recognized by the Missouri Supreme Court – it has been preempted or cannot investigate the scope of authorized activities under Halo's federal licenses or whether Halo's activities fall within those federal permissions.

110. The commission itself has recognized it cannot entertain a collection action against a customer not subject to the commission's regulatory authority, and it cannot order a non-regulated entity to pay a disputed bill. An order to pay a disputed bill is an award of damages, but the commission lacks the power to award damages.[73] Since "[t]he Commission is without authority to award money damages" it "lacks jurisdiction over the requested remedy" and therefore "lacks subject matter jurisdiction over the complaint."[74] Therefore, the commission clearly lacks jurisdiction over Requests for Relief L, M and N and they must be dismissed.

111. These decisions, however, do not address *personal* jurisdiction. This commission is not a court, and it does not have broad *personal* jurisdiction over any person that is not a public utility but merely has some contact with a public utility that leads to a dispute. This commission cannot just hale some private citizen or corporation before it and order that private citizen or corporation to submit to the commission's jurisdiction and then obey some command addressed to the private citizen or corporation the public utility wants to obtain.[75] Succinctly stated, under state law this commission does not have *personal* jurisdiction over an entity unless

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[73] Order Denying Motion to Dismiss and Setting Evidentiary Hearing, *Deborah L. Lollar v. AmerenUE*, Case No. EC-2004-0598 (August 5th, 2004), 2004 WL 1842496 (Mo.P.S.C.) *citing 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).

[74] Order Dismissing Complaint and Closing Case, *Shaffer Lombardo Shurin v. Xspedius (formerly espire)*, Case No. TC-2005-0266 (June 2nd 2005) 2005 WL 1722664 (Mo.P.S.C.), citing to *American Petroleum Exchange v. Public Service Commission*, 172 S.W.2d 952, 955 (Mo. 1943), J. Devine, Missouri Civil Pleading & Practice § 9-1 (1986) and *St. Tax Com-m'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 72 (Mo. banc 1982).

[75] Unlike the complainants, the FCC has clearly recognized that state commissions do not have personal jurisdiction over CMRS providers as a matter of course. That is why FCC rule 20.11(e) requires a CMRS provider to "submit to arbitration by the state commission" but only after the ILEC ***requests*** it to do so. Indeed, the BPS LECs rail at Halo for informing them that they must make a request that Halo submit and that Halo will not submit until they request. BPS LEC Complaint ¶ 50, Request for Relief H. Clearly, the complainants' are simply unhappy with binding federal law, and are trying to get around federal law by filing a state-level complaint.

that entity is one that is *a regulated entity*.[76] This is so because the commission – unlike a court – only has jurisdiction over the "business and property" of a public utility. CMRS providers are not "public utilities" under Missouri law. The commission lacks jurisdiction over Halo's business and property.

112. The complaints attempt to get around this problem by asserting that Halo is subject to the commission's regulatory authority. But that can only be the case if Halo is not acting within and consistent with its *federal* authority. And, as noted above, the commission lacks jurisdiction, power or authority to decide that question.

113. The commission lacks subject matter jurisdiction. The commission lacks personal jurisdiction over Halo and over Halo's business and property. The case must be dismissed.

CONCLUSION

114. The jurisdiction of a tribunal is a threshold matter that must be determined at the outset of the proceeding and tribunal must make a determination that is has both subject matter and personal jurisdiction before continuing with the proceeding or its rulings are void.[77] Even the Supreme Court of the United States must determine its own jurisdiction before it can proceed with a matter, and the rule is the same in Missouri.[78] By filing this Motion, Halo asserts its objections to the commission's assertion of either subject matter or personal jurisdiction over Halo and Halo's business and property as a threshold matter. This requires that the commission investigate its jurisdiction prior to taking any substantive action in this matter. Halo cannot be required to answer, set up defenses, or assert its counterclaims. No hearing can be held "on the merits" unless and until the commission has expressly found it does have subject matter

[76] Order Dismissing Complaint, *Gary L. Smith v. Peter J. Lenzenhuber*, Case No. WC-2001-417 (June 13, 2002) 2002 Mo. PSC LEXIS 806 (Mo. PSC 2002).

[77] *See Beach*, 934 S.W.2d at 318; *Crouch*, 641 S.W.2d at 90; and *Ogle*, 893 S.W.2d at 404.

[78] *See Steel Co.*, 523 U.S. at 94, 118 S. Ct. at 1012; and *Beach*, 934 S.W.2d at 318.

jurisdiction over the action and personal jurisdiction over Halo. As demonstrated by the foregoing, however, the commission does not have either subject matter jurisdiction or personal jurisdiction over Halo or Halo's business or property. Thus the commission can take only one action: dismiss.

Respectfully submitted,

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Attorneys for Halo Wireless, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Motion to Dismiss* was served via regular mail and/or certified mail, return receipt requested, on the following counsel of record on this the 25th day of July, 2011:

W.R. England, III
Brian T. McCartney
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(573) 659-8734 telephone
(573) 761-3587 facsimile

Troy P. Majoue

EXHIBIT 1

Federal Communications Commission
Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSEE: HALO WIRELESS

ATTN: NATHAN NELSON
HALO WIRELESS
307 WEST 7TH STREET SUITE 1600
FORT WORTH, TX 76102-5114

Call Sign	File Number
WQJW781	0003681223
Radio Service NN - 3650-3700 MHz	
Regulatory Status Common Carrier	

FCC Registration Number (FRN): 0018359711

Grant Date	Effective Date	Expiration Date	Print Date
01-27-2009	01-27-2009	11-30-2018	01-27-2009

Market Name: Nationwide

Channel Block: 003650.00000000 - 003700.00000000 MHz

Waivers/Conditions:

This nationwide, non–exclusive license qualifies the licensee to register individual fixed and base stations for wireless operations in the 3650–3700 MHz band. This license does not authorize any operation of a fixed or base station that is not posted by the FCC as a registered fixed or base station on ULS and mobile and portable stations are authorized to operate only if they can positively receive and decode an enabling signal transmitted by a registered base station. To register individual fixed and base stations the licensee must file FCC Form 601 and Schedule M with the FCC. See Public Notice DA 07–4605 (rel November 15, 2007)

Conditions:
Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

EXHIBIT 2

McCOLLOUGH|HENRY PC

1250 South Capital of Texas Highway
Building 2, Suite 235
West Lake Hills, Texas 78746
Phone: 512.888.1114
Fax: 515.692.2522
henry@dotlaw.biz

March 25, 2011

VIA E-MAIL AND U.S. MAIL

Alex Starr — Alex.Starr@fcc.gov
Rosemary McEnery — Rosemary.McEnery@fcc.gov
Michael Engel — Michael.Engel@fcc.gov
Tracy Bridgham — Tracy.Bridgham@fcc.gov
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Halo Wireless, Inc. v. Citizens Telephone Company of Higginsville Missouri*
Halo Wireless, Inc. v. Green Hills Telephone Corporation
Halo Wireless, Inc. v. Mid-Missouri Telephone Company
Halo Wireless, Inc. v. Northeast Missouri Rural Telephone Company
Halo Wireless, Inc. v. Chariton Valley Telephone Corporation
Halo Wireless, Inc. v. Mark Twain Rural Telephone Company
Halo Wireless v. AT&T Missouri

