

Exhibit No.:
Issues: Contractual and Policy
Witness: J. Scott McPhee
Type of Exhibit: Direct
Sponsoring Party: Southwestern Bell Telephone
Company, d/b/a AT&T Missouri
Case Nos.: TC-2012-0331 and TO-2012-0035

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Case Nos. TC-2012-0331 and TO-2012-0035

**Direct Testimony of J. Scott McPhee
On Behalf of AT&T Missouri**


June 4, 2012

AFFIDAVIT OF SCOTT MCPHEE

STATE OF CALIFORNIA)
) SS
COUNTY OF CONTRA COSTA)

I, Scott McPhee, of lawful age, being duly sworn, depose and state:

1. My name is Scott McPhee. I am Associate Director-Wholesale Regulatory Policy and Support for Pacific Bell Telephone Company.
2. Attached hereto and made a part hereof for all purposes is my Direct Testimony.
3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my knowledge and belief.



Scott McPhee 6/1/12

Subscribed and sworn to before me this _____ day of June, 2012.

Notary Public

My Commission Expires:

See Attached
Notary Certificate

June / 1 / 2012
 W

California Jurat

State of California

County of Contra Costa

} s.s.

Subscribed and sworn to (~~or affirmed~~) before me on this 1 day of June,
20 12, by

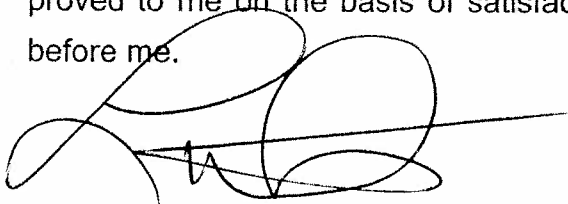
John Scott Mephee

Name of signer (1)

NA

Name of signer (2)

proved to me on the basis of satisfactory evidence to be the person(s) who appeared
before me.



L Mitchell

Commission expires March 17, 2016



seal

OPTIONAL INFORMATION

Although the information in this section is not required by law, it could prevent fraudulent removal and reattachment of this acknowledgment to an unauthorized document and may prove useful to persons relying on the attached document

DESCRIPTION OF ATTACHED DOCUMENT

This certificate is attached to a document titled/for the purpose
of Affidavit
containing 1 pages, and dated 6/1/12

Additional Information

METHOD OF AFFIANT IDENTIFICATION

Proved to me on the basis of satisfactory evidence:

- ☐ form(s) of identification
- ☐ credible witness(es)

Notarial event is detailed in notary journal on:

Page # _____ Entry # _____

Notary contact: _____

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1 **I. INTRODUCTION**

2
3 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

4 A. My name is J. Scott McPhee. My business address is 2600 Camino Ramon, San Ramon,
5 California.
6

7 **Q. ON WHOSE BEHALF ARE YOU PROVIDING YOUR TESTIMONY TODAY?**

8 A. Southwestern Bell Telephone Company, d/b/a AT&T Missouri.
9

10 **Q. BY WHOM ARE YOU EMPLOYED AND WHAT IS YOUR POSITION?**

11 A. I am an Associate Director – Wholesale Regulatory Policy & Support for Pacific Bell
12 Telephone Company d/b/a AT&T California. I work on behalf of the AT&T incumbent
13 local exchange carriers (“ILECs”) throughout AT&T’s 22-state ILEC territory. I am
14 responsible for providing regulatory and witness support relative to various wholesale
15 products and pricing, supporting negotiations of local interconnection agreements
16 (“ICAs”) with competitive local exchange carriers (“CLECs”) and Commercial Mobile
17 Radio Service (“CMRS”) providers, participating in state commission and judicial
18 proceedings, and guiding compliance with the Federal Telecommunications Act of 1996
19 (“1996 Act” or “Act”) and its implementing rules.
20

21 **Q. WHAT IS YOUR EDUCATIONAL BACKGROUND?**

22 A. I received my Bachelor of Arts degree with a double major in Economics and Political
23 Science from the University of California at Davis.

1 **Q. PLEASE OUTLINE YOUR WORK EXPERIENCE AT AT&T.**

2 A. I began employment with AT&T's predecessor, SBC, in 2000 in the Wholesale
3 Marketing – Industry Markets organization as Product Manager for Reciprocal
4 Compensation throughout SBC's 13-state region. My responsibilities included
5 identifying policy and product issues to assist negotiations and witnesses addressing
6 SBC's reciprocal compensation and interconnection arrangements, as well as SBC's
7 transit traffic offering. In June of 2003, I moved into my current role as an Associate
8 Director in the Wholesale Marketing Product Regulatory organization. In this position,
9 my responsibilities include helping define AT&T's positions on certain issues for
10 Wholesale Marketing, and ensuring that those positions are consistently articulated in
11 proceedings before state commissions.

12
13 **Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE STATE PUBLIC UTILITY**
14 **COMMISSIONS?**

15 A. Yes, I have testified before several state public utility commissions, including this one, on
16 telecommunications issues. Virtually all of those cases involved the arbitration of ICAs
17 or disputes regarding the interpretation or enforcement of ICAs, like the one at issue in
18 this proceeding.

19
20 **Q. HAVE YOU TESTIFIED BEFORE ANY OTHER STATE COMMISSIONS ON**
21 **THE SUBJECTS YOU WILL ADDRESS IN THIS TESTIMONY?**

22 A. Yes. AT&T and Halo are contesting in a number of other state commissions the same
23 issues that are presented in this case. As of the date of this testimony, I have filed
24 testimony in the parallel proceedings in eight other states and have reviewed Halo's pre-
25 filed testimony in those states where Halo has filed, and I testified at the evidentiary

1 hearings in the Wisconsin, Tennessee, South Carolina, and Georgia proceedings. As a
2 result, I am familiar with the positions Halo has been advancing on the issues in this case.

