BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF MISSOURI

ALMA COMMUNICATIONS COMPANY D/B/A ALMA TELEPHONE COMPANY; CHARITON VALLEY TELEPHONE CORPORATION; CHARITON VALLEY TELECOM CORPORATION; CHOCTAW TELEPHONE COMPANY; MID-MISSOURI TELEPHONE COMPANY, A CORPORATE DIVISION OF OTELCO, INC.; AND MOKAN DIAL, INC.,	§	CASE NO. TO-2012-0035
COMPLAINANTS	§	
v.	§	
HALO WIRELESS, INC. and SOUTHWESTERN BELL TELEPHONE COMPANY, D/B/A AT&T MISSOURI	§	
RESPONDENTS	§	

HALO WIRELESS, INC.'S RESPONSE TO COMPLAINANTS' APPLICATION FOR REJECTION OF PORTIONS OF AN INTERCONNECTION AGREEMENT

COMES NOW Halo Wireless, Inc. ("Halo"), by and through undersigned counsel, and submits to the Missouri Public Service Commission ("Commission" or "PSC") the following response to the Complainants' Application for Rejection of Portions of an Interconnection Agreement ("Application"):

I. Introduction

The Complainants cannot bring the present Application to reject the interconnection agreement ("ICA") between Halo and Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T") because the agreement is already approved and in effect. Section 252(e)(2)(A) of the Communications Act, which the Complainants cite as the legal basis for their Application, relates only to the 90-day review process of § 252(e)(1), which has long since

passed.[1] Section 252(e)(2)(A) is not a vehicle for appealing the approval of an ICA and it does not authorize the Commission to rescind an approval that it has already ordered. Instead, it is § 252(e)(6) that authorizes aggrieved parties to challenge the approval of an ICA, but that subsection vests exclusive jurisdiction with the federal courts, not state commissions. The Complainants one and only opportunity to seek the rejection of the Halo-AT&T ICA at the PSC was during the § 252(e)(1) review period, before the agreement was approved, but they failed to do so. They cannot now turn back the clock, ask the Commission to resurrect the review process, and request that an existing agreement be rejected. The PSC has already ruled that the Halo-AT&T ICA does not discriminate against the Complainants and that it is not inconsistent with the public interest, convenience and necessity. The Application is without merit and must be denied.

II. The Complainants cannot appeal an order approving an ICA under § 252(e)(2)(A). Instead, § 252(e)(6) authorizes appeals of ICA approvals in the federal courts.

On August 19, 2010, this Commission issued an order approving the Halo-AT&T ICA that the Complainants now request be rejected.[2] In that order, the PSC held that, "[b]ased upon its review of the Agreement between AT&T Missouri and Halo and its findings of fact, the Commission concludes that the Agreement is neither discriminatory nor inconsistent with the public interest and shall be approved."[3] That order was the culmination of the § 252(e)(1)-(2) statutory review process, in which Commission staff carefully examined and evaluated the proposed agreement. Staff then recommended approval and, after further consideration by a PSC regulatory law judge, the ICA was ultimately ordered approved.

[1] 47 U.S.C. § 252(e)(1)-(2).
[2] *See* Order Approving Interconnection Agreement, File No. IK-2010-0384, Missouri Public Service Commission, (Aug. 19, 2010).
[3] *Id* at p. 3.

In bringing this Application to reject all or portions of the Halo-AT&T ICA, the Complainants are functionally attempting to appeal the Commission's August 19, 2010 order. The Application implicitly asks the PSC to overturn that order and find that it erred when it held that the ICA is neither discriminatory nor inconsistent with the public interest. The Act, however, does not authorize the Complainants to appeal an order approving an ICA at the Commission.

