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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE 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. Complainants, vs. Halo Wireless, Inc. Respondent.	)	Case No. IC-2011-0385

AND

BPS Telephone Company, Citizens Telephone Company of Higginsville, Mo., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Fidelity Communications Services I, Inc., Fidelity Communications Services II, Inc., Fidelity Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation Green Hills Telephone Corporation, Green Hills Telecommunications Services, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, K.L.M. Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, Mark Twain Rural Telephone Company, Mark Twain Communications Company, McDonald County Telephone Company, Miller Telephone Company, New Florence Telephone Company, New London Telephone Company, Northeast Missouri Rural Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company, Complainants, v. Halo Wireless, Inc., Respondent.	)	Case No. TC-2011-0404

MOTION TO DISMISS

Halo Wireless, Inc. ("Halo"), for the sole purpose of bringing to the attention of this tribunal that it completely lacks jurisdiction over the subject matter and over the person of Halo, hereby provides its Motion to Dismiss. Halo is not otherwise appearing, and is not in any manner submitting to or acknowledging this tribunal's jurisdiction or powers. As a result of this Motion, the commission must suspend all consideration of the merits and any and all procedural orders pending its threshold decision on jurisdiction.

Nothing in this Motion to Dismiss is intended to address, and shall not be interpreted to address by way of admission or denial, any of the complainants' factual contentions or contentions on the merits. The commission cannot and should not reach any of these asserted facts or contentions and cannot take up the substantive merits. No answer is or can be required. The commission must find that its only permissible course of action is to dismiss for want of jurisdiction.

A. Introduction

1. Halo will refer to the two above-styled complaints by reference to the first complainant in each group. For example, the complainants in Case No. IC-2011-0385 are the "Alma LECs" and the complainants in Case No. TC-2011-0404 are the "BPS LECs."

2. The Alma LECs and the BPS LECs essentially bring the same claims and request the same relief. Both groups request that the commission issue an order "finding and concluding" a host of things beyond the commission's jurisdiction and requesting relief the commission cannot grant.

Complainants' Request for "investigation"

3. The first request in complainants' prayer is that "the Commission utilize this docket to investigate the activities of Halo ..."

4. This commission lacks the jurisdiction and power to "investigate the activities of Halo." Halo is operating pursuant to *federal* authorizations. States have no power or authority to "investigate" the activities of an entity operating under a federal license. The Missouri Supreme Court has expressly adopted the ruling of the U.S. Supreme Court on this very topic. *Holland Industries, Inc. v. Division of Transportation of the State of Missouri*, 763 S.W.2d 666, 669 (Mo. 1989), adopting and imposing U.S. Supreme Court decision in *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 3 L. Ed. 2d 717, 79 S. Ct. 714 (1959).[1] As will be explained below, state commissions completely lack the jurisdiction and power to construe the scope of a federal certificate or to attempt to determine in the first instance whether an entity's activities fall within, and are authorized by, the federal certificate. The commission lacks jurisdiction; it cannot grant the relief that has been requested.

Request A

5. Request "A" seeks a finding that (quoting from BPS complaint) "Halo, by placing traffic on the LEC-to-LEC network for termination to Complainants via Feature Group C Protocol, is subject to the provisions of the Missouri ERE Rules, 4 CSR 240-29.010 et seq."[2]

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[1] "The ICC must be given the first opportunity to decide whether there is a connection between Holland's interstate service and its intrastate service, and whether its operations are consistent with national transportation policy. The proper venue for redress of MDOT's grievance is in a hearing before 'the authority issuing the certificate . . . upon whom Congress has placed the responsibility of action.' *Service Storage*, 359 U.S. at 177. The circuit court erred in its judgment affirming the issuance of the cease and desist order. ... The judgment is reversed and the cease and desist order is vacated to permit further proceedings consistent with this opinion."

[2] Halo is not either admitting or denying any of the alleged "facts" but must note that Request A assumes a host of facts that are contradicted by the complainants' own pleadings, which are also internally contradictory. According to the complaints, Halo established "wireless" interconnection with AT&T at AT&T's wireless tandems within certain LATAs, and that is how the complainants are able to receive "wireless" billing records from AT&T. Alma Complaint ¶ 21; BPS Complaint ¶ 41. Type 2 "wireless" interconnection is not "Feature Group C protocol" or

6. This requested finding and order is a clear assertion that Halo's operations under its federal certificate somehow subjects Halo to this commission's regulatory authority. The complainants seek a state-level order requiring Halo to comply with state-level rules (the "ERE" rules) concerning routing and signaling that claimants appear to assert differ from binding federal rules. The complainants also interpret the ERE rules to require a carrier to pay compensation, even when federal law provides for no compensation, and to require a carrier to waive its right to *not* be a requesting carrier in order to prevent blocking.

7. The commission lacks jurisdiction to impose rules at the state level that conflict with binding federal rules. The commission has been preempted on account of express, field and conflict preemption. The commission completely lacks any power to grant the requested relief.

Request B

8. Request B seeks a finding that "Halo, by placing traffic on the LEC-to-LEC network on behalf of another carrier or carriers, was either a 'Traffic Aggregator' for purposes of the ERE Rules, 4 CSR 240-29.01 0(3) and (38); or was a 'Transiting Carrier' for purposes of the ERE Rule, 4 CSR 240-29.010(38), (39) and (40)."