Request for Inclusion of Complaint, Once Filed, on FCC Accelerated Docket

Dear Mr. Starr, Ms. McEnery, Mr. Engel and Ms. Bridgham:

Halo Wireless, Inc. ("Halo") intends to file a complaint (or individual complaints) against Citizens Telephone Company of Higginsville Missouri, Green Hills Telephone Corporation, Mid-Missouri Telephone Company, Northeast Missouri Rural Telephone Company, Chariton Valley Telephone Corporation, Mark Twain Rural Telephone Company, and AT&T Missouri (the "ILECs"). The purpose of this letter is to request that the Staff exercise its discretion and include the contemplated complaint on the Accelerated Docket.[1]

The matter involves multiple defendants. The defendant carriers are not entirely commonly owned or controlled, but Halo will allege that they have acted in concert, are jointly liable to Halo and the complaint concerns common questions of law or fact. *See*, 47 C.F.R. § 1.735(a). Even if separate complaints are filed, Halo will seek that they be consolidated by the Commission for disposition. Halo has engaged in discussions with counsel for each of the defendants, and each was placed on notice that Halo intended to seek relief from the Commission. *See* 47 C.F.R. § 1.721(a)(8). Given that Halo is seeking inclusion on the Accelerated Docket, it is not necessary to fully comply with all the requisites of subsection (a)(8) at this time. *See* 47 C.F.R. § 1.721(f)(iii). After a decision is made regarding placement on the

[1] Halo will request bifurcation of the damages claims for decision in a separate proceeding as is allowed under § 1.722(b) of the Commission's rules and encouraged for matters sought to be placed on the Accelerated Docket.

Accelerated Docket, Halo will take all required steps appropriate for the designated procedural track.

Halo intends to seek relief under § 208 for violations of § 201 of the Act and §§ 20.11, 51.301, 63.60, 63.62, and 63.501 of the Commission's rules.[2] There are only two major issues. The first is whether an incumbent can block intraMTA CMRS traffic solely because the CMRS carrier refuses to pay access charges billed by the incumbent in violation of 47 C.F.R. § 20.11(d) the incumbent is not using (or properly invoking) the procedure (47 C.F.R. § 20.11(e)) expressly made available to ILECs in similar circumstances in the *T-Mobile Order,*[3] and the CMRS provider has declined to become a requesting carrier. The second issue, raised by the defendants, is whether or not Halo's traffic is CMRS and/or intraMTA to the extent Halo's customer is an enhanced/information service provider and Halo is acting as a "numbering partner."[4]

The issues related to a finding of a violation and liability (but not the quantification of damages) are well suited for resolution through the Accelerated Docket. The disagreements between the parties relate to the kinds of disputes the Commission had in mind when it established this process.[5] Three of the defendants are presently blocking traffic originated by Halo, and the other two will – absent action by the Commission – begin blocking on April 11th (Northeast Missouri), April 18th (Chariton Valley) and April 25th (Mark Twain).[6] This is obviously service-affecting and a damaging business impediment to Halo, which is a new market entrant.[7]

As noted, there are several defendants. Each has been represented by counsel, and they are grouped by counsel below.[8]

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[2] Halo will provide the background facts and then demonstrate why the defendants' conduct violates these specific provisions in the Act or FCC rules.

[3] 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, 20 FCC Rcd 4855 (2005) ("*T-Mobile Order*").

[4] Some of the ILECs have also asserted, as a potential third issue, that Halo is not correctly passing CPN. This issue is a chimera that distracts from the two basic issues because Halo is passing both CPN and Charge Number in accordance with industry standards and Commission rules. Those ILECs who have raised this issue have simply confused CPN and ChPN. In addition, Halo is already complying with the Commission's proposed "phantom" and "Truth in Caller ID" rules. If the ILECs persist in this allegation, Halo will provide call traces to clarify the issue.

[5] Second Report and Order, *In the Matter of Implementation of the Telecommunications Act of 1996 Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, FCC 98-154, 13 FCC Rcd 17018, 17027 ¶ 16 (rel. July 1998) ("*Accelerated Docket R&O*").

[6] The sixth defendant, AT&T, is the defendant that actually implements the blocking at its tandem. AT&T is doing so at the behest of the non-AT&T defendants and AT&T has indicated that it is acting by state compulsion and the action is not completely voluntary. Halo believes this may well be true, and to that extent AT&T bears far less culpability than the other defendants.

[7] *See Accelerated Docket R&O* ¶7, 13 FCC Rcd at 17023 ["... any delay in the process for resolving competitive disputes works to the benefit of the party supporting the current state of affairs. Regardless of the merit of the parties' respective positions, a longer decision time prolongs the time during which the dispute remains unresolved; this in turn can delay a market participant's execution of its business plan. Similarly, absent interim, injunctive-style relief, any delay in the decision process may cause harm by prolonging the time during which the complainant must suffer the damage caused by a violation of the Act."]

[8] Halo will serve counsel with this letter, but will also serve each entity's designated agent for service of process that is listed on the Bureau's website.

Citizens Telephone Company of Higginsville Mo. OCN 1865; FCC Filer information at
http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=807018
Green Hills Telephone Corporation. OCN 1890; FCC Filer information at
http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=808936
Mark Twain Rural Telephone Company. OCN 1914; FCC Filer information at
http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=803688

Above Companies' Counsel:
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Jefferson City, Missouri 65102-0456 — FAX: 573.634.7431

Mid-Missouri Telephone Company. OCN 1917; FCC Filer information at
http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=801801
Northeast Missouri Rural Telephone Company. OCN 1931; FCC Filer Information at
http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=801405
Chariton Valley Telephone Corporation. OCN 1864; FCC Filer Information at
http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=807093

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AT&T Missouri is in the unfortunate position of being in the middle of this dispute, since it is the one that must implement blocking at the tandem. For this reason Halo must include AT&T as a defendant. AT&T's Missouri counsel is:

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St. Louis, Missouri 63101 — FAX: 314.247.0014

I. Background Facts

1. Halo provides "common carrier interconnected" CMRS service.

On January 27, 2009 Halo was awarded a nationwide license ("Radio Station Authorization" or "RSA") to register and operate fixed and base stations in the 3650-3700 MHz band and to support "mobile" and "portable" subscriber stations. The RSA recognizes and adopts

Halo's declaration and intent to provide service as a common carrier, and as a consequence expressly states that Halo's services are "common carrier - interconnected."[9] A copy of the RSA is contained in Exhibit 1.

The Commission created new rules for operations within the 3650-3700 MHz band in 2005.[10] The stated purpose was to encourage the delivery of advanced communications capabilities on a flexible basis. This band was also specifically noted as suited for use with WiMAX, which is one technology used to deliver 4G wireless broadband service.[11] The Commission said that licensees could use the frequencies to provide any service, including telecommunications services or enhanced/information service on a non-carrier basis or as common carriers.[12] This is reflected in the rules for the band, which appear in 47 C.F.R. Part 90,

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[9] Section 332(d)(2) defines "interconnected service":

> (2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B).
>
> 47 C.F.R. § 20.3 also defines "interconnected" and "interconnected service":
>
> Interconnection or Interconnected. Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.
>
> Interconnected Service. A service: (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or (b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

[10] R&O and MO&O, *In the Matter of Wireless Operations in the 3650-3700 MHz Band; Rules for Wireless Broadband Services in the 3650-3700 MHz Band; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band; Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band,* ET Docket Nos. 98-237, 02-380, 04-151, WT Docket No. 05-96, FCC 05-56, 20 FCC Rcd 6502 (rel. Mar. 16, 2005)("*3650-3700 Order*").

