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June 27, 2012

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

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

Dear Ms. McNeal:

AT&T Ohio hereby supplements its Memorandum Contra Halo's motion to dismiss, filed on May 2, 2012 in the referenced case, with the attached "Order Denying Motion To Dismiss" adopted by the Mississippi Public Service Commission on June 22, 2012 in a similar case before that 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

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

**BELLSOUTH TELECOMMUNICATIONS, LLC
d/b/a AT&T SOUTHEAST d/b/a
AT&T MISSISSIPPI**

COMPLAINANT

v.

JUN 27 2012

DOCKET NO. 2011-AD-223

HALO WIRELESS, INC.

DEFENDANT

ORDER DENYING MOTION TO DISMISS

This matter is before the Commission on Defendant Halo Wireless, Inc.'s, Partial Motion to Dismiss. Finding no merit in Halo's motion, the Commission denies the motion to dismiss for the reasons set forth below.

I.

AT&T Mississippi (AT&T") entered into an interconnection agreement ("ICA") with Halo Wireless, Inc. ("Halo"), which was approved by the Commission on June 25, 2010, in Docket No. 2010-AD-184. Through its Complaint, AT&T now seeks "to terminate the ICA and to discontinue its provision of interconnection, transit traffic, and termination services to Halo" and to recoup amounts Halo allegedly owes to AT&T. (Compl., p. 2.)

AT&T explains the ICA, in pertinent part, as follows:

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

(Compl., p.5.) According to Count I of the Complaint, Halo has breached this provision of the ICA by sending “wireline-originated” traffic disguised as “‘Local’ wireless originated traffic” to avoid the access charges required of wireline-originated calls. (*Id.* at 5.)

AT&T characterizes Halo’s behavior as a material violation of the terms of the ICA and “an access charge avoidance scheme” that must be stopped. (*Id.*) In furtherance of the alleged scheme, AT&T asserts in Count II that Halo “is consistently altering the Charge Party Number (“CN”) on traffic it sends to AT&T” thereby “prevent[ing] AT&T Mississippi . . . from determining where the call originated” and properly billing Halo for terminating the traffic. (*Id.* at 6.) Relatedly, Count III asserts that Halo’s traffic, which is properly classified as wireline, is subject to AT&T’s tariffed switched access charges; and therefore, Halo owes AT&T money for terminating Halo’s wireline traffic at the tariffed rates, rather than in accordance with the ICA. (*Id.* at 7.) AT&T also alleged in Count IV that Halo has failed to pay AT&T for transport facilities associated with interconnection in violation of the ICA. (*Id.* at 8.)

Subsequent to AT&T’s Complaint, Halo filed its Suggestion of Bankruptcy and Notice of Stay on August 15, 2011, followed approximately 30 days later with Halo apprising the Commission of Halo’s Notice of Removal to the United States Federal District Court for the Southern District of Mississippi. As grounds for removal, Halo claimed that the FCC has exclusive jurisdiction over the matters alleged in AT&T’s Complaint, thus presenting a federal question for the district court. (Halo’s Notice of Filing Notice of Removal, Ex. A, p. 2.) Halo also asserted federal jurisdiction over the present Complaint because the action related to Halo’s bankruptcy proceeding. (*Id.* at 3-

4.) The district court, relying on similar remands in other jurisdictions and Fifth Circuit precedent recognizing state commission jurisdiction over ICAs, remanded the Complaint to this Commission for its resolution.¹ (AT&T's Resp. to Mot. to Dis., Ex. D., pp. 4-7.)

Halo filed its motion to dismiss Counts I-III on April 6, 2012. Notably, as informed by AT&T through its response and subsequent filings, Halo's near-identical motion to dismiss has been denied by numerous other state commissions, prevailing in none. This Commission finds no reason to buck this trend, and as explained below, denies Halo's Partial Motion to Dismiss.

II.

While the Commission's Rules of Practice and Procedure allow motions practice, the Rules do not specify a standard by which to consider motions to dismiss; therefore, the Commission looks to the State's courts for guidance. "When considering a motion to dismiss, the allegations in the complaint must be taken as true[,] and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim." *Lampkin v. Thrash*, 81 So. 3d 1193, 1195-96 (Miss. Ct. App. 2012) (quoting *Lang v. Bay St. Louis/Waveland Sch. Dist.*, 764 So.2d 1234, 1236 (Miss.1999)).

