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From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Tuesday, January 17, 2012 4:03 PM
To: Filings@psc.state.fl.us
Subject: 110234-TP AT&T Florida's Response to Halo's Partial Motion to Dismiss

Importance: High

Attachments: Untitled.pdf

Untitled.pdf (4 MB)

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B. 110234-TP Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Florida Against Halo Wireless, Inc.

C. BellSouth Telecommunications, LLC d/b/a AT&T Florida on behalf of Tracy W. Hatch

D. 97 pages total (includes letter, certificate of service, pleading and Exhibits A-J)

E. BellSouth Telecommunications, LLC d/b/a AT&T Florida's Response to Halo's Partial Motion to Dismiss .pdf

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January 17, 2012

Ms. Ann Cole
Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 110234-TP
Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Florida Against Halo Wireless, Inc.

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Response to Halo's Partial Motion to Dismiss, which we ask that you file in the captioned docket.

Copies have been served to the Parties shown on the attached Certificate of Service list.

Sincerely,

Tracy W. Hatch

cc: Parties of Record
Gregory R. Follensbee
Suzanne L. Montgomery

Certificate of Service
Docket No. 110234-TP

I HEREBY CERTIFY that a true and correct copy was served via Electronic Mail and First Class U. S. Mail this 17th day of January, 2012 to the following:

Larry Harris, Staff Counsel
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Tracy W. Hatch

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, LLC d/b/a AT&T Florida Against Halo Wireless, Inc.	)	Docket No. 110234-TP
	)	Filed: January 17, 2012

AT&T FLORIDA'S RESPONSE TO HALO'S PARTIAL MOTION TO DISMISS

BellSouth Telecommunications, LLC dba AT&T Florida ("AT&T Florida"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby submits its response to Halo Wireless, Inc.'s ("Halo") Partial Motion to Dismiss. For the reasons set forth below, AT&T Florida respectfully requests that Halo's Motion to Dismiss be denied.

Overview

Halo is relatively new and purports to be a small wireless carrier. By mid-2010, however, numerous carriers across the country, including AT&T Florida and other AT&T incumbent local exchange carriers ("ILECs") began realizing that Halo was sending them inordinately large amounts of traffic, all of which purported to be local (intraMTA) and therefore subject only to reciprocal compensation rates rather than access charges. Based on their review of call data, several carriers, including AT&T Florida 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' interconnection agreements or "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. Several other carriers, including TDS and many rural local exchange carriers ("RLECs"), likewise filed complaints against Halo before state commissions, based on the same claims about

Halo's business practices. There are more than 20 cases pending against Halo with state commissions.

Halo has spared no expense in trying to prevent the state commissions from reaching a decision on the merits (while in the meantime Halo continues to send millions of minutes each month to AT&T Florida 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 the case brought by TDS Telecom in Georgia)[1] and claiming that this stayed all the state commission proceedings. The bankruptcy court, however, held it did not stay these state proceedings. Halo then asked the bankruptcy court to "stay" its ruling that the state commission proceedings are not stayed. That motion was denied.[2] 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 too was denied.[3]

While all that was going on, Halo also removed all the state commission complaint cases to various federal courts, baselessly claiming exclusive federal jurisdiction. The Florida federal district court rejected Halo's argument and remanded AT&T Florida's Complaint to this

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1 *In re Complaint of TDS Telecom on behalf of its subsidiaries Blue Ridge Tel. Co., et. al. against Halo Wireless, Inc., et al.*, Docket No. 34219 (Pub. Serv. Comm'n, Ga.).

2 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).

3 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).

Commission,[4] and every other federal court to rule on Halo's removal petitions (Tennessee, South Carolina, and Missouri) has likewise remanded to the relevant state commission.[5]

Further, even in the two state commission cases that have finally started moving forward, Halo has filed motions to dismiss making the same arguments it makes here. Both state commissions denied those motions.[6] This Commission should do the same.

AT&T Florida's Complaint and Petition for Relief, filed on July 25, 2011, alleges straightforward breaches of the parties' ICA, and there is no doubt that the Commission has jurisdiction over those claims. The Complaint clearly describes the various violations by Halo of certain provisions of the ICA currently in effect between Halo and AT&T Florida. Specifically, as AT&T Florida noted in its Complaint, Halo has violated the ICA by: 1) sending traffic to AT&T Florida that is not "wireless originated traffic" but is instead, landline-originated intrastate intraLATA, intrastate InterLATA or interstate toll traffic for which switched access charges are due but have not been paid; 2) altering or manipulating the call detail information that is transmitted with the traffic that Halo sends to AT&T Florida's network; and 3) failing to pay for certain facilities orderd by Halo pursuant to the ICA.

Standard of Review

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. *Varnes v. Dawkins*, 624 So. 2d

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[4] Order of Remand, *BellSouth Telecommunications, LLC v. Halo Wireless, Inc.*, Case No. 4:11cv470-RH/WCS (N.D. Fla., Dec. 9, 2011) (Exhibit "C" hereto).

[5] Memorandum, *BellSouth Telecommc'ns, Inc. v. Halo Wireless, Inc.*, No. 3-11-5 (M.D. Tenn., Nov. 1, 2011) (Exhibit "D" hereto); 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) (Exhibit "E" hereto); Order, *Alma Commc'ns Co. v. Halo Wireless, Inc., et al.*, Case No. 11-4221-CV-CA-NKL (W.D. Mo., Dec. 21, 2011) (Exhibit "F" hereto).

[6] Order Denying Motion to Dismiss, *BellSouth Telecomss., LLC v. Halo Wireless, Inc.*, Docket No. 11-00119 (Tenn. Reg. Auth., Dec. 16, 2011) (Exhibit "G" hereto); 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 "H" hereto).

349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion requires the moving party to show that, accepting all the allegations as facially true, the petition still fails to state a cause of action upon which relief may be granted. *Id.* at 350. When making a determination of whether to grant a motion to dismiss, only the petition and all documents incorporated therein may be reviewed. *Barbado v. Green & Murphy, P.A.*, 758 So. 2d 1173, 1174-75 (Fla. 4th DCA 2000); Fla. R. Civ. P. 1.130. Further, in assessing the sufficiency of the petition, all material allegations in the petition must be construed against the moving party and in favor of the petitioner. *Mathews v. Mathews*, 122 So. 2d 571, 572 (Fla. 2d DCA 1960); *see also In re: Application for Transfer Certificates Nos. 592-W & 509-S from Cypress Lakes Assocs., Ltd. to Cypress Lakes Utils., Inc. in Polk County*, Docket No. 971220-WS, Order No. PSC-99-1809-PCO-WS (Sept. 20, 1999). Even a cursory review of AT&T Florida's Complaint shows that, assuming all allegations in the Complaint are true, jurisdiction is proper in this Commission and AT&T Florida has clearly stated the basis for its claim of breach of the ICA between AT&T Florida and Halo.

Argument

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

Halo's various arguments in support of its motion are principally directed at the Commission's jurisdiction to address AT&T Florida's claims that Halo has breached the parties' ICA in multiple ways. These arguments fail because when, as here, a complaint alleges breach of an ICA both Florida law and federal telecommunications law are abundantly clear regarding the appropriate forum to seek relief – the Florida Public Service Commission.

This case is a straightforward fact-based ICA dispute that is properly before the Commission for resolution. Halo claims that AT&T Florida's Complaint asks the Commission

to construe wireless licenses that only the FCC can construe. AT&T Florida's Complaint does not ask the Commission to do any such thing. AT&T Florida's claims in no way depend upon a finding or even consideration of whether Halo's actions violated its wireless licenses. Nothing in AT&T Florida'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 Commission, not the FCC) by disguising landline-originated traffic as wireless traffic. Thus, Halo's jurisdictional arguments rest on an inaccurate premise and are meritless.

All of AT&T Florida's claims relate directly to breaches of the Commission-approved ICA and the consequences of such breaches. It is well-established under both federal law and Florida law that the Commission has jurisdiction over such ICA disputes. As the Eleventh Circuit put it: "In granting public service commissions the power to approve or reject [ICAs], Congress intended to include the power to interpret and enforce" ICAs as well. *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs.*, 317 F.3d 1270, 1277 (11th Cir. 2003); *see also Covad Commc'ns v. BellSouth Corp.*, 374 F.3d 1044, 1052-53 (11th Cir. 2004) (affirming district court's dismissal of breach-of-ICA claim on the ground that the claim must first be brought before the state commission). The FCC and courts across the country have reached the same conclusion.[7] This Commission, too, has recognized its authority over ICA disputes, stating that it has "jurisdiction under both Federal and State law to interpret and enforce the ICA." *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Florida*, Docket No. 100021-TP, Order

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[7] *See, e.g., Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 278-81 (5th Cir. 2010); *Connect Commc'ns Corp. v. Sw. Bell Tel., L.P.*, 467 F.3d 703, 708, 713 (8th Cir. 2006); *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); *Sw. Bell Tel. Co. v. Public Utility Comm'n of Tex.*, 208 F.3d 475, 485 (5th Cir. 2000); *Ill. Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 574 (7th Cir. 1999); *In the Matter of Starpower Commc'ns*, 15 FCC Rcd. 11277, at ¶ 7 (June 14, 2000).

No. PSC-10-0457-PCO-TP, at 9 (July 16, 2010). Florida statutes and the Commission's rules confirm that authority. Fla. Stat. § 364.16 (2011); Florida Admin. Code, Rule 25-22.036. Additionally, as noted above, the Tennessee and Wisconsin Commissions have already rejected Halo's same arguments in cases involving the same claims by AT&T ILECs. *See* Exhibits "G" and "H" hereto. This well-established law defeats Halo's Motion to Dismiss.

