BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

The Ohio Bell Telephone Company d/b/a AT&T Ohio,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 12-1075-TP-CSS
	)	
Halo Wireless, Inc.,	)	
	)	
Respondent.	)	

AT&T OHIO'S MEMORANDUM CONTRA HALO'S MOTION TO DISMISS

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AT&T OHIO'S MEMORANDUM CONTRA HALO'S MOTION TO DISMISS

Introduction

The Ohio Bell Telephone Company d/b/a/ AT&T Ohio ("AT&T Ohio") respectfully submits this Memorandum Contra the Motion to Dismiss filed by Halo Wireless, Inc. ("Halo"). The 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 motion, and the denial of the motion, 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 goes forward. That has been the result in the five state commissions that have already considered Halo's stock motion to dismiss, and it should be the result here as well.

AT&T Ohio's Complaint alleges that AT&T Ohio and Halo entered into an interconnection agreement ("ICA") that this Commission approved; that Halo has breached that ICA by sending traffic to AT&T Ohio 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; and that the Commission should grant AT&T Ohio 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, and Ohio law expressly preserves the Commission's authority to resolve issues relating to arrangements and compensation between providers pursuant to Sections 251 and 252 of the 1996 Act.[1] Halo's contention that AT&T

[1] R. C. § 4927.04 ("The public utilities commission has such power and jurisdiction as is reasonably necessary for it to perform the obligations authorized by or delegated to it under federal law, including federal regulations, which obligations include performing the acts of a state commission as defined in the 'Communications Act of 1934,' 48 Stat. 1064, 47 U.S.C. 153, as amended, and include, but are not limited to, carrying out any of the

Ohio is actually asking the Commission to construe Halo's CMRS license and to decide matters within the FCC's exclusive jurisdiction are demonstrably false,[2] and the rest of Halo's arguments merely dispute the merits of AT&T Ohio's claims and have no bearing on whether this case should proceed. Accordingly, AT&T Ohio respectfully requests that the Commission deny Halo's 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 Ohio and other AT&T incumbent local exchange carriers ("ILECs") began realizing 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 including AT&T Ohio 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 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, likewise filed complaints against Halo before state commissions, based on similar claims about Halo's business practices. More than 20 cases currently are pending against Halo with state commissions across the country.

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following: (A) Rights and obligations under the 'Telecommunications Act of 1996,' 110 Stat. 56, 47 U.S.C. 251, as amended . . . .")

[2] AT&T Ohio'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.

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 Ohio and other carriers, for which Halo is not paying the applicable access charges). Yet Halo's tactics have failed at every turn. Halo began by filing for bankruptcy on the day before the first evidentiary hearing was supposed to occur before a state commission (in Georgia) and claiming that this 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.[3] So Halo asked the federal district court in Texas to "stay" the bankruptcy court's decision and enjoin the state commissions from going forward with the pending cases. That motion too was denied.[4] Finally, Halo asked the Fifth Circuit 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.[5]

While all that was going on, Halo also improperly removed the state commission complaint cases that were then pending to ten federal courts, erroneously claiming exclusive federal jurisdiction. Every one of those federal courts remanded the removed case (or cases) to

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[3] 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).

[4] 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).

[5] Order, *Halo Wireless, Inc. v. Alenco Commc'ns, Inc., et al.*, Case No. 11900-50 (5th Cir. Feb 2, 2012) (Exhibit C hereto).

the state commission from which Halo improperly removed it.[6] (This activity preceded the filing of AT&T Ohio's Complaint.) As arbitrators appointed by the Public Utility Commission of Texas in a related case aptly stated, Halo's conduct is "procedural chicanery patently intended solely to delay."[7]

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 five state commissions that have ruled on Halo's motions to dismiss (Tennessee, Wisconsin, South Carolina, Florida and Georgia) denied the motions.[8] In addition, the Staff of

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[6] 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 Allowing Motion to Remand, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, No. 11-00004-8-SWH (Bankr. E.D.N.C. March 5, 2012); Order, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Civil Action No. 3:11cv579-DPJ (S.D. Miss. March 16, 2012); 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).

[7] *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.

[8] 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-11 (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 March 20, 2012) (Exhibit I); Georgia Public Service Commission Staff Recommendation *In Re: 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 (April 16, 2012) (Exhibit J), adopted by 4-0 vote of the Georgia Public Service Commission on April 17, 2012, at its Administrative Session; written Order pending.

the Louisiana Public Service Commission ("LPSC") has recommended that the LPSC deny Halo's similar motion to dismiss there.[9] This Commission should deny the motion to dismiss as well.

Standard for Motion to Dismiss

Conspicuously missing from Halo's Memorandum in Support of 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 Ohio's Complaint are true, the Complaint still fails to state a claim upon which relief may be granted. *E.g., Volbers-Klarich v. Middletown Mgmt.*, 929 N.E.2d 434, 437 (Ohio 2010) ("the movant may not rely on allegations or evidence outside the complaint"; [t]he factual allegations of the complaint . . . must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom"); *RPC Elecs., Inc. v. Wintronics, Inc.* 2012 Ohio App. Lexis 1057, *4 (Ohio App. 2012) (court "may not use the motion to summarily review the merits of the cause of action"). Even a cursory review of AT&T Ohio's Complaint shows that AT&T Ohio has alleged breaches of the parties' ICA and that this Commission has jurisdiction to adjudicate AT&T Ohio's claims.

