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

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| Alma Communications Company d/b/a Alma Telephone Company, Chariton Valley Telephone Corporation, Chariton Valley Telecom Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company,a corporate division of Otelco, Inc., and MoKAN DIAL, Inc. | ) | Case No. IC-2011-0385 |
| Complainants, | ) | |
| vs. | ) | |
| Halo Wireless, Inc. | ) | |
| Respondent. | ) | |

**AND**

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

## MOTION TO DISMISS

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

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

### A. Introduction

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

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

**Complainants' Request for "investigation"**

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

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

**Request A**

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

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

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

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

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

**Request B**

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

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

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

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

**Request C**

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

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

**Request D**

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

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

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

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

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

**Request E**

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

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

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

**Request F**

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

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

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

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

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

**Request G**

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

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

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

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

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

**Request H**

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

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

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

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

**Request I**

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

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

**Request J**

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

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

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

**Request K**

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

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

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

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

**Request L**

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

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

**Request M**

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

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

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

**Request N**

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

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

**Request O**

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

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

**Request P**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**a. Halo's Federal Authorizations**

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

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

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

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

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

[12] Authority for all domestic common carriers.

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

52. Only the FCC can decide whether any particular traffic is or is not "interstate" or "CMRS" and subject to its exclusive original jurisdiction. *See Service Storage,* 359 U.S. at 178-79. The FCC is the exclusive "first decider" and must be the one to interpret, in the first instance, whether a particular activity falls within the certificates it has issued. *Id.* at 177; *see also Gray Lines Tour, Co. v. Interstate Commerce Com.*, 824 F.2d 811, 815 (9th Cir. 1987)[13] and *Middlewest Motor Freight Bureau v. ICC*, 867 F.2d 458, 459 (8th Cir. 1989).[14] The Missouri Supreme Court has recognized this binding federal rule. *Holland Industries,* 763 S.W.2d at 669.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

violation of license and hold Halo subject to state authority as a consequence); N (asking the commission to set aside the FCC's rule that CMRS traffic origination point is the base station serving the CMRS customer).

61. This dispute is quite similar to the jurisdictional tussles over "private radio service" that raged from 1974 to 1989 and even thereafter. Congress preempted state-level entry and rate regulation over CMRS as part of the 1993 amendments. Before 1993, however, the FCC in 1974[17] and then Congress in 1982 pre-empted state-level regulation over private radio. Section 331(c)(3) as enacted in 1982 provided that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service."

62. Even after the courts had repeatedly affirmed the FCC's prior preemption and Congress then ratified it,[18] many Radio Common Carriers ("RCCs") did not like that they were subject to state-level regulation, but other entities not subject to state-level regulation could compete against them. Like the complainants in this case, these RCCs on occasion went to state commissions and tried to convince the state commission to "find" the private service providers

[17] *See e.g., National Assoc. of Regulatory Utility Comm'rs v. Federal Communications Com.,* 525 F.2d 630, 634-635 (D.C. Cir. 1976):

> Second, 30 MHz (806-821 MHz and 851-866 MHz) is allocated to private services, to be licensed to operators in the Public Safety, Industrial and Land Transportation areas, as authorized under 47 C.F.R. §§ 89, 91, 93. Thus, under existing regulations, this allocation makes available additional spectrum for eligible applicants who wish to obtain a license to operate a station, either for their own private purposes, or, with several other eligibles, on a non-profit, cost-sharing basis. In addition, the Orders would create a new category of private mobile operators, eligible for licensing on the 30 MHz presently being allocated. This new category of operators, known as Specialized Mobile Radio Systems (SMRS), would operate on a commercial basis to provide service to third parties. Licensing is to be on a first-come, first-served basis, with SMRS applications treated no differently than those of other private applicants. Because it seeks to utilize a profit motive to speed development and refinement of mobile radio technologies, the Commission concludes that SMRS should not be subject to the common carrier regulations of Title II of the Communications Act, and that state certification of SMRS should be preempted.