When a motion to dismiss tests the legal sufficiency of the complaint, "an inquiry as to the legal sufficiency is 'essentially limited to the content of the complaint.'" *State v. Bayer Corp.*, 32 So. 3d 496, 502 (Miss. 2010) (quoting *T.M. v. Noblitt*, 650 So. 2d 1340, 1345-46 (Miss.1995)). Such motions "are decided on the face of the pleadings alone." *Bayer*, 32 So. 3d at 502 (quoting *Hartford Cas. Ins., Co. v. Halliburton Co.*, 826 So. 2d

¹ The district court also noted that the bankruptcy court had modified the automatic stay to allow state regulatory proceedings to continue with certain limitations. (AT&T's Resp. to Mot. to Dis., Ex. D., pp. 2-3.)

1206, 1211 (Miss.2001)). Similarly, “[i]n reviewing a subject-matter jurisdiction challenge, this Court looks at the type of case by examining the nature of the controversy and the relief sought, assuming the allegations in the well-pleaded complaint are true.” *Collins v. State*, 594 So. 2d 29, 32 (Miss. 1992); *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938, 942 (Miss. 1992).

III.

In its motion to dismiss, Halo argues five points: 1) that the Commission lacks jurisdiction because AT&T is really asking the Commission to determine whether Halo is acting consistent within its federal license, an issue within the exclusive province of the Federal Communications Commission (“FCC”); 2) that the traffic being sent to AT&T does, in fact, originate through wireless equipment, that Halo is not, in fact, altering CNs and that Halo, in fact, is not sending non-local traffic subject to tariffed switched access charges; 3) that the Commission lacks jurisdiction to assess damages associated with tariff violations; 4) that the federal bankruptcy court’s order prohibits any damages calculation; and 5) that res judicata and/or collateral estoppel bars the present Complaint. As explained below, the Commission rejects these arguments and denies Halo’s motion to dismiss Counts I-III of AT&T’s Complaint.

A. The Commission has primary jurisdiction over the AT&T’s Complaint.

The Legislature explicitly recognized the Commission’s “authority to arbitrate and enforce interconnection agreements pursuant to 47 USCS Sections 251 and 252 and the Federal Communications Commission's regulations implementing these sections.” Miss. Code Ann. § 77-3-35(4)(d). The Fifth Circuit, like many other federal courts considering the relevant language of the Federal Telecommunications Act of 1996, found

that “the Act’s grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.” *Southwestern Bell Tel. Co. v. Pub. Util. Comm’n of Tex.*, 208 F.3d 475, 479-80 (5th Cir. 2000); *see Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 276, 278-81 (5th Cir. 2010) (discussing and relying on *Southwestern Bell*).

A review of AT&T’s Complaint shows that each Count is specifically related to an alleged breach of the ICA. The Complaint does not mention or request any interpretation of any federal license associated with Halo.

In its remand order, the district court rejected Halo’s assertion that the present dispute involved Halo’s federal license or otherwise was within the exclusive jurisdiction of the FCC. (*see* AT&T’s Resp. to Mot. to Dis., Ex. D, pp. 6-7) (discussing *Southwestern Bell* and concluding that “but for ‘related to’ jurisdiction under 1334, this Court would not have jurisdiction over AT&T Mississippi’s claims other than appellate jurisdiction”).² Likewise, numerous other federal district courts and state commissions have rejected the very arguments put forth by Halo. (*see* AT&T’s Resp. to Mot. to Dis., p. 4 n. 8 and 9.) For the reasons stated above, the Commission finds that it has jurisdiction over the present dispute and rejects Halo’s arguments to the contrary.

B. Halo raises fact issues that are not properly resolved in a motion to dismiss.

Each Count of the Complaint is sufficiently plead to show that, assuming the facts

² On June 18, 2012, the Court of Appeals for the Fifth Circuit issued an opinion on Halo’s appeal of the bankruptcy court’s order exempting state proceedings from the automatic stay. *Halo Wireless, Inc. v. Alenco Commc’ns Inc.*, No. 12-40122, slip op. (5th Cir. June 18, 2012). The Fifth Circuit affirmed the bankruptcy court’s order and in doing so, reaffirmed the Fifth Circuit’s opinion that the Telecommunications Act embraces cooperative federalism and that “interpretation and enforcement of ICAs is entrusted in the first instance to state commissions.” *Id.* at 18.

are true, AT&T should prevail. For example, Count I alleges that the traffic being sent to AT&T is, in fact, wireline-originated traffic, which is prohibited by the ICA. Assuming such allegation to be true, Halo would be in violation of the ICA. In response, Halo asserts that in actuality the traffic is wireless originated traffic in keeping with the ICA. Examination of each Count of the Complaint in light of Halo's arguments evidences conflicting fact issues. The Commission will not resolve conflicting material fact issues via a motion to dismiss, which tests only the legal sufficiency of the Complaint. Each state commission that has considered these exact issues has held similarly. The Commission finds that AT&T sufficiently plead its Complaint; and therefore, Counts I-III survive Halo's motion to dismiss.

