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May 31, 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 Administrative Law Judge's Ruling Denying Halo Wireless, Inc.'s Partial Motion To Dismiss Counts I, II, And III Of AT&T California's Complaint entered on May 30, 2012 in a similar case before the California Public Utilities Commission.

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

RIM/gd2 5/30/2012



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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Pacific Bell Telephone Company
d/b/a AT&T California (U1001C),

Complainant,

vs.

Halo Wireless, Inc. (U3088C),

Defendant.

Case 12-02-007
(Filed February 13, 2012)

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

1. Summary

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

2. Procedural Background

2.1. The Complaint

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

- (1) Breach of ICA: Sending Wireline-originated traffic to AT&T California;
- (2) Breach of ICA: Alteration or Deletion of Call Detail;
- (3) Obligation to Pay Access Charges for Termination of Landline-Originated Traffic; and
- (4) Breach of ICA: Non-Payment for Facilities.

2.2. Halo's Answer

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

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

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

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

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

¹ Motion, 7.

² *Id.*, 12-17.

³ *Id.*, 17-19.

2.4. AT&T California's Opposition

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

2.5. Halo's Reply

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

⁴ Opposition, 1.

⁵ *Id.*, 8-9.

⁶ *Id.*, 6-8.

⁷ *Id.*, 10.

3. Legal Standard for Motion to Dismiss

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

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

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

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

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

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

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

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

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

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

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

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

4. Discussion

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

4.1.1. The Allegations

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

¹⁰ Complaint, 5, ¶ 10.

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

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

4.1.2.1. Federal Law

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

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

¹¹ *Id.*, 6, ¶ 15.

¹² *Id.*, 7, ¶ 18.

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

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

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

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

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

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

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

4.1.2.2. State Law

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

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

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

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

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

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

¹⁷ Complaint, Exhibit C.

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

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

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

¹⁸ *Id.*

¹⁹ Order Deny Motion to Dismiss, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Dec. 16, 2011); Order, *BellSouth Telecommunications LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., January 26, 2012); Order Deny Motions to Dismiss in Part With Prejudice and in Part Without Prejudice, *Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.*, no. 9594-T!-11 (Publ Serv. Commission Wisconsin, January 10, 2012); Commission directive, Order No. 2012-124, *Bell South Telecommunications, LLC v. Halo Wireless, Inc., for Breach of the Parties’ Interconnection Agreement*, Docket No. 2011-304-C (Pub. Serv. Commission South Carolina February 15, 2012); Order Denying Halo Wireless, Inc.’s Partial Motion to dismiss, Order No. PSC-12-0129-FOF-TP, *Re Complaint and Complaint for Relief against Halo Wireless, Inc. for breaching the Terms of the Wireless Interconnection agreement, by Bellsouth Telecommunications, LLC*, Docket No. 110234-TP (Florida Public Service Commission March 20, 2012); Georgia Public Service Commission, Staff Recommendation in Consideration of Halo’s Partial Motion to Dismiss, *In Re: Complaint of TDS Telecom on Behalf of its Subsidiaries Blue Ridge Telephone Company, et al Against Halo Wireless, et al for Failure to Pay Terminating Intrastate Access Charges for Traffic and for Expedited Declaratory Relief and Authority to Cease Termination of Traffic*, Docket No. 34219 (April 16, 2012).

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

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

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

²⁰ Motion, Exhibit A.

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

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

- (1) Does Halo's traffic that it sends to AT&T California originate from wireless equipment?²¹
- (2) Has Halo altered call detail?²²
- (3) Is Halo's traffic CMRS-originated for purposes of intercarrier compensation?
- (4) Are any portions of the relevant traffic subject to access charges?²³
- (5) Did Halo and Transcom conduct an access charge avoidance scheme?²⁴
- (6) What is the nature of Halo's business model and what impact does that model have on the Count's AT&T California has raised?²⁵

²¹ Motion, 7-12, ¶¶ 13-23.

²² *Id.*, 12-17, ¶¶ 24-37.

²³ *Id.*, 3, ¶ 4.

²⁴ *Id.*, 4, ¶ 6.

²⁵ *Id.*, 4, ¶ 7.

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

IT IS RULED that:

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

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

/s/ ROBERT M. MASON III

Robert M. Mason III
Administrative Law Judge

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 31st day of May, 2012 by e-mail, as indicated, on the parties shown below.

/s/ Jon F. Kelly

Jon F. Kelly

Halo Wireless, Inc.

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