more.[24] Further the exemption applies only to ESPs, not carriers (like Halo) that transport calls for ESPs.[25] AT&T asserts that the Authority rejected Halo's *res judicata* and collateral estoppel arguments when it rejected Halo's *Partial Motion to Dismiss.*[26] AT&T further asserts that *res judicata* and collateral estoppel cannot apply because: 1) the main order Halo relies upon was vacated by the federal district court; 2) the bankruptcy cases involved Transcom, not Halo, and therefore were not between identical parties; 3) the Transcom bankruptcy cases did not involve the same cause of action as this case, since this case involves claims for Halo's breach of a contract that was not even formed until after the bankruptcy cases, while the bankruptcy cases involved the issue of whether Transcom was subject to access charges; and 4) the issue in this case (whether Transcom must be deemed to originate or re-originate calls) was never raised, much less decided, in the bankruptcy cases.[27]

The Authority agrees with AT&T that neither *res judicata* nor collateral estoppel applies in this case. The panel finds that *res judicata* does not apply because the Transcom bankruptcy case and this docket do not involve identical parties and this is a breach of contract case and, therefore, is not the same cause of action. The panel also finds that collateral estoppel does not apply because the issue in this case - the origination or re-origination and termination of Halo's calls – was not raised in the Transcom bankruptcy case. Based on these findings, the Authority concludes unanimously that Halo's *Motion to Dismiss Complaint With Prejudice* should be denied.

<u>THE HEARING</u>

A Hearing in this matter was held before the voting panel of Directors assigned to this docket on January 17, 2012. The Hearing was publicly noticed by the Hearing Officer on

[24] *Id.*
[25] *Id.* at 4, n. 8.
[26] *Id.* at 3, n. 6.
[27] *Id.*

December 16, 2011 and January 12, 2012. Participating in the Hearing were the following parties and their respective counsel:

> **For BellSouth Telecommunications, LLC d/b/a AT&T Tennessee** – **Joelle Phillips, Esq.**, 333 Commerce Street, Suite 2101, Nashville TN 37201 and **J. Tyson Covey, Esq.**, Mayer Brown, LLP, 71 S. Wacker Drive, Chicago, IL 60606.
>
> **For Halo Wireless, Inc.** – **Paul S. Davidson, Esq.**, Waller Lansden Dortch & Davis, LLP, 511 Union Street, Suite 2700, Nashville, TN 37219; **Steven H. Thomas, Esq.** and **Jennifer M. Larson, Esq.**, McGuire, Craddock & Strother, P.C., 2501 N. Harwood, Suite 1800, Dallas, TX 75201; **W. Scott McCollough, Esq.**, McCollough/Henry PC, 1250 S. Capital of Texas Highway, Bldg. 2-235, West Lake Hills, TX 78746.

During the Hearing, the Authority heard testimony from AT&T witnesses J. Scott McPhee and Mark Neinast. Russ Wiseman and Robert Johnson testified for Halo.

AT&T'S *COMPLAINT*

In its *Complaint*, AT&T seeks to terminate its wireless ICA with Halo because Halo has violated the ICA by sending AT&T large volumes of traffic that does not originate on a wireless network. AT&T further asks the TRA to order Halo to pay it the amounts that it owes AT&T. AT&T asserts that the TRA has jurisdiction over this matter, because it involves (1) violations of an ICA entered into under 27 U.S.C. §§ 251 and 252 that was approved by the Authority and (2) violations of AT&T Tennessee's state tariffs.[28] The *Complaint* contains four counts:

Count 1 - Breach of ICA: Sending Wireline-Originated Traffic to AT&T Tennessee: AT&T charges that Halo sends AT&T traffic that is wireline-originated, interstate, interLATA or intraLATA toll traffic and that Halo disguises it as local traffic to avoid access charges that apply to such traffic. AT&T asks the TRA to order Halo to terminate the Parties' ICA for this breach or, in

[28] *Complaint*, p. 3 (July 26, 2011).

the alternative, to order Halo to cease and desist from sending wireline-originated traffic not authorized by the ICA to AT&T.[29]

Count 2 - Breach of ICA: Alteration or Deletion of Call Detail: AT&T alleges that Halo consistently alters the Charge Number ("CN"), which prevents AT&T from properly billing Halo based on where the traffic originated. AT&T requests that the Authority authorize it to terminate the Parties' ICA, or, in the alternative, to order Halo to cease and desist from altering the CN on traffic that it delivers to AT&T.[30]

Count 3 – Payment for Termination of Wireline-Originated Traffic: The wireline-originated traffic that Halo previously sent to AT&T is not governed by the Parties' ICA but is instead subject to tariffed switched access charges. AT&T therefore asks the Authority to order Halo to pay all access charges due to AT&T within thirty days of the Authority's order.[31]

Count 4 – Breach of ICA: Non-payment for Facilities: AT&T asks the TRA to order Halo to pay it for transport facilities that AT&T has provided but for which Halo has refused to pay.[32]

POSITIONS OF THE PARTIES

The Parties have set forth their arguments in full in the record of this docket, in their pre-hearing memoranda and in the presentation of their cases at the Hearing. The following section is intended as a *brief* summary of the positions of AT&T and Halo in this matter.

Position of AT&T Tennessee

AT&T asserts that Halo has engaged in three separate types of breaches of the Parties' ICA.[33] Although the ICA requires Halo to send only wireless-originated traffic to AT&T, 74% of

[29] *Id.* at 3-4.
[30] *Id.* at 4-5.
[31] *Id.* at 5-6.
[32] *Id.* at 6.
[33] *Pre-hearing Memorandum of BellSouth Telecommunications, LLC dba AT&T Tennessee*, p. 1 (January 6, 2012).

the traffic Halo sends to AT&T is landline-originated traffic.[34] According to AT&T, Halo's contention that it is not breaching the ICA is based on a "wireless in the middle" theory, where Transcom is an ESP; ESPs are treated as end-users; and Transcom must be deemed to "re-originate" every call that passes through Transcom to Halo.[35]

AT&T argues that the FCC has expressly rejected Halo's theory in the *Connect America Fund Order*, where the FCC singled out Halo by name.[36] The FCC rejected Halo's theory that calls that begin with an end-user dialing a call on a landline network can be "re-originated" as wireless calls by passing through an ESP with wireless equipment in the middle of the call.[37] Further, the ESP exemption from access charges applies only to ESPs themselves, not to carriers like Halo that serve them.[38] AT&T asserts, however, that Transcom is not an ESP because reducing background noise and inserting "comfort noise" in periods of silence do not alter the fundamental character of the service from the end-user's perspective.[39]

AT&T argues that its call study showing 74% of the calls Halo sends to AT&T are landline-originated is reliable. Further, Halo does not deny that at least some of its calls it sends to AT&T are landline or IP-originated,[40] which results in a breach of the ICA.[41]

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[34] *Id.* at 5. The terms "wireline" and "landline" are used interchangeably in the parties' testimony. For background, federal law specifies that wireless calls that originate and terminate within the same Major Trading Area ("MTA") are "local calls" and subject to reciprocal compensation rates. Calls exchanged between end-users in different MTAs are considered "InterMTA" and are subject to tariffed interstate or intrastate access charges, which are higher than reciprocal compensation rates. Calls that originate from landline telephones are considered "local" if they both originate and terminate within the same local exchange area. Intercarrier compensation rates for intra-exchange calls are set by the landline ICA; the rates for intrastate inter-exchange calls are set by the state access tariff, and the rates for interstate inter-exchange calls are set by the FCC access tariff. *See* J. Scott McPhee, Pre-filed Direct Testimony, p. 9 (December 19, 2011).

[35] *Id.*

[36] *Pre-hearing Memorandum of BellSouth Telecommunications, LLC dba AT&T Tennessee*, p. 6 (January 6, 2012).

[37] *Id.* at 7.

[38] *Id.* at 9.

[39] *Id.* at 10-11.

[40] The term "IP" refers to Internet Protocol.

[41] *Id.* at 11-12.

AT&T asserts that Halo also breached the ICA by inserting false charge numbers; specifically, Halo inserts a Transcom Charge Number ("CN") on every call, and the effect is that every call appears local.[42]

AT&T alleges that Halo is breaching the ICA by refusing to pay for interconnection facilities it obtains from AT&T. Because 100% of the traffic between the Parties is traffic that Halo terminates on AT&T's network, Halo is responsible for 100% of the cost of the interconnection facility under the Parties' wireless ICA.[43]

Position of Halo Wireless, Inc.

Halo asserts that it is not in breach of the ICA and AT&T is not entitled to "significant amounts of money" from Halo for the traffic at issue.[44] Halo further asserts that it has a valid and subsisting Radio Station Authorization from the FCC authorizing Halo to provide wireless service as a common carrier and to operate stations in the "3650-3700" MHz band,[45] and is therefore governed exclusively by federal law.[46] Halo argues that the FCC has exclusive jurisdiction over federal licensing and that a state commission cannot take any action that would amount to a suspension or revocation of a federal license.[47]

Halo provides Commercial Mobile Radio Service ("CMRS") and sells telephone exchange service to Transcom, which is a high volume customer.[48] Halo asserts that Transcom is an ESP because it changes the information content of every call that passes through its system and also

[42] *Id.* at 12-13.
[43] *Id.* at 14-15.
[44] *Halo Wireless, Inc.'s Pre-hearing Memorandum*, p.1 (January 6, 2012).
[45] Russ Wiseman Pre-filed Direct Testimony, p. 2 (December 19, 2011).
[46] *Halo Wireless, Inc.'s Pre-hearing Memorandum*, p. 2 (January 6, 2012).
[47] *Id.* at 2-3.
[48] *Id.* at 1.

offers enhanced capabilities.[49] Transcom is an end-user, not a carrier.[50] Therefore, Halo argues that it is a CMRS carrier selling wireless telephone exchange service to an ESP end-user and its traffic is not wireline-originated.[51] All of the calls received from Transcom within a particular MTA are terminated in the same MTA, so that all of the traffic is subject to local charges in the ICA. [52]

Halo argues that it does not alter or delete call detail in violation of the ICA.[53] Halo populates the CN parameter with the Billing Telephone Number ("BTN") of its end-user customer - Transcom.[54] AT&T alleges improper modification of signaling information related to the CN parameter, but the basis of this claim once again results from the assertion that Transcom is a carrier rather than an end-user.[55] Halo is exactly following industry practice applicable to an exchange carrier providing telephone exchange service to an end-user, and in particular a communications-intensive business end-user with sophisticated Customer Premises Equipment ("CPE").[56]

Halo asserts that it does not owe facilities charges to AT&T.[57] Under the ICA, AT&T may only charge for interconnection facilities when AT&T-provided facilities are used by Halo to reach the mutually agreed Point of Interconnection ("POI").[58] Under the terms of the ICA, the POI is where Halo's network ends.[59] AT&T is attempting to shift cost responsibility for what it calls facilities" to Halo when the ICA assigns responsibility to AT&T because the "facilities" are all on AT&T's side of the POI.[60]

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[49] *Id.*
[50] *Id.* at 4.
[51] *Id.* at 4-6.
[52] *Id.* at 1.
[53] *Id.* at 6-8.
[54] *Id.* at 8.
[55] *Id.*; *see also* Russ Wiseman Pre-filed Direct Testimony pp. 26-28 (December 19, 2011).
[56] *Id.*
[57] *Id.* at 9-14.
[58] *Id.* at 9.
[59] *Id.*
[60] *Id.* at 14.

Findings and Conclusions

Jurisdiction

Throughout these proceedings, Halo has raised objections and challenged the jurisdiction of the Authority to consider the *Complaint* in this matter. The Authority finds that it has jurisdiction to consider the *Complaint* pursuant to both federal and state law. The Authority approved the interconnection agreement between AT&T Tennessee and Halo by order dated June 21, 2010 in TRA Docket No. 10-00063.[61] Interconnection agreements are reviewable and enforceable by the Authority pursuant to 47 U.S.C. § 252 and, in instances where the "market regulation" statute applies, are enforceable pursuant to Tenn. Code Ann. § 65-5-109(m). Further, the Authority has jurisdiction over complaints concerning telecommunications service providers who have elected "market regulation" such as AT&T, pursuant to Tenn. Code Ann. § 65-5-109(m). Halo did not object to the Authority's jurisdiction to approve the interconnection agreement that now lies at the center of this dispute.[62]

The District Court, in its Order remanding this matter back to the Authority, also recognized the TRA's jurisdiction over the interpretation of the ICA. The District Court explained the respective roles of the Court and the Authority, stating:

> The Telecommunications Act of 1996 ("the Act") requires that all ICAs be approved by a state regulatory commission before they become effective. State commissions such as the TRA have authority to approve and disapprove interconnection agreements, such as the one at issue herein. 47 U.S.C. § 252(e)(1). That authority includes the authority to interpret and enforce the provisions of agreements that the state commissions have approved. *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479 (5th Cir. 2000); *Millennium One Communications, Inc. v. Public Utility Comm'n of Texas*, 361 F.Supp.2d 634, 636 (W.D. Tex. 2005). Federal district courts have jurisdiction to review interpretation

[61] *See In Re: Petition For Approval Of The Interconnection Agreement and Amendment Thereto Between BellSouth dba AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063, *Order Approving the Interconnection Agreement and Amendment Thereto* (June 21, 2010).
[62] *See In Re: Petition for Approval of the Interconnection Agreement and Amendment Thereto Between BellSouth dba AT&T Tennessee and Halo Wireless, Inc.*, Docket No. 10-00063.

and enforcement decisions of the state commissions. *Id.; Southwestern Bell* at p. 480, 47 U.S.C. § 252(e)(6). Here, as noted above, there is no state commission determination to review.