3
4 **Q. IN THOSE OTHER CASES THAT YOU REFERRED TO IN YOUR LAST**
5 **ANSWER, WAS HALO THE COMPLAINANT, AS IT IS HERE?**

6 A. No, this case is distinctive in that none of the other cases involved a rule like the Missouri
7 Enhanced Records Exchange Rule. In the other states, the AT&T ILEC was the
8 complainant, asserting claims against Halo (the defendant) for breach of the parties'
9 interconnection agreement and seeking, among other things, authorization to discontinue
10 service to Halo. Here, as I understand it, Halo is nominally the complainant, contending
11 that AT&T Missouri should not be allowed to discontinue service to Halo, as a number of
12 rural local exchange carriers ("RLECs") asked AT&T Missouri to do pursuant to the
13 Enhanced Records Exchange Rule, and as AT&T Missouri informed Halo it intended to
14 do, both on its own account and as requested by the rural LECs. Thus, AT&T Missouri is
15 nominally a respondent in this case. However, AT&T Missouri has filed counterclaims
16 against Halo, and those counterclaims are essentially identical to the claims the AT&T
17 ILECs asserted in the other states. This is why I say that the issues presented in this case
18 are the same as the issues Halo and AT&T ILECs have contested, and are contesting, in
19 the other states.

20
21 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**

22 A. I will discuss AT&T Missouri's ICA with Halo and the claims AT&T Missouri has made
23 for breach of the ICA. I will also provide background on the disputes and why they are
24 important.

1 **Q. WHAT IS AT&T MISSOURI'S MAIN COMPLAINT AGAINST HALO?**

2 A. Halo is sending landline-originated traffic to AT&T Missouri in violation of the parties'
3 ICA. In addition, Halo for many months disguised traffic (by modifying the call records)
4 so that toll traffic appeared to our billing systems to be local traffic. Halo has
5 discontinued that practice, but it was nonetheless wrongful at the time. The effect of
6 Halo's delivery of landline-originated traffic in breach of the ICA (both when Halo was
7 modifying the call records and since it discontinued that practice) has been to enable Halo
8 to avoid paying the AT&T ILECs literally millions of dollars in applicable access
9 charges. AT&T Missouri's aim in this case is to obtain a remedy for, and put an end to,
10 Halo's continuing breach of its ICA with AT&T Missouri.

11
12 **Q. HAS THE FCC RECENTLY ADDRESSED THE EFFECTS OF ACCESS-**
13 **AVOIDANCE SCHEMES LIKE HALO'S?**

14 A. Yes. On November 18, 2011, the FCC issued its *Connect America Order*.¹ In the words
15 of FCC Commissioner Michael J. Copps, that Order
16 puts the brakes on the arbitrage and gamesmanship that have plagued [intercarrier
17 compensation] for years ***and that have diverted private capital away from real***
18 ***investment in real networks***. By some estimates . . . phantom traffic affects nearly
19 one-fifth of the traffic on the carriers' networks. Today we say "no more."²
20
21 Commissioner Copps thus decried the fact that the unlawful avoidance of access charges,
22 also known as access arbitrage, is an ongoing and significant problem for the industry as
23 a whole. Halo's is just the latest in a long line of access charge avoidance schemes.

¹ Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, WC Docket No. 10-90 *et al.*, 2011 WL 5844975 (rel. Nov. 19, 2011) ("*Connect America Order*") (emphasis added).

² *Id.* at p. 749 (statement of Commissioner Michael J. Copps).

1 **Q. WHAT IS THE FINANCIAL IMPACT OF HALO’S SCHEME?**

2 A. Through April 2012, Halo owed AT&T Missouri \$1,806,068 in unpaid access charges,³
3 and the debt continues to increase significantly each month. From December 2010,
4 through March 2012, the monthly volume of traffic Halo sent to AT&T Missouri
5 increased over 1,389%. Halo is now sending AT&T Missouri more than 24 million
6 minutes a month. Across AT&T’s 22-state ILEC territory, Halo owed AT&T
7 approximately \$ 19,575,288 in unpaid access charges as of April 2012. As in Missouri,
8 that amount continues to grow, to the tune of about \$ 1.2 million per month.

10 **Q. WHY IS IT IMPORTANT FOR THE COMMISSION TO DECIDE THIS CASE**
11 **PROMPTLY?**

12 A. Simply because the longer it takes for the Commission to decide this case, the more Halo
13 improperly gains from its scheme and the more AT&T Missouri and other carriers
14 unjustly lose. This is especially so with Halo having filed for bankruptcy, which makes it
15 even less likely that AT&T Missouri will ever receive the access charges it is owed.
16 Halo should not be permitted to continue to “run a tab” on AT&T’s network by sending
17 traffic that is not authorized by the ICA and not paying the applicable rates for its traffic.
18 Because Halo has breached its ICA with AT&T Missouri, AT&T should be allowed to
19 stop accepting traffic from Halo (as it was allowed to do in Tennessee on precisely the

³ This represents the difference between the reciprocal compensation charges Halo has paid and the switched access charges that it should have paid on access traffic. I explain reciprocal compensation charges and access charges below.

grounds it asserts here) in order to avoid future financial harm from Halo not paying the applicable charges for its traffic.⁴

II. BACKGROUND

Q. WHAT IS HALO?

A. Halo Wireless, Inc. is a corporation organized and operating under the laws of the state of Texas. The company is headquartered in Fort Worth, Texas.

Q. WHO ARE HALO'S OFFICERS?

A. Halo's officers are:

Russell Wiseman, President

Jeff Miller, Chief Financial Officer

Carolyn J. Malone, Secretary/Treasurer⁵

Q. DOES HALO HAVE ANY EMPLOYEES?

A. Halo has only two employees – Jeff Miller and Carolyn Malone, each of whom is paid \$500 per month. While Halo identifies Russell Wiseman as its President, Mr. Wiseman is not an employee of Halo. Mr. Wiseman is paid as an employee of an affiliate

⁴ In light of Halo's pending bankruptcy proceeding, AT&T Missouri does not ask the Commission to order payment of any money as part of this case. AT&T Missouri does, however, ask the Commission to rule that Halo should be required to pay AT&T Missouri the applicable access charges on the traffic Halo has sent. Liquidation of these amounts and other payment issues presumably will be dealt with in the bankruptcy court.

