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June 28, 2012

Barcy F. McNeal, Secretary
Public Utilities Commission of Ohio
180 East Broad Street, 11th Floor
Columbus, Ohio 43215-3793

Re: AT&T Ohio v. Halo Wireless, Inc.
Case No. 12-1075-TP-CSS

Dear Ms. McNeal:

AT&T Ohio hereby supplements its Memorandum Contra Halo's motion to dismiss, filed on May 2, 2012 in the referenced case, with the attached "Order Denying Halo's Motion To Dismiss" adopted by the North Carolina Utilities Commission on June 27, 2012 in a similar case before that commission.

It should be noted that of the eleven state commissions that have considered a Halo motion or partial motion to dismiss, essentially identical to the one pending in referenced case, all eleven have denied the motion.

Thank you for your courtesy and assistance in this matter. Please contact me if you have any questions.

Very truly yours,

/s/ Jon F. Kelly

Attachments

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-55, SUB 1841

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
BellSouth Telecommunications, Inc.,)	
d/b/a AT&T North Carolina)	
)	
v.)	ORDER DENYING HALO'S
)	MOTION TO DISMISS
HALO Wireless, Inc.)	

BY THE PRESIDING COMMISSIONER: On May 25, 2010 and April 5, 2010, BellSouth Telecommunications, Inc., d/b/a AT&T North Carolina (AT&T North Carolina) and Halo Wireless, Inc. (Halo or Respondent) executed an MFN agreement dated March 25, 2010 in which Halo adopted in its entirety the wireless Interconnection Agreement (ICA) as executed between AT&T North Carolina and T-Mobile USA, Inc. On June 10, 2010 in Docket No. P-55, Sub 1809 the Commission approved the ICA.

On July 25, 2011, AT&T North Carolina filed a complaint against Halo alleging that Halo had breached the ICA by: (1) sending traffic to AT&T North Carolina 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 North Carolina's network; and (3) failing to pay for certain facilities ordered by Halo pursuant to the ICA.

On July 27, 2011, the Commission issued an Order Serving Complaint (the Order) on Respondent. The Order directed the Respondent to satisfy the demands of the Complainant or to file an answer on or before August 11, 2011.

On August 11, 2011, both AT&T North Carolina and Halo separately filed notification to the Commission that Halo had filed a Chapter 11 Bankruptcy Petition in the United States Bankruptcy Court, Eastern District of Texas. That filing operated as an automatic stay of proceedings against Halo until the Bankruptcy Court ruled otherwise.

On August 19, 2011, the Commission issued an Order Holding Docket in Abeyance.

On October 7, 2011, Halo formally notified the Commission that a Notice of Removal of the issues pending in this docket to the United States Bankruptcy Court for the Eastern District of North Carolina and that, pursuant to federal law, jurisdiction to determine the matters in dispute in this docket was divested from the Commission and removed to the bankruptcy court.

On March 5, 2012, the United States Bankruptcy Court for the Eastern District of North Carolina issued an Order Allowing Motion to Remand (the Bankruptcy Order) certain state utility regulatory issues in dispute in this case back to the Commission for determination.

On May 1, 2012, the Commission issued an Order Reinstating Docket and Requiring Answer. The May 1, 2012 Order directed Respondent to satisfy the demands of the Complainant or to file an answer on or before May 21, 2012.

On May 21, 2012, Halo filed its Answer to AT&T North Carolina's Complaint and denied that it breached the ICA. In its Answer, Halo claims to provide commercial mobile radio service (CMRS) and to sell telephone exchange service to Transcom Enhanced Services, Inc. (Transcom), Halo's high volume customer. According to Halo, Transcom is an enhanced service provider (ESP) end-user that changes the content of every call that passes through its system and also offers other enhanced capabilities. Halo further contends that because it is selling telephone exchange service to an ESP end-user, the minutes of relevant traffic are not subject to access charges. In its Answer, Halo asserts two affirmative defenses to the Complaint: (1) the Commission has no jurisdiction to consider the federal issues involved in Counts I, II, and III of the Complaint; and (2) the Complaint fails to state a claim upon which relief can be granted.

Also on May 21, 2012, Halo filed the Motion of Halo Wireless Inc. to Dismiss¹ Counts I, II, and III of AT&T's Complaint and Notice of May 16, 2006 Order Confirming Plan of Reorganization for Transcom Enhanced Services. In its partial Motion to Dismiss the Complaint, Halo contends that the Commission lacks jurisdiction to consider and resolve the federal issues involved in Counts I, II, and III of the Complaint because AT&T North Carolina is improperly and impermissibly seeking to have the Commission determine whether Halo is acting within its federal Radio Station Authorization (RSA) license from the Federal Communications Commission (FCC) which authorizes Halo to provide wireless service as a common carrier. Further, Halo contends that AT&T North Carolina is improperly and impermissibly seeking to have the Commission determine whether its high volume customer, Transcom, is really an end-user ESP because the Commission lacks the capacity and jurisdiction to take up that issue because the issue is governed by federal law and only the FCC or a federal court can resolve it.