In *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, 759 F.Supp.2d 772 (E.D. Va. 2011), the court held that federal district courts have federal question jurisdiction to interpret and enforce an ICA, pursuant to 28 U.S.C. § 1331. *Id. at 778; see also BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-79 (11th Cir. 2003) (federal courts have jurisdiction under Section 1331 to hear challenges to state commission orders interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir. 2003)(federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

Based on the reasoning in the above-cited cases, the Court finds that it has subject matter jurisdiction to hear this matter, pursuant to 28 U.S.C. § 1331 because the ICAs arise under federal law. As stated in *Verizon Maryland*, ICAs are federally mandated agreements and to the extent the ICA imposes a duty consistent with the Act, that duty is a federal requirement. *Verizon Maryland, Inc. v. Global NAPS, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004).

The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action. Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what fora parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).

The Third Circuit Court of Appeals has held that interpretation and enforcement actions that arise after a state commission has approved an ICA must be litigated in the first instance before the relevant state commission. *Core Communications, Inc. v. Verizon Pennsylvania, Inc.*, 493 F.3d 333, 344 (3d Cir. 2007). A party may then proceed to federal court to seek review of the commission's decision. *Id.* Citing *Core*, a district court in Ohio has also held that a complainant is required to first litigate its breach-of-ICA claims before the state commission in order to seek review in the district court. *Ohio Bell*, 540 F.Supp.2d at 919-920 (citing cases from numerous district courts).

On the other hand, in *Central Telephone*, the court held that a party to an ICA is not required to exhaust administrative remedies by bringing claims for breach of an ICA first to a state commission. *Central Telephone*, 759 F.Supp.2d at 778 and 786.

> The Court agrees with the reasoning of the *Core* and *Ohio Bell* opinions. The Act provides for judicial review of a "determination" by the state commission. Until such determination is made, the Court cannot exercise this judicial review. *See Ohio Bell,* 540 F.Supp.2d at 919. As the *Core* court stated: "a state commission's authority to approve or reject an interconnection agreement would itself be undermined if it lacked authority to determine in the first instance the meaning of an agreement that it has approved." *Core,* 493 F.3d at 343 (citing *BellSouth Telecommunications,* 317 F.3d at 1278, n.9).[63]

The Authority is mindful, however, of the restrictions placed upon these proceedings by the Order of the Bankruptcy Court. In an Order issued on October 26, 2011, the Bankruptcy Court ruled that "pursuant to 11 U.S.C. § 362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 . . . is not applicable to currently pending State Commission Proceedings," including proceedings brought by AT&T.[64] However, the Bankruptcy Court further stated that

> any regulatory proceedings . . . may be advanced to a conclusion and a decision in respect of such 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.[65]

Therefore, nothing in this Order is intended to permit as part of these proceedings the liquidation of the amount of any claim against Halo or to affect the debtor-creditor relationship between the Parties beyond that permitted in the Bankruptcy Court's October 26, 2011 Order.

AT&T's *Complaint* - Count 1

Count 1 of the *Complaint* alleges that Halo has breached the ICA by impermissibly sending traffic originating from wireline telephones to AT&T, although the interconnection agreement only

[63] *BellSouth Telecommunications, Inc. v. Halo Wireless, Inc,* Case No. 3-11-0795, M.D. Tenn., *Memorandum,* pp. 4-6 (November 1, 2011).
[64] *In re: Halo Wireless, Inc.,* Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay,* p. 1 (October 26, 2011).
[65] *In re: Halo Wireless, Inc.,* Case No. 11-42464, Bkrtcy. E. D. Tex., *Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay,* p. 2.

permits Halo to send AT&T traffic that originates from wireless networks. The applicable language from the interconnection agreement reads:

> 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.[66]

The Authority interprets the language of the ICA to require Halo only to deliver traffic that has originated through wireless transmitting and receiving facilities. Thus, evidence that Halo has delivered wireline-originated traffic will result in a finding that Halo has breached the ICA.

The Authority has reviewed Halo's *ex parte* filings with the FCC in the *Connect America Fund* docket, where the description of Halo and Transcom's operations is the same as that which has been presented to the TRA in this proceeding. Indeed, reviewing the *ex parte* filings made by Halo makes it clear that the FCC was aware of Halo's assertion that it provided service to ESPs and used wireless technology. In the resulting *Connect America Fund Order,* the FCC addressed and rejected Halo's assertion that traffic from its customer Transcom is wirelessly originated. The *Connect America Fund Order* states:

> 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,"

[66] J. Scott McPhee, Pre-filed Direct Testimony, pp. 6-7 (December 19, 2011).

> 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."[67]

After clearly describing the operations of Halo, including its use of wireless technology and relationship with Transcom, the FCC found that calls are not originated by Transcom and that wireline originated calls are not reclassified as wireless calls because of a wireless link in the middle of the call path. The FCC in the *Connect America Fund Order* continues:

> 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.[68]

The Authority agrees with the FCC's rejection of Halo's assertions and finds 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 wireless-originated call for purposes of reciprocal compensation.

Nor does Halo deny that it is sending traffic that originated on the wireline PSTN.[69] In response to the question, "Do you admit that some of the communications in issue actually started on other networks?" Halo's witness Mr. Wiseman responds "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."[70]

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[67] *Connect America Fund Order*, ¶ 1005 *(footnotes omitted)*. The term "CLEC" refers to Competitive Local Exchange Carrier.
[68] *Connect America Fund Order*, ¶ 1006 *(footnotes omitted)*.
[69] The term "PSTN" refers to the Public Switched Telephone Network, which means the calls were originated on the landline network.
[70] Russ Wiseman, Pre-filed Direct Testimony, p. 14 (December 19, 2011).

AT&T's traffic study also demonstrates that Halo has delivered wireline traffic to AT&T. AT&T estimates that about 74% of the traffic Halo sends to AT&T originates on the networks of landline carriers.[71] Even though Halo does not deny it has likely sent wireline traffic to AT&T, it contests the accuracy of AT&T's traffic study. Halo's arguments against AT&T's traffic study are: (1) that telephone numbers are an unreliable indictor of who originates a call, if wireless technology is used for the call and where the call originates and (2) calls that originate using IP technology are not landline calls.

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. In addition, the Authority finds that the convention of collecting data for a single week is sufficient to demonstrate whether wireline traffic was sent to AT&T by Halo. Further, Halo identifies several calls included in AT&T's traffic study as likely being IP-originated,[72] which is considered by the industry to be wireline-originated for the purpose of intercarrier compensation rules.[73]

Based upon the Authority's agreement with the FCC's dispositive decision in the *Connect America Fund Order*, Halo's admission that it has delivered wireline-originated and IP-originated traffic to AT&T, and the information contained in AT&T's traffic study, the Authority finds that Halo has materially breached its interconnection agreement with AT&T.

[71] Mark Neinast, Pre-filed Direct Testimony, pp. 3, 11 and Attachment MN-3 (December 19, 2011).
[72] Russ Wiseman, Pre-filed Rebuttal Testimony, pp. 8-9 (January 3, 2012).
[73] Mark Neinast, Pre-filed Rebuttal Testimony, p. 6 (January 3, 2012).

AT&T's *Complaint* - Count 2

Count 2 of the *Complaint* alleges that Halo breached its interconnection agreement with AT&T by improperly altering call detail information that allows AT&T to properly classify calls for the purpose of intercarrier compensation. Section XIV.G of the ICA requires:

> The parties will provide each other with the proper call information, including all proper translations for routing between networks and any information necessary for billing where BellSouth provides recording capabilities. This exchange of information is required to enable each party to bill properly.[74]

In addition, Section XIV.E of the ICA also requires Halo to provide many types of call detail information, including the Charge Number.

In most cases, industry members use the Calling Party Number ("CPN") to determine whether a call is jurisdictionally long-distance or local. In rare cases a CN is included in the call detail record to indicate the number that will actually be financially responsible for the call. For example, some businesses want all calls made by its employees in a particular office to be billed to single number. Halo admits that it uses Transcom's BTN to populate the CN fields on traffic since February 2011.[75]

As with Count 1, the Authority finds that the FCC's *Connect America Fund Order* dispositively resolves this issue. Because the FCC dismisses "re-origination" by Transcom, Transcom clearly cannot be the originating entity and thus inserting Transcom's number as the Charge Number is inappropriate. Therefore, because Halo has improperly altered call detail information, the Authority finds that Halo has materially breached its interconnection agreement with AT&T.

[74] *Complaint*, p. 4 (July 26, 2011).
[75] Russ Wiseman, Pre-filed Direct Testimony, pp. 29-30 (December 19, 2011).

AT&T's *Complaint* – Count 3

Count 3 of the *Complaint* alleges that Halo has not properly compensated AT&T for the traffic it has delivered. Halo has been paying AT&T reciprocal compensation, which is only appropriate if the end-user initiated the call wirelessly within the MTA in which it is terminated, instead of switched access charges, which are appropriate for wireline-originated calls. The FCC's decision in the *Connect America Fund Order*, with which the Authority concurs, is that Halo's traffic does not originate within an MTA with its customer Transcom. In addition, AT&T's traffic study demonstrates that AT&T terminated calls that originated outside the MTA where it was terminated. Further, Halo's use of MTA specific numbers to assert a 100% intra-MTA factor necessarily implies that switched access charges were avoided since Transcom was not the true originating party.

The Authority's findings on Counts 1 and 2 of the *Complaint* concerning the wireline and IP-origination of Halo's traffic necessarily lead to the conclusion that Halo has not been properly compensating AT&T for the traffic it has delivered. The payment of reciprocal compensation is only appropriate if the end-user, which is not Transcom, initiated the call wirelessly within the MTA where it is terminated. Thus, Halo has failed to compensate AT&T for calls where it was due switched access charges. Therefore, the Authority finds that Halo is liable to AT&T Tennessee for access charges on the interstate and intrastate interLATA and intraLATA landline traffic it has sent to AT&T Tennessee.

AT&T's *Complaint* - Count 4

Count 4 of the *Complaint* alleges that Halo has refused to pay AT&T for transport facilities. Section V.B, page 10 of the ICA states:

> 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.[76]

Halo does not dispute that it terminates all of its traffic on AT&T's network, but it does dispute AT&T's charges for the two-way trunk groups that connect the Parties. Halo details the arrangement of facilities with which it connects to AT&T in various locations, and it cites from FCC rules to argue that AT&T cannot charge Halo for facilities on AT&T's side of the POI.[77] This line of reasoning might be appropriate if Halo were a CLEC. However, Halo is not a CLEC but rather a CMRS provider, and under the ICA it signed with AT&T, each party is required to pay its share of the facilities cost. The Authority finds that Halo owes AT&T for the proportionate share of the facilities that connect Halo's Point of Presence ("POP") to AT&T's network as required by the ICA. The ICA allocates the costs of facilities based on the proportion of traffic each party sends to the other party, and since Halo sends 100 % of its traffic to AT&T, the Authority finds that Halo should pay 100% of the cost for these facilities as required by the ICA.

Transcom Is Not an Enhanced Service Provider

The FCC has established a bright-line rule that the "enhanced" service designation does not apply to services that merely "facilitate 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 a service is not "enhanced" when the service does not alter the fundamental character of the service *from the end-user's perspective.*[78] Thus, for example, the FCC has held that

[76] Mark Neinast, Pre-filed Direct Testimony, p.19 (December 19, 2011).
[77] Russ Wiseman, Pre-filed Direct Testimony, p. 41 (December 19, 2011).
[78] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, 11 FCC Rcd. 21905, ¶ 107 (1996).

services are not "enhanced" when customers use the same dialing method for allegedly "enhanced" calls that they would for any other call,[79] or where the alleged "enhancement" was made "without the advance knowledge or consent of the customer" that placed the call and the customer is not "provided with the 'capability' to do anything other than make a telephone call."[80]

The Authority finds that Transcom's services fail to meet the FCC's bright-line rule, since the record in this proceeding indicates that Transcom provides no services to actual end-users and does not offer any enhancements discernable to the person that actually places the call.[81] The record also supports the conclusion that end-users are completely unaware that Transcom is even involved in call delivery.[82] Nor does Halo's testimony prove that Transcom is an ESP. Halo asserts that Transcom

> ... employs computer processing applications that act on the format, content, code, protocol or similar aspects of the received information. The platform will provide the customer additional, different, or restructured information. This is done by generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications.[83]

However, despite the claim of computer processing of data, 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.[84] The Pennsylvania Public Utility Commission rejected a similar claim relating to Transcom's services, finding that "the removal of background noise" and

[79] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd. 7457, ¶ 15 (2004) ("*IP-in-the-Middle Order*").
[80] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826, ¶ 16, n. 28 (2005) ("*AT&T Calling Card Decision*").
[81] Mark Neinast, Pre-filed Rebuttal Testimony, p. 5 (January 3, 2012).
[82] *Id.*
[83] Robert Johnson, Pre-filed Rebuttal Testimony, p. 12 (January 3, 2012).
[84] *Id.* at 12-13.

"the insertion of white noise" do not make Transcom an ESP.[85] 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 these processes are deemed "enhancements" in the sense of an ESP.[86] For the reasons above, the Authority finds that Transcom is not an ESP for this particular traffic.