⁵ See Schedule JSM-1 at 10 (*Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc.*, Docket No. 9594-TI-100, Halo Wireless, Inc. and Transcom Enhanced Services, Inc.'s Answers (without exhibits) on Issues 1-8 in the Notice of Proceeding (filed with Pub. Serv. Comm'n of Wisc., Dec. 2, 2011)).

1 company, Source Communications of America. Halo does not pay Mr. Wiseman any
2 compensation.⁶

3
4 **Q. WHO OWNS HALO?**

5 A. Halo is owned by Scott Birdwell (50%), Gary Shapiro (10%), and Timothy Terrell
6 (40%).⁷

7
8 **Q. WHAT DOES HALO CLAIM TO BE?**

9 A. Halo claims to be a commercial mobile wireless service (“CMRS”) provider.
10

11 **Q. WHAT TYPE OF EQUIPMENT DOES HALO CLAIM TO OPERATE?**

12 A. Halo claims to operate wireless “base stations” by which it connects to its “customers.”
13 Halo leases the base station equipment from a company called SAT Net.⁸ SAT Net is
14 another affiliate of Halo. The officers of SAT Net include the same Jeff Miller and
15 Carolyn Malone who are the officers/employees of Halo. The common owners/investors
16 between SAT Net and Halo are Scott Birdwell, Gary Shapiro, and Tim Terrell.⁹
17

⁶ See Schedule JSM-2 at 8-9 (*In re: Halo Wireless, Inc.*, United States Bankruptcy Court for the Eastern District of Texas, Case No. 11-42464 (“*Halo Bankruptcy proceeding*”), Transcript of Proceeding Conducted by United States Trustee, Section 341 Meeting of Creditors held Sept, 19, 2011 (“Creditors’ Meeting Transcript”)).

⁷ See Schedule JSM-1 at 10.

⁸ Schedule JSM-2 (Excerpts from Creditors’ Meeting Transcript) at 14. The entire transcript is voluminous and will be made available upon request.

⁹ Schedule JSM-2 at 15-16.

1 **Q. WHERE DOES HALO GET ITS REVENUE?**

2 A. Halo gets 100% of its revenue from a closely affiliated company called Transcom.¹⁰ In
3 fact, if we assume, just for the sake of discussion, that Transcom is a “customer” of Halo,
4 as Halo claims it is, then Transcom is Halo’s *only* paying customer in Missouri. In a
5 submission it made in the parallel proceeding in Wisconsin on January 11, 2012, Halo
6 stated that it had 35 consumer customers – only one whom was in Missouri. Halo has
7 since clarified that its “consumer customers” are not paying customers.

8
9 **Q. WHAT IS TRANSCOM?**

10 A. Transcom is a corporation organized and operating under the laws of the state of Texas.
11 Headquartered in Fort Worth, Texas, Transcom operates switches in Dallas, New York,
12 Atlanta and Los Angeles. Transcom accepts traditional circuit-switched protocols such
13 as Time Division Multiplexing (“TDM”) at these switches.¹¹

14
15 Transcom has represented on its website that the company’s “core service
16 offering” is “voice termination services.”¹² Voice termination service is the intermediate
17 routing of telephone calls between carriers for termination to the carriers serving the
18 called party. On its website, Transcom stated that it terminates “nearly one billion

¹⁰ Schedule JSM-1 at 4-5 (“Currently, the only [high volume] customer is Transcom, and traffic from Transcom provides 100 percent of Halo’s current revenues . . .”).

¹¹ Schedule JSM-3 (Transcom webpages).

¹² *Id.*

1 minutes per month,” and provides service to the largest Cable/MSOs, CLECs, broadband
2 service providers, and wireless customers.¹³

3
4 **Q. DOES TRANSCOM’S WEBSITE STILL SAY THAT TRANSCOM’S CORE**
5 **SERVICE OFFERING IS VOICE TERMINATION SERVICES?**

6 A. Interestingly enough, no; Transcom changed its website after AT&T pointed out in other
7 state commission proceedings Transcom’s representation there that Transcom’s core
8 service offering is voice termination services. AT&T also pointed out that contrary to
9 Transcom’s litigation position that it is an enhanced service provider, Transcom’s self-
10 description on its website made no mention whatsoever of enhanced services. Transcom,
11 evidently recognizing that its presentation of itself on its website was detracting from the
12 picture it was trying to paint in the state commission proceedings, recently changed its
13 website. That change does not help the Transcom/Halo cause here; rather, it is an
14 acknowledgement that the candid admissions on the website were hurting Trancom/Halo.
15 In fact, the Transcom representative who testifies on behalf of Halo in these cases
16 admitted in pre-filed testimony in South Carolina that Transcom changed its website
17 specifically because AT&T was pointing out the website admissions in these
18 proceedings.¹⁴

¹³ *Id.*

¹⁴ Pre-filed Surrebuttal Testimony of Robert Johnson, South Carolina Public Service Commission Docket No. 2011-304C, at 10, lines 20-22 (“Transcom has recently updated its website to more clearly establish . . . that Transcom is an ESP.”).

1 **Q. WHO ARE TRANSCOM’S OFFICERS?**

2 A. The officers of Transcom are largely the same as the officers of Halo. The officers of
3 Transcom are:

4 Scott Birdwell, CEO and Chairman

5 W. Britt Birdwell, COO and President

6 Jeff Miller, Chief Financial Officer

7 Carolyn J. Malone, Secretary and Treasurer¹⁵

8
9 **Q. WHO OWNS TRANSCOM?**

10 A. There are several investors. Scott Birdwell is the largest single individual owner.¹⁶

11
12 **Q. IS THIS THE SAME SCOTT BIRDWELL WHO IS THE MAIN SHAREHOLDER**
13 **OF HALO?**

14 A. Yes, this is the same Scott Birdwell who also controls Halo. Mr. Wiseman, in his current
15 capacity as the President of Halo (having replaced Mr. Birdwell in that capacity), reports
16 to a management committee of the investor-owners: Scott Birdwell, Jeff Miller, and
17 Carolyn Malone.¹⁷

¹⁵ Schedule JSM-1 at 11.