9. This requested finding and order attempts to have the commission characterize Halo's regulatory classification as something other than a CMRS provider. It is a clear collateral attack on Halo's federal authorization, because it asserts that Halo and its traffic is "not CMRS" but is instead "aggregator," "transiting carrier" or "IXC." As will be shown below, state commissions cannot assume the power to interpret or act in derogation of an entity's federal

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interconnection, nor is it "Feature Group D." The hand-off from Halo to AT&T does not occur within the "LEC-LEC network." It may well be that *AT&T* placed Halo's traffic on the "LEC-LEC network" but the complaints themselves show that Halo did not place the traffic on the "LEC-LEC network." The complainants also need to make up their mind whether to wrongly assert Halo's traffic is "Feature Group C" or to wrongly assert that Halo's traffic is "Feature Group D." It cannot be both. If and when it may become necessary when a forum with jurisdiction handles these disputes, the facts will reveal it is actually not "Feature Group C, "Feature Group D" or any other kind of switched access type feature group.

certificate, and only the FCC can decide whether Halo's operations comport with its federal authorizations. This commission cannot act until the FCC holds that Halo can be subjected to a different regulatory classification by a state commission. The commission completely lacks any power to grant the requested relief.

Request C

10. Request C seeks a finding that "Halo, by placing wireline originated traffic, originated by or with the use of FGD Protocol,[3] on the LEC-to-LEC network for termination using FGC Protocol is in violation of the ERE Rule, 4 CSR 240-29.030(3)."

11. The complaints characterize Halo's traffic as "wireline originated" and then attempt to have the commission subject Halo to the ERE rules related to "wireline" traffic. Once again, the assertion is that Halo's traffic is "not CMRS" because it is "not wireless" and is instead "wireline." As will be shown below, state commissions cannot assume the power to interpret or act in derogation of an entity's federal certificate, and only the FCC can decide whether Halo's operations comport with its federal authorizations. This commission cannot act until the FCC holds that Halo can be subjected to a different regulatory classification by a state commission. The commission completely lacks any power to grant the requested relief.

Request D

12. Request D seeks a finding that "Halo, by placing wireline originated traffic, originated in one LATA and terminating to a wireline telephone of Complainants within another LATA, on the LEC-to-LEC network utilizing FGC Protocol, as opposed to traversing an

[3] Again, Halo is not admitting or denying any asserted facts, but the premise of C is inconsistent with the premise of "A" and "B." "A" and "B" assert that Halo is "originating" through "Feature Group C." C asserts that Halo is "originating" through Feature Group D. Further, both complaints are wholly inconsistent in their use of "originating" and "originated."

interexchange carrier point of presence utilizing FGD Protocol is in violation of the ERE Rule, 4 CSR 240-29.010(1)."

13. Once again, the complainants seek a state-level ruling that Halo is not acting within its FCC license, but is instead a "wireline" carrier. They ask the commission to treat Halo as if it is an "IXC" providing "telephone toll" rather than a CMRS company providing "wireless" CMRS-based "telephone exchange service" and/or "exchange access" and "personal communications service." The complaints are also essentially asking the commission to set aside or look through the FCC's "administrative purposes" rule that uses the wireless base station or the POI as the originating point to discern whether a particular call is "intraMTA." Finally, the complaints are asking the commission to overturn or create an exception to the FCC's binding precedent and rules concerning when a CMRS provider can properly be characterized and treated as an "IXC."

14. As will be shown below, state commissions cannot assume the power to interpret or act in derogation of an entity's federal certificate, and only the FCC can decide whether Halo's operations comport with its federal authorizations. This commission cannot act until the FCC holds that Halo can be subjected to a different regulatory classification by a state commission. This commission lacks the power to take any action that has the effect of prohibiting Halo's personal wireless service. *See* 47 U.S.C. § 332(c)(7)(B)(i)(II). The commission completely lacks any power to grant the requested relief.

Request E

15. Request E seeks a finding that "Halo has failed to comply with the provisions of its interconnection agreement with AT&T requiring Halo to enter agreements with Complainants prior to sending traffic to AT&T for termination to Complainants, 4 CSR 240-2.030(6)."

16. This part of the complaint seeks an interpretation of the ICA between Halo and AT&T, and then implicitly assumes that the complainants have standing to raise claims regarding asserted breaches of that ICA. The complainants cannot demonstrate they have standing under that contract as third party beneficiaries. They cannot claim any rights under the ICA. The commission lacks subject matter jurisdiction to interpret or enforce contracts in any event.[4]

17. The complainants have no contract with Halo. More important, they are attempting to overturn a binding FCC rule and decision that holds there is no federal obligation on the part of a CMRS provider to make contractual arrangements with an ILEC before using indirect interconnection to send traffic to that ILEC. As will be shown below, *federal* law pursuant to the *T-Mobile Order*[5] and the rules promulgated in that order provides that unless and until there is a contract traffic can and must flow, but "no compensation" is due until an ILEC makes a "request for interconnection" that comports with 47 C.F.R. § 20.11(e). The commission completely lacks any power to grant the requested relief.

Request F

18. Request F seeks a finding that "Halo's claim it terminated the traffic in question to Complainants pursuant to a 'de facto' bill and keep arrangement is not proper or lawful, as

[4] The commission lacks subject matter jurisdiction over the request by non-parties to the contract for an interpretation of and the attempt to obtain relief concerning the AT&T ICA. *See* Order Denying Motion to Dismiss and Setting Evidentiary Hearing, *Deborah L. Lollar v. AmerenUE*, Case No. EC-2004-0598 (August 5, 2004), 2004 WL 1842496 (Mo.P.S.C.) ["The Commission is without authority to award money to Complainant, or to alter, construe or enforce any contract. The Commission cannot do equity," *citing State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. banc 1979); *State ex rel. City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. banc 1958); *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, transferred 176 S.W.2d 533 (Mo. 1943); *St. ex rel. Kansas City Power & Light Co. v. Buzard*, 168 S.W.2d 1044 (Mo. 1943); *May Department Stores Co. v. Union Electric Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, (Mo. 1937); *Kansas City Power & Light Co. v. Midland Realty Co.*, 93 S.W.2d 954, 959 (Mo. 1936); *Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940)].