IT IS THEREFORE ORDERED THAT:

1. Halo Wireless Inc.'s *Motion to Dismiss Complaint With Prejudice* is denied.

2. BellSouth Telecommunications, LLC d/b/a AT&T Tennessee is authorized to terminate the interconnection agreement previously approved by the Authority in TRA Docket No. 10-00063 and to stop accepting traffic from Halo Wireless, Inc.

3. Halo Wireless, Inc. is liable to BellSouth Telecommunications, LLC d/b/a AT&T Tennessee for access charges on the interstate and intrastate interLATA and intraLATA landline traffic it has sent to AT&T Tennessee thus far and for the interconnection facilities it has obtained from AT&T Tennessee. However, nothing in this Order is intended to permit as part of these proceedings the liquidation of the amount of any claim against Halo or to affect the debtor-creditor relationship between the Parties beyond that permitted in the *Order Granting Motion of the AT&T*

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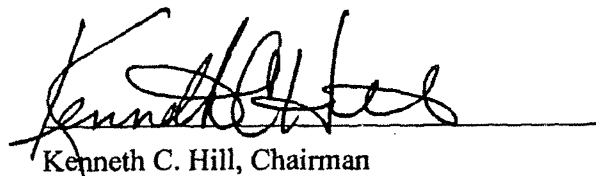
[85] *Palmerton Tel. Co. v. Global NAPS South, Inc., et al.*, PA PUC Docket No. C-2009-2093336, 2011 WL 1259661, at 16-17 (Penn. PUC, March 16, 2010). ("We find that Transcom does not supply GNAPS with 'enhanced' traffic under applicable federal rules"). Note that the Pennsylvania Public Utility Commission specifically rejected the Transcom Bankruptcy Court's April 28, 2005 Memorandum Opinion finding Transcom to be an ESP on the basis that Transcom had indicated in that proceeding that it provided "data communications services over private IP networks (VoIP)." *Id.* The Authority is not persuaded by the Transcom bankruptcy court rulings regarding Transcom's status as an ESP, either.

[86] *Id.*

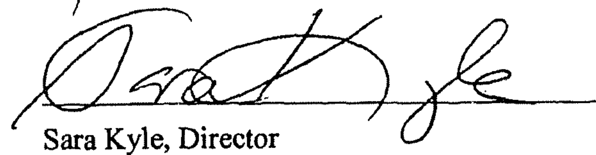
Companies to Determine Automatic Stay Inapplicable and for Relief From the Automatic Stay [Dkt. No. 13], issued by the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, in Case No. 11-42464-btr-11 on October 26, 2011. AT&T Tennessee may pursue further action for the collection of access charges or facilities charges in the United States Bankruptcy Court for the Eastern District of Texas, Sherman Division, or other appropriate fora as permitted by that Court.

4. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen days from the date of this Order.

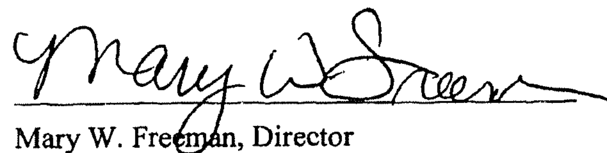
5. Any party aggrieved by the Authority's decision in this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty days from the date of this Order.



Kenneth C. Hill, Chairman



Sara Kyle, Director



Mary W. Freeman, Director

Exhibit G

PSC REF#:158138

DATE MAILED

JAN 12 2012

Public Service Commission of Wisconsin
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PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation into Practices of Halo Wireless, Inc., and Transcom Enhanced Services, Inc. — 9594-TI-100

ORDER DENYING MOTIONS TO DISMISS IN PART WITH PREJUDICE AND IN PART WITHOUT PREJUDICE

This Order denies, in part with prejudice and in part without prejudice, the Motions to Dismiss that were filed by Halo Wireless, Inc. (Halo), and Transcom Enhanced Services, Inc. (Transcom), on November 18, 2011.

The Commission opened this docket on its own motion by a Notice of Proceeding dated October 20, 2011. On November 18, 2011, Halo and Transcom each filed a Motion to Dismiss. On November 23, 2011, a Prehearing Conference was held in this docket that identified an issues list for the docket and set a schedule for the filing of testimony and a hearing date. On December 5 and December 6, 2011, responses to the Motions to Dismiss were filed by the Wisconsin Rural Local Exchange Carriers, the TDS Telecom Companies,[1] and Wisconsin Bell, Inc., d/b/a AT&T Wisconsin. On December 13, 2011, Halo and Transcom each filed a reply 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, as more fully described below.

In the Motions to Dismiss, Halo and Transcom raise issues or arguments of procedure and notice and of substantive jurisdiction. On procedure and notice, Halo and Transcom argue the Commission erred in the opening of the docket (referencing a staff request for a

[1] On December 6, 2011, the Wisconsin State Telecommunications Association filed a letter to join the TDS Telecom Companies' response.

docket number), in the identification of this docket as a "proceeding" as opposed to an "investigation," in the specification of this matter as a Class 1 contested case, and in failing to notice potential adverse outcomes. Halo and Transcom also argue that the Commission was effectively estopped from acting in this case because of bankruptcy court actions and activities in other states. On the jurisdictional matters, Halo argues that it is a Commercial Mobile Radio Service (CMRS) provider and thus not subject to Commission jurisdiction. Further, because Halo views Transcom as an end user customer, it contends that the services it provides to Transcom are exchange services, not toll services, and thus access charges are not applicable. Likewise, Transcom identifies itself as an enhanced service provider (ESP), and as such, it alleges, it is not subject to Commission jurisdiction. Transcom argues that as an ESP, it provides no telecommunications service and thus would generate no traffic subject to access charges.

The procedural and notice arguments raised by Halo and Transcom are unconvincing and without merit. The opening of the matter and the notice process used followed traditional and standard Commission process and practice and further yielded no harm to the ability of Halo and Transcom to fully participate in this docket. Halo and Transcom have a full opportunity to explain, defend, and argue the issues at the hearing as scheduled at the Prehearing Conference. Further, nothing in the bankruptcy court actions cited by Halo and Transcom impacts any of the actions taken by the Commission to move this case forward for investigation. The Commission finds no merit in the Halo and Transom collateral estoppel arguments and the alleged violations of the scope of the current bankruptcy stay. The procedural and notice matters raised in the

Motions to Dismiss, and the collateral estoppel arguments and the alleged violations of the scope of the bankruptcy stay arguments raised, are thus denied with prejudice.

As to the jurisdiction arguments, the self-identification of Halo and Transcom as a CMRS provider and an ESP, respectively, do not trump the very basis for opening the docket – to investigate the nature of these two entities and the services they are providing in Wisconsin. By *identifying these very matters as issues for the docket* and setting a process for data requests, testimony and hearing (including cross-examination) and subsequent briefing, the Commission docket provides Halo and Transcom ample due process to make their factual arguments[2] and related jurisdictional claims. Investigating who these providers are and what they are doing will determine, per Wisconsin statutes and other relevant law, what their appropriate classifications are and thus what obligations exist or do not exist as to the handling of their traffic and the appropriate compensation mechanisms that should apply. A claim of no jurisdiction is quite different than a "finding" of no jurisdiction, and this proceeding will focus exactly on the latter. Thus, the substantive jurisdictional arguments related to the Motions to Dismiss are denied without prejudice.

The Commission has jurisdiction to issue this Order under Wis. Stat. §§ 196.02(1) and (7), 196.016, 196.04, 196.219, 196.26, 196.28, 196.44, and other pertinent provisions of Wis. Stat. ch. 196.

ORDER

1. This Order is effective the day after the date of mailing.

[2] For instance, the arguments raised by Transcom about the Commission's lack of jurisdiction over an ESP (pages 10-15 of its Motion) and Halo's arguments about the Commission's lack of jurisdiction over CMRS providers (pages 11-24 of its Motion).

2. The November 18, 2011, Motions to Dismiss of Halo Wireless, Inc., and Transcom Enhanced Services, Inc., are denied. As described above, 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.

Dated at Madison, Wisconsin, January 10, 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.[3] 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

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[3] *See State v. Currier*, 2006 WI App 12, 288 Wis. 2d 693, 709 N.W.2d 520.

Exhibit H

Action Item 1

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE

ADMINISTRATIVE MATTER	☐	DATE	**February 15, 2012**
MOTOR CARRIER MATTER	☐	DOCKET NO.	**2011-304-C**
UTILITIES MATTER	☑	ORDER NO.	**2012-124**

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

SUBJECT:

DOCKET NO. 2011-304-C - 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 - Discuss this Matter with the Commission.

COMMISSION ACTION:

Move that we deny Halo's Partial Motion to Dismiss Counts I, II, and III of the AT&T Complaint. Under the law, Halo can prevail on its Motion only if it can show that even if the allegations of AT&T's complaint are true, the Complaint still fails to state a cause of action upon which relief may be granted. This is not the case with the Complaint in the present case. In the present situation, all of AT&T's claims relate to alleged breaches of contract of the interconnection agreement between the two companies. In opposition, Halo makes a number of factual arguments about AT&T's claims. Factual disputes cannot establish a basis for dismissing a complaint. Similarly, while Halo disputes AT&T's position that this Commission has jurisdiction to adjudicate AT&T's claims, again factual determinations must be made before the Commission can rule on the jurisdictional dispute. Further, AT&T has stated that it will not seek any relief beyond that authorized by the Bankruptcy Court, so asserting the continued jurisdiction of the Bankruptcy Court is not a ground for dismissal. After considering all of these matters, Mr. Chairman, I once again move that we deny the Halo partial Motion to Dismiss, since it does not state appropriate grounds for even partial dismissal of the AT&T Complaint.

PRESIDING: Howard SESSION: Regular TIME: 2:00 p.m.

	MOTION	YES	NO	OTHER
FLEMING	☐	☑	☐	
HALL	☐	☑	☐	
HAMILTON	☐	☑	☐	
HOWARD	☐	☑	☐	
MITCHELL	☑	☑	☐	
WHITFIELD	☐	☑	☐	
WRIGHT	☐	☐	☐	Absent — NARUC Business - Attending an ICER Workshop in Brussels, Belgium

(SEAL) RECORDED BY: J. Schmieding

PUBLIC SERVICE COMMISSION
SOUTH CAROLINA

Exhibit I

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition for relief against Halo Wireless, Inc. for breaching the terms of the wireless interconnection agreement, by BellSouth Telecommunications, LLC d/b/a AT&T Florida.	DOCKET NO. 110234-TP ORDER NO. PSC-12-0129-FOF-TP ISSUED: March 20, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS

BY THE COMMISSION:

Background

On July 25, 2011, BellSouth Telecommunications, LLC d/b/a AT&T Florida ("AT&T") filed a Complaint and Petition for Relief ("Complaint") against Halo Wireless, Inc. ("Halo"). In the Complaint, AT&T alleges that Halo has violated the terms of the parties' interconnection agreement ("ICA") by terminating traffic to AT&T which was not originated on a wireless network, in order to avoid the payment of access charges to AT&T. AT&T asked that the Complaint be bifurcated into two phases: an expedited initial phase where we would terminate the parties' ICA, and then a second phase where we would determine any amounts Halo owed AT&T. In support of its Complaint, AT&T specifically alleges we have jurisdiction pursuant to federal law, the terms of the Parties' ICA, and Chapters 120 and 364, Florida Statutes ("F.S.").

On August 8, 2011, Halo filed for Chapter 11 Bankruptcy Protection in the United States Bankruptcy Court for the Eastern District of Texas. On August 16, 2011, Halo filed a Suggestion of Bankruptcy, Notice of Stay, and Notice of Extensions with our Commission Clerk. The effect of Halo's Bankruptcy was an automatic stay of our proceedings until such time as the Bankruptcy Court should order otherwise.

On September 30, 2011, Halo filed a Notice of Removal with the District Court in Tallahassee, in which Halo sought to remove our pending (but stayed) proceeding to the United States District Court for the Northern District of Florida ("District Court"). In the removal action, Halo asserted that the issues involved in our proceeding implicated questions of federal law over which the Federal Communications Commission, not the Florida Public Service

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Commission, had exclusive jurisdiction. Halo also asked the District Court to transfer the action from the Northern District of Florida to the Bankruptcy Court in Texas.

On December 9, 2011, the District Court issued its Order of Remand, whereby the District Court remanded this matter back to us for further proceedings.[1] In its Order, the District Court noted that the Bankruptcy Court had specifically ruled "that the pending proceedings against Halo in state public utility commissions – but not any attempts to collect any amount determined to be due – are exempt from the automatic stay."

Following the District Court's Order, on December 16, 2011, the Prehearing Officer issued Order No. PSC-11-0506-PCO-TP, Order Resuming Docket, and giving Halo twenty (20) days in which to file an answer to the Complaint. On January 5, 2012, Halo filed a Partial Motion to Dismiss and Answer to AT&T's Complaint ("Motion to Dismiss"). In the Motion to Dismiss, Halo sought that Counts I, II, and III of AT&T's Complaint be dismissed, while answering Count IV of AT&T's Complaint. On January 17, 2012, AT&T filed a Response to Halo's Partial Motion to Dismiss ("AT&T Response"). On February 27, 2012, Halo filed a First Notice of Supplemental Authority, advising us of recent activity of the United States Court of Appeals for the Fifth Circuit with regards to Halo's bankruptcy proceeding.

This Order determines Halo's Partial Motion to Dismiss. We have jurisdiction over these matters pursuant to the provisions of 47 United States Code §252 and Chapters 364 and 120, F.S.