¹⁶ *Id.*

¹⁷ Schedule JSM-2 at 64.

1 **Q. WHAT IS YOUR UNDERSTANDING OF THE RELATIONSHIP BETWEEN**
2 **TRANSCOM AND HALO?**

3 A. Transcom and Halo are operating in concert in an attempt to avoid access charges.
4 Transcom aggregates third-party long distance traffic by selling its “voice termination
5 service,” then hands the traffic off to Halo, which mischaracterizes the traffic as wireless-
6 originated intraMTA traffic.

7
8 **Q. HOW AND WHY WOULD HALO AND TRANSCOM BE ACTING TOGETHER?**

9 A. Transcom is a very high-volume “least-cost router”¹⁸ operating in the middle of long
10 distance calls. To the best of my knowledge, and based on everything Halo has said in
11 other state proceedings, neither Transcom nor any customer of Transcom actually
12 initiates any telephone calls. Rather, Transcom takes calls initiated by customers of other
13 carriers and then hands the calls off to someone else (here, Halo) *before* the calls are
14 delivered to the carrier that actually terminates the call to an end user. Halo and
15 Transcom then argue that this process somehow transforms landline-originated traffic
16 into wireless-originated traffic, and somehow transforms interMTA (i.e., toll) wireless
17 traffic into intraMTA (i.e., local) traffic. In this way, Halo erroneously contends that
18 none of the traffic it hands off to ILECs is access traffic or subject to access charges.

19 **Q. HAS TRANSCOM PREVIOUSLY BEEN ASSOCIATED WITH OTHER**
20 **CARRIERS THAT ENGAGED IN ACCESS-AVOIDANCE PRACTICES?**

21 A. Yes. Transcom previously sent traffic to carriers like CommPartners and Global NAPS,
22 which, like Halo, had schemes designed to avoid access charges. Global NAPs

¹⁸ AT&T Missouri witness Mark Neinast explains the term “least-cost router” at page 10 of his prefiled Direct Testimony.

1 previously reported that a substantial portion of its traffic was delivered to it by
2 Transcom.¹⁹ With Global NAPs in receivership and CommPartners in bankruptcy, Halo
3 provides a replacement vehicle for Transcom's continuing arbitrage.
4

5 **III. HALO'S DEALINGS WITH AT&T**

6 **Q. WHEN DID HALO BEGIN TO SEND TRAFFIC TO AT&T?**

7 A. Halo first sent traffic to AT&T in September 2010 in Texas. In Missouri, Halo began to
8 send traffic to AT&T in December 2010. Typically, when a carrier enters the market,
9 there is a ramp-up period where one would expect growth to be steady, but not
10 exponential. Halo is notable in that the rate its traffic has grown has been abnormally
11 fast.
12

13 **Q. HAS HALO ENTERED INTO AN ICA WITH AT&T MISSOURI UNDER**
14 **SECTIONS 251 AND 252 OF THE 1996 ACT?**

15 A. Yes. The ICA is attached to my testimony as Schedule JSM-4. Halo actually opted into
16 the ICA of another carrier, T-Mobile, subject to one important amendment, which I will
17 discuss below. This Commission approved Halo's ICA, as amended, pursuant to Section
18 252(e) of the 1996 Act.
19

¹⁹ *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other Affiliates*, Docket C-2009-2093336, Opinion and Order entered March 16, 2010 ("the majority of [GNAPs'] traffic is received from three other carriers, Transcom, CommPartners and PointOne"); *Joint Petition Of Hollis Telephone et al for Authority to Block the Termination of Traffic from Global NAPs Inc.*, New Hampshire Public Utilities Commission, Docket No. DT 08-028, Reconsideration Order, Order No. 25,088 dated November 9, 2009; and *Matter of the Complaint of AT&T Ohio v. Global NAPs, Ohio, Inc.*, PUCO Case No. 08-690-TP-CSS, Opinion and Order dated June 9, 2010.

1 **Q. WHEN DID THIS OCCUR?**

2 A. On June 17, 2010, and June 21, 2010, respectively, Halo and AT&T Missouri
3 executed (1) an MFN interconnection agreement (filed with the Commission under VT-
4 2010-0029) under which Halo adopted the agreement between AT&T Missouri and T-
5 Mobile USA, Inc. (formerly known as Voicestream Wireless Corp.), which was
6 previously approved by the Commission in Case No. TO-2001-489; and (2) an
7 amendment to that MFN agreement, which was approved by the Commission under File
8 No. IK-2010-0384 on August 19, 2010.

9
10 **Q. ARE THERE DIFFERENT TYPES OF INTERCONNECTION AGREEMENTS**
11 **FOR DIFFERENT TYPES OF CARRIERS?**

12 A. Yes. Landline ICAs contain different terms and conditions than wireless ICAs due to
13 different treatment of the different types of traffic. A major difference between landline
14 and wireless ICAs concerns what constitutes a local call and the appropriate
15 compensation for the exchange of such calls between the carriers' respective end users, as
16 well as some differences in how landline and wireless carriers provision and pay for
17 certain network facilities.

18
19 **Q. WHAT TYPE OF ICA DOES HALO HAVE WITH AT&T?**

20 A. The T-Mobile ICA Halo opted into with AT&T Missouri is a wireless ICA.

21
22 **Q. WHAT IS THE SIGNIFICANCE OF THE AMENDMENT TO THE ICA THAT**
23 **YOU MENTIONED?**

24 A. The ICA amendment that Halo agreed to when it adopted the ICA includes the following
25 clause:

1 *Whereas, the Parties have agreed that this Agreement will apply only to* (1)
2 traffic that originates on AT&T's network or is transited through AT&T's
3 network and is routed to Carrier's wireless network for wireless termination
4 by Carrier; and (2) *traffic that originates through wireless transmitting and*
5 *receiving facilities before [Halo] delivers traffic to AT&T* for termination by
6 AT&T or for transit to another network. (Emphasis added).
7