[11] WiMAX (Worldwide Interoperability for Microwave Access) is a "4G" transport technology. WiMAX provides wireless transport point-to-point links and can also support full mobile cellular-type access. It is based on the IEEE 802.16 standard. The 802.16 specification applies across a wide swath of the RF spectrum, and WiMAX could effectively function on any frequency below 66 GHz. There is no uniform global licensed spectrum for WiMAX, although the WiMAX Forum has published three licensed spectrum profiles: 2.3 GHz, 2.5 GHz and 3.5 GHz. Restricted use on the 3650-3700 MHz spectrum can and does use a variant of the 802.16 standard.

[12] *See*, *3650-3700 Order* ¶¶ 36-37 and associated notes:

> 36. Licensees in the 3650 MHz band may provide services on a common carrier or non-common carrier basis [note 67 set out below] and will have flexibility to designate their regulatory status based on any services they choose to provide.[note 68 set out below] Such an approach will provide them with the greatest flexibility to use the spectrum for service applications that are best suited for their needs.[note 69 omitted] In other words, wireless licensees in the 3650 MHz band will be able to provide all allowable services anywhere within their service area at any time, consistent with whatever regulatory status they choose. We believe that this approach is likely to achieve efficiencies in administrative process and provide flexibility to the marketplace.
>
> 37. While wireless licensees in the 3650 MHz band will be subject to specific licensing and operating provisions adopted in this order, other rules may also apply to these licensees depending

Subpart Z.[13] Unlike some bands, the 3650-3700 band is not "exclusive" and any person can operate in the band by obtaining a license to do so. The license takes the form of a Radio Station Authorization ("RSA"). After the licensee is given the RSA, then each base and fixed station must be registered in the Commission's database.[14] Halo is thus a common carrier and a licensee under the Act and the rules.

Halo's CMRS 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. *See* 47 C.F.R. § 20.3 definitions of "commercial mobile radio service,"[15]

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on the type of the service they provide. For instance, if a wireless licensee provides Commercial Mobile Radio Services (CMRS), which makes the licensee a common carrier, other obligations attach as a result of that decision under Title II of the Communications Act or the Commission's rules (e.g., universal service, CALEA).[note 70 set out below]

[note 67] Regulatory status as a common carrier or non-common carrier depends on the services provided pursuant to the Communications Act, not the issuance of a license or authorization by the Commission. Generally, common carriers are telecommunications providers (*i.e.*, an entity that holds itself out for hire indiscriminately for the purposes of carrying transmissions provided by the customer) in so far as it provides telecommunications services (*i.e.*, the transmission of information of the user's choosing without change in the form or content of the information). *See* 47 U.S.C. § 153. This means that a non-common carrier does not hold itself out for hire indiscriminately for the purposes of carrying transmissions provided by the customer.

[note 68] We note that applicants may request common carrier status as well as non-common carrier status for authorization in a single license. *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12636-38 (¶¶ 205-208), 12644-45 (¶¶ 225-226), 12652-53 (¶¶ 245-251) (1997) (*LMDS Second Report and Order*); *aff'd, Melcher v. FCC*, 134 F.3d 1143 (D.C. Cir. 1998).

[note 70] 47 C.F.R. Part 20. In addition, certain rules may be applicable generally to all wireless services. *See, e.g.*, 47 C.F.R. Part 1, 17 (provisions implementing NEPA, antenna structure registration requirements).

[13] *See, e.g.*, 47 C.F.R. § 90.1309:

Sec.90.1309 Regulatory status.

Licensees are permitted to provide services on a non-common carrier and/or on a common carrier basis. A licensee may render any kind of communications service consistent with the regulatory status in its license and with the Commission's rules applicable to that service.

[14] Sec. 90.1307 Licensing.

The 3650–3700 MHz band is licensed on the basis of non-exclusive nationwide licenses. Non-exclusive nationwide licenses will serve as a prerequisite for registering individual fixed and base stations. A licensee cannot operate a fixed or base station before registering it under its license and licensees must delete registrations for unused fixed and base stations.

The requirement to register stations is a restriction on actual provision of service to users; it does not act as a prerequisite to having either "common carrier" or "interconnected" status.

[15] Commercial mobile radio service. A mobile service that is:

(a)(1) provided for profit, i.e. , with the intent of receiving compensation or monetary gain;

(2) An interconnected service; and

(3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or

(b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

"interconnected,"[16] "interconnected service"[17] and "public switched network.[18] The RSA expressly provides that it authorizes "common carrier – interconnected service."

Halo provides "telephone exchange service" and "exchange access" as defined in § 153 of the Act,[19] which means that Halo is a "service provider" for purposes of numbering and can obtain "CO codes" that are assigned to customers for use in association with Halo's telecommunications service offerings. To this end, Halo obtained an OCN (429F) and has secured numbering resources for rate centers in several MTAs throughout the country, including Missouri.

2. The Missouri impasse.

Halo has assembled and is presenting the correspondence between the parties, appropriately marked as Exhibits. The references below will use the Exhibit number, but on occasion will also employ a short hand description or reference to the date of the communication.

Halo has an interconnection agreement with AT&T Missouri. As part of that agreement AT&T provides "transit" to Halo, whereby calls from Halo customers can be routed to other carriers for transport and termination.

The majority of the traffic going to CO codes operated by the ILECs that are or were receiving traffic being sent by Halo for termination in Missouri is jurisdictionally interstate and intraMTA. Most of the traffic is coming from a base station in Junction City, Kansas and flows into the portion of Missouri that is within the Kansas City MTA (MTA 34) boundary. Two of the ILECs (Citizens and Green Hills) are entirely within this MTA. About 75% of the CO codes operated by Mid-Missouri are also in this MTA.

Halo also has a base station in Wentzville, MO, serving the St. Louis MTA (MTA 19). The rest of the CO codes operated by Mid-Missouri, which is about 25% of their total, come

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[16] Interconnection or Interconnected. Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network.

[17] Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

[18] Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

[19] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Provi*ders, CC Docket Nos. 96-98, 95-185, ¶¶ 1013-1015, 11 FCC Rcd 15499, 15999-16002 (1996) ("*Local Competition Order*") (subsequent history omitted).

from this base station. All of the traffic involving the other three ILECs (Northeast Missouri, Chariton Valley and Mark Twain) is in this MTA.