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

Halo denies AT&T Florida's factual allegations – both the allegation that the traffic it has sent to AT&T was originated on landline telephones and the allegation that Halo has disguised the traffic so that it will appear to be wireless-originated and local. While AT&T disagrees (and will present substantial evidence to prove its allegations), the dispute about whether the traffic is, or is not, landline-originated is a factual dispute. For the purpose of Halo's Motion to Dismiss, AT&T Florida's factual allegations must be assumed as true, and factual disputes or factual denials are not a basis to dismiss a complaint. *McWhirter, Reeves, McGothlin, Davidson, Rief, & Bakas, P.A. v. Weiss,* 704 So. 2d 214, 215 (Fla. 2d DCA 1998) ("A motion to dismiss, filed pursuant to Florida Rule of Civil Procedure 1.140(b)(6), tests the legal sufficiency of a complaint to state a cause of action and is not intended to determine issues of ultimate fact."). In fact, the existence of an alleged factual dispute is precisely the reason that an evidentiary record is needed and Halo's motion to dismiss must be denied. *See id.* (holding that trial court erred in going outside of complaint and dismissing case).

Moreover, in its recent broad-sweeping decision establishing the Connect American Fund, the FCC rejected Halo's argument that the traffic at issue is wireless traffic, and instead 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).[8] Indeed, the FCC specifically references Halo in explaining that Halo's scheme is unlawful, and held 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.

C. AT&T Florida Does Not Seek Any Relief Beyond That Authorized by the Bankruptcy Court.

The bankruptcy court in Halo's bankruptcy case held that the automatic bankruptcy stay does not apply to state commission proceedings like this one. In that order, the bankruptcy court indicated that state commissions can "determine that the Debtor [Halo] has violated applicable law over which the particular state commission has jurisdiction," and it explained that state commissions should not issue relief involving "liquidation of the amount of any claim against the Debtor." *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) (Exhibit "J" hereto). Consistent with that order, which was entered long after AT&T Florida filed its Complaint here, AT&T Florida clarifies that, with regard to any unpaid access charges or facilities charges at issue in this case, it merely asks the Commission to determine that Halo is responsible to pay those charges, not to quantify

[8] In a status conference before the Tennessee Regulatory Authority on November 21, 2011, counsel for Halo conceded that the FCC "disagreed with Halo" and went on to explain that Halo contends that the FCC was simply "incorrect in the way they addressed it." Transcript of Proceeding, *In re Complaint of Concord Tel. Exchange, Inc., et al. against Halo Wireless, Inc.*, Docket No. 11-00108, at 26 (Nov. 21, 2011) (Exhibit "I" hereto).

those charges or require payment. Quantification and payment issues will presumably be dealt with in the bankruptcy court.

Conclusion

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

Respectfully submitted,

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1012812

EOD
11/01/2011

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

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

ORDER DENYING MOTIONS FOR STAY PENDING APPEAL

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

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

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

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

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

Exhibit A

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

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

Exhibit B

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

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

BELLSOUTH TELECOMMUNICATIONS, LLC,

Plaintiff,

v. CASE NO. 4:11cv470-RH/WCS

HALO WIRELESS, INC.,

Defendant.

_____/

ORDER OF REMAND

This is a dispute between two telecommunications carriers concerning the terms of the parties' wireless interconnection agreement and the amount due from one to the other for terminating access charges. The plaintiff initiated the proceeding by filing a complaint in the Florida Public Service Commission. The defendant removed the proceeding to this court, asserting this is a "civil action" within the meaning of the federal bankruptcy removal statute, 28 U.S.C. § 1452. The defendant has moved to transfer the case to the United States Bankruptcy Court for the Eastern District of Texas, where the defendant has filed a Chapter 11

Exhibit C

bankruptcy proceeding and an adversary proceeding. This order concludes that even if this is a civil action within the meaning of § 1452 and removal was therefore proper, equitable remand—as expressly authorized by § 1452—would be appropriate. This order grants the motion to remand and denies the motion to transfer.

I

BellSouth Communications, LLC d/b/a AT&T Florida ("AT&T") is a local exchange carrier. Halo Wireless, Inc., is a telecommunications carrier. AT&T and Halo entered into a wireless interconnection agreement. Under that agreement Halo sends wireless-originated traffic to AT&T, and Halo compensates the local exchange carrier by means of a "terminating access charge." AT&T asserts that Halo sent wireline-originated traffic in breach of that agreement and for the purpose of avoiding the payment of terminating access charges. AT&T also claims that Halo altered or deleted call information so that AT&T could not properly bill Halo for the termination of Halo's traffic. AT&T filed a complaint with the Florida Public Service Commission seeking monetary relief for past underpayments and the authority to terminate the interconnection agreement.

According to Halo, from May to August of this year, 100 different telecommunications companies located in ten different states brought at least 20 separate proceedings against Halo in the public utility commissions of those states,

all seeking resolution of claims similar to AT&T's. Faced with substantial litigation costs, on August 8, 2011, Halo filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Texas. Halo began removing the state commission proceedings to federal court. On September 1, 2011, Halo filed an adversary proceeding in the United States Bankruptcy Court for the Eastern District of Texas, seeking a declaratory judgment as to the issues raised in the various state commission proceedings.

Halo removed the Florida Public Service Commission proceeding to this court, invoking the court's removal jurisdiction under 28 U.S.C. § 1452 and asserting subject matter jurisdiction under 28 U.S.C. § 1334. Halo has moved to transfer the proceeding to the Bankruptcy Court for the Eastern District of Texas. AT&T opposes transfer and has moved to remand.

II

Halo argues that I can and should transfer the case without deciding whether removal was proper. Although there is authority to the contrary, I assume I could indeed transfer the case without addressing removal. The better course here is not to do so.

III

Due to the limited jurisdiction of federal courts, removal statutes must be construed narrowly, and remand is generally favored. *See Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). The sole basis for removal jurisdiction invoked by Halo is 28 U.S.C. § 1452(a), which provides in relevant part:

> A party may remove *any claim or cause of action in a civil action* other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a) (emphasis added). None of the exceptions apply. The removability of the proceeding AT&T initiated in the Florida Public Service Commission turns on whether it was a "civil action" within the meaning of the statute.

The issue is one of first impression in this circuit. In *BellSouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002), I held that a Florida Public Service Commission proceeding was improperly removed under the general removal statute, 28 U.S.C. § 1441, which allows removal of "any civil action brought in a State court." I held that the Florida Commission is not a state "court" as required by the statute. But the bankruptcy removal statute, § 1452, does not include that language; it allows removal of a "civil action" without

requiring that the action be pending in a "court." *See Quality Tooling, Inc. v. United States*, 47 F.3d 1569, 1572 (11th Cir. 1995) (holding that § 1452(a) is not limited to removal of claims from state courts).

To determine whether a proceeding is a "civil action," the focus is on the nature of the specific dispute. *See Vartec*, 185 F. Supp. 2d at 1282-83. In analyzing the requirements of a "civil action" and "State court" under the general removal statute, the Supreme Court, after holding that a county court was a "State court," went on to examine the proceeding to determine whether it was a "judicial controversy," as opposed to an administrative concern:

> Of course, the statutory designation of the action of a body as a judgment, or the phrasing of its finding and conclusion in the usual formula of a judicial order, is not conclusive of the character in which it is acting. When we find, however, that the proceeding before it has all the elements of a judicial controversy, to wit, adversary parties and an issue in which the claim of one of the parties against the other, capable of pecuniary estimation, is stated and answered in some form of pleading, and is to be determined, we must conclude that this constitutional court is functioning as such.

Comm'rs of Road Improvement Dist. No. 2 v. St. Louis Sw. Ry., 257 U.S. 547, 557 (1922) (citation omitted); *see also Upshur Cnty. v. Rich*, 135 U.S. 467, 474 (1890) ("The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a [civil action]."); *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1267 (3d Cir. 1994).

This inter-carrier dispute has all the essential elements of a "judicial controversy." The dispute is a contract dispute between adversarial parties, and AT&T seeks damages as a result of Halo's alleged breach of the contract. The procedures involved also bear substantial similarities to a traditional civil action in a court. The action was initiated by AT&T's complaint filed in the Public Service Commission. Halo may file an answer to the complaint. The parties may conduct discovery. *See, e.g.,* Fla. Stat. § 364.183(2). Either party may file motions, including motions to dismiss and in some cases, motions for summary final order. *See* Fla. Admin. Code Ann. r. § 28-106.204. There are also differences between court procedures and the procedures in effect at the Florida Public Service Commission. For example, courts enter enforceable judgments; the Commission, in contrast, ordinarily must go to court to enforce its orders. *See, e.g.,* Fla. Stat. § 364.015. But such limitations do "not destroy the essential character of the proceeding as a judicial contest." *See In re Raymark Indus., Inc.*, 238 B.R. 295, 298 (Bankr. E.D. Pa. 1999). The case for holding this proceeding a "civil action" within the meaning of § 1452 is strong. *Cf. id.* (finding that a revival proceeding qualified as a civil action under § 1452(a) because the action was initiated by a complaint and the defendant could "file an answer or motion to dismiss, avail himself of discovery, file for summary judgment and ultimately have the matter resolved at an evidentiary hearing").