Legal Standard For Motion To Dismiss

A motion to dismiss raises as a question of law the sufficiency of the facts alleged to state a cause of action.[2] In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the petitioner, the petition still fails to state a cause of action for which relief may be granted.[3] The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.[4]

When making this evaluation, only the petition and documents attached to or incorporated therein by reference can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.[5] Where agreement terms are incorporated into the petition by reference and are the basis of the petition, the agreement can be reviewed in determining the "nature of the alleged claim."[6]

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[1] Order of Remand, BellSouth Telecommunications, LLC v. Halo Wireless, Inc., Case No. 4:11cv470-RH/WCS (N.D. Fla., December 9, 2011), filed as Commission Document No. 08930-11.
[2] Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).
[3] *Id.* at 350. *See also* Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).
[4] Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).
[5] Varnes v. Dawkins, 624 So. 2d at 350; Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), *overruled on other grounds*, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).
[6] *See* Veal v. Voyager Prop. & Cas. Ins. Co., 51 So. 3d 1246, 1249-50 (Fla. 2d DCA 2011).

AT&T's Complaint

AT&T alleges that AT&T and Halo entered into an ICA, when Halo adopted the AT&T – T Mobile agreement in its entirety; we acknowledged this adoption as effective on July 27, 2010 in Docket No. 100194-TP. Pursuant to the ICA, claims AT&T, Halo is only authorized to terminate wireless originated traffic to AT&T, and may not terminate non-wireless (or wireline) originated traffic. AT&T avers that in order to avoid the payment of access charges, Halo altered the Charge Party Number ("CN") to disguise the nature of the traffic. As a result of this conduct, AT&T alleges Halo owes it significant amounts of money, amounts which are increasing every month Halo's conduct continues. As relief, AT&T seeks the termination of the parties' ICA; the discontinuation of interconnection, traffic transit, and termination services to Halo; and the payment of money owed AT&T.

AT&T's Complaint contains four (4) counts against Halo. Count I alleges Halo sends large amounts of wireline-originated toll traffic to AT&T for termination, in violation of the parties' ICA. Count II alleges that Halo alters the call information provided to AT&T, in order to disguise the source of the call, in violation of the ICA. Count III alleges that Halo's unauthorized wireline-originated traffic, being in violation of the terms of the ICA, should be billed at AT&T's tariffed switched access rate. Count IV of the Complaint alleges that Halo has ordered, but failed to pay for, certain transport facilities associated with interconnection.

AT&T specifically alleges that we have jurisdiction to interpret and enforce the ICA and AT&T's state tariffs. AT&T avers that §252 of the Act (Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56) expressly authorizes state commissions to mediate interconnection agreement negotiations, arbitrate interconnection agreements, and approve or reject interconnection agreements. AT&T further alleges that Section XX of the parties' ICA specifically provides that either party may petition us for a resolution of a dispute arising from the ICA. Finally, AT&T maintains that Chapters 120 and 364, F.S., as well as Chapters 25-22 and 28-106, Florida Administrative Code ("F.A.C."), provide specific state law authority for our adjudication of this dispute.

Halo's Partial Motion To Dismiss

In its Partial Motion to Dismiss, Halo avers that it is a commercial mobile radio service ("CMRS") provider, authorized by the FCC to provide wireless service as a common carrier. Halo states that while AT&T has styled its Complaint as a dispute regarding the parties' ICA, AT&T does not in fact seek interpretation or enforcement of the ICA. Rather, Halo asserts that AT&T is actually seeking to have us decide whether Halo is acting within the scope of its federal license, and that we lack jurisdiction to make this determination.

Halo maintains that it sells wireless telephone exchange service to a high volume customer, Transcom Enhanced Services, Inc. ("Transcom"), and AT&T's Complaint is actually seeking to have us decide whether Transcom is an Enhanced/Information Service Provider ("ESP"); again, Halo alleges we are without jurisdiction to make this determination. Halo asserts it sells wireless based telephone exchange service to Transcom, and therefore, none of the traffic at issue is subject to access charges.

Halo asserts that only the FCC has jurisdiction to determine whether Halo's service is in fact wireless. Despite the fact the FCC has exclusive jurisdiction over CMRS providers, Halo alleges AT&T and other ILECs have "coordinated a multi-state attack" on Halo, with over 100 ILECs suing Halo in over 20 proceedings in 10 states, in all cases accusing Halo of "an access charge avoidance scheme," and accusing Halo of altering Called Party Number ("CPN") information which they know is not true. Halo maintains that it populates the charge number field with Transcom's number, because Transcom is the end user customer, and "applicable industry standards" call for this practice.

Halo goes on to allege that the underlying dispute in this docket is controlled by federal law, which preempts any state disposition of these issues. Halo claims both the FCC and the courts agree that states cannot regulate CMRS providers, and that state commissions cannot issue "cease and desist" orders to CMRS providers. Halo states that the regulatory classifications for Halo and Transcom are defined and governed exclusively by federal law, and states are pre-empted from regulating CMRS providers, over whom the FCC has exclusive jurisdiction.

As to Count I of AT&T's Complaint, Halo asserts that the traffic at issue is in fact wireless-originated. Halo's customers have wireless customer premises equipment ("CPE"), which transmits calls to Halo's base station; Halo's network processes these calls and hands them off to the LEC for termination or transit. Halo concludes that once Transcom's status as an ESP is acknowledged, Transcom is an end user, and AT&T's contentions fail, since AT&T's claim in Count I is based on the idea that Halo's customers are not end users.

Regarding Count II, Halo reaffirms that Transcom is an end user. Halo asserts that its practices regarding address signaling ensure that AT&T's system recognizes end user telephone exchange traffic, exactly as required by the ICA. Halo avers that its method is exactly the same as AT&T's with respect to a large business end user. Halo states that it does not change the content or in any way manipulate the address signal information that is ultimately provided to AT&T; AT&T's claim is based upon its incorrect assertion that Transcom is a carrier rather than an end user. Halo concludes that it is exactly following industry practice applicable to exchange carriers providing access to end users, "and in particular a communications-intensive business end user with sophisticated CPE."

As to Count III, Halo disputes AT&T's assertion that the traffic at issue is subject to exchange access charges. Halo reiterates AT&T's position that AT&T wishes to defer our consideration of Counts III and IV until after Counts I and II are resolved, and further, since AT&T admits that the traffic is not covered by the ICA, AT&T is in effect seeking a claim for damages, over which we have no legal jurisdiction. Regardless, Halo claims, the Bankruptcy Court's Order does not allow us to order payment of any sums. Halo continues, however, to maintain that it does not owe AT&T access charges as alleged in Count III for several reasons.

Finally, with respect to Count IV, Halo admits that we have jurisdiction over the "facilities" issue, but denies that it ordered the specific "transport facilities" at issue, or that AT&T in fact provided those facilities. Halo essentially claims that the elements at issue are actually "trunks" or "trunk groups," which ride on, but are not themselves, "facilities."

AT&T's Response

In its Response, AT&T asserts that by mid-2010, AT&T Florida and other AT&T Incumbent Local Exchange Carriers ("ILECs") determined that Halo was terminating large amounts of traffic, which was not wireless-originated. Accordingly, states AT&T, several AT&T ILECs, as well as several other carriers (including TDS and many rural local exchange carriers) have filed complaints against Halo in other state commissions, based upon the same claims about Halo's business practices. In total, AT&T asserts there are more than 20 cases pending before state commissions.

AT&T asserts that Halo filed for bankruptcy the day before the first state commission (Georgia's PSC) was due to begin an evidentiary hearing, in an attempt to stay all state proceedings. When the Bankruptcy Court did not stay state proceedings, Halo sought review of the Bankruptcy Court's decision, which was denied. Simultaneously, claims AT&T, Halo was attempting to remove state commission complaints to various Federal courts, on the basis of exclusive federal jurisdiction. AT&T asserts that the Florida court rejected Halo's argument and remanded the proceeding back to us, and every other court which has ruled on the removal petition has likewise remanded the case to the state commission. AT&T states that in two states which are moving forward, Halo filed Motions to Dismiss identical to the Partial Motion filed here; both State Commissions denied those motions. AT&T avers that the July 25, 2011 Complaint alleges straightforward breaches of the parties' ICA, and that we have jurisdiction over these claims.

AT&T argues that both Florida and Federal law are clear that the we are the appropriate forum to seek relief for allegations of breach of an ICA. AT&T avers that its Complaint does not ask us to construe Halo's wireless licenses, and nothing in AT&T's Complaint even references those wireless licenses. AT&T maintains that all of its claims relate directly to breaches of the ICA we approved, and the FCC, federal courts, and we ourselves have all recognized our authority over ICA disputes.

Furthermore, AT&T claims that the dispute about whether the traffic terminated to AT&T is wireless-originated is a factual dispute, and for purposes of a motion to dismiss, all factual allegations in the complaint must be assumed to be true. AT&T goes on to aver that in its recent Connect America Fund decision, the FCC rejected Halo's specific argument regarding the nature of the traffic, and re-affirmed that the traffic is wireline-originated.

Finally, AT&T asserts that it does not seek any relief in this proceeding beyond that which the Bankruptcy Court specifically authorized. AT&T states that it merely asks us to determine that Halo is responsible for payment of any unpaid access charges or facilities charges, and not to quantify the amount or require payment. Accordingly, AT&T requests that Halo's Partial Motion to Dismiss be denied.

Halo's First Notice Of Supplemental Authority

By its First Notice of Supplemental Authority ("First Notice"), Halo advises us that the United States Court of Appeals for the Fifth Circuit has decided to hear Halo's appeal of the Bankruptcy Court's denial of the stay and remand to state commissions. Halo advises that the Fifth Circuit has established an expedited briefing and oral argument schedule, setting the week of April 30, 2012, for oral arguments. Halo suggests that "if the Fifth Circuit finds, consistent with all extant precedent, that the state commission proceedings are subject to the automatic stay, any actions taken by the state commissions would be void *ab initio.*" Halo concludes that the "risk of reversal" of the bankruptcy court's decision is real, and therefore, "Halo requests that this tribunal abate any deadlines or proceedings until the conclusion of the appellate process in the Fifth Circuit."

Analysis

Despite the convoluted procedural nature of this docket, the issue before us is whether to grant or deny Halo's Partial Motion to Dismiss Counts I – III of AT&T's Complaint. As we stated above, the standard to apply is whether, accepting all of AT&T's allegations as true and in a light most favorable to AT&T, AT&T has stated a cause of action upon which we have jurisdiction to grant relief. We determine the answer to that question is yes, and therefore, Halo's Partial Motion to Dismiss is denied.

In Counts I and II,[7] AT&T has alleged that Halo is terminating wireline traffic, unauthorized by the parties' ICA, and is not paying access charges for such traffic, which constitute breaches of the parties' ICA. Accepting these allegations as true, both federal and state law clearly authorize us to consider and adjudicate these claims.

As referenced by AT&T in its Response, both federal law (specifically 47 U.S.C. §252) and state law (Section 364.16, F.S.) designate us as the primary authority to interpret and enforce Interconnection Agreements we approve. We have asserted this authority in several recent orders,[8] and this authority has been upheld by numerous federal court decisions.[9] Thus, our primary jurisdiction to enforce the terms of Interconnection Agreements is beyond question.

---

[7] AT&T is not requesting we take any action regarding Count III, at least until Counts I and II are resolved. AT&T suggests that we may not have jurisdiction over its claim for interstate switched access charges, and that AT&T expects it will file a federal court action for collection of interstate access charges. AT&T concludes that it is possible that such federal court action may also encompass AT&T's claims for intrastate access charges in Count III. Therefore, with respect to Count III, we do not make any decision at this time.

[8] *Se, e.g.*, Order No. PSC-10-0457-PCO-TP, issued July 16, 2010, in Docket No. 100021-TP, In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc. d/b/a AT&T Florida.; Order No. PSC-11-0451-FOF-TP, issued October 10, 2011, In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.; Order No. PSC-11-0420-PCO-TP, issued September 28, 2011, in Docket No. 090538-TP, In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services), et. al.

As cited by AT&T in its response, two other states which have addressed and decided this issue, Tennessee[10] and Wisconsin,[11] came to this same decision without equivocation. In denying Halo's substantially similar Motions to Dismiss, both states determined their authority under Federal and their individual state laws to proceed with the dockets.[12] Furthermore, the terms of the AT&T Florida - Halo ICA we approved specifically provide that disputes relating to the interpretation or the implementation of the agreement can be resolved by us.[13]

Finally, our clear authority in this matter was explained by Judge Hinkle in the Order on Remand:

> The Florida Legislature and Congress have given the Florida Public Service Commission a role in resolving inter-carrier disputes on issues of this kind due to the Commission's expertise. *See, e.g.*, Fla. Stat. §364.16; 47 U.S.C. §252. As I noted in *Vartec*:
>
> > "[T]he Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. §364.07 (2001) [now Fla. Stat. §364.16 (2011)], not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in a different court; instead, it afforded a remedy in a different type of forum altogether. In such a proceeding, the competence brought to bear will not be that of a court, but of a regulator.

Order on Remand, Pages 8 – 10, citing *BellSouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1283-84 (N.D. Fla. 2002).