[5] *See* Declaratory Ruling and Report and Order, *In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket 01-92, FCC 05-42, note 57 20 FCC Rcd 4855 (2005) ("*T-Mobile Order*"). ["Under the amended rules, however, in the absence of a request for an interconnection agreement, no compensation is owed for termination."].

there was no negotiated or arbitrated agreement between Halo and any Complainant, that there was no balance of traffic upon which a 'bill and keep' arrangement must be predicated, and that no such arrangement has been approved by this Commission as required by 47 USC 252(e)."

19. Request F is a plain and bald request that the commission overrule the FCC's *T-Mobile Order* and the federal rules (47 C.F.R. § 20.11(d) and (e)) promulgated in that order. The commission cannot grant this relief, and thus does not have jurisdiction.

Request G

20. Request G seeks a finding that "Halo has violated the ERE Rule by stripping, altering, moving, masking, or failing to deliver correct originating caller identification information to Complainants, 4 CSR 240-29.040(5) and (6)."[6]

21. The commission lacks jurisdiction because it cannot grant the requested relief. If and to the extent 4 CSR 240-29.040(5) and (6) are inconsistent with the FCC's current signaling rules, they are pre-empted. This is particularly so if and to the extent the rule is then used to change binding federal rules relating to compensation. *See Verizon Wireless (VAW) LLC v. Kolbeck*, 529 F. Supp. 2d 1081, 1091-1092, 1094-1097 (D.S.D. 2007), *see especially* 1096 ["A

[6] Halo is not answering, and so it neither admits nor denies any part of the complaints. Halo must observe, however, that the complainants assertions that Halo is not signaling or is altering SS7 CPN are contradicted by their own pleading. Alma Complaint ¶ 29 makes it clear that Halo is, in fact, still sending CPN without alteration, because the BPS LECs are seeing it in their "switch records." BPS complaint ¶ 52 is technically incoherent, because it confuses signaling with switch records. Alma Complaint ¶ 24 commits the same error. The complainants must be receiving CPN because otherwise they could not make the assertion the call is "wireline originated" by examining the calling party numbers they use to make that assertion.

When a forum with jurisdiction ultimately receives evidence relating to this dispute the facts will demonstrate that Halo always did and still does religiously populate the SS7 CPN parameter with the information that should be there and does not strip, alter, move, mask or fail to deliver CPN. The complainants are actually upset that in mid-February 2011 Halo began to ***also*** populate the SS7 "Charge Number" parameter with the billing telephone number of the "financially responsible party" – Halo's customer. This practice is perfectly in accord with the definition of "originating caller identification" in 4 CSR 240-29.020 and the requirement that this information be signaled in 4 CSR 240-29.040, even though those rules cannot be applied in this case. The practice is also perfectly in accord with the FCC's proposed "phantom traffic rules" and "Truth and Caller ID" rules. The complainants' characterization of Halo's policy of providing *both* CPN and Charge Number information without alteration to somehow constitute changing or removing CPN information is purposefully designed to put Halo in a false light. This commission cannot impose signaling rules that conflict with the FCC's rules, and it cannot punish Halo for complying with the FCC's present and proposed rules.

state law authorizing a LEC to bill for call termination in the absence of an interconnection agreement or a formal request for one would directly conflict with, and is preempted by, the FCC's *T-Mobile Order*. The Legislature cannot create an obligation for payment when no obligation exists because the parties have not executed or requested an interconnection agreement."] The commission completely lacks any power to grant the requested relief.

Request H

22. The BPS LECs' Request H seeks a finding "That by requiring Complainants to specifically request interconnection, as well as request Halo to engage in arbitration before the Missouri Commission, Halo has erected unwarranted, unnecessary and potentially prejudicial barriers to the establishment of an interconnection and compensation arrangement (pursuant to Sections 251 and 252 of the Act) and has effectively refused to compensate Complainants for the traffic Halo is sending to them for termination."

23. This is a bald request that the commission "find" that the FCC was wrong in *T-Mobile*. *T-Mobile* is binding authority. Even by the complainants' own admission Halo has merely required that the ILEC complainants abide by that order, and the associated rules in 47 C.F.R. § 20.11(d) and (e). The commission lacks jurisdiction because it cannot grant the requested relief.

24. The Alma LECs' Request for Relief H is different than the BPS LECs' H. The Alma LECs' Request for Relief H seeks a finding and order that "Halo performed the above violations of the ERE without obtaining a variance from the Commission permitting it to do so, 4 CSR 240-29.030(1)." The probable reason is that the Alma LECs have expressly refused to even try to invoke 47 C.F.R. § 20.11(e), whereas the BPS LECs claim to have done so.

25. As will be shown below, the ERE rules cannot be applied to Halo, and those rules cannot operate to have the effect the complainants' seek. Such result would conflict with binding federal rules and they are preempted. The commission lacks power to grant the requested relief.

Request I

26. Request I seeks a finding that "Halo has terminated traffic to Complainants in violation of the ERE Rule as set forth above, and Complainants should be compensated for such traffic based upon the rates contained in their access tariffs for such traffic, including interest or late fees and attorneys fees as permitted by those tariffs, and that said amounts are immediately due and payable."