To be sure, two decisions point the other way. In *In re Adams Delivery Service, Inc.*, 24 B.R. 589 (B.A.P. 9th Cir. 1982), the Ninth Circuit Bankruptcy Appellate Panel held that a proceeding before the National Labor Relations Board could not be removed under the statutory predecessor to § 1452. The panel said the NLRB was not acting as a court and "the concept of a civil action is inseparable from a court proceeding." The panel thus concluded that the NLRB proceeding was not a "civil action" removable under the statute. *See id.* at 592. The court also noted that "the NLRB is not functionally a forum where private parties may present labor disputes. Rather the NLRB determines which complaints it will act upon in its own name in furthering the policies of the federal labor laws." *Id.* This makes the NLRB different from the Florida Public Service Commission, which, at least as alleged in the complaint, has statutory authority to resolve private disputes of this nature.

Citing *Adams*, the United States Bankruptcy Court for the Eastern District of Kentucky recently held in an unpublished decision that removal of an administrative proceeding was improper under both § 1441 and § 1452(a) because the proceeding was not a civil action. *See In re T.S.P. Co.*, Bankr. No. 10-53637, 2011 WL 1431473, at *2-3 (Bankr. E.D. Ky. Apr. 14, 2011). Both *Adams* and *T.S.P.* substantially relied on a bankruptcy treatise for the proposition that an administrative proceeding is a not a civil action. *See 1-3 Collier on Bankruptcy* ¶

3.07[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011) (citing *In re Adams Delivery Serv., Inc.*, 24 B.R. 589) ("Section 1452(a) does not permit removal of actions that are not 'civil actions.' Such things as criminal or administrative proceedings, for example, are not subject to removal."). Aside from citing the treatise, neither decision set out any significant analysis of why the proceeding at issue was not functionally a civil action.

Ultimately, though, whether § 1452 authorized the removal of this proceeding does not matter. The statute permits a court to remand a removed proceeding "on any equitable ground." 28 U.S.C. § 1452(b). In deciding whether to remand a proceeding on this basis, courts consider a variety of factors, including the preference for a state tribunal to resolve state-law questions, the expertise of a particular court or tribunal, and the effect of remand on the efficient administration of the bankruptcy estate. *See, e.g., In re Scanware, Inc.*, 411 B.R. at 897-98; *In re Royal*, 197 B.R. 341, 349 (Bankr. N.D. Ala. 1996); *see also Whitney Nat'l Bank v. Lakewood Investors*, No. 11-0179-WS-B, 2011 WL 3267160, at *6 (S.D. Ala. July 28, 2011) (citing cases and noting the various factors applied by courts under § 1452(b)).

The Florida Legislature and Congress have given the Florida Public Service Commission a role in resolving inter-carrier disputes on issues of this kind due to

the Commission's expertise. *See, e.g.,* Fla. Stat. § 364.16; 47 U.S.C. § 252. As I noted in *Vartec:*

> [T]he Florida Legislature has given the Florida Public Service Commission authority to resolve disputes between carriers, *see* Fla. Stat. § 364.07 (2001) [now Fla. Stat. § 364.16 (2011)], not in an effort to bypass, but instead precisely because of, its regulatory expertise. By creating a remedy for inter-carrier disputes before the Commission, the Legislature did not simply afford jurisdiction over such disputes in a different court; instead, it afforded a remedy in a different type of forum altogether. In such a proceeding, the competence brought to bear will not be that of a court, but of a regulator.

Vartec, 185 F. Supp. 2d at 1283-84. That expertise is important in the present dispute, which involves the interpretation and enforcement of an interconnection agreement approved by the Florida Commission. Halo argues this dispute involves "exclusive" questions that only the Federal Communications Commission can address, but that seems unlikely, and would not defeat equitable remand in any event. *See id.* at 1285 ("The remedy for a state administrative agency's improper exercise of state-law-created jurisdiction over state-law disputes is not removal to federal court."). According to the interconnection agreement, Halo agreed that the applicable state public utility commission could resolve disputes. *See* ECF No. 4-1 at 22 of 25. If the Florida Commission lacks jurisdiction, Halo can presumably seek relief in the Federal Communications Commission. *See id.* And any order of the Florida Commission will be subject to challenge in federal court. *See BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317

F.3d 1270, 1277-79 (11th Cir. 2003). Halo's remedy—if it ultimately needs or is entitled to a remedy—is not removal of this proceeding to a federal court before the Commission even has a chance to consider AT&T's petition.

Further, remand will have minimal effect on the administration of Halo's bankruptcy estate. The United States Bankruptcy Court for the Eastern District of Texas has ruled that the pending proceedings against Halo in state public utility commissions—but not any attempts to collect any amount determined to be due—are exempt from the automatic stay. *See* Case No. 11-42464, Hr'g Tr. 107, 111-12, Oct. 7, 2011; ECF No. 14-1 at 109 & 113-14 of 117. The bankruptcy court's determination that this type of proceeding is exempt from the automatic stay and may go forward supports this court's decision to remand the proceeding.

On balance, I conclude that equitable remand is appropriate.

IV

For these reasons,

IT IS ORDERED:

AT&T's motion to remand, ECF No. 10, is GRANTED. Halo's motion to transfer, ECF No. 8, is DENIED as moot. This proceeding is remanded to the Florida Public Service Commission. The clerk must take all steps necessary to effect the remand.

SO ORDERED on December 9, 2011.

s/Robert L. Hinkle
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.	)
	) NO. 3-11-0795
v.	) JUDGE CAMPBELL
HALO WIRELESS, INC.	)

MEMORANDUM

Pending before the Court are Defendant's Motion to Transfer (Docket No. 6) and Plaintiff's Motion for Entry of an Order Remanding Proceeding to Tennessee Regulatory Authority (Docket No. 15). For the reasons stated herein, Defendant's Motion to Transfer is DENIED, and Plaintiff's Motion to Remand is GRANTED.

FACTS

This action was originally filed by Plaintiff before the Tennessee Regulatory Authority ("TRA"), alleging that Defendant materially breached its wireless interconnection agreement ("ICA") with Plaintiff. Plaintiff sought to terminate the ICA, based upon Defendant's breaches, and to recover certain monies allegedly owed by Defendant to Plaintiff. Docket No. 1-1. Plaintiff's Complaint alleges causes of action for breach of contract only. *Id.*

Following the filing of Plaintiff's Complaint in the TRA, Defendant filed a Suggestion of Bankruptcy, indicating that Defendant had filed a voluntary petition for relief under the federal Bankruptcy Code in the U.S. Bankruptcy Court for the Eastern District of Texas ("the Bankruptcy Court") and asserting that the automatic stay (11 U.S.C. § 362) prohibited any further action against Defendant in the instant proceeding. Docket No. 1-2.

Exhibit D

Thereafter, Defendant removed the TRA action here, alleging that this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 1452. Docket No. 1. Defendant then filed an adversary proceeding in the Bankruptcy Court, naming Plaintiff as one of several defendants in that adversary proceeding. Docket No. 6-1, ¶ 5. Defendant has asked the Bankruptcy Court in the adversary proceeding for declaratory judgment as to all federal issues raised in various state commission proceedings filed against it, including this action. *Id.*

Defendant then moved to transfer this action to the Bankruptcy Court. Docket No. 6. Plaintiff opposes Defendant's Motion to Transfer and asks the Court to remand this action to the TRA for further administrative proceedings. Docket No. 15.

Recently the Bankruptcy Court held that the various state commission proceedings involving the Debtor (Defendant) are excepted from the Bankruptcy Code's automatic stay, pursuant to 11 U.S.C. § 362(b)(4),[1] so that the commissions can determine whether they have jurisdiction and, if so, whether there is a violation of state law. Docket No. 21-1. 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. *Id.*[2]

Defendant has appealed this ruling of the Bankruptcy Court and has moved to stay the actions pending appeal. Docket No. 24. Defendant has represented that it intends to request certification of this issue to the Fifth Circuit Court of Appeals. *Id.*

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[1] 11 U.S.C. § 362(b)(4) provides that a bankruptcy petition does not stay the commencement or continuation of an action or proceeding by a governmental unit.

[2] The Bankruptcy Court did not rule that this action in this Court may proceed, yet neither party is arguing that the automatic stay should apply herein.

MOTION TO REMAND

This action is not an appeal from a state commission decision; rather, this action was removed prior to a determination by the TRA. The Court will address the Motion to Remand first, since granting the Motion to Remand would make the Motion to Transfer moot. Plaintiff argues that Defendant improperly removed this action to this Court.

Federal law provides that a party may remove any claim or cause of action in a civil action by a governmental unit to enforce such governmental unit's police or regulatory power to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under the Bankruptcy Code. 28 U.S.C. § 1452(a).[3] The Bankruptcy Code provides that the district courts have original but not exclusive jurisdiction of all civil proceedings arising in or related to bankruptcy cases. 28 U.S.C. § 1334(b).

Plaintiff argues that a claim for interpretation or enforcement of an IRA must be brought in the first instance in the state commission that approved the IRA in question. Docket No. 15. Plaintiff argues that the jurisdiction of this Court is limited to determining rights under ICAs after final ruling from the state commission. *Id.* Defendant, on the other hand, contends that this action was properly removed under Section 1452(a) because the TRA proceeding is a "civil action"[4] and that the TRA does not have jurisdiction because the claims implicate federal questions. Defendant also asserts that

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[3] Section 1452 also provides that the Court to which such claim or causes of action is removed may remand such claim or cause of action on any equitable ground. 28 U.S.C. § 1452 (b).

[4] In the case of *In re T.S.P. Co., Inc.*, 2011 WL 1431473 (Bankr. E.D. Ky. April 14, 2011), the court held that the debtor could not remove the action under 28 U.S.C. § 1452, finding that administrative proceedings are not "civil actions" and are therefore not removable. *Id.*

the claims for relief fall within the Federal Communications Commission ("FCC") exclusive original jurisdiction. Docket No. 1.[5]

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).[6] 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.[7] *Id. at 778; see also*

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[5] Despite this assertion, Defendant asks the Court to transfer the action to the U.S. Bankruptcy Court for the Eastern District of Texas.