We find that Halo's First Notice of Supplemental Authority is essentially an additional motion for stay or abatement of these proceedings. We see no reason why we should wait to decide the instant Motion to Dismiss. Given our decision to deny the motion to dismiss, the next

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[9] *See, e.g.* Am. Dial Tone, Inc. v. BellSouth Telecomms., Inc., 2010 U.S. Dist. LEXIS 123162 (N.D. Fla. 2010); BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc., 317 F.3d 1270, 1277-79 (11th Cir. 2003); Covad Communications v. BellSouth Corp, 374 F.3rd 1044 (11th Cir. 2004).

[10] Tennessee Regulatory Authority Docket No. 11-00119, In Re: BellSouth Telecommunications, LLC v. Halo Wireless, Inc.

[11] Public Service Commission of Wisconsin Docket 9594-TI-100, Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc..

[12] *Order Denying Motion to Dismiss*, Tennessee Regulatory Authority Docket No. 11-00119 at 12; *Order Denying Motions to Dismiss in Part With Prejudice and in Part Without Prejudice*, Public Service Commission of Wisconsin Docket 9594-TI-100 at 2-3.

[13] *See* ICA, Section XX Resolution of Disputes ("....[i]f the issue is not resolved within 30 days, either party may petition the Commission for a resolution of the dispute, or to the extent that the Commission does not have jurisdiction or declines to review the dispute, then the FCC. However, each party reserves the right to seek judicial or FCC review of any ruling made by the Commission concerning this Agreement."); Section XXVI, Governing Law ("this Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state in which service is provided, without regard to its conflict of laws principles, and the Communication Act of 1934 as amended by the Act.").

step involves our staff scheduling an issue identification meeting with the parties, where procedural matters will be discussed, followed by the establishment of a procedural schedule by the Prehearing Officer. We also believe that given the issues in this docket, discovery and prefiled testimony due dates will likely extend beyond April 2012, and there will be sufficient time to adjust the procedural schedule, if necessary, to take account of any decision by the Fifth Circuit prior to the evidentiary hearing in this docket.

In conclusion, given our clear jurisdiction to adjudicate this Interconnection Agreement dispute under both federal and state law, as well as the terms of the ICA itself, and there is no reason to delay determination of Halo's Partial Motion to Dismiss. Accordingly, we deny Halo's Partial Motion to Dismiss, since AT&T has stated a cause of action upon which we have jurisdiction to grant relief.

Closure of Docket

Given our decision to deny Halo's Partial Motion to Dismiss with respect to Counts I and II, this docket shall remain open in order to conduct an evidentiary hearing.

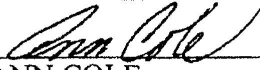
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Halo Wireless Inc.'s Partial Motion to Dismiss the Complaint of AT&T is hereby denied as to Counts I and II. It is further

ORDERED that an issue identification meeting shall be scheduled and this matter shall be set for an evidentiary hearing. It is further

ORDERED that this docket shall remain open to address AT&T's Complaint.

By ORDER of the Florida Public Service Commission this 20th day of March, 2012.



ANN COLE
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Florida Public Service Commission
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Tallahassee, Florida 32399
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

LDH

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Exhibit J

FILED

MAY 0 9 2012

EXECUTIVE SECRETARY
G.P.S.C.

COMMISSIONERS:

TIM G. ECHOLS, CHAIRMAN
CHUCK EATON
H. DOUG EVERETT
STAN WISE

DEBORAH K. FLANNAGAN
EXECUTIVE DIRECTOR

REECE McALISTER
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Georgia Public Service Commission

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DOCKET# 34219
DOCUMENT# 142716

Docket No. 34219

In Re: **Complaint of TDS TELECOM on Behalf of its Subsidiaries Blue Ridge 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 DENYING PARTIAL MOTION TO DISMISS

On March 12, 2012, Halo Wireless Inc. filed a Partial Motion to Dismiss Counts I Through III; Notice of Filing of May 16, 2006 Order Confirming Plan of Reorganization of Transcom Enhanced Services and Motion to Dismiss; and Answer to the Complaint in Intervention of BellSouth Telecommunications, LLC d/b/a AT&T Georgia.

I. Background

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 Commission 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.

II. 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 alleges that Halo altered or deleted call detail information. *Id.* at 4-5. Furthermore, AT&T alleges that Halo has refused payment of access charges on non-wireless originated traffic. *Id.* at 5-6. Finally, AT&T alleges that Halo has not paid for transport facilities provided under the parties' ICA. *Id.* at 6.

AT&T requests the following relief:

(a) Expedite the processing of this case;
(b) 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;

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

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

(e) Find that Halo is liable for the cost of interconnection facilities it has obtained from AT&T Georgia; and

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

Id. at 6-7.

III. Halo Motion

On March 12, 2012, Halo moved to dismiss Counts I through III of AT&T's complaint. In its Motion, Halo makes a preliminary statement that it has an FCC license to provide commercial mobile radio services. (Motion, pp. 1-2). Halo also states 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 asserts that a state commission cannot undertake to interpret or enforce federal licenses. *Id.* at 6. Halo's arguments with respect to the individual counts it seeks to dismiss are summarized as part of Staff's recommendation.

IV. Staff Recommendation

Staff recommends that the Commission deny Halo's Partial Motion to Dismiss. The Georgia Court of Appeals has held that "[i]n ruling on a motion to dismiss, the trial court must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff." *Cunningham v. Gage,* 301 Ga. App. 306, 307 (2009). In order for Halo to prevail on its Partial Motion to Dismiss, the Commission must conclude that even if AT&T's allegations are true, AT&T would still not have stated a claim upon which relief could be granted.

AT&T's Complaint does not require the Commission to interpret or enforce any federal license. Instead, the complaint requests that the Commission interpret the parties' interconnection agreement that was approved by the Commission on August 10, 2010 in Docket No. 32226. The Commission has the authority to interpret the interconnection agreements that it approves. *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc. et al.* 317 F. 3d 1270 (2003).

Count I of AT&T's complaint alleges that Halo is breaching the parties' interconnection agreement by sending "traffic to AT&T Georgia that is not wireless-originated traffic, but rather is wireline-originated interstate, interLATA or intraLATA toll traffic." (AT&T Complaint, p. 4). Halo asks the Commission to dismiss the claim based on its contention that the traffic being sent

to AT&T originates from end user wireless equipment. (Halo Motion, p. 7). Halo argues that AT&T is barred from asserting that its customer, Transcom, is not an end user because AT&T was involved in litigation in bankruptcy court for the Northern District of Texas, and that court held that Transcom is an end user and that access charges do not apply to its traffic. *Id.* at 11.

With respect to Count I, Staff recommends that the Commission find that there are differences between the parties as to questions of fact. Further, if the allegations contained within AT&T's Complaint are presumed to be correct, then AT&T would prevail on this Count. Finally, Staff recommends that the Commission find that AT&T is not barred from asserting that Transcom is not an end user.

> Three prerequisites must be met before res judicata will apply: (1) identity of the cause of action; (2) identity of the parties or their privies; and (3) previous adjudication on the merits by a court of competent jurisdiction.

James v. Intown Ventures, LLC, 2012 Ga. LEXIS 194 (2012) (citations omitted). As noted by the Tennessee Regulatory Authority, the Transcom bankruptcy proceeding did not involve the identical parties as the current case. *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.* Docket No. 11-00119, p. 6. In addition the TRA correctly noted that this case is a contract case and therefore not the same cause of action. *Id.* Collateral estoppel also requires that the identity of the parties be the same, and that requirement is not satisfied in this case. *See, Body of Christ Overcoming Church of God, Inc. v. Brinson,* 287 Ga. 485, 486 (2010). Moreover, the bankruptcy court orders do not resolve the issues AT&T raised in its complaint.

In Count II, AT&T alleges that Halo breached the parties' interconnection agreement by altering "call information it delivers to AT&T by inserting Charge Number ("CN") information when the call contains none, which has the effect of making toll calls appear to be local." (Complaint, p. 5). Halo's response is based on its contention that "this is end user telephone exchange service originating traffic and the service being provided is functionally equivalent to an integrated services digital network ("ISDN") primary rate interface ("PRI") . . . trunk to a large communications intensive business customer." (Halo Motion, pp. 11-12). However, this response involves an apparent factual dispute with the allegations raised in AT&T's complaint that are relevant to the resolution of this issue. Again, if the allegations contained in AT&T's complaint are presumed to be true, then AT&T would prevail on this issue. Therefore, dismissal is not proper for Count II.

In Count III, AT&T alleges that the traffic Halo is sending it is subject to access charges. (Complaint pp. 5-6). Halo argues that Count III should be dismissed because the Bankruptcy Stay prohibits consideration of any order to pay access charges and the traffic in question is not subject to access charges. (Halo Motion, p. 16). The Bankruptcy Court Order provides that regulatory proceedings cannot involve "liquidation of the amount of any claim against the Debtor, or any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor." AT&T's Complaint did not request that the Commission liquidate

the amount of the claim against the Debtor; therefore, it does not violate the bankruptcy stay. For these reasons, Staff recommends that the Commission deny the Partial Motion to Dismiss with respect to Count III.

V. Commission Decision

For the reasons stated therein, the Commission adopts Staff's recommendation to deny Halo's Partial Motion to Dismiss.

VI. Ordering Paragraphs

WHEREFORE, it is

ORDERED, Halo's Partial Motion to Dismiss is hereby denied.

ORDERED FURTHER, that this Order shall remain in full force and effect until further Order of the Commission.

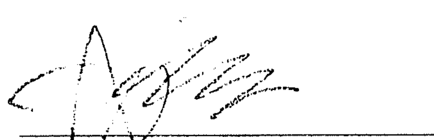
ORDERED FURTHER, that a motion for reconsideration, rehearing, oral argument, or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

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 April, 2012.

Reece McAlister
Executive Secretary

5-8-12
DATE



Tim G. Echols
Chairman

5-7-12
DATE

STATE OF ILLINOIS

Exhibit K

ILLINOIS COMMERCE COMMISSION

May 16, 2012

Illinois Bell Telephone Company -vs Halo Wireless, Inc.	:	
	:	12-0182
Complaint as to Violations of an Interconnection Agreement entered into under 47 U.S.C. §§ 251 and 252 and pursuant to Section 10-0108 of the Public Utilities Act.	:	**SERVED ELECTRONICALLY**

NOTICE OF ADMINISTRATIVE LAW JUDGE'S RULING

TO ALL PARTIES OF INTEREST:

Notice is hereby given that the Administrative Law Judge has denied the "Partial Motion of Halo Wireless, Inc. to Dismiss Complaint" filed on April 30, 2012.

Notice is also given by the Administrative Law Judge that responses to "Halo Wireless, Inc.'s Objections to Direct Testimony of J. Scott McPhee" and "Halo Wireless, Inc.'s Objections to Direct Testimony of Mark Neinast," filed on May 15, 2012, must be received by 5:00 P.M. on May 23, 2012 and that replies thereto must be received by 3:00 P.M. on May 29, 2012.

Sincerely,

Elizabeth A. Rolando
Chief Clerk

EAR:lkb
Administrative Law Judge Von Qualen

Service List – 12-0182

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* Active Parties

Exhibit L

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.,	)	**File No: TC-2012-0331**
and,	)	
Southwestern Bell Telephone Company, d/b/a AT&T Missouri	)	
Respondents.	)	
Alma Communications Company, d/b/a Alma Telephone Company, Chariton Valley Telephone Corporation, Chariton Valley Telecom Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, a Corporate Div. of Otelco, Inc., and MoKan Dial, Inc.,	)	
Complainants,	)	**File No. TO-2012-0035**
v.	)	
Halo Wireless, Inc., and Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	
Respondent.	)	

ORDER REGARDING MOTION TO CONSOLIDATE , MOTION TO DISMISS AND MOTION TO DISMISS AT&T MISSOURI'S COUNTERCLAIM

Issue Date: May 17, 2012 Effective date: May 17, 2012

Background

On May 1, 2012, the Alma Respondents[1] and the Craw-Kan Respondents[2] (collectively, the "Non-AT&T Respondents") jointly filed a motion to consolidate this action with File Number TO-2012-0035, which is currently being held in abeyance. On May 2, 2012, the Craw-Kan Respondents filed a motion to dismiss, claiming that Halo Wireless, Inc. ("Halo") could not maintain this suit pursuant to Section 351.574, RSMo 2000, because it was administratively dissolved for failure to maintain its Certificate of Authority to operate in Missouri. Also on May 2, 2012, Respondent Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri") filed its answer to Halo's complaint and a counterclaim. Halo filed its response to the two motions and the counterclaim on May 11, 2012. Halo has moved that AT&T Missouri's counterclaim be dismissed.

AT&T Missouri's Counterclaim

AT&T Missouri's counterclaim alleges that Halo breached the interconnection agreement ("ICA") between it and Halo and seeks an order excusing it from further performance under the ICA. AT&T Missouri specifically alleges that Halo is sending it large volumes of traffic that does not originate on a wireless network as a scheme to avoid access charges.

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

[2] The Craw-Kan Respondents are: 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, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, and Seneca Telephone Company.

Halo's response to the counterclaim is composed four exhibits.[3] These exhibits appear to relate to Halo's claim that the traffic sent to AT&T is of the nature of "enhanced services" and thus not subject to access charges.

It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party.[4] The parties' arguments and unautheticated exhibits merely demonstrate that there are facts in dispute regarding the counterclaim. Because the counterclaim cannot be ruled upon without record evidence, the Commission will take up the counterclaim at the evidentiary hearing and will issue its decision on the counterclaim in conjunction with the decision on Halo's complaint. Halo's motion to dismiss the counterclaim will be denied.