27. As noted above, this request seeks action beyond the commission's powers. Halo is only subject to exchange access charges to the extent that federal law allows ILECs to impose access on a CMRS provider's traffic under the Communications Act and 47 C.F.R. § 20.11(d). The complainants are asking the commission to act outside of its limited authority, stand in the shoes of the FCC, and make new federal law.[7] The commission completely lacks any power to grant the requested relief.

Request J

28. Request J seeks a finding that "Halo has violated the ERE Rule as set forth above, and the Complainants that have not sought and obtained blocking to date are entitled to commence blocking proceedings in accordance with the ERE Rule."

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[7] If the commission were to take this impermissible action by disregarding binding federal rules – including the Communications Act definition of "exchange access" and 47 C.F.R. § 20.11(d), which the commission has no authority or jurisdiction to interpret or apply in this case – it would then have to go further and specifically analyze the complainants' access tariffs, and then find that the complainants' tariffs do cover this traffic. The complaints do not contain any provisions from the LECs' access tariffs, however. The complaints seek a finding that their access "rates" apply, but they do not seek a finding that the *tariffs* apply. Access *rates* can only apply if the *tariff* applies. The complaints are therefore deficient. Clearly, even then, the commission would have power only over Halo's traffic that is "intrastate." The problem, however, is that the commission would have to first decide that certain traffic is "not interstate," which is something it cannot do under the circumstances.

29. The complainants own pleadings reflect an understanding that much of the traffic in issue is jurisdictionally interstate. Even if the traffic is intrastate, blocking would violate Halo's federal right to interconnect under § 332(c)(1)(B). Any order purporting to authorize blocking would be void. The commission completely lacks any power to grant the requested relief.

Request K

30. Request K seeks a finding that "For the period of time before its CMRS license was effective, Halo was unlawfully operating as an un-certificated carrier providing telecommunications services within Missouri, without having obtained the appropriate certificate or authorization from the Missouri Public Service Commission or the state of Missouri, or in the alternative was providing traffic aggregation and termination services by private contract with certificated Missouri carriers within the state of Missouri without properly registering to do business in the state of Missouri."

31. This request clearly asks the state commission to decide questions relating to Halo's *federal* authorizations. Complainants want the state commission to decide when Halo's "license" was effective" and to then – after the commission presumably finds the license was effective on some date later than that stated on Halo's Radio Station Authorization[8] – hold that Halo was subject to the commission's jurisdiction because it had no "effective" federal license. This is a *Service Storage* question, and under Missouri law state agencies cannot assume the

[8] Halo's RSA was issued on January 22, 2009. *See* Exhibit 1. The complainants want this commission to "interpret" the license in a way that would make it not "effective" until April 15, 2011 based on the assertion that Halo had not secured "accepted" base station registrations. *See, e.g.,* Alma Complaint ¶¶ 30-33, Request for Relief L and M. In other words, the complainants want a *state commission* to find that because Halo operated "unaccepted" base stations before April 15, Halo was in violation of the *FCC's* Part 90 rules, and as a consequence "loses" CMRS status. This is not the law. More important, this commission is wholly without the authority or competence to entertain or decide the question. If the complainants have an issue regarding Halo's compliance with FCC rules, they know how to find their way to the FCC to seek and obtain relief. Indeed, many of the complainants already raised this very issue with the FCC and now want to also litigate the question at the state level. They are barred from such duplicitous efforts.

power to interpret or determine the scope of a federal authorization. *Holland Industries, supra.* The commission simply cannot entertain the issue. Only the FCC can decide it. The commission completely lacks any power to grant the requested relief.

Request L

32. Request L asks the commission to find that "Halo was not operating as a CMRS provider prior to April 15, 2011; any and all Halo traffic terminating to Complainants prior to April 15, 2011 is and was subject to Complainants' access tariffs; and Complainants should be compensated for such traffic based upon the rates contained in their access tariffs for such traffic, including interest or late fees and attorneys' fees as permitted by those tariffs, and that said amounts are immediately due and payable."

33. This too is a *Service Storage* question that the commission cannot entertain. Further, it ultimately asks the commission to overturn 47 C.F.R. § 20.11(d) or hold it does not apply. The commission cannot grant this requested relief, and therefore has no jurisdiction.

Request M

34. Request M seeks a finding that "Halo is not legitimately operating as a CMRS provider on or after April 15, 2011, and Halo and its customers did not access Halo's networks via mobile devices; therefore, Complainants should be compensated for such traffic based upon the rates contained in their access tariffs for such traffic, including interest or late fees and attorneys' fees as permitted by those tariffs, and that said amounts are immediately due and payable."

35. This too is a *Service Storage* question. Complainants want the state commission to investigate and interpret the scope of Halo's activities under its federal license, and to hold there was no such license. This question is subject to the FCC's exclusive jurisdiction. The

request also seeks a finding that 47 C.F.R. § 20.11(d) does not apply, but the commission lacks jurisdiction to interpret or enforce that rule. The commission completely lacks any power to grant the requested relief.

Request N

36. Request N seeks a finding "That traffic which, at the beginning of the call, originates from a wireless end user in one MTA and is delivered to Halo's base station in another MTA, for ultimate termination to customers of Complainants in the same MTA as the base station, does not constitute calls to and from end-users that both originate and terminate in the same MTA, and Complainants should be compensated for such traffic based upon the rates contained in their access tariffs for such traffic, including interest or late fees and attorneys fees as permitted by those tariffs, and that said amounts are immediately due and payable."

37. This request is a collateral attack on FCC definitions, rules and orders that the commission lacks jurisdiction to interpret or enforce. The request also, ultimately, asks the commission to find or create some exception to, or worse, to overrule, binding FCC rules providing that the originating location for CMRS traffic is the base station or the POI. The commission cannot grant the requested relief, and therefore has no jurisdiction.