[18] *See*, *e.g., Telocator Network of America v. FCC*, 761 F.2d 763 (D.C. Cir. 1985*)* ("*Millicom case*").

were not "really" private service providers and therefore were subject to state regulation notwithstanding the preemption. Mississippi took a shot, and was brought to heel by the federal courts. *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com.*, 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm.*, 648 F.2d 1350 (5th Cir. 1981).[19] Pennsylvania tried it, the FCC on three separate occasions held it could not do so, and Pennsylvania ultimately decided to give up the effort.[20] Louisiana took up the cause and issued a "cease and desist order" to a provider. The FCC ruled that Louisiana's action was "without force and effect" and the provider was free "to continue to operate irrespective of any ruling to the contrary at the state level."[21]

63. In all of these instances the allegation at the state commission was that the private service provider was acting outside of the federal authorization, or had violated that authorization, with the effect that the private service provider was no longer protected from state common carrier regulation. In each instance the FCC or the courts squarely held that *only* the FCC could decide whether the state could act. In each instance the FCC or the courts held that the entity was not subject to state common carrier regulation and no state could assert that it was a common carrier or subject to regulation as such at the state level.

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[19] "This Court, having considered the arguments of the parties, views the Mississippi Public Service Commission's application of Miss.Code § 77-3-3 (1972) to plaintiff Motorola as an illegal attempt to usurp jurisdiction to regulate communication activity that is preempted by the Federal Communications Commission. … The FCC has exclusive jurisdiction to 'classify radio stations … prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class … encourage the larger and more efficient use of radio in the public interest … (and) make such rules and regulations and prescribe such restrictions and conditions … as may be necessary to carry out the provisions of this Act….' 47 U.S.C. § 303(a), (b), (g), (r) (1970)."

[20] In the *Matter of Paul Kelley d/b/a American Teltronix*, 3 FCC Rcd 1091 (1988) (Delegated Authority); Memorandum Opinion and Order, *Paul Kelley d/b/a American Teltronix Licensee of Station WNHM552*, 3 FCC Rcd 5347 (1988) (On Review); *Second Memorandum Opinion and Order*, 5 FCC Rcd 1955 (1990) (On reconsideration); *Mobilfone of Northeastern Pennsylvania, Inc. v. Paul Kelley, d/b/a American Teltronix*, C-871182 and C-871578, 1989 Pa. PUC LEXIS 135, 70 Pa. PUC 302 (Penn PUC, 1989).

[21] Declaratory Ruling, *In the Matter of Data Com, Inc.; and American Welding Supply, Inc., Licensee of Station KNBP-212 in the Business Radio Service*, FCC 86-315, 104 F.C.C.2d 1311 (rel. Jul. 1986).

64. The caselaw is manifest that states have been preempted. No state has the power or jurisdiction to "interpret" Halo's federal status in an ill-advised effort to find some "violation" or "exception" within the federal law that could then be used to assert state-level regulation. States purely and simply cannot act or assert jurisdiction unless and until the FCC says state action is permissible.

65. The FCC has exclusive original jurisdiction over communications by wire or radio that are interstate. *See* 47 U.S.C. § 152. Additionally, under § 152 (also called "Section 2 of the Act"), the FCC has exclusive original jurisdiction over the authorization to communicate by radio on an interstate or intrastate basis and then the exclusive jurisdiction over regulation of radio communications themselves. *See, e.g.*, 47 U.S.C. §§ 152(a), 201, 202, 203, 214, 332.

66. Section 152(b) originally reserved rights to the states to regulate intrastate communication service by wire or radio. Section 332(c)(3) (passed in 1993) expressly preempted state regulation over market entry and the rates charged by mobile service providers. Section 332(c)(7) allows state and local governments to retain some zoning authority over "siting" of "personal wireless service facilities," but § 332(c)(7)(B)(i)(II) expressly denies any state or local government the power to take any action that prohibits or has the effect of prohibiting the provision of personal wireless services. Halo provides personal wireless services, and thus, no state or local government may prohibit or take action that has the effect of prohibiting Halo's provision of its service. The complainants are each contending that Halo lacks authority to provide its personal wireless service (CMRS), and they are seeking or intend to seek a *state commission* order allowing blocking, which obviously would have the effect of prohibiting Halo from using its already-installed facilities to provide its personal wireless services. The

complainants are requesting that a state prohibit, or take action having the effect of prohibiting, Halo's wireless service.