Non-AT&T Respondents' Motion to Consolidate

File Number TO-2012-0035 was held in abeyance at the Complainants' request while it initiated blocking proceedings pursuant to the Commission's Enhanced Record Exchange Rules ("ERE Rules"). Now, the Non-AT&T Respondents in File Number TC-2012-0331 (Complainants in TO-2012-0035) argue that their allegations in TO-2012-0035, concerning the ICA between Halo and AT&T, involve related questions of law and fact to the instant proceeding and that it would serve administrative economy to join the two

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[3] It is unclear whether Halo intended to file a cover pleading, or if there was an error with using the Commission's Electronic Information and Filing system ("EFIS"), but only the exhibits appear in EFIS.

[4] *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to, State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955).

proceedings. Specifically, those allegations claim that the ICA, as implemented, is discriminatory to telecommunications services providers who are not parties to the agreement, and that the ICA is not consistent with the public interest, convenience, or necessity.

In response, Halo makes three arguments. The first is that since the Complainants in File Number TO-2012-0035 requested that case to be held in abeyance, and since the Commission found that request to be proper, the Complainants cannot change their request. Halo's second argument is that the Commission lacks jurisdiction to grant the remedy sought in TO-2012-0035. And Halo's third argument is that adding new issues to File Number TC-2012-0331, which is proceeding on an expedited schedule, would be prejudicial and unworkable.

The Alma Respondents filed a response to Halo's arguments on May 12, 2012. They argue that they did not intend to interject the legal issues in TO-2012-0035 into the procedural schedule of this case, but rather that single hearing could be used to decide both cases. The Alma Respondents further note that any relief ordered in TC-2012-0331 may eliminate the need for additional relief to be ordered in TO-2012-0035, but that if additional relief is requested an evidentiary record will have already been established form which to render a decision.

Halo's arguments are without merit. The Commission granted the request to hold TO-2012-0035 in abeyance simply because it was Complainant's complaint. Holding the complaint in abeyance prejudiced no party and merely froze the action until the parties made a further request. In fact, Halo did not object to the request, but rather chose to assert a challenge to the application of the Commission's ERE rules, which was

procedurally improper because no blocking action had been initiated at the time of the request to hold TO-2012-0035 in abeyance.

The Commission made no decision on any selection of remedies as Halo implies, and there is no procedural or substantive limitation on the Complainants that would prevent them from seeking to reactivate TO-2012-0035. Moreover, if Halo is correct, that the Commission lacks jurisdiction to award the relief requested in TO-2012-0035, then it is difficult to see how making such a summary determination in conjunction with TC-2012-0331 could in any way render the current procedural schedule unworkable or prejudicial.

Commission Rule 4 CSR 240-2.110(3) states:

> When pending actions involve related questions of law or fact, the commission may order a joint hearing of any or all the matters at issue, and may make other orders concerning cases before it to avoid unnecessary costs or delay.

The type of traffic that is initiated by Halo and transited to the Non-AT&T Respondents through AT&T Missouri by the terms of the ICA is a central issue in TC-2012-0331. The determination on that issue will help determine if Halo is in violation of the Commission's ERE Rules. Additionally, the Commission will be taking up AT&T Missouri's counterclaim concerning whether Halo has breached the ICA at the evidentiary hearing. Clearly, evidence surrounding the ICA will be adduced at the evidentiary hearing scheduled for TC-2012-0331, and that same evidence could resolve the issues presented in TO-2012-0035.

Because these two matters involve related questions of law and fact, and because evidence regarding the ICA will already be adduced at hearing, the Commission will grant the motion to consolidate Files Numbers TO-2012-0035 and TC-2012-0331. To the extent any party believes that taking evidence on the ICA (which should have already been contemplated by the parties) will require additional time, they may file a motion for a

continuance of the evidentiary hearing and propose any necessary modifications to the procedural schedule.

The Craw-Kan Respondents Motion to Dismiss

The Craw-Kan Respondents have moved to dismiss this action pursuant to Section 351.574.1, RSMo 2000, which provides:

> A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

In support of their motion, the Craw-Kan Respondents attach a copy of the August 25, 2010 letter from the Missouri Secretary of State to Halo that administratively dissolves Halo for failure to file a correct and current annual report.

Halo argues that section 351.574.3 and .5, RSMo 2000, allows the Commission to stay the proceeding until its certificate is reinstated, and even without a certificate it is allowed to defend itself in any proceeding in this state. Halo has also produced documentation of completing the requirements for reinstatement of its certificate with the Secretary of State.

Section 351.488.3 provides: "When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." Assuming Halo's application for reinstatement is complete, it would have the effect of erasing the administrative dissolution and there would be no basis to dismiss this action. The Commission will deny the motion to dismiss and will direct Halo to file its Certificate of Authority to transact business in Missouri as soon as it is reinstated.

THE COMMISSION ORDERS THAT:

1. Halo Wireless, Inc.'s motion to dismiss the counterclaim filed by Southwestern Bell Telephone Company, d/b/a AT&T Missouri is denied.

2. The Non-AT&T Respondents' motion to consolidate File Number TC-2012-0331 with File Number TO-2012-0035 is granted. File Number TO-2012-0035 is reactivated. File Number TC-2012-0331 shall be designated as the lead case. All filings in these matters shall be made in File Number TC-2012-0331.

3. The Craw-Kan Respondents' motion to dismiss is denied.

4. Halo Wireless, Inc.'s shall file proof of having reinstated its Certificate of Authority to conduct business in this state immediately upon receipt from Missouri's Secretary of State.

5. Any party that wishes to modify the procedural schedule shall file their request no later than May 24, 2012. Any party wishing to modify the procedural schedule shall schedule a phone conference between all of the parties and the Regulatory Law Judge as soon as is practically possible to address any proposed changes.

6. This order is effective immediately upon issuance.

BY THE COMMISSION

(S E A L)

Steven C. Reed
Secretary

Harold Stearley, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

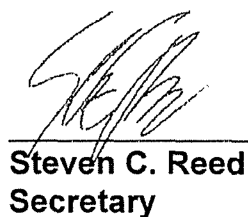
Dated at Jefferson City, Missouri,
on this 17th day of May, 2012.

STATE OF MISSOURI

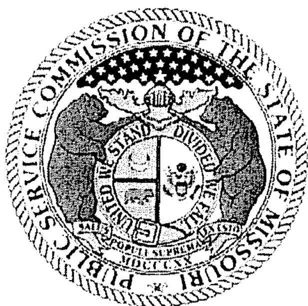
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 17th day of May 2012.



Steven C. Reed
Secretary



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MISSOURI PUBLIC SERVICE COMMISSION

May 17, 2012

File/Case No. TC-2012-0331

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Enclosed find a certified copy of an ORDER in the above-numbered matter(s).

Sincerely,

Steven C. Reed
Secretary

Individuals listed above with a valid e-mail address will receive electronic service. Individuals listed above without a valid e-mail address will receive paper service.

Exhibit M

FILED
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company d/b/a AT&T California (U1001C), Complainant, vs. Halo Wireless, Inc. (U3088C), Defendant.	Case 12-02-007 (Filed February 13, 2012)

ADMINISTRATIVE LAW JUDGE'S RULING DENYING HALO WIRELESS, INC.'S PARTIAL MOTION TO DISMISS COUNTS I, II, AND III OF AT&T CALIFORNIA'S COMPLAINT

1. Summary

This ruling denies Halo Wireless, Inc.'s (Halo) Partial Motion to Dismiss Counts I, II, and III of the Pacific Bell Telephone Company d/b/a AT&T California's Complaint on the grounds that Halo has failed to satisfy the legal requirements to prevail on this Motion. Specifically, this ruling finds that Pacific Bell Telephone Company d/b/a AT&T California (AT&T California) has stated causes of action with the level of specificity mandated by Pub. Util. Code § 1702 and Rule 4.2(a) of the Commission's Rules of Practice and Procedure and that, as such, this Commission has jurisdiction to resolve the Counts contained in AT&T California's complaint. This ruling also finds that there are numerous disputed material facts that prevent Halo from prevailing on its Partial Motion to Dismiss.

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2. Procedural Background

2.1. The Complaint

On February 13, 2012, Pacific Bell Telephone Company d/b/a AT&T California (AT&T California) filed a complaint against Halo Wireless, Inc. (Halo). AT&T California alleges that on May 4 and May 5, 2010, the parties executed an interconnection agreement (ICA) which authorized Halo to send only wireless-originated traffic to AT&T California. AT&T California alleges that Halo breached the ICA by sending traffic to AT&T California that was not wireless-originated traffic, but was instead landline-originated interstate, interLATA, or intraLATA toll traffic. AT&T California asserts the following counts:

(1) Breach of ICA: Sending Wireline-originated traffic to AT&T California;

(2) Breach of ICA: Alteration or Deletion of Call Detail;

(3) Obligation to Pay Access Charges for Termination of Landline-Originated Traffic; and

(4) Breach of ICA: Non-Payment for Facilities.

2.2. Halo's Answer

On April 13, 2012, Halo filed its Answer to AT&T California's Complaint and denies that it breached the ICA. Halo claims to provide commercial mobile radio service (CMRS) and sells telephone exchange service to Transcom Enhanced Services, Inc. (Transcom), Halo's high-volume customer. According to Halo, Transcom is an end-user and an enhanced service provider (ESP) for phone-to-phone calls because Transcom changes the content of every call that passes through its system and also offers enhanced capabilities. Further, Halo asserts that as a CMRS, it is selling telephone exchange service to an ESP end-user and, as such, the minutes of the relevant traffic are not subject to access

charges. Halo asserts two affirmative defenses: (1) the Commission has no jurisdiction to consider the federal issues involved in Counts I, II, and III of the complaint, nor does the Commission have jurisdiction to award the relief requested in these three Counts; and (2) the complaint fails to state a claim upon which relief can be granted.

2.3. Halo's Partial Motion to Dismiss Counts I, II, and III

Halo included in its answer a Partial Motion to Dismiss Counts I, II, and III of the complaint on the grounds that the Commission lacks jurisdiction to consider and resolve the federal issues involved in these three Counts. On April 16, 2012, the Commission's Docket Office noticed and instructed Halo to refile its Answer and Partial Motion to Dismiss as separate documents within seven business days of the notice. Halo refiled its Answer and Partial Motion to Dismiss as separate pleadings on April 23, 2012.

In its Motion, Halo asserts that the Commission should dismiss Count I "because the traffic being sent to AT&T California does originate from end user wireless equipment."[1] As for Count II, Halo asserts it should be dismissed "because Halo is not altering or deleting call detail, and therefore, Halo is not in breach of the ICA."[2] Finally, Halo seeks dismissal of Count III on the grounds that the Commission lacks jurisdiction and that "the Bankruptcy Stay prohibits consideration of any order to pay access charges."[3]

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[1] Motion, 7.

[2] *Id.*, 12-17.

[3] *Id.*, 17-19.

2.4. AT&T California's Opposition

AT&T California asserts that Halo's Motion is the most recent in a string of failed efforts to "forestall State Commission adjudication of Halo's unlawful practices in proceedings that are plainly within State Commission authority."[4] AT&T California also asserts that Halo's Motion raises a number of material factual disputes, thus making it improper for the Commission dismiss Counts I, II, and III.[5] As for Counts I and II, AT&T California argues that the Commission has jurisdiction to determine whether Halo is liable for Breach of its ICA.[6] With respect to Count III, AT&T California argues that since it will not seek any relief beyond that authorized by the Bankruptcy Court, the Bankruptcy Stay does not prevent AT&T California from proceeding with its complaint before the Commission.[7]

2.5. Halo's Reply

On May 14, 2012, Halo filed its reply in support of its Partial Motion to Dismiss, reiterating its position that the Commission lacks the jurisdiction to determine the federal issues imbedded in Counts I, II, and III, and again disputing that it owes AT&T California any additional sums for the termination of its traffic.

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[4] Opposition, 1.

[5] *Id.*, 8-9.

[6] *Id.*, 6-8.

[7] *Id.*, 10.

3. Legal Standard for Motion to Dismiss

Surprisingly, and as AT&T California has pointed out, Halo's Motion fails to cite to the operative Commission standards for resolving Motions to Dismiss. Over the years, the Commission has developed two differing standards for ruling on a Motion to Dismiss, and we address and apply each standard in this ruling.

3.1. The First Standard: Do the Undisputed Facts Require the Commission to Rule in the Moving Party's Favor as a Matter of Law?

In *Raw Bandwidth Communications, Inc. v. SBC California, Inc. and SBC Advanced Solutions, Inc.*, the Commission stated that a Motion to Dismiss "requires the Commission to determine whether the party bringing the motion prevails based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice."[8] A motion for summary judgment is appropriate where the evidence presented indicates there are no triable issues as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. (Code of Civil Procedure, § 437(c); Weil & Brown, *Civil Procedure Before Trial*, 10:26-27.) While there is no express Commission rule for summary judgment motions, the Commission looks to California Code of Civil Procedure § 437(c) for the standards on which to decide a motion for summary judgment. *Id.*[9] § 437(c) provides:

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[8] Case 03-05-023 (September 11, 2003) [Scoping memo and Ruling of Assigned Commissioner on Motion to Dismiss and Preliminary Matters at 3, citing to Westcom Long Distance, Inc. v. Pacific Bell et al., Decision (D.) 94-04-082, 54 CPUC2d 244, 249].

[9] *See Westcom, supra*, 54 CPUC2d, 249-250.

> The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.

3.2. The Second Standard: Is Defendant Entitled to Prevail Even if the Complaint's Well-Pleaded Allegations are Accepted as True?