Request O

38. Request O seeks a finding that "Halo, by failing to use alternative means of delivering traffic after Complainants initiated blocking procedures, or by failing to commence an expedited complaint proceeding under the provisions of the ERE Rule (4 CSR 240-29.100 and/or 29.130), failed to implement mechanisms provided Halo by the ERE Rule by which to avoid any negative consequences of blocking."

39. It is hard to understand this request, but it appears to be a request for declaratory ruling that Halo failed to mitigate damages. The commission does not have the power to award damages, so it clearly does not have any authority to decide whether a party took appropriate measures to mitigate damages. Halo is not a plaintiff before the commission in any event. This is an anticipatory defense to an action already pending before the FCC (*see* Exhibit 2 attached hereto) in which certain of the complainants are defendants. Those defendants have already raised the same defense before the FCC (*see* Exhibit 3 attached hereto) and the commission simply has no power to even address it. The action is already before the FCC, and this defense must be prosecuted only at the FCC. The commission completely lacks any power to grant the requested relief.

Request P

40. Request P seeks a finding that "AT&T, at the request of Complainants, is authorized and directed to block all Halo traffic from terminating to Complainants on the LEC-to-LEC network until Halo has satisfied Complainants and the Commission that Halo is in full compliance with all provisions of the ERE Rule."

41. Even the complainants admit that some of the traffic in issue is interstate. This commission completely lacks the power and authority to authorize blocking of interstate traffic. If and to the extent any traffic is intrastate, blocking would interfere with and deny Halo its *federal* right to interconnect under § 332(c)(1)(B) and 47 C.F.R. § 20.11(a), and this commission lacks the power to deny Halo its federal interconnection rights under the Act and FCC rules. The commission cannot grant the requested relief, and therefore has no jurisdiction.

B. MANY OF THE COMPLAINANTS ARE BARRED FROM BRINGING THIS ACTION AT THE STATE LEVEL BECAUSE THEY ALREADY RAISED ALL THESE ISSUES AT THE FCC.

42. Several of the ILEC complainants are raising all these issues in a duplicitous fashion since they had previously raised the very same issues as part of their opposition to an FCC complaint brought by Halo on March 28, 2011. Specifically, complainants Citizens, Green Hills, Mid-Missouri, NEMO, Chariton Valley, and Mark Twain are already Respondents in the ongoing FCC proceeding. *See* Exhibit 2. The Halo FCC Complaint was filed at the FCC under 47 U.S.C. § 208 of the Communications Act, seeking damages under § 206. As part of their opposition to the Halo FCC complaint, these ILECs raised each and every one of the very same issues they now wish to litigate before the state commission. *See* Exhibit 3.

43. The complainants' state commission complaint is merely an attempt to circumvent the jurisdiction of the FCC, which Halo invoked when it filed the Halo FCC Complaint under § 208 at the FCC. In a somewhat similar situation arising in 1992, Judge Limbaugh of the Eastern District of Missouri correctly observed that "[t]he duplicity of these actions and the inconsistent rulings would only create more problems for the parties and necessitate further litigation."[9] Since the Respondents elected to raise these issues in the context of Halo's FCC complaint they "may not thereafter file a complaint on the same issues in the alternative forum, regardless of the status of the complaint." "This has the effect of preventing 'duplicative adjudications and inconsistent results' ... and 'avoids giving a complaining party several bites at the apple.'" *See Premiere Network Servs. v. SBC Communs.*, Inc., 440 F.3d 683, 688 (5th Cir. 2006), citing with approval to *Bell Atl. Corp. v. MFS Communications Co.*, 901 F. Supp. 835, 853 (D. Del. 1995). *See also* Decision Granting Motion to Dismiss, *Pacific Bell Telephone Company v. MAP Mobile Communications, Inc.*, Decision 06-04-010, Case 05-11-016

[9] *Southwestern Bell Tel. Co. v. Allnet Communications Services, Inc.*, 789 F. Supp. 302, 305 (E.D. Mo. 1992).

(Cal. PUC, April 13, 2006), 2006 Cal. PUC LEXIS 116 (dismissing ILEC state-level complaint because same issues already before FCC in previously-filed complaint by CMRS provider).

44. Further, even if this commission had jurisdiction to hear the relevant issues (which it does not), complainants' tactic of filing the same issues before the commission after raising them in response to Halo's FCC complaint would have a material and debilitating impact on Halo's ability to defend itself before the commission. Halo is the complaining party at the FCC and most certainly could not present its FCC complaint *damages* claims by way of counterclaim (and perhaps even defense) at the commission. Further, as this commission well knows, unlike the FCC – which does have the statutory to power to award damages – this commission does not have that power. The complainants are clearly attempting to deprive Halo of its federal right to seek damages under § 206 by bringing all the same issues before a forum that cannot hear all the issues and grant all (or even any) of the relief that is involved. Moving forward would deprive Halo of its procedural and substantive due process rights guaranteed under the U.S. Constitution. All of the issues must be resolved in one forum that has jurisdiction over all of the claims and that forum (the FCC) already has all of these issues before it.