On June 1, 2012, AT&T North Carolina filed AT&T North Carolina's Response and Memorandum in Opposition to Halo's Partial Motion to Dismiss (Response). In its Response, AT&T North Carolina asserts that Halo's Partial Motion to Dismiss is the most recent of a long line of futile Halo efforts to forestall state commission adjudication of Halo's unlawful practices that are plainly within state commission authority. AT&T

¹ Halo's motion cites no statutory basis for its motion to dismiss. However, because of the language used by Halo in the motion, the Commission assumes that Halo's motions are based upon Rule 12(b)(1) and Rule 12(b)(6), respectively, of the North Carolina Rules of Civil Procedure. In common parlance, these motions are known as a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss because the complaint fails to state a claim upon which relief could be granted. The analysis in this Order is based upon these denominations.

North Carolina asserts that this Commission's authority to interpret and enforce an ICA has been routinely recognized and exercised by this Commission. Further, AT&T North Carolina asserts that Halo's claim that AT&T North Carolina is seeking to have this Commission construe Halo's CMRS license and/or decide matters which are exclusively within the FCC's jurisdiction are demonstrably false and rely upon factual disputes which should have no bearing on whether this case should proceed.

On June 5, 2012, Halo filed Halo Wireless, Inc.'s Reply in Support of Partial Motion to Dismiss (Reply). In the Reply, Halo reiterates its position that the commission lacks jurisdiction to determine the federal issues inherent in Counts I, II, and III of the Complaint and again disputed that it owes AT&T North Carolina any significant sums of money for the traffic in dispute in this proceeding.

DISCUSSION AND ANALYSIS

In its Motion to Dismiss, Halo requests that AT&T North Carolina's Complaint be dismissed because: (1) the Commission lacks jurisdiction over the subject matter of the Complaint; and/or (2) the Complaint fails to state a claim upon which relief can be granted. A motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim upon which relief can be granted. Lack of subject matter jurisdiction challenges the court's statutory or constitutional power to adjudicate a claim and can be raised at any level of the proceeding. N.C.G.S. § 1A-1, Rule 12(h)(3); see *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). "[U]nlike a Rule 12(b)(6) dismissal, the court need not confine its evaluation [of a Rule 12(b)(1) motion] to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing." 2 James W. Moore et al., *Moore's Federal Practice*, § 12.30[3] (3rd ed.1997) [hereinafter 2 *Moore's Federal Practice*]; see *Cline v. Teich*, 92 N.C.App. 257, 264, 374 S.E.2d 462, 466 (1988). If the evaluation is confined to the pleadings, the court must "accept the plaintiff's allegations as true, construing them most favorably to the plaintiff." 2 *Moore's Federal Practice*, § 12.30[4]. Unlike a Rule 12(b)(6) motion, consideration of matters outside the pleadings "does not convert the Rule 12(b)(1) motion to one for summary judgment...." *Id.*

By contrast, when ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E. 2d 838, 840 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the complaint as true, *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 574-75, 473 S.E. 2d 680, 682 (1996), but the court is not required to accept as true any conclusions of law or unwarranted deductions of fact. See *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E. 2d 161, 163 (1970). The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a legal certainty that the plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim. *Id.* For purposes of a motion to dismiss, any written instrument attached as an exhibit to a pleading is treated as part of the pleading and may be considered without converting a motion to dismiss into a motion for summary judgment. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Thus, a

plaintiff's claim may properly be dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that there is no legal basis for the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses on its face some fact that necessarily defeats the claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E. 2d 222, 224 (1985); see also *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E. 2d 682(1985).

With these standards in mind, the Commission will review the pleadings and certain written instruments attached thereto to determine: (1) if this Commission has jurisdiction to determine the issues raised in AT&T North Carolina's complaint; and, (2) whether the Complaint fails to state a claim upon which relief can be granted because: (a) the complaint, on its face, reveals no legal basis for the claim; (b) the complaint, on its face, reveals the absence of facts sufficient to make a valid claim; or (c) the complaint discloses some fact that necessarily defeats the claim.

AT&T North Carolina's Complaint includes four Counts. Count I alleges that Halo "is materially violating the parties' ICA" by sending landline-originated traffic to AT&T North Carolina. Complaint ¶ 8. Count II alleges that Halo's insertion of incorrect Charge Number data in the call information it sends to AT&T North Carolina "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 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.* ¶¶ 15-17.