8 Schedule JSM-5 is a copy of this amendment. The significance of this amendment is that
9 it clearly provides that Halo can *only* send wireless-originated traffic to AT&T Missouri.
10 Any landline-originated traffic sent by Halo to AT&T Missouri for termination is in
11 violation of the terms of the ICA.
12

13 **IV. HALO'S BREACH OF THE ICA BY SENDING LANDLINE TRAFFIC**

14 **Q. HAS HALO BEEN COMPLYING WITH THE ICA BY SENDING ONLY**
15 **WIRELESS-ORIGINATED TRAFFIC TO AT&T MISSOURI?**

16 A. No. As Count I of AT&T Missouri's Counterclaims alleges, Halo is breaching the ICA
17 by sending traffic that is originated when a retail end user places a call using a landline
18 telephone. This is not "traffic that originates through wireless transmitting and receiving
19 facilities" as required by the ICA. Furthermore, Halo presented inaccurate call
20 information that effectively disguised the type of traffic it sent to AT&T. AT&T
21 Missouri witness Mark Neinast explains how AT&T discovered the true nature of the
22 calls that Halo has been sending to AT&T.
23

24 **Q. WHY DOES IT MATTER WHETHER HALO SENDS AT&T LANDLINE-**
25 **ORIGINATED OR WIRELESS-ORIGINATED TRAFFIC?**

26 A. First and foremost, of course, it is important because the ICA requires Halo to send
27 AT&T Missouri wireless-originated traffic only. There are no provisions in the ICA that
28 allow Halo to send AT&T Missouri landline traffic. Accordingly, Halo breached the

1 contract when it did not abide by that requirement. Second, there is a significant
2 difference in what Halo is required to pay AT&T Missouri for terminating landline traffic
3 (if such traffic were allowed) versus terminating wireless traffic. This is known as
4 “intercarrier compensation.” Different intercarrier compensation rates apply depending
5 on whether traffic is local or non-local, and the definitions of what qualifies as local or
6 non-local differ depending on whether the traffic is wireless or landline. Halo has been
7 breaching its ICA by sending non-local landline traffic to AT&T Missouri but then
8 claiming the traffic is actually wireless and local, in order to pay a lower intercarrier
9 compensation rate. The ICA contains intercarrier compensation rates for some kinds of
10 traffic, but non-local landline traffic is subject to different rates contained in AT&T’s
11 switched access tariffs.

12
13 **Q. YOU SAID THAT LOCAL AND NON-LOCAL CALLS ARE DEFINED**
14 **DIFFERENTLY FOR WIRELESS AND LANDLINE TRAFFIC. PLEASE**
15 **ELABORATE.**

16 A. Whether a call is “local” (and thus subject to reciprocal compensation rates) or “non-
17 local” (and thus subject to tariffed access charges) is determined based on different
18 criteria for calls placed using a wireless device as opposed to calls placed using a landline
19 telephone. Consistent with the FCC’s intercarrier compensation regulations, AT&T’s
20 ICAs with wireless carriers (including Halo’s ICA with AT&T) provide that calls
21 originated and terminated by end-users that are both physically located within the same
22 MTA (Major Trading Area) (“IntraMTA” calls) are “local” calls and thus subject to
23 reciprocal compensation rates. *See* ICA at p. 3 (“‘Local Traffic,’ for the application of
24 reciprocal compensation, means telecommunications traffic between a LEC and a CMRS

1 provider that, at the beginning of the call, originates and terminates within the same
2 Major Trading Area ('MTA'), as defined in 47 CFR Section 24.202(A)."). An MTA,
3 therefore, is analogous to a landline local calling area, but as explained below, it is
4 typically much larger. Calls exchanged between end-users located in different MTAs are
5 "interMTA" calls and subject to tariffed interstate or intrastate switched access charges,
6 which are higher.

7 Different criteria are used to determine whether landline traffic is "local" or "non-
8 local" for purposes of intercarrier compensation. Landline traffic does not rely on MTA
9 boundaries. Rather, landline traffic uses what I will refer to generally as "local calling
10 areas." Local calling area and MTA boundaries are vastly different in size (with MTAs
11 being geographically much larger than local calling areas). There are only 4 MTAs that
12 cover any geographic area in Missouri (and only 51 in the nation), whereas there are 723
13 local calling areas in Missouri alone.

14
15 **Q. IS THERE A SIGNIFICANT DIFFERENCE BETWEEN THE AMOUNTS HALO**
16 **HAS BEEN PAYING TO AT&T TO TERMINATE HALO-DELIVERED**
17 **TRAFFIC AND THE AMOUNT THAT HALO SHOULD BE PAYING?**

18 A. Yes. Because it claims that all of the traffic it sends to AT&T Missouri is wireless and
19 local (intraMTA), Halo has only been paying AT&T the reciprocal compensation rate on
20 all of the Halo-delivered traffic that AT&T terminates. As demonstrated in Mr. Neinast's
21 testimony, however, much of the Halo-delivered traffic is actually interexchange landline
22 traffic and is therefore subject to AT&T Missouri's tariffed access charges – not
23 reciprocal compensation. Of course, Halo should not be sending AT&T any landline-

1 originated traffic at all, but when it does send such traffic it obviously should be
2 responsible for paying the applicable terminating access rate.

3
4 **Q. DOES HALO DENY THAT IT HAS BEEN SENDING AT&T TRAFFIC THAT**
5 **BEGINS USING A LANDLINE VOICE SERVICE?**

6 A. No. In fact, Halo has consistently acknowledged in its testimony in other states that it
7 delivers traffic to AT&T that starts out on landline equipment, such as a regular landline
8 phone. Halo has argued, however, that even when calls actually begin as landline calls,
9 they somehow “originate” again as wireless (and local) calls when they pass through
10 Transcom before reaching Halo. More specifically, Halo has contended that Transcom is
11 an “Enhanced Service Provider,” or “ESP,” that ESPs are treated as “end users,” and that
12 ESPs are deemed to originate (or re-originate) calls that pass through them.