45. Because of Halo's FCC filing, the commission (indeed, any tribunal other than the FCC) necessarily lacks subject matter jurisdiction over any issues that were already raised in Halo's FCC complaint or the Missouri ILEC respondents' opposition. *See Cincinnati Bell Tel. Co. v. Allnet Communications Servs., Inc.*, 17 F.3d 921, 924 (6th Cir. 1994); *Frontier Communications of Mt. Pulaski, Inc. v. AT&T Corp.*, 957 F. Supp. 170, 174-75 (C.D. ILL. 1997). Thus, not only are the ILEC complainants that already are respondents in the FCC complaint attempting to raise *their* issues in a second, illegitimate forum, their gambit – if allowed – would effectively prevent Halo from even mounting a defense or raising counterclaims before the

commission, because of Halo's previously filed FCC complaint and because this commission cannot award the damages Halo is positioned to seek at the FCC. This situation most certainly argues against any proposition that Halo should be required to appear and participate in this case given Halo's inability to in fact put up a full defense or bring any counterclaims at the state level. As noted, the commission completely lacks any jurisdiction to "interpret the boundaries of federally issued certificates,"[10] yet that is exactly what the commission would be doing by addressing any of the complainants' issues because they all involve an examination of Halo's federal permissions, the scope of permitted activity, and the result of Halo's federal status.

C. THE COMPLAINTS RAISE ISSUES OVER WHICH THIS COMMISSION LACKS JURISDICTION OR POWER

46. Although many of them are couched in terms of state rules, the complainants' requests each rest on the proposition that Halo lacks federal authority to provide the services that give rise to the purported traffic, or that Halo's traffic is not "wireless" or "CMRS" because it is claimed to originate on other networks. They ask the commission to "investigate" the scope of Halo's federal authorization, interpret Halo's federal licenses in light of the complainants' alleged facts, and then conclude that Halo is somehow subject to state-level jurisdiction under *state law* because of perceived exceptions to binding and jurisdictional *federal law* that expressly prohibits state regulation of market entry and rates. The complainants assert that their *intrastate* tariffs apply to this traffic, and that Halo is somehow an intrastate access customer. To reach this conclusion, however, the complainants are necessarily asserting that the traffic is not "wireless" or "CMRS" and is *also* not "intraMTA" or otherwise *not* "non-access" traffic as defined by *FCC rules*.

[10] Even if Halo had not brought the section 208 complaint it *still* could not counterclaim for damages under section 206 for a violation of the Communications Act or FCC rules at the state commission. As is plain from sections 207 and 208 the only two possible venues for such claims are *federal court* or the *FCC*. State commissions completely lack jurisdiction over such actions. The commission cannot award damages because of state law limitations.

47. The allegations, claims and requests for relief are purely and simply an attempted collateral and state-level attack on Halo's federal authorizations. The complainants are necessarily asking the commission to act in the place of the FCC and find exceptions to binding and exclusive federal rules that would give an opening for state-level regulation and jurisdiction, which they then of course ask the commission to exercise in punitive and protective fashion.

48. The commission, however, cannot entertain the complainants' plea for action. The commission lacks jurisdiction over the subject matter and jurisdiction over Halo's person, property and business.[11] Only the FCC can resolve the threshold questions that could, possibly, then lead to the exercise of state-level jurisdiction and power. The complainants must take their complaint to the FCC, for the FCC has **exclusive and primary original jurisdiction**. The entire case must be dismissed.

a. Halo's Federal Authorizations

49. On January 27, 2009, the FCC issued Halo a *nationwide* license ("Radio Station Authorization" or "RSA"), a copy of which is attached hereto as Exhibit 1, to register and operate fixed and base stations in the 3650-3700 MHz band (a particular "slice" of FCC-controlled radio spectrum governed by Part 90, Subpart Z of the FCC's rules) and to support "mobile," "portable" and "fixed" subscriber stations throughout the domestic United States. Halo's service includes "broadband data" and Internet capabilities, but it also includes real-time, two-way switched voice service support that is interconnected with the public switched network. The "common carrier" RSA designation entitles Halo to "interconnect" with other carriers for the purpose of exchanging traffic. *See* 47 U.S.C. § 332(c)(1)(B); 47 C.F.R. § 20.3 (supplying

[11] Halo acknowledges there is commission authority that might be read to hold to the opposite. This will be addressed below when Halo discusses the commission's delegated powers under state law. Any state law that could be read to grant personal jurisdiction over Halo, however, has been preempted by federal law.

definitions of "commercial mobile radio service," "interconnected," "interconnected service" and "public switched network").

50. Halo provides "interconnected" "telephone exchange service" (as defined at 47 U.S.C. § 153(47)) and "exchange access" (as defined at 47 U.S.C. § 153(16)). Halo also provides "personal wireless service" (as defined at 47 U.S.C. § 332(c)(7)(C)(i)), because Halo provides "commercial mobile services," "common carrier wireless exchange access services" and/or "unlicensed wireless services" (as defined in 47 U.S.C. § 332(c)(7)(C)(iii)). Halo is conducting all of its activities by virtue and as a result of its *federal* authorization to provide service under its RSA and also pursuant to the FCC's "blanket" permission to provide interstate service by wire or radio in 47 C.F.R. § 63.01(a).[12]

51. The FCC has exclusive original jurisdiction to "authorize" the offering of purely or predominately interstate telecommunications service. 47 U.S.C. § 214(a)-(d). The FCC's rules implementing this part of § 214 give automatic and advance permission for a common carrier to provide interstate telecommunications service by wire or radio so long as the common carrier has the necessary authorization for any radio frequencies that it uses to do so. Unlike many states overseeing intrastate services, the FCC does not require prior application for or receipt of a "certificate." *See* 47 C.F.R. § 63.01(a). Therefore, even if and to the extent that any of Halo's services involve "wireline" communications (which Halo denies), Halo has *federal* authority to provide interstate "wireline" service, including telephone exchange service and exchange access service.

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[12] Authority for all domestic common carriers.

> (a) Any party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies.