C. The Commission may hear and determine tariff-related claims.

Generally, the Commission has exclusive original jurisdiction over the intrastate business and property of public utilities, Miss. Code Ann. § 77-3-5, and has authority to investigate, adjudicate and enforce Commission related laws, rules, regulations and orders. *See, e.g.*, Miss. Code Ann. §§ 77-1-53, 77-2-3(2); Pub. Util. R. Practice and P. 11.101 and 15.102. More specifically, the Commission still sets the rates for switched access service. *See* Miss. Code Ann. § 77-3-35.

Halo argues that Count III of the Complaint "is on its face a tariff collection action over which the Commission lacks jurisdiction because it is as a matter of law a claim for damages." (Partial Mot. to Dis., p. 17.) Halo does not support its broad statement with any citation to authority. Such claim may be contrary, in whole or in part, to the authority cited by the Commission in the paragraph above and to the view of Commission authority identified by Mississippi courts. *See Singing River Mall Co. v.*

Mark Fields, Inc., 599 So. 2d 938, 942 (Miss. 1992) (acknowledging “the commission’s authority to decide judicial questions and to pass upon the rights of parties”); *see also Town of Bolton v. Chevron Oil Co.*, 919 So. 2d 1101, 1105-06 (Miss. Ct. App. 2005) (discussing “whether the Board’s authority embraces the types of harm suffered by the landowners such that the landowners are precluded from seeking monetary and injunctive relief in the circuit court until they exhaust their remedies before the Board”).

The Commission harbors no doubt that it can consider whether Halo owes AT&T access charges under an applicable tariff, but as explained below, the Commission need not decide whether it could award AT&T “damages” should Halo be found liable for access charges. Halo notes that the bankruptcy court’s order modifying the automatic stay prohibits any regulatory proceeding from “liquidation of the amount of any claim against the Debtor[.]” (Partial Mot. to Dis., p. 17.) AT&T appears to agree but observes that the bankruptcy court’s order “does not mean, however that state commissions cannot determine that Halo is liable for access charges in an amount that remains to be determined, which is what Count III . . . seeks.” (Resp. to Partial Mot. to Dis., pp. 9-10.) Consequently, the Commission may hear Count III but will not issue any order contravening the bankruptcy court’s directive.³

D. AT&T is not precluded from pursuing the present dispute.

In arguing that AT&T is precluded from pursuing Counts I-III, Halo returns to its previous argument that AT&T is not *really* suing Halo for breach of the ICA but rather, is attempting to re-classify the regulatory categorization of Halo’s high volume customer,

³ A first read of the Fifth Circuit’s slip opinion, *see supra* n. 2, appears to indicate that if a state commission “enters a money judgment against Halo, as long as it does not seek to enforce that judgment, the action still falls under the exception to the automatic stay.” *Halo Wireless*, No. 12-40122, slip op. at 20; *see id.* at 22. Consequently, the automatic stay does not appear to impede a monetary judgment against Halo.

Transcom Enhanced Services, Inc. Relying on a bankruptcy order confirming Transcom's plan for reorganization, Halo argues that res judicata and collateral estoppel bar AT&T's present claims.⁴

The Mississippi Supreme Court has set forth the elements of res judicata or claim preclusion, as follows:

In applying the doctrine of res judicata, "there are four identities which must be present: (1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person against whom the claim is made." *Harrison*, 891 So.2d at 232 (citing *Quinn v. Estate of Jones*, 818 So.2d 1148, 1151 (Miss.2002) and *Dunaway v. W.H. Hopper & Assocs., Inc.*, 422 So.2d 749, 751 (Miss.1982)). In addition to the four identities, a fifth requirement is that the prior judgment must be a final judgment that was adjudicated on the merits. *Anderson v. LaVere*, 895 So.2d 828, 833 (Miss.2004).