In *Re Western Gas Resources-California, Inc.*, D.99-11-023 (November 4, 1999), we articulated another standard for dismissing complaints and applications that is slightly different than what was adopted in *Raw Bandwidth*:

> On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (*E.g., MCI Telecommunications Corp. v. Pacific Bell*, D.95-05-020, 59 Cal.P.U.C.2d 665, 1995 Cal.P.U.C. LEXIS 458, at *29-*30, citing *Burke v. Yellow Cab Co.* (1973) 76 Cal.P.U.C. 166.) 3CPUC 3d, 301.

This standard was employed more recently in *Everyday Energy Corporation v. San Diego Gas & Electric Company*, D.12-03-037 (March 29, 2012), wherein the Commission added: "By assuming that the facts as alleged in the complaint are true for the purpose of deciding whether to grant a motion to dismiss, we assume that Complainant will be able to prove everything alleged in its complaint." (Slip OP, 7.)

In determining if the complaint's allegations are "well pleaded," we are guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or commission order or rule:

> Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or anybody politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

4. Discussion

4.1. Accepting the AT&T California Complaint's Well Pleaded Allegations as True, AT&T California has Stated Causes of Action, and both Federal and California Law Authorize the Commission to Adjudicate Counts I, II, and III

4.1.1. The Allegations

In Count I, AT&T California alleges that Halo is violating the terms of a duly executed and Commission-approved ICA by sending traffic to AT&T California that is "not wireless-originated traffic, but rather is landline-originated interstate, interLATA or intraLATA toll traffic."[10] In Count II, AT&T California alleges that Halo is violating § 3.2.4.1 of the ICA by altering or deleting "call

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[10] Complaint, 5, ¶ 10.

information it delivered to AT&T California by inserting Charge Number information when the call contains none, which has the effect of making toll calls appear to be local. This has prevented AT&T California (and likely other, downstream carriers) from being able to properly bill Halo based on where the traffic originated."[11] In Count III, AT&T California alleges that landline-originated traffic is subject to tariffed switched access charges which Halo refuses to pay.[12] Accepting each of these allegations as true, we conclude that AT&T California has stated causes of action with the level of specificity mandated by Pub. Util. Code § 1702 and Rule 4.2(a).[13] That being the case we also conclude that both Federal and California law vest this Commission with jurisdiction to resolve AT&T California's Counts against Halo.

4.1.2. Applicable Law Grants this Commission with Jurisdiction to Resolve AT&T California's Complaint against Halo.

4.1.2.1. Federal Law

47 U.S.C. § 252 grants State Commissions with the primary authority to interpret and enforce ICAs. Specifically, § 252(e)(1) gives State Commissions the initial authority to approve or reject ICAs:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State Commission. A State Commission to which an agreement is

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[11] *Id.*, 6, ¶ 15.

[12] *Id.*, 7, ¶ 18.

[13] Such a conclusion also requires the Commission to reject Halo's attempt to recharacterize what AT&T California is asking the Commission to decide. (*See* Motion, 2 ¶¶ 1 and 2.)

> submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Further, § 252(e)(6) gives the Federal courts jurisdiction to review determinations made by State Commissions:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State Commission's failure to act. In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

In reviewing these sections the Court in *BellSouth Telecommunications v. MCIMETRO Access*, (11th Cir. 2003) 317 F.3d 1270, 1277, opined by using the word "determination" in § 252(e)(6) "Congress did not intend to limit State Commissions' authority to the mere approval and rejection of agreements....It is reasonable to read the grant of authority in § 252(e) as encompassing the interpretation of agreements, not just their approval or rejection."[14] The Federal

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[14] *See also Covad Communications v. BellSouth Corporation*, (11th Cir. 2004) 374 F.3d 1044, 1053. *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278-81 (5th Cir. 2010) *Connect America Fund*, WC Docket No. 10-90 *et al., Report and Order and Further Notice of Proposed Rulemaking*, 2011 WL 5844975, FCC 11-161, at ¶¶ 1005-06 (rel. Nov. 18, 2011) *Pacific Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1128 (9th Cir. 2003) *Michigan Bell Tel. Co. v. MCIMETRO Access Trans. Servs., Inc.*, 323 F.3d 348, 362-63 (6th Cir. 2003) *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999).

Communications Commission (FCC) also agrees with this assessment of the State Commission's authority to interpret a disputed ICA.[15]

4.1.2.2. State Law

In *Cox California Telecom, LLC. V. Global NAPs California, Inc.* (September 20, 2007) D.07-09-050, this Commission recognized its authority to interpret ICAs:

> The Commission has authority consistent with state and federal law to resolve interconnection disputes. The commission is a constitutionally-created agency charged with regulating industries critical to the public welfare, and with securing an affordable, reliable, high-quality, interconnected telephone network for all Californians. Even with the presence of the Federal Telecommunications Act of 1996, the federal government contemplated that states would play a vital role in the dual regulation of telecommunications...[and] have the power to arbitrate, interpret and enforce interconnection disputes.[16]

4.1.2.3. The ICA Contemplated that the Commission and California Law would Govern its Interpretation and Enforcement

Section 25 of the ICA provides that "[t]his Agreement shall be governed by the laws of the State of California and applicable federal law."[17] Moreover,

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15 *In the Matter of Starpower Communications*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd. 11277, ¶ 6 (In applying § 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under § 252. We conclude that it is.)

16 2007 WL 2766472, *4-5. *See also Pacific Bell v. PacWest Telecommunications, Inc.* (9th Cir. 2003) 325 F.3d 1114, 1126-1127.

17 Complaint, Exhibit C.

§ 34 provides that the "Agreement shall become effective upon approval by the [California Public Utility] Commission."[18] Without a doubt, this Commission has the statutory authority to interpret the ICA in dispute and to resolve the Counts which AT&T California has asserted. We also note that other State Commissions in Tennessee, Wisconsin, South Carolina, Florida, and Georgia have reached the same conclusion regarding the extent of their jurisdiction and rejected Halo's similarly-worded Motions to Dismiss.[19]

4.1.2.4. The Bankruptcy Stay does not Prohibit this Commission from Considering an Order to Pay Access Charges

Although Halo references a bankruptcy stay order in its Headnote C, it does not attach the order to its Partial Motion. Instead, it attaches a Memorandum Opinion regarding Transcom Enhanced Services, LLC issued by

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18 *Id.*

19 Order Deny Motion to Dismiss, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Dec. 16, 2011); Order, *BellSouth Telecommunications LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., January 26, 2012); Order Deny Motions to Dismiss in Part With Prejudice and in Part Without Prejudice, *Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.*, no. 9594-T!-11 (Publ Serv. Commission Wisconsin, January 10, 2012); Commission directive, Order No. 2012-124, *Bell South Telecommunications, LLC v. Halo Wireless, Inc., for Breach of the Parties' Interconnection Agreement*, Docket No. 2011-304-C (Pub. Serv. Commission South Carolina February 15, 2012); Order Denying Halo Wireless, Inc's Partial Motion to dismiss, Order No. PSC-12-0129-FOF-TP, *Re Complaint and Complaint for Relief against Halo Wireless, Inc. for breaching the Terms of the Wireless Interconnection agreement, by Bellsouth Telecommunications, LLC*, Docket No. 110234-TP (Florida Public Service Commission March 20, 2012); Georgia Public Service Commission, Staff Recommendation in Consideration of Halo's Partial Motion to Dismiss, *In Re: Complaint of TDS Telecom on Behalf of its Subsidiaries Blue Ridge Telephone Company, et al Against Halo Wireless, et al 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 (April 16, 2012).

the United States Bankruptcy Court, Northern District of Texas.[20] In analyzing this Memorandum Opinion, we do not find any language that would prevent this Commission from considering the access-charge issue.

Moreover, AT&T California attached as Exhibit L to its Opposition a document in the matter of *In re Halo Wireless, Inc.* issued by the United States Bankruptcy Court for the Eastern District of Texas entitled Order Granting Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and for Relief from the Automatic Stay [DKT. NO. 13]. The Order provides that the automatic stay imposed by 11 U.S.C. § 362 "is not applicable to currently pending State Commission Proceedings, except as otherwise set forth herein[.]" Furthermore, the Order states that nothing precludes the AT&T Companies (which includes AT&T California) from seeking relief from the Automatic Stay in this Court to pursue the Reserved Matters once a State Commission "has (i) first determined that is 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 [.]"

As AT&T California has conceded in its opposition that it does not and will not seek any relief beyond that authorized by the Bankruptcy Court, we do not see the Bankruptcy Stay as an impediment to this complaint proceeding to decision.

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[20] Motion, Exhibit A.

4.2. Halo has Failed to Identify the Undisputed Facts to Establish that a Judgment should be Entered in its Favor

About the only material fact that is not in dispute is that the parties executed the ICA. Beyond that, what is clear from the AT&T California's complaint, Halo's answer, Halo's Partial Motion to Dismiss, and AT&T California's Opposition thereto is that there are numerous material disputed facts that require this Commission to deny Halo's Motion. We list the following examples of disputed material facts:

(1) Does Halo's traffic that it sends to AT&T California originate from wireless equipment?[21]

(2) Has Halo altered call detail?[22]

(3) Is Halo's traffic CMRS-originated for purposes of intercarrier compensation?

(4) Are any portions of the relevant traffic subject to access charges?[23]

(5) Did Halo and Transcom conduct an access charge avoidance scheme?[24]

(6) What is the nature of Halo's business model and what impact does that model have on the Count's AT&T California has raised?[25]

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[21] Motion, 7-12, ¶¶ 13-23.

[22] *Id.*, 12-17, ¶¶ 24-37.

[23] *Id.*, 3, ¶ 4.

[24] *Id.*, 4, ¶ 6.

[25] *Id.*, 4, ¶ 7.

These issues, as well as the others that the parties have set forth in their respective pleadings, will undoubtedly be the subject of discovery, and possibly both further briefing and evidentiary hearings.

IT IS RULED that:

1. As set forth in the body of this ruling, Pacific Bell Telephone Company d/b/a AT&T California has stated causes of action with the level of specificity mandated by Public Utilities Code Section 1702 and Rule 4.2(a) of the Commission's Rules of Practice and Procedure.
2. This Commission has jurisdiction to resolve all Counts contained in Pacific Bell Telephone Company d/b/a AT&T California's complaint.
3. As set forth in the body of this ruling, there are numerous material disputed facts in Pacific Bell Telephone Company d/b/a AT&T California's Complaint, Halo Wireless Inc.'s (Halo) Answer, Halo's Partial Motion to Dismiss Counts I, II, and III.
4. Halo Wireless Inc.'s Partial Motion to Dismiss Counts I, II, and III from Pacific Bell Telephone Company d/b/a AT&T California's complaint is denied.

Dated May 30, 2012, at San Francisco, California.

/s/ ROBERT M. MASON III
Robert M. Mason III
Administrative Law Judge

Exhibit N

Louisiana Public Service Commission

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Foster L. Campbell, Chairman
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EVE KAHAO GONZALEZ
Executive Secretary

DENNIS WEBER
Executive Counsel

JOHNNY E. SNELLGROVE, JR.
Deputy Undersecretary

April 20, 2012

2012 APR 20 PM 1:54
LA PUBLIC SERVICE COMMISSION

Ms. Terri Lemoine
Louisiana Public Service Commission
Docketing Division
P. O. Box 91154
Baton Rouge, LA 70821

Docket No. U-32237 – In Re: Petition of BellSouth Telecommunications, LLC d/b/a AT&T Louisiana Seeking Relief from Breaches of Interconnection Agreement with Halo Wireless, Inc.

Dear Ms. Lemoine:

Please file the attached Commission Staff's Memorandum in Opposition to Halo Wireless Inc.'s Partial Motion to Dismiss Counts I through III on behalf of the Commission Staff in the above referenced docket.

If you have any questions, feel free to contact me at 225-342-3034.

Sincerely,

Jeffery Valliere
LPSC Staff Attorney

JV/lb
cc: Commissioners
Service List

LOUISIANA PUBLIC SERVICE COMMISSION

STATE OF LOUISIANA

2012 APR 20 PM 1:
LA PUBLIC SERVICE COMMISSION

BELLSOUTH TELECOMMUNICATIONS,
LLC D/B/A AT&T LOUISIANA

VERSUS **DOCKET NO. U-32237**

HALO WIRELESS, INC.

In Re: Petition of BellSouth Telecommunications, LLC d/b/a AT&T Louisiana Seeking Relief from Breaches of Interconnection Agreement with Halo Wireless, Inc.

COMMISSION STAFF'S MEMORANDUM IN OPPOSITION TO HALO WIRELESS INC.'S PARTIAL MOTION TO DISMISS COUNTS I THROUGH III

Now into Court, through undersigned counsel, comes the Louisiana Public Service Commission Staff (hereinafter "Commission Staff" or "Staff"), who submit the following Memorandum in Opposition to Halo Wireless Inc.'s Partial Motion to Dismiss Counts I through III of the Petition of Bellsouth Telecommunications, LLC d/b/a AT&T Louisiana. For the reasons set forth below, Halo's Partial Motion to Dismiss should be denied.

A. *Background Facts*

On February 10, 2012, Bellsouth Telecommunications, LLC d/b/a AT&T Louisiana ("AT&T") filed a Petition requesting an Order from the Louisiana Public Service Commission ("Commission") excusing AT&T from further performance under its wireless interconnection agreement ("interconnection agreement") with Halo Wireless, Inc. ("Halo") based upon alleged material breaches on the part of Halo under the interconnection agreement. The Petition alleged that in March and April, 2010, AT&T and Halo executed an interconnection agreement, which adopted an earlier interconnection agreement between T-Mobile USA, Inc. and AT&T.