The blocking mentioned above and further described below therefore involves jurisdictionally interstate traffic in substantial part. In any event, the blocking for even "intrastate" traffic still effectively frustrates Halo's federal right to interconnect, regardless of the actual jurisdiction of any particular call. *See T-Mobile Order* note 41, citing to *CMRS Second Report and Order*.[20]

Each of the non-AT&T ILECs involved claim to be "rural incumbent local exchange carriers," ("RLECs") as defined in § 153(37) of the Act. Presumably, each will assert the § 251(f) exemption from § 251(c) duties.[21] Each has transported and terminated traffic originated

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[20] Second Report and Order, *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, FCC 94-31, ¶¶ 227-230, 9 FCC Rcd 1411, 1497-1498 (1994) (noted omitted):

> 227. The Notice refers to the right of mobile service providers, particularly PCS providers, to interconnect with LEC facilities. The "right of interconnection" to which the Notice refers is the right that flows from the common carrier obligation of LECs "to establish physical connections with other carriers" under Section 201 of the Act. The new provisions of Section 332 do not augment or otherwise affect this obligation of interconnection.
>
> 228. Previously, the Commission has required local exchange carriers to provide the type of interconnection reasonably requested by all Part 22 licenses. In the case of cellular carriers, the Commission found that separate interconnection arrangements for interstate and intrastate services are not feasible. Therefore, we concluded that the Commission has plenary jurisdiction over the physical plant used in the interconnection of cellular carriers and we preempted state regulation of interconnection. We found, however, that a LEC's rates for interconnection are severable because the underlying costs of interconnection are segregable. Therefore, we declined to preempt state regulation of a LEC's rates for interconnection. The Commission recognized, however, that the charge for the intrastate component of interconnection may be so high as to effectively preclude interconnection. This would negate the federal decision to permit interconnection, thus potentially warranting our preemption of some aspects of particular intrastate charges.
>
> 229. The Commission has allowed LECs to negotiate the terms and conditions of interconnection with cellular carriers. We required these negotiations to be conducted in good faith. The Commission stated, "we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection." We also preempted any state regulation of the good faith negotiation of the terms and conditions of interconnection between LECs and cellular carriers. The Notice, however, requested comment on whether we should require LECs to file tariffs specifying interconnection rates for PCS providers.
>
> 230. We see no distinction between a LEC's obligation to offer interconnection to Part 22 licensees and all other CMRS providers, including PCS providers. Therefore, the Commission will require LECs to provide reasonable and fair interconnection for all commercial mobile radio services. The Commission finds it is in the public interest to require LECs to provide the type of interconnection reasonably requested by all CMRS providers. The Commission further finds that separate interconnection arrangements for interstate and intrastate commercial mobile radio services are not feasible (i.e., intrastate and interstate interconnection in this context is inseverable) and that state regulation of the right and type of interconnection would negate the important federal purpose of ensuring CMRS interconnection to the interstate network. Therefore, we preempt state and local regulations of the kind of interconnection to which CMRS providers are entitled.

[21] For purposes of this letter Halo does not challenge this claim. Halo, however, reserves the right to do so. For the record, however, Halo has not submitted a "bona fide request" under § 251(f) and does not intend to do so now or in the future.

by Halo. There is no written agreement in place between Halo and these RLECs. Halo is satisfied with the resulting current default "bill and keep" arrangement for reciprocal compensation, and believes that this arrangement constitutes "reasonable compensation" for purposes of 47 C.F.R. § 20.11(b)(1) and (2). The RLECs apparently disagree and instead desire to be paid for transport and termination. The first contact Halo had with any of them after they observed Halo traffic coming to them via the AT&T tandem the carriers was the receipt of *access charge* invoices to Halo. *But see* 47 C.F.R. § 20.11(d). Halo disputed the access charge billings, as it is allowed to do under § 20.11. Respective counsel for both RLEC groups contacted Halo and the parties had various discussions. If is fair to say that "disputes exist as to whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers." *See T-Mobile Order* ¶ 4. *See also* ¶¶ 6-7 and compare to the situation described below.

The *T-Mobile Order* prescribed a very specific remedy for these exact circumstances. The Commission promulgated two new subsections to 47 C.F.R. § 20.11. First, the Commission agreed with the CMRS providers that default tariffing should no longer be allowed, and created § 20.11(d) to expressly prohibit LEC attempts to "impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs." The Commission in turn realized that as a result of this new prohibition CMRS providers would no longer have any incentive, practical requirement or any legal compulsion to become requesting carriers. Given that neither § 252 nor § 332(c) provide a means for ILECs to seek compulsory negotiations, the FCC used its rulemaking authority under § 332 and amended "our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act." *T-Mobile Order* ¶ 9.[22] The result is that CMRS providers are allowed to continue indirect interconnection without first establishing a written contract imposing any specific compensation obligation.[23] If an ILEC wants to require that one be created, all it has to do is send a formal notice to the CMRS provider and (1) "request interconnection"; (2) "invoke the negotiation and arbitration procedures in section 252 of the Act" and (3) in the original notice letter or at least at some point before seeking a state commission arbitration it must request that the CMRS provider "submit to arbitration by the state commission." The Commission *did not* require the CMRS provider to begin this process or take any initial action. The *ILEC* must invoke the rule and take these three steps.[24] When the ILEC does so, the CMRS provider must negotiate in good faith and must submit to state level arbitration upon request.

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[22] The rule amendment was a new subsection (e), which provides:

> (e) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in § 51.715 of this chapter shall apply.

[23] The ILECs here contend that Halo had some duty to establish a written obligation prior to delivering traffic through indirect interconnection. That is inconsistent with the Commission's interpretation of the applicable law in the *T-Mobile Order*.

[24] *T-Mobile Order* Regulatory Flexibility Analysis, ¶ 20:

> Further, we directly address the concern of small incumbent LECs that they would be unable to obtain a compensation arrangement without tariffs by providing them with a new right to initiate a

The difficulties between Halo and all of the RLECs arises entirely from Mr. Johnson's clients' steadfast refusal to use – and in the case of Mr. England's[25] clients, correctly invoke – the remedy the Commission crafted for these very companies in *T-Mobile*. Citizens and Green Hills were part of the "Missouri Small Telephone Company Group" and were represented by the same counsel as today.[26] Chariton Valley, Mid-Missouri and Northeast Missouri also participated in *T-Mobile* and they used the same counsel as today.[27] Despite their clear knowledge and background from the case each of them sent access tariff billings to Halo, and took offense when Halo disputed the access billings based on § 20.11(d). Halo painstakingly explained the course of action each of them could take to benefit from § 20.11(e),[28] but each of them has refused to "request interconnection" and/or properly "invoke the negotiation and arbitration procedures in section 252 of the Act." None of them has to date sent a request that Halo submit to state commission arbitration. *See* Exhibits 2 through 33.

Halo attempted to conduct substantive discussions regarding potential terms notwithstanding its position that the ILECs were not following the rule. *Id.* Apparently the RLECs expected Halo to simply sign their proffered terms containing non-cost-based prices using legacy interconnection methods rather than modern IP-based technology and would not seek negotiated (and, if necessary, arbitrated) terms applying the substantive standards in the Act and Commission rules regarding § 251(b) and (c) and the cost principles in § 252(d). They were not anxious to produce the kind of information they are required to provide under 47 C.F.R. § 51.301(c)(8)(i) and (ii).[29] They do not want to discuss technically-feasible direct interconnection using IP rather than legacy circuit-switched arrangements. In order to avoid having to deal with the result of the *ILEC* requesting interconnection and invoking § 252, they are engaging in unreasonable strong-arm tactics by illegally instituting traffic blocking until Halo waives its rights and submits to their unilaterally imposed terms or becomes a requesting carrier. The significant difference in results that they could obtain at the state level depending on which entity is the requesting carrier will be explained below.

Citizens and Green Hills contend that they have in fact properly invoked § 20.11(e). Halo disagrees, for they have not "requested interconnection." *See* Exhibit 11. Nonetheless, Halo engaged in substantive discussions with these two RLECs, yet they chose to persist in blocking notwithstanding that Halo met the illegal and unreasonable conditions they had unilaterally set to

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section 252 process through which they can obtain a reciprocal compensation arrangement with any CMRS provider.