67. The complaints both ultimately rely on the proposition that Halo is violating the Communications Act or an FCC rule, exceeding the scope of its federal authorizations and conducting activity that is subject to state entry regulation, and assert that Halo is subject to an access charge because of claimed "exceptions" or "interpretations" of the Communications Act and FCC rules. The complaints are dressed up using state law claims, but they are in fact, and must be construed to be, inappropriate § 206 complaints because if Halo's activities *do* fall under its federal authorizations and *do not* incur an access charge under *federal* law, then no contrary state laws or rules can lawfully be enforced to the contrary. There is, however, no provision, and no authority, that would allow a party to file a case with a state commission alleging a violation of the Communications Act or FCC rules, or seeking a declaratory ruling involving questions about the Communications Act or FCC rules.

68. The complainants' *state commission* filings seek extraordinary relief based on their interpretations of Halo's *federal* authorizations and Halo's insistence that the complainants honor the *federal* rules. The entire matter is subject to the exclusive original jurisdiction of the FCC, and the state completely lacks jurisdiction. The commission cannot grant the requested relief.

**c. This is not a § 252 case; the complainants refuse to use the process given to them by the FCC that would allow them to enter the § 252 process.**

69. State commissions have some residual jurisdiction over purely intrastate communications under § 152(b). That authority, however, was considerably reduced by the passage of the 1993 amendments to the Communications Act which expressly preempted state-level regulation of or restriction of market entry and state-level regulation of wireless service

rates. Further, the 1996 amendments to the Act even further circumscribed state commission authority, even for purely intrastate activity. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, n. 6 (1999).[22] Congress delegated only certain duties and powers to state commissions as part of the 1996 amendments, and then required that when states are exercising these limited duties they limit the activity to implementing the FCC's rules.[23] The complaints do not claim to be founded on § 252 of the Communications Act, and thus this commission completely lacks jurisdiction because all of the issues raised are FCC-exclusive issues that do not fall within the states' remaining residual power or their delegated authority. In any event, the complainants are essentially and ultimately requesting that the commission *ignore* and effectively *overturn* the FCC's rules and specific parts of the Communications Act.

70. Under the FCC's rules, when carriers are indirectly interconnected, all "non-access" traffic is subject to a "no compensation" regime unless and until the indirectly

[22] "JUSTICE BREYER appeals to our cases which say that there is a "'presumption against the pre-emption of state police power regulations,'" post, at 10, *quoting from Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and that there must be "'clear and manifest' showing of congressional intent to supplant traditional state police powers," *post*, at 10, *quoting from Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947). But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange. The appeals by both JUSTICE THOMAS and JUSTICE BREYER to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts -- but it is hard to spark a passionate "States' rights" debate over that detail." (emphasis added)

[23] Halo acknowledges there are a few instances where state-level rules can be applied as part of a § 252 arbitration or in a "post-ICA dispute." But those rules cannot be inconsistent with FCC regulations, and they cannot serve to override any provision in the Communications Act. In any event, the complaints are not founded on § 252 and do not purport to be a § 252(b) arbitration petition or a post-ICA dispute. Indeed, the complainants rant at Halo for advising them all they had to do to get paid lawful compensation is "request interconnection" and "invoke the negotiation and arbitration procedures contained in section 252 of the Act" just as the FCC's *T-Mobile* rule 20.11(e) tells them they ***must*** do.

interconnected carriers enter into a written ICA.[24] The FCC's *T-Mobile* decision (which this commission is surely aware of, since the ILEC complainants now before the commission precipitated that case) promulgated a rule allowing ILECs to send a written "request for interconnection" that "invoke[s] the negotiation and arbitration procedures contained in section 252 of the Act" to a CMRS provider. *See* 47 CFR § 20.11(e). At that point, the carriers must negotiate terms implementing their respective duties under § 251(a), (b) and, if applicable, (c). If the parties are unable to resolve all issues through negotiation, the incumbent may request that the CMRS provider "submit to arbitration by the state commission." *See* 47 C.F.R. § 20.11(e).