[6] "We believe that the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete." *Southwestern Bell*, 208 F.3d at 480. Most circuits have held that state commissions have the authority to interpret and enforce ICAs. *See Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 84, n.12 (1st Cir. 2010) and cases cited therein.

[7] Citing the Fourth Circuit Court of Appeals in *Verizon Maryland Inc. v. Global NAPS, Inc.*, 377 F.3d 355 (4th Cir. 2004), the *Central Telephone* court held that an ICA is a creation of federal law because it is a tool through which the Telecommunications Act is implemented and enforced. *Central Telephone*, 759 F.Supp.2d at 777.

Bellsouth Telecommunications, Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1278-79 (11th Cir. 2003) (federal courts have jurisdiction under Section 1331 to hear challenges to state commission orders interpreting ICAs because they arise under federal law) and *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Servs., Inc.*, 323 F.3d 348, 353 (6th Cir. 2003) (federal courts have jurisdiction to review state commission orders for compliance with federal law). Although these cases involved state commission orders, their holdings provide guidance on this issue.

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

The fact that this Court has jurisdiction does not end the matter, however. The fact that the Court *could* hear this action does not necessarily mean the Court *should* hear this action.[8] Although the Act details how parties, states and federal courts can draft and approve ICAs, it is silent on how and in what fora parties can enforce ICAs. *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 83 (1st Cir. 2010). Because the Act does not specifically mandate exhaustion of state action, whether to construe the Act as prescribing an exhaustion requirement is a matter for the Court's discretionary judgment. *Ohio Bell Tel. Co., Inc. v. Global NAPS Ohio, Inc.*, 540 F.Supp.2d 914, 919 (S.D. Ohio 2008).

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[8] In *Southwestern Bell*, cited above, the court held that state commissions *could* hear disputes such as this one but did not reach the issue of whether state commissions were the exclusive jurisdiction for such cases. *Southwestern Bell*, 208 F.3d at 479-480.

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.[9]

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).

For all these reasons, Plaintiff's Motion for Entry of an Order Remanding Proceeding to Tennessee Regulatory Authority is GRANTED, and this case is remanded to the TRA. The Bankruptcy Court has held that the TRA action may proceed except to the extent the parties attempt

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[9] The *Central Telephone* court, characterizing the *Core* court's reasoning as "flawed," criticizes *Core* and those cases which follow its reasoning, arguing that the *Core* opinion went too far. *Central Telephone*, 759 F.3d at 783-84.

to obtain and/or enforce a money judgment. There is no indication in the record that the Bankruptcy Court wants this case (or others like it) to be transferred to it.

The parties' other arguments and Defendant's Motion to Transfer are moot.

IT IS SO ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **N/A**
Adversary Proceeding Number: **11-80162-dd**

ORDER GRANTING MOTION TO REMAND

The relief set forth on the following pages, for a total of 4 pages including this page, is hereby ORDERED.

FILED BY THE COURT
11/30/2011

Entered: 12/01/2011

David R. Duncan
US Bankruptcy Judge
District of South Carolina

Exhibit E

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Bellsouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina, Plaintiff, v. Halo Wireless, Inc., Defendant.	C/A No. 11-80162-dd **ORDER GRANTING MOTION TO REMAND**

This matter is before the Court on a Motion for Remand ("Motion") filed by Bellsouth Telecommunications, LLC d/b/a AT&T Southeast d/b/a AT&T South Carolina ("Plaintiff") on November 7, 2011. An Objection to Plaintiff's Motion was filed on November 21, 2011 by Halo Wireless, Inc. ("Defendant"), and a Reply was filed by Plaintiff on November 28, 2011. The Court now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

In July 2011, Plaintiff filed state commission proceedings against Defendant in South Carolina and various other states, alleging violations of the parties' Interconnection Agreements ("ICAs"). Plaintiff claims primarily that Defendant disguised calls delivered by Plaintiff in order to avoid paying Plaintiff for such calls. On August 8, 2011, Defendant filed a chapter 11 bankruptcy petition in the Eastern District of Texas. Soon thereafter, Defendant attempted to remove the various state commission proceedings, including the proceeding pending in South Carolina, to federal courts in several different states. Judge Rhoades, the bankruptcy judge presiding over Defendant's chapter 11 case, found that the automatic stay did not apply to the state commission proceedings and ordered that such proceedings continue to a conclusion. On November 3, 2011, Judge Campbell, United States District Court Judge for the Middle District

of Tennessee, granted a Motion to Remand filed by Plaintiff in the Tennessee action, remanding the proceeding back to the Tennessee Regulatory Authority.

In this instant proceeding, Plaintiff argues that the proceeding should be remanded to the Public Service Commission of South Carolina ("South Carolina PSC") because the Court lacks jurisdiction over the proceeding. Plaintiff first argues that removal is substantively improper because the proceeding is an administrative proceeding and not a "civil action". Additionally, Plaintiff argues that the South Carolina PSC has exclusive jurisdiction to decide ICA disputes; only after the state commission makes a decision, Plaintiff argues, does the federal court have jurisdiction to review the PSC's decision. Plaintiff further argues that even if the federal court has jurisdiction, the South Carolina PSC has primary jurisdiction, and that this Court should defer to the PSC to decide this issue. Finally, Plaintiff argues that removal to this Court was not proper because the proceeding should have been removed to the District Court, and if the District Court sought to transfer the proceeding to the bankruptcy court after removal to the District Court, such transfer would be improper because the bankruptcy court has no jurisdiction over the issues raised. Defendant responds at length that this proceeding in fact meets the definition of a "civil action", that the South Carolina PSC lacks jurisdiction over the proceeding due to the federal law issues involved, and that therefore remand to the South Carolina PSC is inappropriate.

CONCLUSIONS OF LAW

This action, just like the action addressed in Judge Campbell's order, was removed to this Court prior to any adjudication by the South Carolina PSC. Thus, there is no decision or interpretation for this Court, or any other bankruptcy or district court, to review. *See Concord Telephone Exchange, Inc. v. Halo Wireless*, No. 3-11-0796 (M.D. Tenn. Nov. 3, 2011) ("Federal

district courts have jurisdiction to review certain types of decisions by state commissions, and the Telecommunications Act of 1996 . . . provides for judicial review of certain types of determinations by state commissions. . . . Here, however, as noted above, there is no state commission determination to review.") (citing *Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475,480 (5th Cir. 2000); 47 U.S.C. § 252(e)(6)). The South Carolina PSC is primarily responsible for enacting and overseeing rates, regulations, terms, and conditions relating to telecommunication service providers and their ICAs. *See* 47 U.S.C. § 252(e); S.C. Code § 58-9-10 et seq. As a result, the South Carolina PSC has jurisdiction over the claims presently before the Court, and it is in the best position, with expertise in such matters, to decide this dispute relating to the parties' ICA. *See id.* This Court agrees with the reasoning behind Judge Campbell's decision to remand the Tennessee action to the Tennessee Regulatory Authority, and finds the same should be done here. The remaining arguments presented by the parties do not have to be addressed, as the Court has found that remand is appropriate for the reasons stated above. Plaintiff's Motion to Remand is granted. The case is remanded to the South Carolina Public Service Commission.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion to Remand is granted. The case is remanded to the South Carolina Public Service Commission, where it may proceed to a conclusion.

AND IT IS SO ORDERED.

Exhibit F

MIME-Version:1.0
From:ecfMOW.notification@mow.uscourts.gov
To:cmecf_atynotifications@mow.uscourts.gov
Bcc:
--Case Participants: Toby L. Gerber (tgerber@fulbright.com), Mark A. Platt (mplatt@fulbright.com), Louis A Huber, III (dyoung@schleehuber.com, lhuber@schleehuber.com, lsprouse@schleehuber.com), Ann Ahrens Beck (ann.beck@att.com, felicia.finley@att.com, leo.bub@att.com, maryann.purcell@att.com, mr6217@att.com), Jennifer Heintz (cassie.melloway@psc.mo.gov, dawn.carafeno@psc.mo.gov, jennifer.heintz@psc.mo.gov, kristy.westrich@psc.mo.gov), Craig S. Johnson (cj@cjaslaw.com), Missouri Public Service Commission (jennifer.heintz@psc.mo.gov)
--Non Case Participants:
--No Notice Sent:

Message-Id:<3638180@mow.uscourts.gov>
Subject:Activity in Case 2:11-cv-04221-NKL Alma Communications Company et al v. Halo Wireless, Inc. et al Order on Motion to Remand
Content-Type: text/html

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
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U.S. District Court

Western District of Missouri

I HEREBY ATTEST AND CERTIFY ON 12/22/11 THAT THE FOREGOING DOCUMENT IS A FULL TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE AND IN MY LEGAL CUSTODY.
ANN THOMPSON
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
BY _____ DEPUTY

Notice of Electronic Filing

The following transaction was entered on 12/21/2011 at 9:46 AM CST and filed on 12/21/2011
Case Name: Alma Communications Company et al v. Halo Wireless, Inc. et al
Case Number: 2:11-cv-04221-NKL
Filer:
Document Number: 43(No document attached)