The Complainants cite 47 U.S.C. § 252(e)(2)(A) as the basis for the Application and the grounds for rejecting the Halo-AT&T ICA.[4] They contend that the agreement's standard transiting terms (and transit in general) discriminate against other carriers that are indirectly interconnected with the originating carrier and conflict with the public interest.[5] While § 252(e)(2)(A) does authorize the Commission to reject a negotiated ICA if it discriminates against third party carriers or is inconsistent with the public interest, this subsection only applies to the 90-day statutory review process of § 252(e)(1).[6] A plain reading of these consecutive subsections makes clear that § 252(e)(2)(A) merely establishes the two grounds for rejecting an ICA that is under consideration for approval. This is confirmed by PSC Rule 4 CSR 240-36.050(4), which cites § 252(e)(2)(B) (the equivalent of § 252(e)(2)(A) for arbitrated ICAs), as the Commission's standard of review when approving agreements.

[4] *See* Application at ¶ 32.
[5] *See id* at ¶¶ 27-31.
[6] *See MCI Telecomms. Corp. v. BellSouth Telcomms., Inc.*, 1997 U.S. Dist. LEXIS 23883, 3-4 (N.D. Fla. Nov. 20, 1997) ("The Act provides further that any interconnection agreement adopted by negotiation or arbitration must be submitted to the state regulatory authority for approval. 47 U.S.C. § 252(e)(1). The Act provides standards to be applied and procedures to be followed by the state regulatory authority in determining whether to approve any such agreement. See, e.g., 47 U.S.C. § 252(e)(2) & (4)."); *Verizon N.Y., Inc. v. Covad Communs. Co.*, 2006 U.S. Dist. LEXIS 7414 (N.D.N.Y Feb. 3, 2006) ("An agreement reached through arbitration [or negotiation] must then be submitted for final approval by the State commission, which can reject it for failure to comply with the terms of section 251 or FCC-enacted regulations. 47 U.S.C. § 252(e)(1)-(2).").

The Halo-AT&T ICA, however, has already successfully completed the §252(e)(1)-(2) approval process and has been in effect for well over a year. This was a public process that allowed the Complainants the opportunity to oppose the agreement and argue to the Commission why they feel it should be rejected. The Complainants failed to avail themselves of this right. The Commission's staff and regulatory law judge, however, duly considered the effect of the ICA on third party carriers and the public interest when it was determined that the agreement should be approved.

Section 252(e)(2)(A) does not authorize challenges to existing ICAs, nor does it grant state commissions the authority to rescind previous decisions to approve or reject an agreement. In any event, under § 252(e)(4), the PSC was divested of its ability to reject the ICA 90 days after submission.[7] This statutory deadline would be rendered meaningless if, as the Complainants contend, the Commission could go back in time and reopen the § 252(e)(1)-(2) process in order to hear an appeal that could have been brought as an opposition when the ICA was under review.

Instead, it is § 252(e)(6) that establishes the procedure to challenge a prior Commission order approving an ICA. Under this subsection, "any party aggrieved by such a determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." This process of state commission approval or rejection and federal court review of such decisions is clearly

[7] 47 U.S.C. § 252(e)(4) ("If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved.").

delineated by the Act and well-settled.[8] One federal court concisely explained this approval and review process as such:

> The Act instructs that agreements adopted through arbitration or negotiation be submitted to the state commission for review, and the commission may then approve the agreement or reject it if it is inconsistent with the Act. Id. § 252(e)(1)-(2). If the commission fails to act, the agreement will be deemed approved. Id. § 252(e)(4). Once a state commission has approved or rejected an interconnection agreement, 'any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section.' Id. § 252(e)(6).[9]

Making absolutely clear that the federal courts have jurisdiction over an appeal of a PSC order approving an ICA, § 252(e)(6) was specifically incorporated into the Commission's rules at 4 CSR 240-36.050(6).