71. Halo has repeatedly and consistently recognized the ILEC complainants' right under 20.11(e) to "request interconnection" from Halo and "invoke the negotiation and arbitration procedures contained in section 252 of the Act." Halo has repeatedly and consistently said that once Halo receives a "request for interconnection" from an ILEC Halo will "negotiate in good faith" just like the rule requires, and Halo will acknowledge that the parties have entered the § 252 process. Indeed, Halo has received compliant 20.11(e) requests – *i.e.*, requests that did "request interconnection" and did "invoke the negotiation and arbitration procedures contained in section 252 of the Act" – from (1) a national conglomerate of ILECs, (2) a company with Arkansas and Oklahoma ILEC operations, (3) a group of 13 California ILECs and, very recently, (4) a small Texas ILEC. Halo accepted those requests and agreed they were compliant. Thus, Halo and all those companies are currently engaged in the § 252 process. Further, Halo has agreed to pay interim compensation at a negotiated price to the national company and is discussing the appropriate price with the others. The interim payment obligation for each of those companies is/will be effective back to the day after the compliant request was received.

[24] *See T-Mobile Order* note 57 ["Under the amended rules, however, in the absence of a request for an interconnection agreement, no compensation is owed for termination."].

Halo is busily engaged in substantive negotiations with these companies, and topics include proposed agreement terms, direct IP-based interconnection, reciprocal compensation, jointly-provided access, and the balance of standard interconnection agreement required by § 251.

72. Halo and the BPS complainants have conducted several discussions on this topic, and exchanged correspondence as well. Each time Halo patiently explained that the BPS complainants have yet to submit a "request for interconnection" that complies with 20.11(e). Instead, the BPS complainants repeatedly send letters that request "negotiations" for "an agreement." Further, some of these "requests for agreement" that purport to rest on 20.11(e) were submitted on behalf of Green Hills, FCSI, FCSII and MTCC even though they are not ILECs, and are flatly ineligible for the entire process.

73. Halo has advised the BPS ILECs that despite their poor choice of words Halo was willing to accept they had adequately "invoke[d] the negotiation and arbitration procedures contained in section 252 of the Act." Halo, however, advised the BPS ILECs that they still – after all these months and many responses pointing out the omission – have not "requested interconnection." The requirement to "request interconnection" is important because the "request for interconnection" has procedural implications rooted in both 20.11(e) and also § 252(a)(1).[25] More important, "interconnection" is a term of art, with discrete *physical* meaning and results. Under the FCC's rules, "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).

[25] Section 252(a)(1) expressly requires "a request for interconnection, services, or network elements pursuant to Section 251." This substantive "request for interconnection, services, or network elements pursuant to section 251" then kicks off the procedural aspects of § 252.

74. At such time as any of the ILEC complainants "request interconnection" and "invoke the negotiation and arbitration procedures contained in section 252 of the Act," Halo will – as it has done with many other ILECs that recognized the rule requirements – enter negotiations under § 252, and attempt to reach a resolution on the issues carriers must negotiate under § 251. The complainants' blocking and state complaint are largely designed to coerce Halo into "voluntarily" agreeing to "negotiate and enter into a binding agreement … without regard to the standards set forth in subsections (b) and (c) of section 251." *See* § 252(a)(1). Halo, however, is "clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act." *See Coserv LLC v. Southwestern Bell Tel. Co*., 350 F.3d 482, 488 (5th Cir. 2003).[26]

75. Rule 20.11(e) is rooted in § 332(c)(1)(B) of the Communications Act. Section 332(c)(1)(B) in turn rests on § 201. These are separate and independent *exclusive* grants of authority to the FCC. States do not have any power to interpret, apply or enforce the rule, § 201 or § 332(c)(1)(B). The FCC has exclusive original jurisdiction to decide whether the complainants have "properly" or "sufficiently" invoked their rights under 20.11(e) in order to start the "252" process. The states have not been delegated – by Congress or the FCC – the power to interpret, apply or enforce 20.11. The question is not subject to resolution by a state commission, since §§ 201 and 332 and 20.11 are outside the scope of an arbitration under § 252.[27] Only *after* it is clear that the parties are within the § 252 process (by agreement or as a