Docket Text:
ORDER entered by Judge Nanette Laughrey. Plaintiffs' motion to remand this case to the Missouri Public Services Commission ("the Commission") [Doc. # 7] is GRANTED for the reasons expressed in Orders granting remand in similar cases by the Middle District of Tennessee [Doc. # 38-1] and the District of South Carolina Bankruptcy Court [Doc. # 41-5]. The Commission has the authority to regulate the subject matter of this dispute, and the Court does not have jurisdiction over Plaintiffs' claims until the Commission has rendered a decision for the Court to review. To the extent Defendant argues that Plaintiffs' claims should first be decided by the FCC, this argument is mooted by the FCC's recent rulemaking decision rejecting Defendant's position and reaffirming that the power to regulate these issues lies with state agencies. [Doc. # 41-

6]. Plaintiffs' request for costs and attorney fees for wrongful removal is DENIED. The propriety of removal was a complicated issue of law that Defendant appears to have pursued in good faith. This is a TEXT ONLY ENTRY. No document is attached.(Kanies, Renea)

2:11-cv-04221-NKL Notice has been electronically mailed to:

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Toby L. Gerber tgerber@fulbright.com

2:11-cv-04221-NKL It is the filer's responsibility for noticing the following parties by other means:

Exhibit G

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:

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[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)

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[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

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[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

[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

PUBLIC SERVICE COMMISSION OF WISCONSIN

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

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

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

The Commission opened this docket on its own motion by a Notice of Proceeding dated October 20, 2011. On November 18, 2011, Halo and Transcom each filed a Motion to Dismiss. On November 23, 2011, a Prehearing Conference was held in this docket that identified an issues list for the docket and set a schedule for the filing of testimony and a hearing date. On December 5 and December 6, 2011, responses to the Motions to Dismiss were filed by the Wisconsin Rural Local Exchange Carriers, the TDS Telecom Companies,[1] and Wisconsin Bell, Inc., d/b/a AT&T Wisconsin. On December 13, 2011, Halo and Transcom each filed a reply in support of their Motions to Dismiss. At its open meeting of January 5, 2012, the Commission denied the Motions to Dismiss, some parts with prejudice and some without, as more fully described below.

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

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

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

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

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

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

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

ORDER

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

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

2. The November 18, 2011, Motions to Dismiss of Halo Wireless, Inc., and Transcom Enhanced Services, Inc., are denied. As described above, the procedural and notice arguments or claims raised in the motions are denied with prejudice. The substantive aspects related to jurisdiction are denied without prejudice.

Dated at Madison, Wisconsin, January 10, 2012

By the Commission:

Sandra J. Paske
Secretary to the Commission

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See attached Notice of Rights

Docket 9594-TI-100

PUBLIC SERVICE COMMISSION OF WISCONSIN
610 North Whitney Way
P.O. Box 7854
Madison, Wisconsin 53707-7854

NOTICE OF RIGHTS FOR REHEARING OR JUDICIAL REVIEW, THE TIMES ALLOWED FOR EACH, AND THE IDENTIFICATION OF THE PARTY TO BE NAMED AS RESPONDENT

The following notice is served on you as part of the Commission's written decision. This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

PETITION FOR REHEARING

If this decision is an order following a contested case proceeding as defined in Wis. Stat. § 227.01(3), a person aggrieved by the decision has a right to petition the Commission for rehearing within 20 days of mailing of this decision, as provided in Wis. Stat. § 227.49. The mailing date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The petition for rehearing must be filed with the Public Service Commission of Wisconsin and served on the parties. An appeal of this decision may also be taken directly to circuit court through the filing of a petition for judicial review. It is not necessary to first petition for rehearing.

PETITION FOR JUDICIAL REVIEW

A person aggrieved by this decision has a right to petition for judicial review as provided in Wis. Stat. § 227.53. In a contested case, the petition must be filed in circuit court and served upon the Public Service Commission of Wisconsin within 30 days of mailing of this decision if there has been no petition for rehearing. If a timely petition for rehearing has been filed, the petition for judicial review must be filed within 30 days of mailing of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition of the petition for rehearing by operation of law pursuant to Wis. Stat. § 227.49(5), whichever is sooner. If an *untimely* petition for rehearing is filed, the 30-day period to petition for judicial review commences the date the Commission mailed its original decision.[3] The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

If this decision is an order denying rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not permitted.

Revised: December 17, 2008

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

In The Matter Of:

Tennessee Regulatory Authority
Docket No. 11-00108

Complaint of Concord Telephone Exchange, et al.
November 21, 2011

Original File 2011-11-21 TRA Halo 1 FINAL.txt

Min-U-Script®

Exhibit I

BEFORE THE TENNESSEE REGULATORY AUTHORITY

IN RE:	
COMPLAINT OF CONCORD TELEPHONE EXCHANGE, INC., HUMPHREYS COUNTY TELEPHONE CO., TELLICO TELEPHONE COMPANY, TENNESSEE TELEPHONE COMPANY, CROCKETT TELEPHONE COMPANY, INC., PEOPLES TELEPHONE COMPANY, WEST TENNESSEE TELEPHONE COMPANY, INC., NORTH CENTRAL TELEPHONE COOP., INC. AND HIGHLAND TELEPHONE COOPERATIVE, INC. AGAINST HALO WIRELESS, LLC, TRANSCOM ENHANCED SERVICES, INC. AND OTHER AFFILIATES FOR FAILURE TO PAY TERMINATING INTRASTATE ACCESS CHARGES FOR TRAFFIC AND OTHER RELIEF AND AUTHORITY TO CEASE TERMINATION OF TRAFFIC	Docket No. 11-00108

TRANSCRIPT OF PROCEEDINGS

Monday, November 21, 2011

APPEARANCES:

For TDS Telecom, et al:	Mr. H. LaDon Baltimore Mr. Norman J. Kennard
For Halo and Transcom:	Mr. Paul S. Davidson Mr. Steven H. Thomas Mr. W. Scott McCollough
For AT&T:	Ms. Joelle Phillips
For TRA Staff:	Mr. Jonathan N. Wike

Reported By:
Patricia W. Smith, LCR, RPR, CCR

(The aforementioned cause came on to be heard on Monday, November 21, 2011, beginning at approximately 1:58 p.m., before Chairman Kenneth C. Hill, when the following proceedings were had, to-wit:)

CHAIRMAN HILL: All right. If I could have your attention, let's talk about and meet with Docket 11-00108, Concord Telephone Exchange, et al.

We're going to call that one "Halo #1." Okay? And the BellSouth Telecom/AT&T and Halo will be "Halo #2."

Sorry that we have you as "#2," but that's the way it works out.

So if we're talking about it, just for our shorthand purposes, "Halo 1" and "Halo 2," that would be acceptable in our conversations here. I would appreciate that. That way we can make it easier.

It seems to me we've got a number of things that need to be done. We want to hear from you today. I notice that Mr. Baltimore filed, in his letter, a procedural schedule, which I don't think we can quite get it on the same level that you have it, simply because we've got a motion to dismiss. The complainants need to reply to that, still. And we have a motion to amend, and a response needs to be received from Halo that -- on those two items.

If it's acceptable to the parties, I think giving ten days for those responses would be reasonable. That would be December 1st, which is a Thursday; right? 2:00 p.m. We used to do 4:00 p.m. Not anymore. 2:00 p.m. 2:00 p.m. Okay?

And so Halo 1, we're talking about you right now. If we have no problem from Halo about this, the motion for admission pro hac vice, we'll entertain that motion and accept that, if that's without any problem from the representatives of Halo.

MR. DAVIDSON: We have no objection to it.

CHAIRMAN HILL: No objection?

MR. DAVIDSON: No objection.

CHAIRMAN HILL: Okay. All right. Very good.

(Court reporter requests name of speaker.)

MR. DAVIDSON: Yes. If I may, as a preliminary matter --

CHAIRMAN HILL: Yes, indeed.

Now, let me back up. Since -- you know, I always get the cart before the horse. Now, that's the old way of saying it. I've got the Lamborghini before I get the loan. That's the new way

of saying it.

(Laughter.)

CHAIRMAN HILL: But let's start right over here at -- well, you're not in Halo 1. Forget you for now. We love you, but we're going to forget you for now.

But let's start right here and go across, and let's have everybody's name, who you represent, and all that sort of thing, so we can have it on the record. Thank you very much.

MR. DAVIDSON: Yes, sir. On Halo 1, my name is Paul Davidson, with the law firm of Waller Lansden here in Nashville. And I have with me, to my immediate right, Mr. Steve Thomas of the McGuire Craddock firm, representing Halo, as well as Scott McCollough, of McCollough Henry, representing Halo -- and -- and Transcom -- that's right -- in Halo 1 and in Halo 2.

CHAIRMAN HILL: Halo and Transcom. All right.

MR. KENNARD: Your Honor, Norman Kennard, Thomas Long, representing TDS Tech and the North Central and Highland Co-ops.

MR. BALTIMORE: And for the record, Your Honor, Don Baltimore, local counsel for the

complainants.

And I would also like to add to what I said earlier about my clients on the phone. Not all of them are on the phone. I have Mr. Bruce Mottern, with TDS Telecom, here and Mr. John McConley with North Central Telecom.

CHAIRMAN HILL: All right. And are --

MR. BALTIMORE: John McClanahan. I'm sorry.

CHAIRMAN HILL: Very good. Okay. Now, thank you very much for introducing yourselves.

Do we have an agreement that December 1st is good for the motion, the various motions that we need to hear about -- the replies, actually, to motions?

MR. KENNARD: Yes, Your Honor, that's fine.

CHAIRMAN HILL: Is that reasonable?

MR. KENNARD: Just a point of clarification --

CHAIRMAN HILL: Yes. Would you use your microphone, please.

MR. KENNARD: There were two motions to dismiss filed. We answered the one involving Transcom. We did not answer the one involving Halo

because of its -- the question of its automatic stay. So if I understood you, that's the one we'll be answering.