[25] The reference to counsel by name is not intended to be personal, nor should it be taken as such. It is merely easier to group the RLECs by the two counsels. The two groups have approached this matter in slightly different fashion but the actions within each group were entirely consistent, except for timing.

[26] *See* Docket 01-92, Comments of Missouri Small Telephone Company Group, August 17, 2004, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=6516287827.

[27] *See, e.g.,* Docket 01-92, Motion to Dismiss of Missouri Independent Telephone Group, p. 1, note 1, August 3, 2004, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=6516286469.

[28] This should not have been necessary since all of the ILEC defendants were active participants in *T-Mobile* and, as such, they should be able to follow the rule the FCC wrote just for them.

[29] Halo indicated both in writing and orally that it desired information about the ILECs' network that Halo reasonably requires to identify the network elements that it needs in order to serve a particular customer, and cost data that would be relevant to setting rates if the parties were in arbitration. *See* Exhibits 4 and 8. The ILECs have refused to provide this information. Instead they walked away and chose to block Halo's traffic.

avoid blocking.[30] *See* Exhibits 5, 11, 17 and 22. The other RLECs – through counsel – initially sent an email that appeared to try to invoke § 20.11(e), but they now take the position that, for example, "Mid-Missouri has not requested interconnection agreement negotiations with Halo. Mid-Missouri has informed Halo that it can avoid the blocking request by requesting negotiations with Mid-Missouri to adopt or establish an interconnection agreement."[31] *See* Exhibit 13. Indeed, the assertions made by the RLECs to Halo are astoundingly similar to the arguments they made to the Commission in *T-Mobile*.[32] The Commission granted these very companies relief in the form of the right to force § 252 procedures, but they are now refusing to avail themselves of that vehicle. Instead, they have returned to access charge billings and blocking.

These RLECs are not using the process the Commission gave them the last time they caused the same problems, and have now violated multiple provision in the Act and Commission rules by demanding access payment and blocking traffic unless and until Halo concedes to their demands.

3. The RLECs' blocking threats and then consummation of the threat.

Halo is providing the blocking-related documents, including:

- Initial requests for blocking by the LECs listed above.
- Halo's response to the request for blocking by some of the LECs. Halo has not responded to the Northeast Missouri Rural Telephone Company, Chariton Valley or Mark Twain requests, largely because the prior responses were essentially ignored and doing so would be fruitless.

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[30] *See* Exhibit 4. ["In order for Halo Wireless to avoid having its traffic blocked on the LEC-to-LEC Network beginning on March 1, 2011, Halo must: (1) agree to enter into good faith negotiations to establish a reciprocal compensation agreement consistent with the Telecommunications Act for the exchange of and compensation for local traffic; and (2) comply with the requirements of the MoPSC CARE Rule, in particular, to immediately cease and desist from sending any interLATA wireline traffic to Citizens and Green Hills for termination. These actions must be taken on or before February 18, 2011."] Halo did engage in good faith negotiations. The condition concerning "interLATA wireline traffic" is a purposeful and incorrect mischaracterization and attempts to prevent Halo from providing its CMRS service based on the ILECs' unilateral demands rather than the requirements in the Act and Commission rules. Regardless, this would and should be a matter for negotiation and if necessary arbitration. 47 C.F.R. § 51.301(c)(5) expressly provides that "… coercing another party into reaching an agreement that it would not otherwise have made" violates the duty to negotiate in good faith. Blocking traffic in this manner unless Halo agrees to waive its rights is patent coercion. This is one of the causes of action Halo intends to raise in this matter.

[31] *See* Exhibit 28.

[32] *Compare T-Mobile* note 35 description of Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 5 ["claiming that it is the CMRS providers that have elected to bypass the negotiation process by establishing indirect interconnection with incumbent LECs without any agreement to do so" and ¶ 8 [stating rural alliance argument that "in the absence of an agreement or other arrangement, wireless termination tariffs are the only mechanism by which they can obtain compensation for terminating this traffic" *with* Mid-Missouri counsel March 7 letter. ["Instead of complying with the law, and with an interconnection agreement approved by the State of Missouri, Halo sent Mid-Missouri terminating traffic without any notice or opportunity to develop the reciprocal compensation and exchange access arrangements required for these types of traffic. Mid-Missouri billed the correct exchange access rates for this traffic, the only compensation mechanism available to Mid-Missouri as Halo failed to obtain an agreement with Mid-Missouri as required by law."]

- Letters by counsel for some of the RLECs indicating they do not agree to withdraw or defer the blocking requests.

The blocking correspondence refers to some Missouri PSC rules. Those rules can be found at: http://www.sos.mo.gov/adrules/csr/current/4csr/4c240-29.pdf

The Missouri Enhanced Record Exchange Rules ("CARE rules") do not apply on their face. The notices justify blocking on 4 CSR 240-29.130(2). This is the rule that AT&T perceives to require it to block upon the request. It provides:

> (2) A terminating carrier may request the originating tandem carrier to block, and upon such request the originating tandem carrier shall block, the originating carrier's Local Exchange Carrier-to-Local Exchange (LEC-to-LEC) traffic, if the originating carrier has failed to fully compensate the terminating carrier for terminating compensable traffic, or if the originating carrier has failed to deliver originating caller identification

While the RLECs may each be a "terminating carrier" under the rules, Halo is not an "originating carrier" as the rules define that phrase. 4 CSR 240-29.020(29) defines an "originating carrier" as:

> (29) Originating carrier means **the telecommunications company** that is responsible for originating telecommunications traffic that traverses the LEC-to-LEC network. A telecommunications company whose retail telecommunications services are resold by another telecommunications company shall be considered the originating carrier with respect to such telecommunications for the purposes of this rule. A telecommunications company performing a transiting traffic function is not an originating carrier. (emphasis added)

Halo is the source of traffic going to AT&T and presumably to the RLECs involved. Halo, however, is not a "telecommunications company" under the state statute and thus it cannot be an "originating carrier" under the CARE rules. 4 CSR 240-29.020(34) has a specific definition of "telecommunications company": "those companies as set forth by section 386.020(51),[33] RSMo Supp. 2004." Under the cited Missouri statutory provision:

> (52) "Telecommunications company" includes telephone corporations as that term is used in the statutes of this state and every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any facilities used to provide telecommunications service for hire, sale or resale within this state; (emphasis added)

This definition clearly provides that an entity is a "Telecommunications company" only if it provides a "telecommunications service." The statute defines that term in subpart (54):

> (54) "Telecommunications service", the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any

[33] The rule cites to subsection (51) but the correct reference is obviously subsection (52).

> form of writing, signs, signals, pictures, sounds, or any other symbols. Telecommunications service does not include:
>
> [...]
>
> (c) The offering of radio communication services and facilities when such services and facilities are provided under a license granted by the Federal Communications Commission under the commercial mobile radio services rules and regulations;

Halo is a CMRS provider and is operating pursuant to an FCC Radio Station Authorization that grants federal permission to offer interconnected common carrier service on a nationwide basis. Under the Missouri statute's definition, this is not a "telecommunications service." Halo is therefore not a "telecommunications company," and, as a consequence, cannot be an "originating carrier" under the CARE rules.