Thus, AT&T North Carolina's assertions, which for the purposes of this motion must be assumed to be true, allege breaches of the ICA and ask the Commission to determine the consequences of such breaches. Federal appellate courts have repeatedly held that the Telecommunications Act of 1996 Act entrusts the interpretation and enforcement of ICAs to state commissions.² The FCC agrees.³ So does the North Carolina Legislature.⁴ This Commission, too, has recognized its authority to interpret

² *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. MCI Metro 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. MCI Metro 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).

³ *In the Matter of Starpower Commc'ns*, 15 FCC Rcd. 11277, at ¶ 7 (FCC, 2000).

⁴ G.S. § 62-133.5(m)(3)h provides that a local exchange company's election under subsection (m) "does not affect the Commission's jurisdiction concerning . . . [t]he authority of the Commission to act in accordance with federal . . . laws or regulations, including those granting authority to . . . enforce interconnection agreements."

and enforce interconnection agreements,⁵ and has not hesitated to exercise this authority.⁶ 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. And last but not least, the Bankruptcy Order recognized that this Commission is an appropriate tribunal to determine whether the traffic that Halo transmits over AT&T North Carolina's network resulted in a breach of the parties' ICA. Clearly then, the Commission has jurisdiction to enforce and interpret ICAs.

In its motion, however, Halo asserts that AT&T North Carolina 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). Halo instead contends that AT&T North Carolina is actually seeking a ruling on "whether Halo is acting within and consistent with its federal license" (Motion ¶ 1) and /or whether Halo's high volume customer, Transcom, is an ESP. Halo asserts that these determinations are beyond the province of this Commission and are in the exclusive domain of the FCC or the federal courts.

While the assertions might give the Commission some pause if AT&T North Carolina had requested a Commission determination of those issues in the Complaint, a thorough review of the four corners of the Complaint does not yield any indication, either expressed or implied, that AT&T North Carolina has asked the Commission to make such a determination. Indeed, Halo has not cited any specific language from the Complaint itself that would support Halo's contention that AT&T North Carolina is questioning whether Halo is operating within the parameters of its federal license or Transcom's status as an ESP. Without such citation, Halo's assertion about AT&T North Carolina's intention is nothing more than unsubstantiated conjecture and speculation. Such conjecture and speculation cannot provide a basis to deprive this Commission of subject matter jurisdiction over the substance of AT&T North Carolina's complaint, that Halo has breached the parties' ICA by sending landline-originated traffic to AT&T North Carolina's network, by inserting incorrect Charge Number data in the call information it sends to AT&T North Carolina, by failing to pay applicable access charges that are commensurate to the wireline traffic that Halo is sending to AT&T North Carolina's network, and by failing to pay for interconnection facilities as required by the ICA. These are matters which are addressed in the ICA. As such, this Commission clearly is

⁵ See Opinion, Docket No. P-55, Sub 1710, *Petition for Approval of Nextel South Corp.'s Adoption of Interconnection Agreement Between Sprint Communications, L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina d/b/a AT&T Southeast*, (NCUC Sept. 2, 2008) ("As this Commission stated in a previous decision, '[t]he Act gives state commissions authority to approve or reject interconnection agreements, and this authority clearly carries with it the authority to interpret and enforce the very agreements they already approved.'" (citation omitted)).

⁶ *E.g.*, Order Resolving Credit Calculation Dispute, Docket No. P-836, Sub 5 *et al.*, *BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina* (NCUC Sept. 22, 2011); Order Ruling on Dockets, Docket No. P-55, Sub 1815 *et al.*, *In re Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC, by BellSouth Telecommunications, Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina* (NCUC Sept. 22, 2010); Opinion, Docket No. P-913, Sub 7, *In Re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.* (NCUC Dec. 8, 2008).

authorized by federal and state law to determine whether the terms and conditions that apply to these matters have been breached by the conduct of Halo. Under these circumstances, Halo's self serving assertions that AT&T North Carolina is seeking to resolve a dispute regarding its RSA license and the status of its ESP customer must be disregarded and Halo's motion to dismiss the Complaint for lack of subject matter jurisdiction must be denied.

Similarly, Halo's motion to dismiss the Complaint for failing to state a claim upon which relief can be granted must also be denied. In making this determination and for the purposes of this motion, the allegations that AT&T North Carolina made in its Complaint must be assumed to be true. Applying that standard of this case, AT&T North Carolina's complaint alleges that Halo has been sending traffic to AT&T North Carolina that is not "wireless originated traffic," as the ICA requires; that Halo has been altering call detail information that is transmitted with the traffic that Halo sends to AT&T North Carolina's network; and that Halo has failed to pay for certain facilities ordered by Halo pursuant to the ICA. For the purpose of this motion to dismiss, these allegations are deemed to be true and, as a result, AT&T North Carolina would be entitled to relief. For these reasons, Halo's motion to dismiss the Complaint for failing to state a claim upon which relief can be granted must also be denied.