13
14 **Q. HAS THE FCC ADDRESSED HALO’S ARGUMENT?**

15 A. Yes. The FCC rejected Halo’s argument about where Halo’s calls originate in the
16 *Connect America Order*. Here is the FCC’s discussion, which I quote at length because
17 of its importance:

18 1003. In the *Local Competition First Report and Order*, the Commission stated
19 that calls between a LEC and a CMRS provider that originate and terminate
20 within the same Major Trading Area (MTA) at the time that the call is initiated
21 are subject to reciprocal compensation obligations under section 251(b)(5), rather
22 than interstate or intrastate access charges. As noted above, this rule, referred to as
23 the “intraMTA rule,” also governs the scope of traffic between LECs and CMRS
24 providers that is subject to compensation under section 20.11(b). The *USF/ICC*
25 *Transformation NPRM* sought comment, *inter alia*, on the proper interpretation of
26 this rule.

27
28 1004. The record presents several issues regarding the scope and interpretation of
29 the intraMTA rule. Because the changes we adopt in this Order maintain, during
30 the transition, distinctions in the compensation available under the reciprocal
31 compensation regime and compensation owed under the access regime, parties

1 must continue to rely on the intraMTA rule to define the scope of LEC-CMRS
2 traffic that falls under the reciprocal compensation regime. We therefore take this
3 opportunity to remove any ambiguity regarding the interpretation of the intraMTA
4 rule.

5
6 1005. We first address a dispute regarding the interpretation of the intraMTA
7 rule. **Halo Wireless (Halo) asserts that it offers “Common Carrier wireless**
8 **exchange services to ESP and enterprise customers” in which the customer**
9 **“connects wirelessly to Halo base stations in each MTA.”**²⁰ It further asserts
10 that its “high volume” service is CMRS because “the customer connects to Halo's
11 base station using wireless equipment which is capable of operation while in
12 motion.” **Halo argues that, for purposes of applying the intraMTA rule,**
13 **“[t]he origination point for Halo traffic is the base station to which Halo's**
14 **customers connect wirelessly.”** On the other hand, ERTA claims that Halo's
15 traffic is not from its own retail customers but is instead from a number of other
16 LECs, CLECs, and CMRS providers. **NTCA further submitted an analysis of**
17 **call records for calls received by some of its member rural LECs from Halo**
18 **indicating that most of the calls either did not originate on a CMRS line or**
19 **were not intraMTA, and that even if CMRS might be used “in the middle,”**
20 **this does not affect the categorization of the call for intercarrier**
21 **compensation purposes.** These parties thus assert that by characterizing access
22 traffic as intraMTA reciprocal compensation traffic, Halo is failing to pay the
23 requisite compensation to terminating rural LECs for a very large amount of
24 traffic. Responding to this dispute, CTIA asserts that “it is unclear whether the
25 intraMTA rules would even apply in that case.”

26
27 1006. **We clarify that a call is considered to be originated by a CMRS**
28 **provider for purposes of the intraMTA rule only if the calling party initiating**
29 **the call has done so through a CMRS provider.** Where a provider is merely
30 providing a transiting service, it is well established that a transiting carrier is not
31 considered the originating carrier for purposes of the reciprocal compensation
32 rules. Thus, we agree with NECA that **the “re-origination” of a call over a**
33 **wireless link in the middle of the call path does not convert a wireline-**
34 **originated call into a CMRS-originated call for purposes of reciprocal**
35 **compensation and we disagree with Halo’s contrary position.** (Emphasis
36 added, footnotes omitted).²¹

20 The FCC cited two Halo *ex parte* filings for this description, which make clear that the alleged ESP is Transcom. For reference, I attach Halo’s two *ex partes* as Schedule JSM-6 and Schedule JSM-7.

21 *Connect America Fund*, FCC 11-161, 2011 WL 5844975 (rel. Nov. 18, 2011) (“*Connect America Order*”).

1 **Q. BASED ON YOUR PARTICIPATION IN THE PARALLEL CASES INVOLVING**
2 **AT&T ILECS AND HALO IN OTHER STATES, DOES HALO AGREE THAT**
3 **THE FCC HAS REJECTED HALO'S THEORY THAT ALL CALLS**
4 **ORIGINATE WITH TRANSCOM?**

5 A. In the early stages of the litigation between AT&T ILECs and Halo, Halo's position on
6 the FCC's Order was a moving target, as Halo has struggled to try to find some way to
7 avoid the unavoidable fact that that Order deprives it of any defense against AT&T's
8 claims. However Halo now acknowledges that the FCC rejected its theory. For example,
9 Halo's attorney asked the following questions at the hearing in the Wisconsin case on
10 February 28, 2012:

11 Q: Now, you understand Halo took the position all along, even before the
12 FCC order, based on our reading of the rules, we thought Transcom was
13 the originating party. You understand we took that position, right?

14
15 A: I've read that.

16
17 Q. Okay. *And the FCC disagreed on November 18th?*

18
19 A. I've read that, too.²²
20

21 In addition, Russ Wiseman, who has routinely testified on behalf of Halo in these
22 proceedings as Halo's president, testified as follows in the most recent version of his
23 testimony, in Georgia: "We acknowledge that the FCC . . . apparently now believes
24 ESPs . . . do not originate calls."²³ This is clearly an acknowledgement that the FCC has

²² See Schedule JSM-8 (Transcript of February 28, 2012 hearing in Wisconsin Public Service Commission's Investigation into Practices of Halo Wireless, Inc. and Transcom Enhanced Services, Inc. (PSCW Docket No. 9594-TI-100), at 94-95 (emphasis added).

²³ Prefiled Direct Testimony of Russ Wiseman on Behalf of Halo Wireless, Inc. in Georgia Public Service Commission Docket No. 34219, at 31, lines 3-4.

1 rejected Halo's theory, because the only basis for Halo's theory that Transcom originates
2 the calls that Halo delivers to AT&T was Halo's contention that Transcom is an ESP.