Finally, the interface between Halo and AT&T is "Type 2A." Halo's CMRS network uses 4G protocols. Halo's traffic therefore cannot be said to "originate via the use of feature group C protocol." *C.f.*, 4 CSR 240-29.020(1), (13), (18). Therefore 4 CSR 240-29.040(1) does not apply. Once again, this means that Halo's traffic is simply not captured within the express terms of the CARE Rules.

The CARE rules do not apply and do not cover any of Halo's traffic. Even if the CARE rules could be said to apply, the prerequisite of non-payment of "compensable amounts" is not met because no compensation is in fact yet due. There are several other reasons blocking is not allowed under the CARE rules that need not be addressed at this time. Halo will not be using the processes set out in 4 CSR 240-29.120(5).

State rules cannot authorize the blocking of interstate traffic. Nor can state rules impose obligations that go beyond those imposed by the FCC with regard to signaling or negotiations, including the processes or who has the burden. The rules do not apply, so the recourse made available within them is inappropriate. Instead, given the fact that a large proportion of the traffic is jurisdictionally interstate and blocking even intrastate traffic frustrates Halo's federal right to interconnect, Halo is seeking relief at the Commission.

4. The § 251(f) rural exemption leads to significant outcomes depending on whether Halo or the RLECs is the "requesting carrier" and § 252 arbitration becomes necessary.

Halo provides "telephone exchange service" and "exchange access" and direct interconnection for those two services is dealt with only through § 251(c).[34] If there is to be a

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[34] The Texas PUC adopted this straightforward reasoning in the Sprint/Brazos decision affirmed by the federal district court (both cited above)(emphasis added):

> In reviewing the briefs submitted in this case, it is clear that Sprint's request is expressly for the ability to offer and provide telephone exchange service. In order for Sprint to accomplish this, Sprint stated that it must be able to connect with other carrier's networks in order to exchange traffic, specifically "telephone exchange" traffic. Sprint argued that it seeks interconnection only through FTA § 251(a), and not (c).
>
> The Commission disagrees with Sprint's contention that it can receive interconnection through FTA § 251(a) to offer and provide telephone exchange service. FTA § 251(c)(2) provides, in part, that an ILEC is obligated to provide interconnection for the transmission and routing of "telephone exchange service" and exchange access. FTA § 251(a), however, does not require ILECs or other telecommunications carriers to interconnect for the express purpose of exchanging traffic relating

price for transport and termination then that is of course important and Halo obviously wants that price to be set consistent with statutory standards, *e.g.*, TELRIC. At this point, however, the only reason Halo has any incentive to become a requesting carrier would be to obtain direct interconnection with the RLECs, or if Halo desired to actualize some of the other "LEC" duties arising from § 251(b), such as resale or access to structure.[35]

Let us assume that Halo succumbed to the ILEC's demands that Halo become a requesting carrier and in that fashion the parties begin "the negotiation and arbitration procedures in section 252 of the Act" and do not reach a fully negotiated set of terms. Assume one or the other files an arbitration petition with the Missouri PSC under § 252(b)(1). The state commission is supposed to "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement." *See* § 252(b)(4)(C). The "subsection (c)" implementation requirement relates to "(1) ensur[ing] that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251"; and "(2) establish[ing] any rates for interconnection, services, or network elements according to subsection (d)." Subsection (d), in turn, speaks to the substantive pricing standards for implementing § 251(b)(5) and (251(c).

Each of the non-AT&T ILECs, however, asserts rural status as an RLEC and an exemption from §251(c) duties and obligations. Presumably they will claim that the cost-based pricing requirements in §252(d) for interconnection or transport and termination also do not apply. Halo has already faced this issue in other states. For example, in Texas Mid-Plains Rural Cooperative asserts that "rural telephone companies like Mid-Plains are exempt from TELRIC pricing standards" and instead the applicable "standard" is considerably more subjective: "just, reasonable and nondiscriminatory." This Texas RLEC advised Halo that it does not have any TELRIC studies for transport and termination and would not be conducting any notwithstanding that the RLEC is simultaneously claiming that the parties are using "the negotiation and arbitration procedures in section 252 of the Act." *See* Exhibit 35.

Given that the duty to negotiate in good faith to implement § 251(b)(5) is contained in § 251(c)(1), the RLECs are certain to argue they are exempt from that duty as well. If that proposition is accepted, then there is nothing for the state to arbitrate, and no remaining standards the state commission must apply to prescribe pricing terms to implement either interconnection or reciprocal compensation. The rural exemption has eliminated every topic and every standard that the "negotiation and arbitration procedures in section 252" is all about. We have a process, but no substance, no standards, no requirements and no duties. In that situation, there is a fairly compelling argument that there is in fact no arbitration to be had at all.

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to telephone exchange service. FTA § 251(a) encompasses a broad duty to interconnect for all carriers. *The duty of an ILEC to provide interconnection for purposes of exchanging "telephone exchange service" is solely and expressly an FTA § 251(c) obligation*.

[35] Halo does not need an interconnection agreement to obtain number portability. *See* Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *In the Matter of Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, FCC 03-284, ¶ 34, 18 FCC Rcd 23697 (2003)

Most RLECs have so asserted,[36] at least two states – Texas[37] and Maine[38] – have agreed, and so has at least one federal court.[39] NARUC filed an *ex parte* with the Commission only a few days ago in WC Docket 10-143 and expressed the view that state level arbitration is not available against a rural carrier because the rural exemption from § 251(c) also operates to immunize an RLEC from arbitration with regard to § 251(b) duties. *See* Exhibit 34.[40] Thus, if Halo were to become the requesting carrier there is a substantial possibility that Halo could not actually secure the "arbitration" part in "the negotiation and arbitration procedures in section 252 of the Act."

As noted, Halo is satisfied – for now – with the current informal "bill and keep" arrangement using indirect interconnection. The RLECs, of course, are the ones that want to establish a price for transport and termination, and it seems quite fair to require them to take the initiative. If Halo is for some reason required to dedicate the resources to negotiating (and, if necessary, arbitrating or litigating over any unresolved issues) then Halo will want to address far more than just the price for traffic each party terminates over indirect interconnection. For example, traffic volumes in the future may be sufficient to warrant direct interconnection rather than the current indirect arrangement via AT&T's tandem. Given the RLECs' exemption from §

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[36] Comcast recently filed an *ex parte* advising the Commission that RLECs in Vermont are refusing to negotiate under § 252 given their § 251(f) exemption. *See* Comcast *ex parte* filing, *In the Matter of Petition of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended,* Docket No. WC 10-143, February 17, 2011, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7021029946.

[37] Texas PUC Docket 31038, *Petition of Sprint Communications Company L.P. For Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms With Brazos Telecommunications Inc.*, Order Denying Sprint's Appeal of Order No. 1 (Dec. 2, 2005), available at http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/31038_40_497828.PDF ["Accordingly, the Commission finds that Sprint is requesting interconnection under FTA § 251(c)(2), and therefore, Sprint is required to petition to lift BTI's rural exemption under FTA § 25 l(f)(l)(A) before proceeding to negotiate and arbitrate an interconnection agreement. Until Sprint seeks termination of BTI's rural exemption and the Commission makes a determination regarding same, BTI is not obligated to negotiate and arbitrate an interconnection agreement with Sprint."]