52. Only the FCC can decide whether any particular traffic is or is not "interstate" or "CMRS" and subject to its exclusive original jurisdiction. *See Service Storage,* 359 U.S. at 178-79. 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)[13] and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989).[14] The Missouri Supreme Court has recognized this binding federal rule. *Holland Industries,* 763 S.W.2d at 669.

b. State regulatory authorities have no jurisdiction and no power to construe or interpret the boundaries of federally issued certificates or to subject a federal licensee to state regulation regarding operations claimed to not be "authorized" by the federal certificate.

53. Halo's operations that involve communications to or from end-points on the PSTN in Missouri are being conducted pursuant to FCC authorizations. Halo does not have, is not required to have, cannot be compelled to seek or secure, and will not seek or secure, any state permissions for such services unless and until the FCC requires Halo to do so. This commission completely lacks any jurisdiction and does not have the power to interpret the scope of Halo's federal authorizations, decide whether any activity was outside of those authorizations, try to determine whether Halo violated a license requirement as an excuse to impose state regulation, demand that Halo secure a state-level certificate for activity arguably subject to the federal authorizations, or in any way interfere with Halo's federally-authorized activities. Nor can this commission impose any obligations on Halo relating to operations or compensation since the

[13] "State regulatory authorities may not assume the power to interpret the boundaries of federally issued certificates or to impose sanctions upon operations assertedly unauthorized by the federal certificate. *Service Storage & Transfer Co. v. Virginia, 359 U.S. 171, 178-79, 3 L. Ed. 2d 717, 79 S. Ct. 714 (1959).* The [federal issuing agency] is entitled to interpret, in the first instance, certificates it has issued. *Service Storage*, 359 U.S. at 177."

[14] "[I]interpretations of federal certificates [which on their faces cover the operations] should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action."

FCC has already occupied that field by promulgating rules on the subject that are binding on the commission and must be honored.

54. Halo's federal authorizations to provide wireless and jurisdictionally interstate "wired" or "wireless" service are nationwide in scope. The RSA is a single nationwide blanket authorization. The authorization pursuant to 47 C.F.R. § 63.01(a) is single, unitary and nationwide in scope. Halo is building a nationwide network and intends to provide service in every region.

55. If multiple state commissions took up these issues it is highly likely several of them would render inconsistent and conflicting rulings on Halo's nationwide business model and characterization under the Communications Act. There is a distinct possibility that one state may rule that Halo can provide service in a certain fashion and under certain specific circumstances, while another state may hold that Halo cannot provide service at all, or must operate under materially different rules. The clear result would be a hodge-podge of potentially different and inconsistent regulatory requirements based on state-level interpretations of Halo's one wireless RSA and Halo's FCC-granted authority to provide interstate service.

56. There is one nationwide CMRS license, and therefore it cannot simultaneously mean several different and inconsistent things, nor can it possibly grant different rights or duties depending on separate and inconsistent rulings by state commissions. A federal license cannot lawfully lead to any obligation to pay obeisance to a state commission as the price of exercising the federal right. This tribunal lacks subject matter jurisdiction, and it has no personal jurisdiction over Halo, or Halo's business or property.

57. The FCC has recognized that the possibility of multiple state proceedings – with potential conflicting or inconsistent results on a state-by-state basis – can be so significant that it

impedes investment, slows deployment and ultimately become a barrier to entry.[15] Halo insists that the present proceedings – like the eight others existing in at least three other states – very clearly present this situation, and further insists that no state can take any action unless and until the FCC expressly rules the states may do so.

58. If any person – the complainants or this tribunal – has some reason to believe that Halo is providing a service that is not "permitted" or covered by the FCC authorizations, that Halo should or should not render a service or provide that service in only a specific manner, then as a matter of law the sole venue for presentation of that question is the FCC. If the complainants believe they are entitled to access charges, then they must first obtain a ruling from the FCC to the effect that access charges are applicable here. Then, and only then, can they file a collection action before the proper venue, demonstrate that their tariffs do actually control and prove up the damages amount. The complainants cannot drag Halo before a state-level tribunal for litigation

[15] *See, e.g.*, Declaratory Ruling, In *the Matter of Public Service Company of Oklahoma Request for Declaratory Ruling*, DA 88-544, ¶ 24, 3 FCC Rcd 2327, 2329 (rel. Apr. 1988) [finding that "inconsistent state regulation" "would impede development of a uniform system of regulation for Commission licensees."]; Second Report and Order, *In the Matter of Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services; In the Matter of the Applications of GLOBAL LAND MOBILE SAT-ELLITE, INC.; GLOBESAT EXPRESS; HUGHES COMMUNICATIONS MOBILE SATTELLITE, INC.; MCCA AMERICAN SATELLITE SERVICE CORPORATION; MCCAW SPACE TECHNOLOGIES, INC.; MOBILE SATELLITE CORPORATION; MOBILE SATELLITE SERVICE, INC.; NORTH AMERICAN MOBILE SATELLITE, INC.; OMNINET CORPORATION; SATELLITE MOBILE TELEPHONE CO.; SKY-LINK CORPORATION; WISMER & BECKER/TRANSMIT COMMUNICATIONS, INC.*, Gen. Docket No. 84-1234 RM-4247; File Nos. 1625-DSS-P/L-85 1626-DSS-P/L-85; File Nos. 1627-DSS-P/L-(50)-85 1628-DSS-P-(5)-85; File No. 1629-DSS-P/L-85; File Nos. 1630-DSS-P/L-85 1631-DSS-P-85; File No. 1632-DSS-P/L-85; File Nos. 1633-DSS-P/L-85 1634-DSS-P/L-85 1635-DSS-P/L-85; File Nos. 1636-DSS-P/L-85 1637-DSS-P/L-85 1638-DSS-P-85; File Nos. 1639-DSS-P/LA-85 1640-DSS-P-85; File Nos. 1641-DSS-P/L-85 1642-DSS-P/L-85 1643-DSS-P/L-85 1644-DSS-P/L-85 1645-DSS-P/L-85; File Nos. 1646-DSS-P/L-85 1647-DSS-P/L-85; File Nos. 1648-DSS-P/L-85 1649-DSS-P/L-85; File Nos. 1650-DSS-P/L-85 1651-DDS-P/L-85 1652-DSS-P-85, FCC 86-552, ¶ 40, 2 FCC Rcd 485, 491 (rel. Jan. 1987) [Finding that "permitting states to impose their individual regulatory schemes over" an FCC licensee "would not only be impractical but would seriously jeopardize the operation of the system. Requiring the consortium to adhere to fifty potentially conflicting" standards "would render implementation" "virtually impossible."]; Memorandum Opinion and Order, *In the Matter of Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization*, BC Docket No. 82-536, FCC 84-187, ¶ 20, 98 F.C.C.2d 792, 800 (rel. May 1984) [Finding that individual state regulations over a wireless service can impede or create a barrier to entry when the network is regional or national, and that state regulations over a nationwide network would constitute a direct burden on interstate communications].