3
4 **V. HALO'S LIABILITY FOR ACCESS CHARGES**

5 **Q. WHAT IS THE BASIS FOR AT&T MISSOURI'S REQUEST THAT THE**
6 **COMMISSION RULE THAT HALO MUST PAY AT&T MISSOURI ACCESS**
7 **CHARGES?**

8 A. As demonstrated above, Halo is sending AT&T Missouri interexchange landline traffic
9 on which Halo has been paying reciprocal compensation (as if the traffic were local)
10 rather than the higher access charges that apply to interexchange traffic. AT&T Missouri
11 is simply asking the Commission to rule that Halo owes access charges on the
12 interexchange traffic that AT&T Missouri has terminated for Halo (minus a credit for
13 charges Halo has paid). AT&T Missouri, however, is not asking the Commission to
14 determine how much Halo owes – that task is for the bankruptcy court.

15
16 **Q. ARE THE ACCESS CHARGE RATES THAT HALO OWES SET FORTH IN**
17 **THE PARTIES' INTERCONNECTION AGREEMENT?**

18 A. No, these are tariffed rates. AT&T Missouri's federal tariff, filed with the FCC, requires
19 Halo to pay access charges on the interstate traffic AT&T Missouri has terminated for
20 Halo, and AT&T Missouri's state tariff, filed with this Commission, requires Halo to pay
21 access charges on the intrastate non-local traffic AT&T Missouri has terminated for Halo.

22
23 **Q. WHAT ARE THE PERTINENT PROVISIONS OF THE FEDERAL TARIFF?**

24 A. Southwestern Bell Telephone Company Access Service Tariff F.C.C. NO. 73, Section
25 6.9.

1 **Q. WHAT ARE THE PERTINENT PROVISIONS OF THE STATE TARIFF?**

2 A. P.S.C. Mo.-No. 36 Access Services Tariff Sections 3.8, 6.11.

3
4 **VI. CONCLUSION AND BASIS FOR DISCONTINUATION OF SERVICE TO HALO**

5 **Q. HOW SHOULD THE COMMISSION RULE IN THIS PROCEEDING?**

6 A. The Commission should find that Halo has breached the parties' ICA by sending AT&T
7 Missouri landline-originated traffic.

8
9 **Q. WHAT RELIEF IS AT&T MISSOURI SEEKING FROM THE COMMISSION**
10 **FOR HALO'S BREACHES OF THE ICA?**

11 A. AT&T Missouri is asking the Commission to:

12 (a) Find that Halo has materially breached the ICA by sending landline-
13 originated traffic to AT&T Missouri;

14 (b) Find that as a result of that breach, AT&T Missouri is excused from
15 further performance under the ICA, may terminate the ICA and may stop
16 accepting traffic from Halo;

17 (c) Find, without quantifying any specific amount due, that Halo is liable to
18 AT&T Missouri for access charges on the non-local landline traffic it has
19 sent to AT&T Missouri; and

20 (d) Grant all other relief as is just and appropriate.

21
22 **Q. WHY DO HALO'S BREACHES EXCUSE AT&T MISSOURI FROM FURTHER**
23 **PERFORMANCE UNDER THE ICA?**

24 A. That is a legal question. I am informed by counsel, however, that there are two reasons.

25 First, counsel informs me that under Missouri law, a party to a contract is excused from

1 performing its obligations under the contract if the other party materially breaches the
2 contract. Counsel informs me that the authorities for this proposition of law include
3 *Barnett v. Davis*, 335 S.W.3d 110, 112 (Mo. App. W.D. 2011) (noting “Missouri’s first to
4 breach rule, stated in *R.J.S. Security v. Command Security Services, Inc.*, 101 S.W.3d 1,
5 18 (Mo. App. W.D. 2003), which provides that “a party to a contract cannot claim its
6 benefit where he is the first to violate it.” A breach by one party will excuse the other
7 party’s performance, however, only if the breach is material. *Id.*) I am not personally
8 knowledgeable about these cases, but am providing this information so the Commission
9 will know AT&T Missouri’s position.

10
11 **Q. IS THE BREACH HALO COMMITS WHEN IT SENDS AT&T MISSOURI**
12 **LANDLINE-ORIGINATED TRAFFIC A MATERIAL BREACH?**

13 A. I do not know if the term “material” has a specific legal meaning. If it does, I cannot
14 speak to that. I can say, however, that the requirement that Halo send AT&T only
15 wireless-originated traffic goes to the very heart of the parties’ agreement, as evidenced
16 by the fact that the ICA was specifically amended when Halo entered it in order to make
17 this requirement clear. This is a wireless agreement for a supposedly wireless provider,
18 and that is absolutely central to the parties’ arrangement. By sending AT&T Missouri
19 landline-originated traffic, Halo was not violating some secondary or ancillary
20 requirement; it was violating the very core of the agreed arrangement.

1 **Q. WHAT IS THE SECOND REASON THAT HALO’S BREACHES EXCUSE AT&T**
2 **MISSOURI’S CONTINUED PERFORMANCE OF THE ICA?**

3 A. Much of Halo's conduct that breaches the ICA also violates the Missouri Commission's
4 Enhanced Record Exchange ("ERE") Rule. 4 CSR 240-29.120(2) provides:

5 A transiting carrier may block any or all Local Exchange Carrier-to-Local
6 Exchange Carrier (LEC-to-LEC) traffic it receives from an originating
7 carrier and/or traffic aggregator who fails to fully compensate the
8 transiting carrier or who fails to deliver originating caller identification to
9 the transiting carrier. . . .

10
11 In an explanatory note to this section of the rules, the Commission sets out the rule’s
12 purpose: “This rule establishes parameters and procedures enabling transiting carriers to
13 block traffic of originating carriers and/or traffic aggregators who fail to comply with
14 rules pertaining to LEC-to-LEC traffic.”

15 **Q. IS AT&T MISSOURI A “TRANSITING CARRIER?”**

16 A. Yes. AT&T Missouri is a “transiting carrier” as defined by 4 CSR 240-29.010(39)
17 because it is a “telecommunications company that provides facilities on the LEC-to-LEC
18 network over which a telecommunication is transmitted, when the telecommunication
19 neither originates nor terminates on that telecommunications companies network.”