[38] Order, *CRC Commc'ns o/Me., Inc. Petition/or Consol. Arbitration with Indep. Tel. Cos. Towards an Interconnection Agreement Pursuant to 47 U.S.C. 251, 252*, No. 2007-611, at 14 (Me. Pub. Utils. Comm'n May 5, 2008), available at http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb_docview&docid=68344&img_rng=205545&vol_id=1:

> A rural ILEC is not exempt from the obligations set forth in §251(a) and §251(b). We are unable, however, to find in the text of the TelAct language conferring upon this Commission authority to directly enforce the requirements of §251(a) and §251(b). Instead, the TelAct contemplates only that the requirements of §251(a) and §251(b) will be enforced by a state commission in the context of its authority to arbitrate "open issues" remaining after voluntary negotiations have yielded incomplete results. Again, however, rural ILECs are exempt from the duty to negotiate in good faith. ***Until and unless the rural exemption is lifted, there is, quite simply, nothing to arbitrate***. (emphasis added).

[39] *Sprint Communs. Co. L.P. v. PUC*, 2006 U.S. Dist. LEXIS 96569 *15 (W.D. Tex. Aug. 14, 2006) ["The Court further notes that § 251(a) and (b) say nothing at all about 'agreements,' 'negotiations,' or 'arbitration.' 47 U.S.C. § 251(a) and (b). Although there are duties established by § 251(a) and (b), and such duties apply to Brazos, the Court cannot find any language in the Act indicating that these duties independently give rise to a duty to negotiate or to arbitrate."]

[40] NARUC *ex parte* filing, *In the Matter of Petition of CRC Communications of Maine, Inc. and Time Warner Cable, Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended,* Docket No. WC 10-143, March 18, 2011, available at http://fjallfoss.fcc.gov/ecfs/document/view?id=7021034773.

251(c), however, Halo as a requesting carrier would have no way to force them to negotiate in good faith toward reasonable terms for direct interconnection using "the negotiation and arbitration procedures in section 252 of the Act," and so state-level arbitration is not an option if and to the extent Halo is the requesting carrier.

The RLECs are not exempt from § 332(c)(1)(B) and rule 20.11(a).[41] Those "interconnection" requirements are independent and separate from §§251 and 252, although there is certainly considerable overlap.[42] One might think that this separate set of obligations could be used and applied with regard to the RLECs within the context of § 252, but one would be wrong. *See Core Communications, Inc. v. SBC Communications, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 8447, ¶ 18 (2004) ("Neither the general interconnection obligation of section 251(a) nor the interconnection obligation arising under section 332 is implemented through the negotiation and arbitration scheme of section 252."); *Qwest Corp., Notice of Apparent Liability for Forfeiture*, 19 FCC Rcd 5169, ¶ 23 (2004) (defining the term "interconnection agreement" for purposes of section 252, as limited that term to those "agreement[s] relating to the duties outlined in sections 251(b) and (c)"); *see also, e.g., Qwest Corp. v. Public Utils. Comm'n of Colo.*, 479 F.3d 1184, 1197 (10th Cir. 2007) ("[T]he interconnection agreements that result from arbitration necessarily include only the issues mandated by § 251(b) and (c)."). *See even further Fitch v. PUC*, 261 Fed. Appx. 788, 792 (5th Cir. Tex. 2008).[43]

Halo cannot be reasonably expected to itself invoke a process leading to a state-level proceeding to set "appropriate conditions" when (1) it is not clear the state has or will exercise jurisdiction; (2) the provisions in the Act that establish the substantive standards for "appropriate conditions" are said to not apply; (3) the process to be used is principally designed to implement a duty that is claimed not to be at issue; and (4) it is likely that only the issues the RLECs want addressed will be resolved and in a context where Halo will bear a considerable cost, yet receive little, if any, benefit – particularly since Halo probably could not secure direct interconnection

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[41] (a) A local exchange carrier must provide the type of interconnection reasonably requested by a mobile service licensee or carrier, within a reasonable time after the request, unless such interconnection is not technically feasible or economically reasonable. Complaints against carriers under section 208 of the Communications Act, 47 U.S.C. 208, alleging a violation of this section shall follow the requirements of §§ 1.711-1.734 of this chapter, 47 CFR 1.711-1.734.

[42] *See Local Competition Order* ¶¶ 1022-1026.

[43] First, Affordable contends that the PUCT erred when it refused to arbitrate Affordable's claims under 47 U.S.C. §§ 201, 332(c)(1)(B) and 47 C.F.R. § 20.11. It also asserts that the district court erroneously concluded that § 332 is "outside the scope of an arbitration under § 252." In making this claim, Affordable recognizes that the FCC prefers that LEC-CMRS disputes are handled through the negotiation/arbitration process that was adopted in §§ 251/252 of the 1996 amendments, but Affordable nevertheless asserts that the FCC has also "taken great care to ensure that where § 332 or FCC wireless precedent requires a different substantive result than would the 1996 amendments standing alone, then its CMRS rules prevail."

Affordable's argument must fail. The FCC has clearly directed state commissions to arbitrate LEC-CMRS interconnection agreements under §§ 251 and 252, concluding that state commission arbitration proceedings would achieve "just, reasonable, and fair" agreements, which is the "common goal" of §§ 201, 332, 251, and 252. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 F.C.C.R. 15499, 16005 P 1023 (Aug. 8, 1996).

under any arrangement other than access tariffs. The RLECs want to change the compensation relationship and they have a mechanism they are refusing to use (or properly invoke).

The RLECs' clear goal in their varied efforts is to untether the substance in §§ 251 and 252 from the § 252 process by functionally requiring Halo to "negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251" (*see* § 252(a)(1)) and secure the opportunity to have the state commission arbitrate "open issues" also without regard to the statutory standards. The RLECs appear to be strategically gaming the process to prevent this opportunity, or to at least structure the matter so that the state can refuse to apply § 251(c) "technically feasible" standards and even the § 332(c)(1)(B)/20.11(a) "reasonably requested unless not technically feasible or economically reasonable" standard for physical interconnection. Halo has every right to not volunteer to begin this kind of wide open, standardless, state-level case when there is no potential benefit whatsoever and clearly a significant cost.[44]

The rule requires three things. Two of those things, once taken, impose the duty to negotiate. The last is only necessary if the RLEC intends to be the petitioner for state-level arbitration, and it can come at any point up to the day a state-level petition is filed. There must be (1) A request for "interconnection"; (2) An invocation of the negotiation and arbitration procedures in § 252; and before the state petition is filed; (3) a request that the CMRS provider submit to state arbitration.

There are significant and substantial reasons the FCC required each of the three steps in 20.11 in order to invoke § 252, for substantive consequences flow from each. For example, the requirement that the RLEC "request interconnection" was put in place to eliminate any question that § 251(c) is involved, and the state commission can actually *conduct* a § 252 arbitration. The RLECs have very carefully *not* requested interconnection. They deride Halo's insistence that they request interconnection, but have not yet stated a valid reason why the Commission referred three times to a required "request for interconnection" in § 20.11(e). In *T-Mobile* the CMRS providers and the ILECs were already indirectly interconnected, and the Commission was well aware of that. *See T-Mobile Order* ¶ 5.[45] Further, the Commission is well aware that "interconnection" under § 251(a) and 251(c)(2) (along with the "physical connections" referred to in § 332(c)(1)(B) [which in turn implements the "physical connection" aspects of § 201(a)] means "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." *See* 47 C.F.R. 51.5. *See also Competitive Telcoms. Ass'n v. FCC*, 117 F.3d 1068, 1071 (8th Cir. 1997). The Commission did not provide that RLECs could "request a reciprocal compensation arrangement under § 251(b)(5)," which is

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[44] Halo has clearly and repeatedly informed the RLECs that we will negotiate, using any of the three available contexts (§ 201/§ 332(c); § 251(a); § 252), at any time once the RLEC clearly identifies which track it desires to use and properly meets any procedural prerequisites. Once the context is firmly established, Halo will dutifully implement the appropriate standards and rules, and use the resulting process applicable within that context.