The federal courts' jurisdiction over § 252(e)(6) actions is exclusive and this Commission cannot even entertain the Complainants' Application.[10] Jurisdiction was purposefully conferred on the federal courts by the Act in order to "facilitate more uniform interpretation of the federal

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[8] *See e.g., GTE South v. Morrison*, 957 F. Supp. 800, 804 (E.D. Va. 1997) ("Section 252 sets out a four-stage approach to developing an interconnection agreement: First, voluntary negotiations for the first 135 days, § 252(a); Second, arbitration of the unresolved issues commencing during the 135th to 160th day and concluded by the State commission within nine months of the first interconnection agreement request, § 252(b); Third, approval or rejection by the State commission, § 252(e)(1)-(4); and Fourth, review of State commission actions, § 252(e)(6)."); *Verizon Md., Inc. v. Core Communs., Inc.*, 631 F. Supp. 2d 690, 692 (D. Md. 2009) ("A proposed ICA must then be submitted to the state commission for its review and approval. Id. § 252(e)(1)-(2). Any party aggrieved by a 'determination' of a state commission under Section 252 may bring an action in the appropriate federal district court 'to determine whether the agreement or statement meets the requirements' of Sections 251 and 252. Id. § 252(e)(6)."); *AT&T Communs. of the Midwest, Inc. v. Contel of Minn., Inc.*, 1998 U.S. Dist. LEXIS 22996 (D. Minn. Apr. 30, 1998); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 633 (S.D. Ind. 1998).

[9] *See AT&T Communs., Inc. v. Michigan Bell Tel. Co.*, 60 F. Supp. 2d 636, 638 (E.D. Mich. 1998).

[10] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 803-804 (8th Cir. 1997) ("[S]ubsection 252(e)(6) directly provides for federal district court review of state commission determinations when parties wish to challenge such determinations. 47 U.S.C.A. § 252(e)(6). […] Although the terms of subsection 252(e)(6) do not explicitly state that federal district court review is a party's 'exclusive' remedy, courts traditionally presume that such special statutory review procedures are intended to be the exclusive means of review. We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act."); *Wisconsin Bell v. PSC*, 27 F. Supp. 2d 1149, 1154 (W.D. Wis. 1998) ("Under the Act, federal judicial review is the sole remedy to correct errors in determinations related to interconnection agreements."); *AT&T Communs., Inc. v. Michigan Bell Tel. Co.*, 60 F. Supp. 2d 636, 640 (E.D. Mich. 1998) ("There is 'no state forum available to vindicate' a telecommunication carrier's claim that an interconnection agreement violates the Act. See 47 U.S.C. § 252(e)(4)."); *AT&T Communs. of the Midwest, Inc. v. Contel of Minn., Inc.*, 1998 U.S. Dist. LEXIS 22996 (D. Minn. Apr. 30, 1998); *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 297 (4th Cir. Md. 2001); *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 302 (4th Cir. Md. 2001); *MCI Telecomm. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 512 (3d Cir. Pa. 2001).

statutory scheme."[11] In so doing, Congress "conditioned state participation in the interconnection agreement negotiation, arbitration and approval process on consent to federal judicial review of the state's participatory actions."[12] The PSC has no power to overturn or rescind its approval of the Halo-AT&T ICA and any action that seeks to do so must be brought in federal court.

III. The Complainants' allegations are baseless and the Application must be denied.

The Application has made a number of allegations of misconduct by Halo, all of which Halo denies in their entirety. In the first instance, the agreement's transiting provisions are standard terms commonly found in many ICAs. Transit service is entirely lawful and has not been found by any competent tribunal to be discriminatory or inconsistent with the public interest. Indirect interconnection does not disadvantage the Complainants or place them in an inferior position in any way.[13] If they so choose, the FCC's rules authorize the Complainants to request interconnection with Halo, something they have thus far refused to correctly do.[14] That is the proper procedure for addressing the Complainants' apparent concerns, not requesting that the PSC reject industry-standard transiting terms in an already-approved ICA.

The Complainants allege that Halo has breached Section 3.1.3 of the ICA by not requesting interconnection with them prior to originating traffic to their networks.[15] Section 3.1.3, however, is permissive and it does not require that Halo always first negotiate or arbitrate an ICA prior to sending any traffic to a third party carrier. The Complainants' argument, if accepted, would mean that transit service and indirect interconnection is prohibited by the

[11] *See In the Matter of Procedures for Arbitrations Conducted Pursuant to Section 252(e)(5) of the Communications Act of 1934, as amended*, 16 FCC Rcd 6231, 6234 (FCC 2001)
[12] *See US West Communs., Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997).
[13] *See* Application at ¶ 28.
[14] *See* 47 C.F.R. § 20.11(e).
[15] *See* Application at ¶¶ 22-24.