Finally, the Commission notes that in Section III of Halo's motion, Halo argues extensively that the Commission should dismiss AT&T North Carolina's Complaint because of Transcom's Chapter 11 Bankruptcy Action and Confirmation Order of May 2006. Halo alleges that the Confirmation Order found that Transcom was an ESP that was not subject to access charges, that AT&T, as a creditor of Transcom, is bound by that determination in this proceeding, and that this finding merits the dismissal of this action against Halo because: (1) Section 1141(a) of the Bankruptcy Code provides:

[T]he provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, and entity acquiring property under the plan, and any creditor, equity security holder, or general partner of the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan;

and, (2) the doctrines of res judicata and collateral estoppel preclude AT&T North Carolina from attempting to re-litigate Transcom's status as an ESP in this proceeding.

Halo attached numerous documents and orders from the Transcom Bankruptcy action to the dismissal motion for the Commission's consideration. AT&T North Carolina neither mentions Transcom in its Complaint nor attaches any of the aforementioned documents to its pleadings. Therefore, neither Halo's allegations nor the documents supporting these allegations may be considered in determining whether the Complaint should be dismissed for failing to state a claim upon which relief can be granted.

Moreover, the Commission notes that “[u]nder the doctrine of res judicata or ‘claim preclusion,’ a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies.” *Whitacre Partnership v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996)). For res judicata to apply:

a party must “show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both [the party asserting *res judicata* and the party against whom *res judicata* is asserted] were either parties or stand in privity with parties.”

State ex rel. Tucker, 344 N.C. at 413–14, 474 S.E.2d at 128 (quoting *Thomas M. McInnis & Assoc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)).

Under the companion doctrine of collateral estoppel or issue preclusion, “the determination of an issue in a prior judicial or administrative proceeding precludes the re-litigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding.” *Whitacre Partnership*, 358 N.C. at 15, 591 S.E.2d at 880. A party attempting to assert collateral estoppel must show:

that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [the party asserting collateral estoppel and the party against whom collateral estoppel is asserted] were either parties to the earlier suit or were in privity with parties.

State ex rel. Tucker, 344 N.C. at 414, 474 S.E.2d at 128–29.

As illustrated above, both res judicata and collateral estoppel have many discrete elements that must be proven to and found by the Commission before either can be used to preclude a party from litigating a claim or an issue. At this early stage of the proceeding, where the record consists of AT&T North Carolina’s unsworn Complaint and Halo’s unsworn answer to the Complaint, an evidentiary hearing surely would be needed to determine whether the elements required by those doctrines are present in this case. For instance, from the record as it now stands, the Commission questions whether Halo has standing to assert the preclusive effect of a judgment and cause of action in which it was not a party, whether Halo was in privity with Transcom and thus entitled to rely on the bankruptcy judgment, and what were the precise issues litigated and decided by the bankruptcy judgment. None of these questions can be answered without a more detailed inquiry than is allowed under a motion to dismiss for failing to state a claim upon which relief can be granted. For this reason, Halo’s motion to dismiss the Complaint because of the bankruptcy order and the doctrines of res judicata and collateral estoppel must be denied.

Therefore, the Commission concludes, after carefully considering the pleadings filed in this proceeding and the arguments of the parties, (1) that the Commission has jurisdiction to interpret and enforce the terms of the ICA; and (2) that the allegations contained in the Complaint, when viewed in the light most favorable to AT&T North Carolina, adequately assert a basis upon which relief can be granted. With regard to the latter, the Commission finds specifically that the Complaint alleges that Halo has been sending traffic to AT&T North Carolina that is not "wireless originated traffic," as the ICA requires; that Halo has been altering call detail information that is transmitted with the traffic that Halo sends to AT&T North Carolina's network; and that Halo has failed to pay for certain facilities ordered by Halo pursuant to the ICA. Further, the Commission finds that because these allegations must be accepted as true for the purpose of Halo's motion, the Complaint states claims upon which the Commission could grant AT&T North Carolina relief.

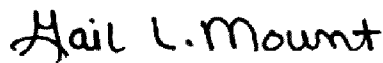
Therefore, for the aforementioned reasons, Halo's Motion to Dismiss Counts I, II, and III of AT&T North Carolina's Complaint is hereby denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 27th day of June, 2012.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Gail L. Mount". The signature is written in a cursive, flowing style.

Gail L. Mount, Chief Clerk

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 28th day of June, 2012 by e-mail, as indicated, on the parties shown below.

/s/ Jon F. Kelly

Jon F. Kelly

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Summary: Correspondence supplementing AT&T Ohio's May 2, 2012 Memorandum Contra Halo's motion to dismiss electronically filed by Jon F Kelly on behalf of AT&T Ohio