[45] As the Commission recognized in the *Intercarrier Compensation NPRM*, CMRS providers typically interconnect indirectly with smaller LECs via a Bell Operating Company (BOC) tandem. In this scenario, a CMRS provider delivers the call to a BOC tandem, which in turn delivers the call to the terminating LEC. The indirect nature of the interconnection enables the CMRS provider and LEC to exchange traffic even if there is no interconnection agreement or other compensation arrangement between the parties.

separate from "interconnection." The FCC required RLECs to "request interconnection" and was therefore going beyond mere establishment of a means for payment of transport and termination. Given the clear understanding that the carriers involved would already be indirectly interconnected, the Commission had to be requiring that the RLEC go to the CMRS provider and seek to establish *direct* physical connections, *e.g.*, interconnection.[46]

When the RLEC does "request interconnection" it will in effect become the requesting carrier *for physical interconnection* and will be submitting to state commission jurisdiction to establish terms for all § 251(b) and (c) duties. The Commission had to be aware that its carefully chosen words would subject the RLECs to direct interconnection and the resulting competition – at least with regard to CMRS – and effectively skip over the § 251(f) exemption that otherwise *immunizes the RLECs from competition.* In the same way the FCC was using its independent power over LEC-CMRS interconnection under § 332(c)(1)(B) to allow ILECs to functionally be a requesting carrier even though this was not otherwise possible under § 252, the Commission was imposing a § 251(c)(2) direct interconnection obligation – along with the standards in § 252(d)(1) – for RLECs notwithstanding § 251(f). There was a careful and purposeful balance: the RLECs can now be requesting carriers and force CMRS providers to enter an agreement that provides for transport and termination. But there is a price: they cannot do so while still hiding behind the rural exemption from § 251(c).[47] Both sides suffer and each can benefit. Competition wins all around. That fully explains the finding that under its *T-Mobile* result "[a]though establishing contractual arrangements may impose burdens on CMRS providers and LECs, including some small entities, that do not have these arrangements in place, we find that our approach in the Order best balances the needs of incumbent LECs to obtain terminating compensation for wireless traffic and the pro-competitive process and policies reflected in the 1996 Act." *T-Mobile* Regulatory Flexibility Analysis ¶ 21 (emphasis supplied).

The RLECs have realized that they cannot both get paid and avoid facing the prospect of direct interconnection under § 251(c)(2) using technically feasible methods – in this case via IP. Therefore, they are running away from the *T-Mobile* option and resorting to coercion by getting AT&T to block traffic.

5. The RLECs' allegations of improper CPN signaling and carriage of "wireline interLATA traffic" are not a justification for blocking.

The RLECs' counsel made two allegations in recent correspondence they may raise in response to Halo's filing. First, the RLECs accuse Halo of not correctly signaling CPN information. Second, the RLECs assert that at least some of the traffic is "wireline" "interLATA" traffic that should not be routed over CMRS interconnection. *See* Exhibits 31 and 34 through 37.

A. Halo assiduously follows industry practices and even the Commission's proposed "phantom traffic" rules with regard to signaling.

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[46] During negotiations the parties can, of course, decide to enter a voluntary agreement acceptable to all and to do so without regard to the standards in the Act, and thereby voluntarily maintain § 251(a) indirect interconnection. But clearly the drafter of the order recognized that absent the presence of a § 251(c)(2) requirement and request there can be no state arbitration, and indeed no § 252 process at all.

[47] If the defendants do not want to pay this price in order to get the benefit of being paid for transport and termination then they can simply leave the current bill and keep arrangement in place. Or, they can use the alternative mechanisms in §§ 201, 251(a) or 332(c)(1)(B). Halo has repeatedly offered to use each of those alternative processes. Exhibits 4, 8, 11, 17, 18 and 19.

Citizens and Green Hills' March 9, 2011 letter (Exhibit 31) asserts:

> Since our call, Citizens and Green Hills inform me that as of mid-February of this year, in a substantial number of cases, they are no longer able to identify in the designated calling number field the actual calling party number (CPN) of Halo originated calls terminating to Citizens and Green Hills. Since mid-February, thousands of calls transported by Halo to Citizens and Green Hills for termination are now showing a CPN of (816) 912-1901 instead of the "true" CPN. Not only does this appear to be a violation of the Commission's Enhanced Record Exchange (ERE) Rules in 4 CSR 240-29.040(1) or (2), but it also appears to be a violation of the Federal "Truth in Caller ID Act" which prohibits any caller identification service to "knowingly transit misleading or inaccurate caller identification information with the intent to defraud, cause, harm or wrongfully obtain anything of value."

The RLECs factual assertions are wrong, and demonstrate a fundamental misunderstanding of the technology involved. They also are asserting that when Halo follows industry practices and is exactly compliant with even the FCC's proposed "phantom traffic" signaling rules it is violating the law and engaging in fraudulent practices. Halo strongly disputes these factual and legal contentions.

Halo believes that this issue – if the RLECs persist in the allegations they made in some of their correspondence – may well be the only issue for which there are seriously contested facts. For the record, Halo does not manipulate CPN information in any way. Halo is passing CPN in complete accord with industry practices, and is also populating the Charge Number parameter, when appropriate, using industry practices. Further, Halo is in exact compliance with even the Commission's *proposed* "phantom traffic" rules laid out in NPRM and FNPRM, *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, FCC 11-13, _ FCC Rcd. _(Feb. 9, 2011), 76 Fed. Reg. 11632 (March 2, 2011) ("*2011 ICC NPRM*").[48] Nor is there any violation of

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[48] Halo's practices exactly match with and conform to the requirements in proposed 47 C.F.R. § 64.1601(a)(1) and (2) as they appear at 41 Fed. Reg. 11662-11663 (2011):

> § 64.1601 Delivery requirements and privacy restrictions.
>
> (a) Delivery. Except as provided in paragraphs (d) and (e) of this section:
>
> (1) Telecommunications providers and entities providing interconnected voice over Internet protocol services who originate interstate or intrastate traffic on the public switched telephone network, or originate interstate or intrastate traffic that is destined for the public switched telephone network, are required to transmit the telephone number received from, or assigned to or otherwise associated with the calling party to the next provider in the path from the originating provider to the terminating provider, where such transmission is feasible with network technology deployed at the time a call is originated. The scope of this provision includes, but is not limited to, circuit-switched and packetized transmission, such as Internet protocol and any successor technologies. Entities subject to this provision who use Signaling System 7 are required to transmit the calling party number (CPN) associated with every interstate or intrastate call in the SS7 CPN field to interconnecting providers, and are required to transmit the calling party's charge number (CN) in the SS7 CN field to interconnecting providers for any call where CN differs from CPN. Entities subject to this provision who are not capable of using SS7 but who use multifrequency (MF) signaling are required to transmit CPN, or CN if it differs from CPN, associated with every interstate or intrastate call, in the MF signaling automatic numbering information (ANI) field.