(Petition, Paragraph 4). Within the Petition, AT&T alleges four (4) counts against Halo. Count I (Paragraphs 5-8) alleges that Halo sent wireline-originated traffic to AT&T in contravention of the interconnection agreement. Count II (Paragraphs 9-12) alleges Halo breached the interconnection agreement by altering or deleting call information that Halo delivered to AT&T. Count III (Paragraphs 13-14) alleges that the landline originated traffic sent from Halo to AT&T is subject to switched access charges. Lastly, Count IV (Paragraphs 15-18) alleges that Halo has refused, without lawful justification, to pay bills related to transport facilities that Halo has ordered from AT&T.

On March 13, 2012, Halo filed by facsimile a Notice of Protest, Partial Motion to Dismiss Counts I through III and Answer to the Petition of AT&T. ("Partial Motion to Dismiss"). The Partial Motion to Dismiss, which is addressed in greater detail *infra*, requests dismissal of Counts I through III based in part on an alleged lack of subject matter jurisdiction on the part of the Louisiana Public Service Commission.

Also on March 13, 2012, the Small Company Committee of the Louisiana Telecommunications Association ("Small Company Committee") filed a Notice of Intervention. Thereafter, on April 3, 2012, a Status Conference was held in this matter wherein a deadline of April 20, 2012, was established for Commission Staff to file a response to Halo's Partial Motion to Dismiss. In accordance with the deadline established at the Status Conference, Commission Staff submits this Memorandum in Opposition to the Partial Motion to Dismiss.

B. Law and Argument

In the Partial Motion to Dismiss, it is admitted that Halo entered into an interconnection agreement in Louisiana with AT&T. However, Halo denies that the basis of the AT&T Petition is an interpretation or enforcement of the terms of the interconnection agreement. (Halo Partial

Motion to Dismiss at 1). Halo alleges that, "AT&T is impermissibly and improperly seeking to have the Commission decide whether Halo is acting within and consistent with its federal license." (Halo Partial Motion to Dismiss at 1-2). Accordingly, Halo alleges that the Commission lacks jurisdiction over the subject matter of this litigation. Halo's position is wholly without merit and should not be sustained for the reasons discussed below.

While Halo filed a Partial Motion to Dismiss in this matter, their reasoning appears to constitute an Exception of Lack of Subject Matter Jurisdiction and an Exception of No Cause of Action under Louisiana law. Commission Staff addresses both of Halo's potential avenues of relief below.

1) Subject Matter Jurisdiction

Halo's argument that the Commission lacks jurisdiction to decide this matter rests upon Halo's interpretation that AT&T is seeking a clarification of Halo's commercial mobile radio service ("CMRS") license. Halo's contention that the Commission lacks jurisdiction is without merit for the reasons stated below.

The primary source of the Commission's jurisdiction is La. Const. Art. IV Sect. 21 which reads in pertinent part:

> The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.

Consistent with this constitutional authority, the Commission has adopted the Regulations for Competition in the Local Telecommunications Market ("Local Competition Regulations"), as most recently amended by the General Order dated August 13, 2009. CMRS and CMRS providers are defined in Section 101 of the Local Competition Regulations, and subject to certain

regulations therein. For example, Section 401 (B) requires CMRS providers to file tariffs which identify and describe the rates and terms and conditions of services offered and provided in Louisiana. The tariff filings covered by Section 401 (B) are reviewed by Commission Staff when received.

Section 901 addresses the responsibility of a telecommunications service provider to the Commission when an interconnection agreement has been requested and negotiated. Section 901 (E) requires the negotiating parties to notify the Commission in writing of the date that a telecommunications service provider first requested interconnection. Section 901 (F) states, "In accordance with Section 252 (b) of the Telecommunications Act of 1996, either party to a negotiation may petition the Commission to arbitrate any open issue to the negotiation." Section 901 (G) requires ILECs and CLECs to file reports with the Commission regarding the volume of local terminating traffic. Several other subsections of section 901 address various responsibilities of telecommunications service providers to the Commission with respect to interconnection agreements. It is clear that the framework is well established for the Commission to review information filed by CMRS providers and to address issues related to the interconnection of telecommunication service providers.

Louisiana courts have consistently found that when the lack of subject matter jurisdiction is not apparent from the face of the petition, the burden of proving the lack of jurisdiction is on the party raising an exception. *Crocket v. Department of Public Safety and Corrections*, 97-2528 (La. App. 1st Cir 11/6/1998) 721 So.2d 1081, 1084; See Also *Miller v. Harper*, 99-316 (La. App. 3d Cir. 10/13/1999) 747 So.2d 642, 644; *Dupre Logistics, LLC v. Bridges*, 2010-1071 (La. App. 1st Cir. 12/22/2010) 2010 WL 5479723 at *2.

As stated in the preceding section, the Petition of AT&T includes four (4) counts containing allegations against Halo. In the Partial Motion to Dismiss, Halo moved to dismiss Counts I-III for the Commission's alleged lack of jurisdiction over the subject matter. Count I alleges that despite the requirement in the interconnection agreement that Halo is authorized only to send traffic that originates from wireless transmitting and receiving facilities to AT&T, Halo sends traffic to AT&T that is landline originated traffic. (See Petition, Paragraph 7).

Count II alleges that the interconnection agreement requires Halo to send AT&T proper call information to allow AT&T to bill Halo for the termination of Halo's traffic. (See Petition, Paragraph 10). Despite this requirement, AT&T claims that Halo has altered information that was presented to AT&T with the effect of obstructing AT&T from properly billing Halo for the subject traffic.

Lastly, Count III contains the allegation that the transmission of landline originating traffic to AT&T from Halo is prohibited by the interconnection agreement and therefore subject to tariffed switched access charges.

It is evident from a logical interpretation of the allegations on the face of the AT&T Petition that Counts I through III are seeking an interpretation and enforcement of the interconnection agreement entered into between Halo and AT&T.

Accordingly, all three (3) counts include the same subject matter, the interpretation and enforcement of provisions of the interconnection agreement. The United States Federal Court of Appeals has consistently held that state public utility commissions such as this Commission have the authority under the Telecommunications Act of 1996 to hear cases involving the interpretation and enforcement of interconnection agreements. See *Budget Prepay, Inc. v. AT&T*

Corp., 605 F.3d 273, 279 (5th Cir. 5/3/2010) citing *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas*, (5th Cir. 3/30/2000) 208 F.3d 475, 481-482.

In *Southwestern Bell*, the Fifth Circuit clearly stated, "...we hold that the agreements—themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions." *Southwestern Bell*, 208 F.3d at 485. Thereafter, the Court announced that the determinations of public utilities commissions on the interpretation of interconnection agreements would be upheld unless they were arbitrary and capricious. *Id.*

In addition to the Fifth Circuit, this Commission has concluded that the FCC has authorized state commissions to construe interconnection agreements. *KMC Telecom Inc. v. Bellsouth Telecommunications, Inc.*, 1999 WL 1400188 (La. P.S.C. 10/28/1999).

Commission Staff reviewed the Petition filed by AT&T, including Counts I-III, and found that the subject matter of the Petition does not call into question any federal license issued to Halo to provide wireless service. Instead, the Petition is clear that the paramount issue is whether Halo is breaching the terms of the interconnection agreement it entered into with AT&T. Contrary to Halo's attempt to re-characterize the Petition, AT&T has not raised any issues regarding market entry or the rates of Halo as a CMRS carrier or called into question any federal license.

Halo also argues that jurisdiction is not present in this matter due to pending bankruptcy issues. This argument is premised upon the fact that Count III should be dismissed due to an automatic stay in Halo's bankruptcy proceedings. However, as stated in AT&T's Response to the Partial Motion to Dismiss, the bankruptcy court has held that the automatic stay does not apply to state commission proceedings such as the present matter. (See Exhibit "I" to AT&T Response to Partial Motion to Dismiss). This Commission has the authority to determine that Halo is liable

for damages in an unspecified amount under the holding in the bankruptcy proceeding. For this reason, Halo's argument regarding the automatic stay should be denied.

For the reasons stated above, specifically that well established federal and Commission precedent contradicts the arguments advanced by Halo, the Commission possesses subject matter jurisdiction in this matter. Accordingly, any arguments as to the lack of subject matter jurisdiction are without merit and the Partial Motion to Dismiss should be denied.

2) No Cause of Action

It appears from the arguments contained in the Partial Motion to Dismiss that Halo is alternatively seeking a dismissal based upon an argument akin to an Exception of No Cause of Action. By pursuing an Exception of No Cause of Action, Halo is asking this Tribunal to test the legal sufficiency of the Petition by determining whether the law affords a remedy on the facts alleged in the pleading. *Copeland v. Treasure Chest Casino, L.L.C.*, 01-1122 (La. 1st Cir. 6/21/2002) 822 So.2d 68; *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.* 616 So.2d 1234 (La. 1993).

La. C.C.P. art. 931 is clear that evidence may not be introduced to support or controvert the objection that the petition fails to state a cause of action, and all well-pleaded allegations of fact are accepted by the court as true. Therefore, the sole issue on an Exception of No Cause of Action is whether, on the face of the petition, the plaintiff is legally entitled to the relief sought. *Copeland*, 822 So.2d at 70; citing *Perere v. Louisiana Television Broadcasting Corporation*, 97-2873 (La.App. 1 Cir. 11/6/98), 721 So.2d 1075, 1077. Despite Halo's attempts to alter the nature of AT&T's allegations, Louisiana law is clear that this Tribunal should review the face of the Petition in determining whether the law affords a remedy on the facts alleged in the pleading.

Hall v. Zen-Noh Grain Corp., 01-0324 (La. 2001) 787 So.2d 280; See Also *Copeland, supra.* As such, Halo's factual arguments should not be considered in ruling on the Motion for Partial Dismissal.

Commission Staff incorporates by reference the details of Counts I-III as set forth above. It is clear from a plain reading of these allegations contained in the Petition that AT&T is asking this Tribunal to interpret and enforce the provisions of the interconnection agreement. Specifically, AT&T is asking the Commission to determine that Halo breached the provisions of their interconnection agreement and award the appropriate relief. Halo's federal license and any interpretation or enforcement of that license is irrelevant to the Partial Motion to Dismiss.

Additionally, as presented in AT&T's response to the Motion for Partial Dismissal, at least four (4) other state commissions have rejected similar arguments advanced by Halo.[1] Based upon Louisiana law which is clear that the allegations on the face of the Petition are to be accepted as true, and with due consideration afforded to other state commission which have denied similar arguments advanced by Halo, the Motion for Partial Dismissal should be denied.

C. Conclusion

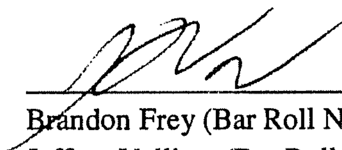
Currently before this Tribunal is a Partial Motion to Dismiss filed by Halo. Halo argues that Counts I-III of the AT&T Petition should be dismissed. Halo's arguments take the form of an Exception of Subject Matter Jurisdiction and an Exception of No Cause of Action. Halo's Partial Motion to Dismiss is without merit as it contradicts well established Louisiana and federal law regarding the interpretation and enforcement of interconnection agreements. Halo's attempts to re-characterize the arguments of AT&T are not supported by the Petition itself and are

[1] Tennessee, Wisconsin, South Carolina, and Florida (See AT&T Response, Page 8).

insufficient to support the Partial Motion to Dismiss. For the reasons stated herein, the Motion for Partial Dismissal should be denied.

WHEREFORE, Louisiana Public Service Commission Staff, pray that this Tribunal deny the Partial Motion to Dismiss Counts I through III as filed by Halo Wireless, Inc., and enter an Order directing that this litigation shall not be dismissed.

Respectfully Submitted,



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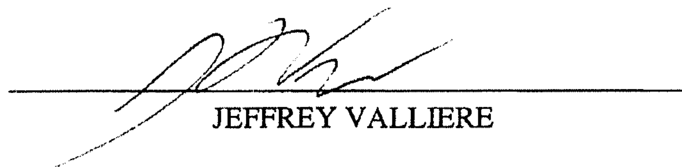
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon all parties of record by fax, email, or United States Mail, properly addressed and postage prepaid, on this 20th day of April, 2012.



JEFFREY VALLIERE

Service List for U-32237
as of 4/20/2012

Commissioner(s)

Lambert C. Boissiere, Commissioner
Eric Skrmetta, Commissioner
James "Jimmy" Field, Commissioner
~~Clyde C. Holloway, Commissioner~~
Foster L. Campbell, Commissioner

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Protestant: **Small Company Committee**

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W. Bradley Kline
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Baton Rouge, LA 70802
Telephone 1:(0)-;

Exhibit O

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

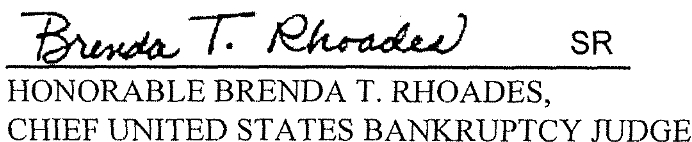
B. any action which affects the debtor-creditor relationship between the Debtor and any creditor or potential creditor (collectively, the "Reserved Matters"); and it is further

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



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.