20
21 **Q. WHAT IS “LEC-TO-LEC TRAFFIC?”**

22 A. 4 CSR 240-29.020(19) defines “LEC-to-LEC traffic” as “that traffic occurring over the
23 LEC-to-LEC network. LEC-to-LEC traffic does not traverse through an interexchange
24 carrier's point of presence.”

25
26 **Q. WHAT IS THE “LEC-TO-LEC NETWORK?”**

27 A. 4 CSR 240-29.020(18) defines the “LEC-to-LEC network” as:

1 . . . statewide telecommunications network comprised of transmission and
2 switching capabilities of local exchange telecommunications carriers. The
3 LEC-to-LEC network's geographic composition consists of the 520, 521,
4 522, and 524 LATAs. The LEC-to-LEC network is used to provide local,
5 intrastate/intraLATA, interstate/intraLATA, and wireless
6 telecommunications traffic that originates via the use of Feature Group C
7 protocol.
8
9

10 **Q. DOES HALO'S TRAFFIC TRAVERSE THE LEC-TO-LEC NETWORK IN**
11 **MISSOURI?**

12 A. Yes. In Missouri, LECs use the LEC-to-LEC network to handle traffic exchanged with
13 wireless carriers. Halo represented itself to AT&T Missouri as a wireless carrier and
14 interconnects with AT&T as a wireless carrier through a wireless interconnection
15 agreement.
16

17 **Q. HOW HAS HALO VIOLATED THE ERE RULE?**

18 A. As explained in more detail above, Halo has been aggregating large amounts of
19 interexchange landline-to-landline traffic and other third-party traffic as if it were
20 wireless originated traffic and using the LEC-to-LEC network to send that traffic to
21 AT&T Missouri. Landline originated interexchange traffic is compensable at tariffed
22 switched access rates. Halo has failed to pay AT&T Missouri the appropriate access
23 rates for terminating Halo's landline originated interexchange traffic, despite AT&T
24 Missouri's demands that Halo do so.²⁴
25

²⁴ A copy of AT&T's November 7, 2011, Demand Letter to Halo was appended to AT&T Missouri's Answer, Affirmative Defenses, Counterclaim and Motion for Expedited Treatment as Exhibit 1 and is attached to my testimony for the Commission's convenience as Schedule JSM-9.

1 **Q. HAS HALO VIOLATED THE ERE RULE IN ANY OTHER MANNER?**

2 A. Yes. As AT&T witness Mark Neinast explains in more detail in his testimony, Halo has
3 also failed to deliver appropriate originating caller identification as required by the rule
4 through the provision of inaccurate Charge Numbers. Although I understand that Halo
5 ceased this practice, Halo's provision of that inaccurate information constituted a
6 violation of the ERE rules during the period Halo was providing that information. Halo's
7 transmitting interLATA wireline traffic over the LEC-to-LEC network in Missouri also
8 violates Section 4 CSR 240-29.010(1) of the ERE rule, which provides: ". . . interLATA
9 wireline telecommunications traffic shall not be transmitted over the LEC-to-LEC
10 network, but must originate and terminate with the use of an interexchange carrier point
11 of presence as defined in 4 CSR 240-29.020(31) of this chapter . . ."

12
13 **Q. HOW DOES THE COMMISSION'S RULE DEFINE AN INTEREXCHANGE**
14 **CARRIER "POINT OF PRESENCE?"**

15 A. 4 CSR 240-29.020(31) states:

16 Point of presence (POP) means the physical location within a LATA
17 where an interexchange carrier processes long distance telephone calls to
18 and from the public switched network. A POP is connected to the public
19 switched network through the use of feature groups A, B and D protocols.
20 Equipment located in a POP does not use feature group C protocol.

21
22
23 **Q. DID HALO USE AN INTEREXCHANGE CARRIER POINT OF PRESENCE TO**
24 **FACILITATE THE TERMINATION OF ITS TRAFFIC?**

25 A. No.

1 **Q. DID AT&T MISSOURI NOTIFY HALO OF AT&T'S INTENTION TO BLOCK**
2 **HALO'S TRAFFIC FOR VIOLATION OF THE ERE RULE?**

3 A. Yes. AT&T Missouri notified Halo on March 19, 2012, through a letter sent by email
4 and U.S. certified mail. A copy of this letter is attached to my testimony as Schedule
5 JSM-10. In this letter, AT&T Missouri set out the reasons it intended to block Halo's
6 traffic, the date the traffic would stop and the action Halo could take to prevent the
7 blocking.

8
9 **Q. DID AT&T MISSOURI NOTIFY HALO OF ANY ADDITIONAL BLOCKING**
10 **REQUESTS?**

11 A. Yes. The other respondent telephone companies in this case had separately notified Halo
12 that they were requesting AT&T Missouri to block Halo's traffic destined to their
13 exchanges. Upon receipt of these blocking requests, AT&T Missouri notified Halo of the
14 requests, AT&T Missouri's requirement to comply under the Commission's rules with the
15 requests, and the steps Halo could take to prevent the blocking from occurring.²⁵

16

²⁵ Copies of AT&T Missouri's notification letters were attached to Halo's Formal Complaint in this proceeding as Exhibits A, B, and C. Copies of Craw-Kan Telephone, et al.'s correspondence to Halo were attached to Craw-Kan Telephone, et al.'s Joint Answer to Halo Wireless' First Amended Complaint as Attachments 1-10. Respondent Alma, Choctaw and MoKan Dial's correspondence to Halo were attached to their Joint Answer and Affirmative Defense to Halo Wireless' First Amended Formal Complaint as Attachments 1, 3 and 5. As these letters have already been provided to the Commission, AT&T Missouri will not burden the record further by reproducing them here.

1 **Q. DID AT&T IMPLEMENT THE BLOCKING OUTLINED IN THESE NOTICES**
2 **TO HALO?**

3 A. No. When Halo filed its formal complaint in this proceeding, AT&T Missouri, pursuant
4 to the Commission's rules, ceased its preparations to block Halo's traffic terminating to
5 AT&T Missouri and the other Respondents. AT&T Missouri formally notified the
6 Commission on April 3, 2012, that blocking preparations had ceased pending the
7 Commission's decision.

8
9 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

10 A. Yes.