over the scope of Halo's federal permissions. No state commission has the jurisdiction to address this question or to interpret Halo's FCC authorizations and then find some putative "exception" or "limitation" (or a violation of the federal license) that is then used to subject Halo to state licensing requirements, state-level entry regulation, state rate regulation, state obligations concerning signaling or routing, or a state order to pay intrastate access charges.[16]

59. The entirety of complainants' requests for relief inescapably and completely raises questions and issues within (a) the FCC's exclusive original jurisdiction over market entry (licensing) of radio based services, (b) the FCC's exclusive original jurisdiction and power to prescribe rules relating to the process for and rules governing "interconnection" between radio service providers and local exchange carriers, (c) the FCC's exclusive original jurisdiction over market entry to provide interstate communications services by wire and/or radio, and/or (d) the FCC's exclusive original jurisdiction to prescribe "compensation" terms governed by §§ 201, 251(b)(5) and 251(g) (*see* § 251(d)(1) and § 251(g)) and then the requirements of 47 C.F.R. § 20.11(a)-(e).

60. Both complaints are replete with attempts to have this commission engage in a wide-ranging "investigation" of Halo's activities and actions pursuant to its FCC authorizations.

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[16] Although the complaints request a declaration that the intrastate tariffs apply and an order that Halo pay them, the first-order question is whether this commission has the power to even consider the matter. Since the commission completely lacks jurisdiction over Halo, it cannot. The question whether the complainants' intrastate access tariffs can or could apply starts (but does not end) only if the absolute prohibition against access charges for non-access traffic in 47 C.F.R. § 20.11(d) does not apply. This commission has no jurisdiction or power to interpret or apply 47 C.F.R. § 20.11 at all. This commission most certainly lacks the power to find unstated exceptions or limitations to the FCC's holding and rules providing that if a call is processed by a base station in the same MTA as the terminating location then it is intraMTA and subject to § 251(b)(5) and not the access regime. *See* First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, ¶ 1044, 11 FCC Rcd 15499 ("*Local Competition Order*") [subsequent history omitted] ["...For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party."]. The complainants' argument and position entirely depends on the proposition that these binding federal rules do not apply, based on some inherent or potential "exception" or "interpretation" that has not yet been articulated by the FCC. Their jurisdictional problem is that *only the FCC* can "find" this asserted exception.

Alma Complaint ¶ 15 (asserting "the nature of services provided by Halo" are "contested"); ¶¶ 18 and 29 (asserting that Halo's traffic is "landline originated," some is intrastate and some is interstate and some is interLATA); ¶ 28 (characterizing Halo's assertions regarding its CMRS status); ¶¶ 30-34 (disagreeing Halo is CMRS, and asserting Halo was acting without FCC authorization, despite acknowledging Halo has an RSA); ¶ 35 (asserting the traffic is "not CMRS" because of alleged "no evidence that Halo actually has any of its own retail end user wireless customers originating calls" – essentially asking the commission to find that CMRS providers are "authorized" only to serve "retail end user wireless customers"); ¶ 36 (alleging Halo engaged in an "improper scheme" and seeking state commission intervention); Requests for Relief B (seeking order characterizing Halo as something other than CMRS provider); C-D (seeking order finding traffic "landline originated"); K-M (seeking findings in derogation of Halo's CMRS status). BPS Complaint ¶ 39 (stating that Halo "purports to be" a CMRS provider, but denying such based on implicit assumption that CMRS can only provide "end-user" service, and stating that "the nature of Halo's traffic is likely to be contested as is the characterization of Halo's status as a 'CMRS provider'"); ¶ 42 (describing the purported results of the BPS complainants' analysis of Halo traffic and characterizing it as "not" CMRS); ¶ 43 (representing traffic as "wireline"); ¶¶ 48, 54 (implicitly asking the commission to determine if Halo is acting as a CMRS provider based on customer status); ¶ 55 (asserting that Halo is an "aggregator" rather than "CMRS"); ¶ 57-59 (asking commission to determine if Halo was acting within "effective" authorization and requesting commission to find that Halo is "not CMRS" based on alleged violation of Part 90 rules); Request for Relief B (seeking holding that Halo is "aggregator" in derogation of CMRS status); C-D (asking for finding that traffic is "wireline originated" and presumably therefore "not CMRS"); K-M (again asking commission to find a