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

Argument

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

AT&T Ohio's Complaint includes two Counts. Count I alleges that Halo "is materially breaching the parties' ICA" by sending landline-originated traffic to AT&T Ohio, and that by reason of that breach, AT&T Ohio should be permitted to discontinue its performance under the ICA. Complaint ¶ 8. Count II follows up on Count I by asking the Commission to find that, because the landline-originated traffic sent by Halo is not permitted by the ICA, such traffic is subject to applicable access charges. *Id*. ¶ 16.

Thus, AT&T Ohio'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.[10] The FCC agrees.[11] This Commission, too, has recognized its authority to interpret and enforce interconnection agreements.[12] Also, Ohio law expressly preserves the Commission's authority to enforce interconnection agreements.[13] The Commission has acted on this authority in many cases.[14]

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[10] 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).

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

[12] *See* Ohio Admin. Code § 4901: 1-7-09(L)(2) ("The commission retains continuing jurisdiction and will maintain regulatory oversight over all approved interconnection agreements.")

[13] *See* R. C. § 4927.04 (supra, footnote 1).

[14] *See, e.g., AT&T Ohio v. Global NAPs, Ohio, Inc.*, Case No. 08-690-TP-CSS, Opinion and Order, June 9, 2010, p. 3 ("Pursuant to Section 4905.26, Revised Code, the Commission may consider disputes filed regarding the provision of telephone service pursuant to Commission approved interconnection agreements."); *Infotelecom LLC v. AT&T Ohio*, Case No. 11-4887-TP-CSS, Entry, October 11, 2011, p. 6 ("Therefore, this complaint is properly before the Commission for the purpose of seeking resolution of a dispute regarding the appropriate interpretation of the interconnection agreement between Infotelecom and AT&T Ohio" and ". . . the Commission, in this case, is

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

Halo brazenly asserts that AT&T Ohio does "not really seek an interpretation or enforcement of th[e] terms" of the ICA (Motion ¶ 38), and does "not actually seek an interpretation or enforcement of the ICA terms" (*id*. ¶ 39), but the Complaint shows that is exactly what AT&T Ohio seeks. Complaint, ¶¶ 6-8, 10. Other state commissions in which AT&T filed substantially identical complaints agree.[15] Halo claims that AT&T Ohio is actually seeking a ruling on "whether Halo is acting within and consistent with its federal license" (Motion ¶ 38), but that is patently false. The Complaint never mentions Halo's license, much less seeks an interpretation of it.[16] 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*. ¶ 39), but that, too, is false. AT&T Ohio's Complaint does not mention Transcom or ask the Commission to decide anything about Transcom; in reality, it is *Halo* that attempts to

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acting pursuant to its independent statutory authority to resolve interconnection agreement disputes pertaining to terms and conditions approved by the Commission.")

[15] *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*, Docket No. 2011-304-C (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").

[16] 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, 2012, 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 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.

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*., ¶ 8), but AT&T Ohio's Complaint does not raise that issue, either. Halo has already entered the market, and AT&T's Complaint does not take issue with any rates Halo may be charging to any of its customers. The question raised by AT&T Ohio's Complaint is whether Halo has breached and is breaching the ICA it signed with AT&T Ohio, 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 Ohio's Complaint. In particular, Halo disputes at length AT&T Ohio's allegation that Halo is breaching the parties' ICA by sending AT&T Ohio landline-originated traffic, arguing that the traffic Halo is sending AT&T Ohio actually originates from wireless equipment.[17] AT&T Ohio 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 Ohio's factual allegations must be taken as true for purposes of deciding Halo's Motion to Dismiss. *See supra* at page 5. 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 recent decision establishing the Connect America Fund, the FCC expressly considered and soundly rejected Halo's argument that the traffic at issue is wireless

[17] Motion ¶¶ 50-60.

traffic, and it reaffirmed that the type of traffic Halo is delivering to AT&T 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.[18]

C. AT&T Ohio's Complaint Does Not Request, and AT&T Ohio 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

[18] 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 ¶ 40), 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 Ohio) 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 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.

charges."[19] 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." The bankruptcy court further explained that state commissions should not issue relief involving "*liquidation of the amount* of any claim against the Debtor."[20] 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 II of AT&T Ohio's Complaint seeks.

Conclusion

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

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[19] Motion Heading C.

[20] *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 L hereto).

Respectfully submitted, this 2nd day of May, 2012.

THE OHIO BELL TELEPHONE COMPANY
d/b/a AT&T OHIO

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12-1075.memo contra.5-2-12

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

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

Exhibit B

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

[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.

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**

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

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

[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*").
>
> . . .

[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.

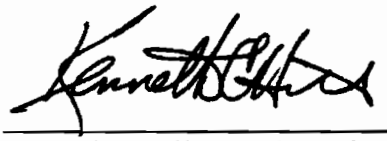
Accordingly, the Hearing Officer denies the Motion to Dismiss filed by Halo and sets this action for further proceedings in accordance with the attached procedural schedule.

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

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.

Summary: Memorandum contra Halo's motion to dismiss - Part 1 - electronically filed by Jon F Kelly on behalf of AT&T Ohio