CHAIRMAN HILL: Mm-hmm. That's correct. Thank you.

MR. THOMAS: And December 1 is a fine date for us to respond on their motion to amend. And I simply don't know the procedure. Is there a reply procedure as well? Or is it simply a motion and response?

CHAIRMAN HILL: Do you want to explain that, Jon?

We'll let our chief counsel explain that.

MR. WIKE: If you will have an opportunity to reply?

MR. THOMAS: No, I'm just asking whether there is, generally speaking, an opportunity to reply or whether that's not usually done.

MR. WIKE: If there usually is an opportunity to reply?

MR. THOMAS: Do the --

CHAIRMAN HILL: Normally there is.

MR. THOMAS: Would the Chairman like to establish dates for replies as well?

CHAIRMAN HILL: Yeah, we usually try to do that within seven days. That's seven calendar days, not seven working days.

MR. THOMAS: Because of the bankruptcy, as Mr. Kennard said, there was a motion and then a response. Would we have -- would Halo have until -- for its reply on the motion to dismiss, would you prefer that we do that at December 1? Or in seven days? How would you like to do that?

CHAIRMAN HILL: December 1 is fine, because we're not going to be able to call everybody together again, either by phone -- and you're welcome to join us by phone as opposed to in person, if you wish. In other words, we're not going to force you to fly here every time that we meet. If, however, you wish to do so, because it makes your case better, that's fine.

December 12th is our next set of conferences here. We'll have a status conference, together, on December 12th, and we will have full reporting capabilities, as we do today, and that sort of thing.

It does keep our costs down if we can try to put things together at the same time. We do not want to delay any kind of adjudication just based upon

our financial needs. However, if we can make everything work together, we do.

And so as I see it, our status conference, if you want to call it that, would be December 12th, following these filings by the 1st. (Pause.)

Well, since you're going to have enough time to respond, oral arguments on those motions on the 12th. That way we've got time in between.

MR. THOMAS: Mr. Chairman --

CHAIRMAN HILL: Yes, sir.

MR. THOMAS: -- I have a previous -- previously-scheduled conference in Washington, D.C., on December 12th. If that is the date that the -- that the Chairman would like to have this hearing, I will be happy to simply opt out of that conference. But if we could do it on a different day, that would be helpful.

CHAIRMAN HILL: Now, would you be available on the 13th?

MR. THOMAS: I am opening my calendar as quickly as I can.

CHAIRMAN HILL: All right. What I want to do is I want to give you-guys plenty of time, but I don't want to make it so that it is too much time to get answers for you. You know, we -- I think that

is always important that we don't take too much time but we give enough time. (Pause.)

So December 13th, what does it look like for you?

MR. THOMAS: I'm -- I'm still waiting for the operating system on my phone to cooperate with me.

CHAIRMAN HILL: Oh, well. Is that an iPad 4S?

MR. THOMAS: It is an iPhone --

CHAIRMAN HILL: An iPhone.

MR. THOMAS: -- 4, and it's finally working. Okay. I apologize. December 12 will work fine for me.

(Laughter.)

MR. THOMAS: I had the wrong date in my head. I apologize.

CHAIRMAN HILL: I tell you, I love counsel. "Now, could you move that?" "Yeah." "Okay." They agreed. Now you don't have to. Okay. Fine.

All right. That'll work. Okay. December 12th, then, we are set for that, and it'll be immediately following our regularly-scheduled conference of the TRA. And that means sometime after one o'clock. We got out before two o'clock in this

last one, and I would suppose our schedule would be about the same. All right? Now . . .

So on the 12th, after we have oral arguments, do you think we can work on the procedural schedule on the 12th? Do you think that's reasonable? Depending on how things work. Okay. Is that reasonable for you-guys?

MR. KENNARD: Your Honor, is it reasonable --

CHAIRMAN HILL: You're on.

MR. KENNARD: Is it reasonable, while we're all here, to establish the procedural schedule for moving on?

CHAIRMAN HILL: Well, yes, it is. And yet if we -- if we have a motion to dismiss that is granted, then, you know, you have already done your work, but you won't be seeing it through, so . . .

I mean, you know, I don't have a problem with it. If you-guys want to do it, go ahead.

If you have ever worked with me before, I'll smile at you, and I want you to get things working together as much as you can. And the only time you see me frown is when I don't get cooperation from the parties. The rest of the time I'm a happy guy.

So if you want to start working on a

schedule together, I'll let you-guys just talk for a while, and I'll go get a drink of water and I'll come back.

MR. THOMAS: Well, Your Honor, we tend to fall into your category on that. We believe that we need to address the motions up front, the motions to dismiss, and entail the jurisdictional concerns that we have.

And also, I think it's important to note that we are seeking a stay on the Bankruptcy Court's ruling. And if that is stayed, that would have an effect on how this would move forward. It has been certified to the Fifth Circuit because of the questions that are involved. We strongly believe that the Fifth Circuit will reverse on that order. But, of course, this -- this TRA cannot take actions based upon prognostication of future events in the Fifth Circuit.

So we will, of course, cooperate to any extent with opposing counsel, to talk to them about possible scheduling. We would be happy to work with the Tennessee Regulatory Authority. But we believe that until this appeal is decided, all of this effort, all of this effort beyond deciding jurisdiction, which we believe is an important consideration, but all the effort beyond deciding jurisdiction could be wasted --

a waste for everyone involved. And so we would urge that we take care in how we move forward.

MR. KENNARD: Your Honor, we appreciate the fact that the motion to abate was denied and that the TRA is moving forward on this. And we further appreciate you-all setting up the conference today on short notice.

The proposal that the Authority consider jurisdiction before it considers fact is going to lead to a situation, I'm concerned, for the TRA that it doesn't have the facts it needs to decide jurisdiction. For example, Halo will assert that it is a commercial mobile radio service carrier. They will not present any facts as to why they are. There will be no testimony as to why they are. There will be no examination of why they claim they are. They will simply apply the label and say, "Because we say we are a CMRS provider, therefore, we are not jurisdictional to you."

Now, I further want to point out that Halo is the only debtor-in-bankruptcy. Transcom is not. Whatever happens in the Fifth Circuit level has no effect whatsoever on this case, on Halo 1, which is -- I guess maybe we should re-label it "Halo and Transcom 1," because our case includes the parent

company, if you will, who feeds the traffic to Halo.

Their defense has been that they are an ESP, an Enhanced Service Provider -- again, provide no facts so far in their pleadings, simply claim and point to a 2005 Bankruptcy Court decision from Texas stating that they are -- a Bankruptcy Court without the regulatory background and with the primary task of discharging Transcom when it was a debtor from bankruptcy. And we -- and our position is, as we have laid out in our motion to dismiss is, that's not a label that they can ascribe to themselves. It is a fact-based determination based upon the definition of an Information Service Provider, and Enhanced Service Provider, and you can't -- so it's difficult to make a decision, if not impossible, without accepting factually what they have said. And how do you develop those facts without having a hearing?

The hearing will also -- those same facts that are being developed will determine what kind of traffic it is. And if the -- if the Authority decides it has the jurisdiction, then it will have the facts available to it to decide whether or not there's been a violation of Tennessee law. There is no requirement that there be two hearings on this. There is no requirement that things occur in a one, two

order, except that obviously the TRA cannot determine that there's been a violation of Tennessee law without also determining there is jurisdiction.

But what most jurisdictions do -- the jurisdictions I've been involved in -- is you have one hearing, because all those same facts are germane to both inquiries. And then you take it under advisement, and the first half of your order is, "Do we have jurisdiction?" The second half -- if the answer to the first question is "yes" -- is to determine whether or not there's been a violation.

What's being proposed here is not required under -- by the -- by Bankruptcy Judge Rhodes. It's simply a delay and a waste of time. This has been going on now for almost a year. It is costing the -- the complainants here approximately $125,000 a month, as the meter runs, as the minutes flow, and they receive no compensation. And it is unfair to the companies and their customers to allow this to drag on.

So our proposal is -- and you have no -- and there's no reason you can't support this, that you couldn't agree to do this -- that we proceed to do all this simultaneously.

Now, I realize you have set up the pleadings schedule. But what I'm suggesting is we're

going to get into that and say, "Well, we need -- we need more facts." So let's set up a hearing schedule today for testimony. We have filed testimony in Georgia. We have filed testimony in Texas. Halo and Transcom have filed testimony in Georgia, and they have filed testimony in Texas. The inquiries into what they're doing should be not difficult for them to revamp testimony. We're prepared to file testimony in two weeks, and they should be as well -- to move ahead, to get to a hearing in January so this thing can be resolved expeditiously.

We have spent six months trying to get this matter before the TRA, as Halo and Transcom filed a removal, which was totally inappropriate, that had to be unwound. They claimed that the automatic stay provisions of the bankruptcy code applied to Halo, which the Bankruptcy Court said they didn't. We're finally here. There is a window here, and I'm urging the TRA to expeditiously move forward and not take this in two steps.

CHAIRMAN HILL: What -- excuse me, but what are we looking at as far as the court date? Are we talking -- I mean, it's just now gotten there. They're going to take a look at when they're going to give you a date on it.

MR. THOMAS: Actually, we have maintained the appeal in two different fronts. As I mentioned earlier, the Bankruptcy Court certified the question to the Fifth Circuit, but at the same time the Fifth Circuit has to accept it, they're not forced to.

We have also appealed it to the District Court, the referring District Court, from the Bankruptcy Court. And that District Court has just set up -- I believe it was Friday or today -- just set up the numbers of the three cases. They're all in front of Judge Schneider. Judge Schneider is familiar with this matter because the previous Federal Court case in the Eastern District of Texas was filed before that judge. And so we expect that things can be moved forward fairly rapidly. We are going to ask the District Court for a stay of the order's enforcement, pending appeal, and -- and then, to the extent that we are unable to obtain that stay from the District Court, we would seek one from the Fifth Circuit, because we believe that a stay is appropriate.