[26] Judge Jackson of the Eastern District of Missouri recently applied the Fifth Circuit's *CoServ* decision by holding that "[w]here the parties have voluntarily included in their negotiations issues other than those required by § 251(b) and (c), the additional issues are subject to compulsory arbitration under § 252(b)(1)." *Southwestern Bell Tel. Co. v. Clayton*, 2011 U.S. Dist. LEXIS 4273 (E.D. Mo. Jan. 18, 2011). The complainants blocking and state complaint are entirely designed to coerce Halo into "voluntarily" including the FCC-exclusive issues in negotiations, so the issues would then be subject to state-level determinations as part of an arbitration. Halo refuses to do so, as it is "clearly free" to do.

[27] The FCC was able to hold that the states could no longer "address the issue" of intercarrier compensation for ISP-bound traffic because even though ISP-bound traffic falls within § 251(b)(5) it **also** – just like CMRS traffic covered by § 332(c)(1)(B) – is subject to § 201, over which the FCC has exclusive jurisdiction and over which the states have no jurisdiction. *See* Order on Remand, R&O and FNPRM, *High Cost Universal Service Reform, Federal-State*

result of a ruling by the FCC) will the states have any authority over the parties' relationship when a timely petition for arbitration is filed, at which point the state commission is 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* 47 U.S.C. § 252(b)(4)(C). Note also that even then the state commission's jurisdiction and delegated power is limited under § 252(b)(4)(A).[28]

76. The ILEC complainants have not implemented this FCC-prescribed remedy, and they do not base any part of their complaints on an assertion that Halo and the complainants are operating within the § 252 context. Indeed, they are asking this commission to relieve them of the burdens imposed by these binding federal rules, and railing at Halo for demanding that they follow it.

77. The complaints are not based on the commission's arbitral powers under § 252(b) or its power to approve interconnection agreements under § 252(e). This is not a "§ 252" proceeding and therefore the commission cannot assert or find jurisdiction based on § 252.

**d. The commission is bound by FCC rules and cannot grant the complainants' request that they be relieved from the obligation to follow FCC rules.**

78. The *T-Mobile Order* also promulgated 47 C.F.R. § 20.11(d), which prohibits local exchange carriers from imposing access charges pursuant to tariff on "non access" traffic. The *T-*

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*Joint Board on Universal Service, Lifeline and Link Up, Universal Service Contribution Methodology, Numbering. Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, FCC 08-262, ¶¶ 17-22, Dockets 01-92, *et al*, 24 FCC Rcd 6475, 6483-6486 (2008), *aff'd, Core Communs., Inc. v. FCC*, 592 F.3d 139, (D.C. Cir. 2010), *cert. den. Core Communs., Inc. v. FCC*, 131 S. Ct. 597, 178 L. Ed. 2d 434 (2010). The FCC extensively discussed the similarity of treatment with regard to ISP-bound and CMRS traffic, and observed the courts' consistent recognition that the FCC has the exclusive power to promulgate "rules of special concern" to CMRS. *Id.* ¶¶ 17, 20 and note 76; *see also Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *vacated and remanded in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) and *Qwest Corp. v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001).

[28] "The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)."

*Mobile Order* reiterated its definitions of "access" and "non-access."[29] Further, under the Communications Act, "exchange access" charges apply only to "telephone toll service" and the FCC's rules and rulings have specifically set out the limited circumstances under which a CMRS provider will be providing "telephone toll service," and be subject to access charges as a consequence.[30] If the complainants want to secure a change to the FCC's rules, they must apply to the FCC, because state commissions must follow them and cannot change, limit, expand or find "exceptions." States "no longer have any authority to address this issue."[31]

## D. THE COMMISSION LACKS JURISDICTION OVER COMPLAINANTS' REQUEST FOR PERMISSION TO BLOCK BASED ON ALLEGED SIGNALING IMPROPRIETIES OR FAILURE TO PAY COMPENSATION BASED ON HALO'S RELIANCE ON FCC RULE 20.11(d) AND (E)