agreement because this service is only utilized with carriers for which Halo does not have an ICA. This position is plainly contradicted by the fact that the ICA contains rates and terms for transit service, all of which would be meaningless if Section 3.1.3 forbids transit.[16] Instead, Section 3.1.3 clearly states that Halo is not required to obtain ICAs with third party carriers because it permits Halo to choose to utilize transit service so long as it indemnifies AT&T. In any event, the Complainants are neither parties nor beneficiaries to the ICA and they cannot bring an action seeking its enforcement.[17]

The Complainants have additionally alleged that Halo is involved in an access avoidance scheme when it originates calls to their networks via AT&T.[18] This is patently untrue as Halo's operations are entirely lawful. If the Complainants truly believe that Halo is operating outside the law and improperly acquiring their access revenues, then the law provides various avenues for redress.[19] The Complainants cannot bring an application to reject an existing ICA to the PSC for any reason and they certainly cannot do so to disguise a claim for violating the Act.

IV. Conclusion

The Act allowed the Complainants an opportunity to challenge the Halo-AT&T ICA during the approval process, which they failed to do. This Commission duly reviewed the agreement and, in approving the ICA, ruled that it is neither discriminatory nor inconsistent with the public interest, convenience and necessity. Section 252(e)(2)(A) does not allow the Complainants to resurrect the review process and request that an existing agreement be rejected. The PSC has not been granted the jurisdiction to hear an appeal of its order or the authority to rescind its approval. Instead, § 252(e)(6) establishes the procedure for challenging the

[16] *See e.g.* Interconnection Agreement at §§ 3.1.3, 3.3.1, and Pricing Appendix § 1.0.
[17] *See id* at § 18.5 ("This Agreement shall not provide any non-party with any remedy, claim, cause of action or other right.").
[18] *See* Application at ¶ 25.
[19] *See e.g.* 47 U.S.C. § 208.

lawfulness of an existing ICA, but that subsection confers jurisdiction with the federal courts. The present Application is entirely without merit and should be dismissed for good cause under Commission Rule 4 CSR 240-2.116(4).

WHEREFORE, for the foregoing reasons, Halo respectfully requests that the Commission issue an order denying and dismissing the Complainants' Application for Rejection of Portions of an Interconnection Agreement.

Respectfully submitted,

/s/ Troy P. Majoue
STEVEN H. THOMAS
(pro hac vice admission)
Texas State Bar No. 19868890
TROY P. MAJOUE
(pro hac vice admission)
Texas State Bar No. 24067738
MCGUIRE, CRADDOCK & STROTHER, P.C.
2501 N. Harwood, Suite 1800
Dallas, TX 75201
Telephone: (214) 954-6800
Facsimile: (214) 954-6850

LOUIS A. HUBER, III
Missouri State Bar No. 28447
SCHLEE, HUBER, MCMULLEN & KRAUSE, P.C.
4050 Pennsylvania, Suite 300
P.O. Box 32430
Kansas City, MO 64171-5430
Telephone: (816) 931-3500
Facsimile: (816) 931-3553

W. SCOTT MCCOLLOUGH
(pro hac vice admission)
Texas State Bar No. 13434100
MCCOLLOUGH|HENRY, P.C.
1250 S. Capital of Texas Hwy, Bldg 2-235
West Lake Hills, TX 78746
Telephone: (512) 888-1112
Facsimile: (512) 692-2522

Attorneys for Halo Wireless, Inc.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been mailed via U.S. Mail, hand-delivered, transmitted by facsimile or by electronic mail to the following counsel of record on this 13th day of January, 2012:

Craig S. Johnson
Johnson & Sporleder, LLP
304 E. High St., Suite 200
P.O. Box 1670
Jefferson City, Missouri 65102

Leo J. Bub, General Attorney
AT&T Missouri
One AT&T Center, Room 3518
St. Louis, Mo 63101

General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

/s/ Troy P. Majoue
TROY P. MAJOUE