EMC Mortg. Corp. v. Carmichael, 17 So. 3d 1087, 1090 (Miss. 2009). It does not appear that Halo satisfies any of the traditional four elements necessary to apply res judicata.

Here, the present dispute alleges breach of the ICA by Halo related to wireless-originated traffic, not a reorganization of Transcom or its status as a purported Enhanced Services Provider. Similarly, the underlying facts are not identical because, if for no other reason and as Halo admits, the ICA was executed after Transcom's reorganization. Nor can the Commission conclude that the parties are substantially identical or that Halo stands in privity with Transcom. For example, Halo is not Transcom's successor in interest. Finally, the quality or character of Halo and Transcom is not identical.

⁴ Halo also appears to argue that the purported legal conclusions reached by an extra-territorial federal court on Transcom's regulatory status are somehow binding on this Commission and require the Commission to dismiss Counts I-III of AT&T's Complaint. Halo does not cite any authority for such proposition, and the Commission rejects the argument. As pointed out by AT&T, other state commissions have also rejected Halo's arguments.

According to its motion to dismiss, Halo is a CMRS provider and Transcom is Halo's high volume customer. Res judicata does not bar AT&T's claims.

"[C]ollateral estoppel is applicable, and the parties to an action will be precluded from relitigating a specific issue, which was: (1) actually litigated in the former action; (2) determined by the former action; and (3) essential to the judgment in the former action." *Estate of Burgess ex rel. Burgess v. Trotter*, 6 So. 3d 1109, 1120 (Miss. Ct. App. 2008) (quoting *In re Estate of Stutts v. Stutts*, 529 So.2d 177, 179 (Miss.1988)). To whatever extent the issue may be relevant in this action, the status of Transcom as an ESP, although apparently contested initially in the bankruptcy proceeding, does not appear to have been actually and fully litigated because the underlying order resolving the matter in the bankruptcy context was later vacated. (Halo's Partial Mot. to Dis., Ex. F; AT&T's Resp. to Mot. to Dis., p. 9 n 19 (citing *Konsinky v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008) and Ex. F, p. 4.)

Before vacating the order, the reviewing court declined to address the propriety of the bankruptcy court's examination of Transcom's ESP status. (Halo's Partial Mot. to Dis., Ex. F, p. 6.) Although the bankruptcy court reiterated its past finding related to Transcom's status in its order confirming the plan, the matter does not appear to have been actually litigated after the vacating of the previous order. Nor is it clear that Transcom's ESP status was essential to the ultimate confirmation of Transcom's reorganization plan.

Regardless, the origination or re-origination and termination of Halo's calls was not litigated in, or an essential part of, the bankruptcy proceedings. Collateral estoppel is not applicable.


III.

IT IS THEREFORE ORDERED that Halo's Partial Motion to Dismiss be, and is hereby, DENIED.

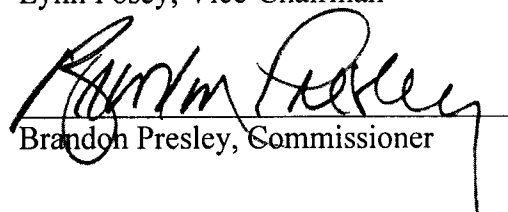
SO ORDERED, this the 22nd day of June 2012.

Chairman Leonard Bentz voted Aye; Vice-Chairman Lynn Posey voted Aye;
Commissioner Brandon Presley voted Aye

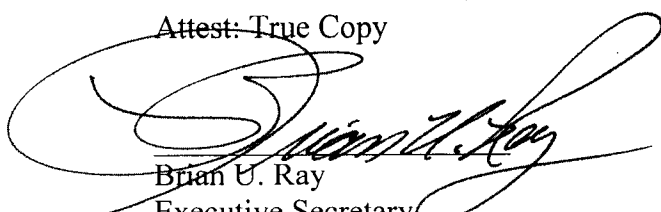



Leonard Bentz, Chairman


Lynn Posey, Vice-Chairman


Brandon Presley, Commissioner

Attest: True Copy


Brian U. Ray
Executive Secretary

Effective this the 22nd day of June 2012.

Certificate of Service

I hereby certify that a copy of the foregoing has been served this 27th day of June, 2012 by e-mail, as indicated, on the parties shown below.

/s/ Jon F. Kelly

Jon F. Kelly

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