79. The complainants claim certain "signaling" improprieties. The ILECs that are defendants in Halo's FCC complaint, however, decided to begin blocking early on, back when the only issue was that Halo would not pay access billings for intraMTA traffic because of 20.11(d) and was insisting that the complainants had to comply with 20.11(e) if they wanted to be paid for transport and termination. Signaling was not an issue at the time. *See* Exhibits 2, 3,

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[29] *See T-Mobile Order*, note 6 (FCC 2005) ["the term "non-access traffic" refers to traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act and ISP-bound traffic."]

[30] *See Local Competition Order* ¶ 1043 and note 2485:

> 1043. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges.
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> Note 2485: "[S]ome cellular carriers provide their customers with a service whereby a call to a subscriber's local cellular number will be routed to them over interstate facilities when the customer is 'roaming' in a cellular system in another state. In this case, the cellular carrier is providing not local exchange service but interstate, interexchange service. In this and other situations where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . . Therefore, to the extent that a cellular operator does provide interexchange service through switching facilities provided by a telephone company, its obligation to pay carrier's carrier' carrier ['access'] charges is defined by § 69.5(b) of our rules." …

[31] *See, e.g.*, Order on Remand and Report and Order, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151, 9171–72, para. 82 (2001) (*ISP Remand Order*), remanded but not vacated by *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

and 4 attached hereto. The signaling issue is a *post-hoc* rationalization being raised to put Halo in a false light.

80. Networks must employ some type of "call control" in order for calls to work – *e.g.*, be set up and torn down. This is particularly so when more than one carrier's network is involved in any given call, such as when the calling party is on one carrier network and the called party is on another carrier's network. Most networks today use some method of "signaling"[32] for this purpose. Traditional telephony networks use either "multifrequency signaling" (in which call control occurs "in band" and uses "pulses" or "tones" recognized and then used by the network) or a later "common control signaling" method known as "SS7."[33] The ERE rules recognize some of these signaling basics, albeit in a more rudimentary way.

81. More modern networks like Halo's use "Internet Protocol" ("IP") protocols – which operate differently, but contain similar information and perform roughly analogous functions – for call control. When an IP network must interoperate with a legacy SS7-based network, a form of "protocol conversion" must occur. A "signaling gateway" will identify the IP-based call control information that is necessary for an SS7-based network to set up or tear down a call, and "populate" the information in the appropriate SS7 "ISDN User Part" "Initial Address

[32] *See,* Definition of "Signaling" in 2007 ATIS "T-1" Glossary, ATIS-0100523.2007, © Alliance for Telecommunications Industry Solutions, 2007 [ANSI Standard], available at http://www.atis.org/glossary/definition.aspx?id=1556: Signaling. The use of signals for controlling communications. 2. In a telecommunications network, the information exchange concerning the establishment and control of a connection and the management of the network, in contrast to user information transfer. 3. The sending of a signal from the transmitting end of a circuit to inform a user at the receiving end that a message is to be sent.

[33] *See* NPRM and FNPRM, *Connect America Fund et al*., WC Docket Nos. 10-90 *et al*., FCC 11-13, ¶ 621, 26 FCC Rcd 4554, 4752 (Feb. 9, 2011) (rel. Mar. 2011) ("*2011 ICC NPRM*") ["A pathway across the PSTN is typically set up for PSTN calls using the Signaling System 7 (SS7) call signaling system, which is a separate, or "out of band," network that runs parallel to the PSTN. The SS7 system performs the function of identifying a path across the PSTN a dialed call can take after the caller dials the called party's telephone number. Once the SS7 system identifies a path across the PSTN, it signals the originating caller's network to notify it that a call path is available, and the call is established over the path. Technical content and format of SS7 signaling is governed by industry standards rather than by Commission rules, although Commission rules require carriers using SS7 to transmit the calling party number (CPN) to subsequent carriers on interstate calls where it is technically feasible to do so."].