There are several points on which we disagree with our opponents, primarily on the jurisdiction issue. There is no factual inquiry necessary to determine whether or not the TRA, or any other state commission, has been delegated the federal

authority -- the authority from the federal law to address the issue of whether a particular service is or is not CMRS or is or is not an ESP. What our opponents are asking is that you do it all at once; you just assume you have jurisdiction and move forward.

What we're asking and what we believe that the Bankruptcy Court made very clear in the order, that said that the action -- the actions before this commission were excepted from the automatic stay. The Court said that the TRA could first determine that it has jurisdiction over these questions. And then -- to the extent that the TRA said it did have jurisdiction on those specific issues, the TRA could then go forward and determine whether or not there had been any violations of state law.

But notice in the order the Court said that there could not be any determinations or actions taken, in terms of collecting or pursuing collection of any amounts, and there could be no actions taken that would interfere with the debtor-creditor relationship. And Transcom and Halo have a debtor-creditor relationship. And this -- any actions that would be taken, as requested in the recent request for amendment, we are going to point out to the TRA that those can't be taken, that what the -- because it would

affect the debtor-creditor relationship, even if those actions were taken solely as to Transcom.

So what we propose is that the TRA focus first on jurisdiction. To the extent you would like to have further briefing, we would be happy to brief it. We would be happy to provide you with information. To the extent you requested specific information that was relevant to the jurisdiction question, we would be happy to address that issue.

The focus of that jurisdictional question we believe is very narrow, and that has to do with not what are these companies doing, but whether the TRA can address the question of what are these companies doing, in terms of whether it is CMRS or not CMRS, whether it is ESP or not ESP.

So the answer to the question is -- if you decided, for example, that the TRA had jurisdiction, you could say, "Yes, under federal law we have the jurisdiction to determine whether a particular service is or is not CMRS." That does not require you to determine whether this particular service is CMRS. It has to do with whether you can make that determination. And that's what we are asking you to focus on first.

And then to the extent that there's

not a stay, to the extent that there's not a reversal on appeal or otherwise an impediment to going forward, we would ask that you keep in consideration that if there's not a stay, in April to May of this year more than a hundred different local exchange carriers brought twenty different proceedings in front of ten different PUCs, including the TRA. Every attempt we have made to cooperate with them or get their cooperation in putting it all together into one federal court lawsuit has been resisted. Every attempt we have made to assist them in the process of seeking compensation under Section 20.11(e), under the federal regulations, has been virtually rejected on every count except for a very few companies. And a few of them are TDS companies that are getting paid today. Federal regulations establish the payment procedure, and they are getting paid if they follow that procedure. No one is getting hurt by delay.

And so we suggest that we proceed in a -- at a more straightforward method, to go through jurisdiction first, and then to go through the process of dealing with the case itself when that comes up. And --

MS. PHILLIPS: Director Hill --

MR. MCCOLLOUGH: Can I --

MS. PHILLIPS: Oh, I'm so sorry.

MR. MCCOLLOUGH: -- speak to this as well?

CHAIRMAN HILL: Sir, would you use the microphone, please.

MR. MCCOLLOUGH: Yes, sir.

MR. THOMAS: I've got one right here.

MR. MCCOLLOUGH: My name is Scott McCollough. I also represent Halo and Transcom. I'd like to point you to your rules -- 1220-1-2.03, defenses, answers, motions to dismiss. Those rules specifically contemplate that a respondent can file a motion asserting various things, including lack of jurisdiction over subject matter or the person.

The rules in subpart 3 require that a motion to dismiss be disposed prior to a hearing on the merits.

Since we now have a motion to amend in this matter, we very well may, in addition to pressing our jurisdictional claims, seek to move for a -- make a motion for more definite statement. All of these things are required to be resolved before the filing of an answer. I will remind the Authority that we have yet to file an answer in this matter. It's only motions to dismiss. So it seems to me that we truly

are getting the loan long before the -- I mean, the Lamborghini far before the loan. We do need to dispose of our preliminary motions before we can even file an answer. Thank you.

MR. KENNARD: Mr. Chairman, if I might be -- if I might be allowed some brief rebuttal, we are now parsing this into three different: Does the TRA even have the jurisdiction to decide whether or not they have jurisdiction? Then, does the TRA have the jurisdiction? And then getting on to the merits.

My proposal was simple, that we schedule the hearings, the testimony and distribution of testimony, schedule that today. That's all I'm suggesting. We're all here. We all have our calendars out, and we can schedule. You don't have to hold a hearing now. And if you interpret your rule as Mr. McCollough has argued, you can rule on the motion to dismiss beforehand, and then we'll have hearings. But at the rate this is going, we're not going to get to hearings until sometime in January or February.

And all I'm saying is we owe it to ourselves to undertake to establish a schedule so you can hear this case expeditiously and we're not sometime in January, then, talking about who is going to file testimony and when.

CHAIRMAN HILL: All right. Thank you for those comments.

Yes, ma'am.

MS. PHILLIPS: Thank you. I'm sorry to stick my --

CHAIRMAN HILL: Well, we'll have you -- we'll have you interrupt. Go ahead.

MS. PHILLIPS: Thank you. I'm sorry.

But to the extent that we're talking about scheduling, I just wanted to point out that Halo 2 involves a market-regulated carrier. There is an 180-day clock on those kinds of complaints. That would run in January -- January 26th.

So, you know, I recognize that there may -- that there may be a need for a hearing, there may be a need for, you know, scheduling. And so we would urge, consistent with TDS and the other complainants in Halo 1, that it's probably worthwhile to go ahead and at least reserve a hearing date in late January. Maybe it will be a hearing. Maybe it will be an opportunity for oral argument on legal matters. Maybe it will be a paper -- you know, a paper-only hearing, one of those things. But reserving a January date probably makes sense.

I certainly don't have any objection

on December 1 to, you know, everybody filing their brief on whether the TRA has jurisdiction to proceed in their respective Halo case. I think in both matters it's going to be a pretty short brief, because 65-5-109(m) says that the TRA has jurisdiction to resolve complaints about interconnection agreements. And Halo itself submitted its own interconnection agreement to this Authority's jurisdiction in Docket 10-00063. So I think that's going to be a pretty quick and easy thing to decide.

And there's -- and we've already got a briefing kind of schedule set up for December 1st anyway. We could file on December 1st. Folks could file replies on December 8, and that would have you ready at the next conference to dispose of any -- to the extent someone thinks there's a threshold legal issue, it could be filed and addressed ahead of that conference.

So I just threw that out because I --

CHAIRMAN HILL: You're suggesting that that -- the idea of jurisdiction, if that's what we're looking at, could be taken care of and disposed of by the 12th?

MS. PHILLIPS: I think it very well could be. And I think to the extent that it presents

an additional issue -- as Mr. Kennard said, there may be fact issues associated with that -- I think those papers can sort of spell out what would need to be done to make a ruling if the TRA couldn't do that.

But I don't -- I don't think that this concept of two separate steps is something that needs -- that requires two separate schedules. We could go ahead and file, you know, papers on that by December 1st.

MR. KENNARD: Mr. Chairman, in support of Ms. Phillips' statements, on Friday the -- may I approach?

CHAIRMAN HILL: Yes, certainly.

MR. KENNARD: -- the Federal Communications Commission released the long-awaited tome on intercarrier compensation. Halo had sought permission from the FCC to continue to do what it's doing as a CMRS service, and the FCC has flatly rejected that claim. So we do think that the jurisdictional questions are not going to take a lot of the Authority's time to resolve.

MR. THOMAS: May I respond just quickly?

CHAIRMAN HILL: Certainly.

MR. THOMAS: First, on the AT&T side,

speaking in terms of the Halo 2 case, I think we've made very clear in our papers that we filed in virtually every proceeding that's involved AT&T that there are certain aspects of the disputes raised by AT&T in front of various commissions, that we believe those commissions do have jurisdiction over. And AT&T's counsel, I believe the provision that she cited has already been addressed and has been conceded to a great extent in the papers.

What we disagree, in terms of jurisdiction, about with AT&T are the same issues that have been raised in the other cases, including Halo 1. And that is whether or not the TRA or another commission would have the jurisdiction at first to decide whether or not a service is or is not wireless.

Once that decision is made -- and, for example, I'm just using that particular decision as an example -- once the decision is made that it's wireless and CMRS, the State clearly has a role in determining disputes under ICAs. And we don't want there to be any confusion about that. The jurisdictional issues that are involved here are not the ones that clearly fall under the State's jurisdiction. They are federal issues.

The second point that I would raise is

that in the FCC's statement, which you were just handed, they disagreed with Halo but they were incorrect in the way they addressed it. Apparently, there was a misunderstanding that we need to deal with the FCC on, because the FCC assumed the existence of carriers and was directing this in terms of a carrier analysis.

As we have pointed out, Transcom Enhanced Services is an Enhanced Service Provider and has been ruled to be an end user under federal law. If it's an end user, then Halo can provide that end user with telephone exchange service. And nothing that was said by the FCC changes that result under federal law.

The question becomes, for purposes of jurisdiction, can the TRA take the federal laws governing enhanced services, the federal regulations, the federal precedent, and can the TRA address the issue of whether or not an entity, an entity service is enhanced? And we believe that's a federally-exclusive issue. That's the issue that we believe has to be addressed, not the underlying issue of whether or not the actual service is enhanced, but whether or not that question may be addressed here. So that's what we're focusing on for jurisdiction.

We don't believe there's any problem

setting a hearing in January, or at some point, on the jurisdiction issue after the parties have had an opportunity to brief that issue properly, to the extent that the TRA would like that briefing. But we don't believe that now is the time to be setting up procedural activities, because, among other things, although our opponents may not be in this position, as I believe is clear to this Authority, if we have twenty cases in ten states, Mr. McCollough and I and other counsel for Halo or Transcom cannot be in all those places at the same time. And so if there is not a stay that is issued, then we will be facing this exact procedural issue in ten different states in twenty different proceedings.

And we would very much appreciate this Authority's and other authorities' patience with our ability to meet all of those schedules.

CHAIRMAN HILL: Well, maybe we need to hit this thing hard and fast, and that way you won't have to worry about it. That way we can get this thing done by Christmas, and we'll be finished with it. I mean, you know, that way you don't have to worry about it dragging on.

I mean, you're very articulate, and I appreciate that, and I'm looking forward to your

argument. I really am looking forward to having the meat of the brief. And I'm looking forward to that from the others, too, so I don't sound like I'm too prejudiced at this point.

But, see, coming from the perspective of sitting as Chair of the TRA, I don't care about Texas, and I don't care about Virginia, and I don't care about Kentucky. And I don't care about anybody else, because I took an oath to take care of the people of Tennessee. I didn't take an oath to take care of you. I took an oath to take care of the people of Tennessee. Now, since you operate in the state of Tennessee, my oath includes you, and I'm to treat you fairly, respectfully, professionally, and I will do that. But I don't have to worry about what else you have to do.

If I have an employee who has problems, I'll see what I can do to help with their schedule, but they still have to work. They still have to be on the job, and they still have to do their work.

If you've got lots of babies that you have to take care of, and apparently you've got twenty of them, you know, you're going to have to figure out what nannies you can pick up to help you with that while it gets done.

So, you know, I'm not trying to be flippant. I'm not trying to be mean. All I'm saying is that I understand that. And we'll be as kind as we can be, but we want to get this thing taken care of so that it's resolved in whatever fashion it's resolved. And I have no prejudice there. I really don't.

So whatever way it's resolved, we need to get it resolved as quickly as we can.

Now, you have not practiced before us, I don't guess, before. Have you?

MR. THOMAS: Not before. No, I have not.

CHAIRMAN HILL: Yeah. Well -- and some of these other folks are new to us too. But let me -- let me just tell you, I'm as transparent as glass. Okay? If you make me mad, I'll tell you. If I think you're doing good, I'll tell you that. But it won't be from a prejudicial standpoint. It'll be just from a personal viewpoint.

But the one thing I like is truth. The one thing I won't tolerate is lying to this Bench in any fashion, whether it's to the whole group or to myself. And I'm not suggesting that you would do that. I'm just telling you that's how I operate.

You're from Texas; right?

MR. THOMAS: Yes.

CHAIRMAN HILL: So being from Texas, you're used to straight-shooting, and I expect that that's what we're going to be getting.

We don't want to obfuscate. We don't want to create a problem. We want to try to get things going as best we can, giving everybody a fair deal. And that's -- that's what we're here for. I appreciate what you've got to say. I appreciate what the other counsel has had to say on the other side of it.

I'd like to take about five minutes, if I could, and talk to our General Counsel, and maybe I've got some ideas after that. I've got a couple of questions for him.

And thank you for your comments.

MR. THOMAS: Thank you.

CHAIRMAN HILL: I appreciate that, from a layperson.

Five-minute break.

(Recess taken from 2:35 p.m. to 2:53 p.m.)

CHAIRMAN HILL: All right. If we could have your attention for just a few more minutes. And I'll ask my General Counsel to interrupt me if I miss something. Okay? I don't mind that, Jon.

All right. First of all, thank you for your willingness to stay at it. I appreciate that. I know we've got at least one counsel that's got to get to a plane, maybe some others. So we will attempt to wrap this up pretty quickly.

All right. We reiterate that the complainants are to reply on the motion to dismiss by December 1st. Then there will be a response available to you, rebuttal, if you will, for Halo, by December 8th.

On the motion to amend, Halo's responses December 1st, and anything that Concord, et al., have to say will be back to us by the 8th.

On the 12th, we will have a status conference. We will hopefully set up, at that point, a procedural schedule, if it is necessary. We'll see what rulings can be made, if any, on that date. Also, I would encourage both parties to be as beefy as possible when it comes to the information, factual information that you're giving us. Give us as much information as you possibly can. That gives you an opportunity to let us see it before it's going to be seen perhaps in direct testimony and that sort of thing, but it helps us understand better how we are to proceed, if we are to proceed. Okay?

In other words, we're not asking you to write a Ph.D. dissertation, and I don't want a lot of words just to have words, but we do want the facts. And if you've got facts for us, let us have them. We don't want to be blind-sided by facts later. We want the facts now, as you weave them in to what you're doing, realizing this is not direct testimony yet. I understand that. But you help me if I have all the facts. Okay?

General Counsel, that's basically the way we're looking at it; is that correct?

MR. WIKE: I think that's correct, Chairman.

CHAIRMAN HILL: All right. Your contact will be Tabatha Blackwell of my office. Tabatha is my senior policy advisor. She will be your contact in my office. My direct office number is (615)741-4648. And Tabatha is at that office number as well, so you can get us there. My administrative assistant, his name is Jimmy Hughes. He will be very kind to you. And if we're not in the office, he'll be the one that you talk to. Okay?

All right. Is there anything else we need to do on Halo and Transcom 1?

MR. MCCOLLOUGH: Mr. Chairman, may I

ask one clarifying question?

CHAIRMAN HILL: Certainly, you may.

MR. MCCOLLOUGH: I'm a little bit confused on --

CHAIRMAN HILL: That's okay.

MR. MCCOLLOUGH: -- which specific --

CHAIRMAN HILL: You're not -- are you from here?

MR. MCCOLLOUGH: No, sir, I'm not.

CHAIRMAN HILL: Okay. I can imagine being confused. That's okay. Go ahead.

MR. MCCOLLOUGH: Well, I'm sure if I stay here long enough, I will soon not any longer be confused.

CHAIRMAN HILL: Okay.

MR. MCCOLLOUGH: TDS did file its response to Transcom's motion to dismiss in Halo 1, and I'm just not certain whether you want Transcom's reply to their response on December 1st or December 8th. And if I may lobby, I would prefer to do it on the 8th, at the --

CHAIRMAN HILL: December 8th would be fine.

MR. MCCOLLOUGH: Thank you.

CHAIRMAN HILL: Yeah, that would be

fine. We don't want to leave you confused. All right.

The Halo 1 team, on the Concord side, do you have any questions or things we need to think about?

MR. KENNARD: I think we're good, Your Honor. Thank you.

CHAIRMAN HILL: All right. I don't want you to miss your plane.

MR. KENNARD: I appreciate that.

CHAIRMAN HILL: Yeah. Okay. Good. If you're finished, you can go. I know these guys are going to stay on the hot seat for a while. We're going to talk Halo 2 here for just a moment.

(Proceedings adjourned at 2:58 p.m.)

REPORTER'S CERTIFICATE

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

I, Patricia W. Smith, Licensed Court Reporter, Registered Professional Reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing proceedings at the time and place set forth in the caption thereof; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I FURTHER CERTIFY that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and seal of office this 23rd day of November, 2011.

PATRICIA W. SMITH, LICENSED COURT REPORTER, REGISTERED PROFESSIONAL REPORTER, CERTIFIED COURT REPORTER, and NOTARY PUBLIC FOR THE STATE OF TENNESSEE

LCR No. 164, Expires 6/30/12

Notary Commission Expires 5/8/12

EOD
10/26/2011

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

In re:	§	Chapter 11
	§	
Halo Wireless, Inc.,	§	Case No. 11-42464-btr-11
	§	
Debtor.	§	

ORDER GRANTING MOTION OF THE AT&T COMPANIES TO DETERMINE AUTOMATIC STAY INAPPLICABLE AND FOR RELIEF FROM THE AUTOMATIC STAY [DKT. NO. 13]

Upon consideration of the *Motion of the AT&T Companies to Determine Automatic Stay Inapplicable and For Relief from the Automatic Stay* [Dkt. No. 13] (the "AT&T Motion")[1], and it appearing that proper notice of the AT&T Motion has been given to all necessary parties; and the Court, having considered the evidence and argument of counsel at the hearing on the AT&T Motion (the "Hearing"), and having made findings of fact and conclusions of law on the record of the Hearing which are incorporated herein for all purposes; it is therefore:

ORDERED that the AT&T Motion is GRANTED, but only as set forth hereinafter; and it is further

ORDERED that, pursuant to 11 U.S.C. §362(b)(4), the automatic stay imposed by 11 U.S.C. § 362 (the "Automatic Stay") is not applicable to currently pending State Commission Proceedings[2], except as otherwise set forth herein; and it is further

ORDERED that, any regulatory proceedings in respect of the matters described in the AT&T Motion, including the State Commission Proceedings, may be advanced to a conclusion

[1] The Court contemporaneously is entering separate orders granting *The Texas and Missouri Companies' Motion to Determine Automatic Stay Inapplicable and in the Alternative, for Relief From Same* [Dkt. No. 31] and the *Motion to Determine the Automatic Stay is Not Applicable, or Alternatively, to Lift the Automatic Stay Without Waiver of 30-Day Hearing Requirement* [Dkt. No. 44] filed by TDS Telecommunications Corporation.

[2] All capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Motion.

Exhibit J

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.