Message" "parameter." The Internet community has devised a series of consensus documents and methods that guide this process.[34]

82. There has been much debate in the industry, and considerable litigation over the "rules" governing signaling between networks. The FCC's recent *2011 ICC NPRM* dedicated a number of pages to this debate, and the FCC has proposed new rules that would govern this very topic. Many incumbent carriers, however, are not willing to await FCC guidance. Further, many incumbent carriers – including the complainants – are dissatisfied with the operation of the current FCC rules regarding signaling and they consistently seek different state-level rules that inappropriately use telephone numbers to "rate" CMRS or IP traffic even though *federal* law says that is not permitted.

83. This is particularly so when it comes to CMRS traffic. The ILECs have sought state-level intervention, and have asked state commissions and even state legislatures to craft individual state rules imposing more detailed and onerous rules than those in effect and presently proposed by the FCC. The major debate between all sides relates to the extent to which "signaling" information, and particularly the "Calling Party Number" ("CPN") and the number assigned to the called party should be used to "rate" a call as "local" or "toll" and "intrastate" or "interstate."

84. The FCC – with repeated approval by the courts – has consistently recognized that telephone numbers cannot be reliably used as a "proxy" for the end point, and therefore the determinant for "rating" a call when "wireless" or "VoIP" technology is in use.[35] The FCC has

[34] *2011 ICC NPRM*, *supra* at ¶ 621 and note 946, ¶ 627 and note 966.

[35] *See* Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, ¶¶ 22, 26, 19 FCC Rcd 22404, 22418, 22421 (rel. Nov. 2004), *aff'd Minn. PUC v. FCC*, 483 F.3d 570 (8th Cir. 2007). *See also*, Memorandum Opinion and Order, Global Crossing Telecommunications v. Southwestern Bell Telephone Co., Case No. 4:04-CV-00319-ERW (E.D. Mo., September, 12, 2006) (PACER Doc 53) [holding that

also held that state-level regulations over CMRS or "VoIP" would interfere with the FCC's national policy of unimpeded entry and uniform treatment.[36] The ILECs and states have often disagreed, however, and have tried to promulgate rules at the state level requiring specific and different practices relating to signaling "content," and then impose compensation consequences that conflict with FCC rules or decisions.

85. For example, the South Dakota legislature passed a state statute imposing specific signaling and compensation requirements for all providers in that state. The statute applied regardless of whether a carrier had an interconnection agreement with any other carrier. The combined result of the signaling and compensation requirements functionally operated to overturn the FCC's 20.11 rules, as promulgated in the *T-Mobile Order*. The United States District Court for the District of South Dakota, Central Division, held that the state statute was preempted because it conflicted with the FCC's compensation rules and purported to adopt industry signaling practices that did not in fact exist. *Verizon Wireless (VAW) LLC v. Kolbeck*, 529 F. Supp. 2d 1081, 1095-1097 (D.S.D. 2007).

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using originating number as geographic proxy for originating end-point of wireless calls when billing access to an IXC that serves CMRS providers is inappropriate because jurisdiction cannot be determined by "call detail" for wireless traffic; noting with approval FCC's use of serving tower in *Local Competition Order* and similar rule relating to USF obligations].

[36] *See Vonage* ¶¶ 22, 26, 19 FCC Rcd at 22418, 22421:

> 22. Were it appropriate to base our decision today on the applicability of Minnesota's "telephone company" regulations to DigitalVoice solely on the functional similarities between DigitalVoice and other existing voice services (as the Minnesota Commission appears to have done), we would find DigitalVoice far more similar to *CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues*. (emphasis added)
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> 26. In the absence of a capability to identify directly DigitalVoice communications that originate and terminate within the boundaries of Minnesota, we still consider whether some method exists to identify such communications indirectly, such that Minnesota's regulations could nonetheless apply to only that "intrastate" usage such as voice calls between persons located in the same state. For example, assume Minnesota were to use DigitalVoice subscribers' NPA/NXXs as a proxy for those subscribers' geographic locations when making or receiving calls. If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.

86. The complainants complaints are premised on a set of state rules that they claim require Halo to take certain acts, engage in specific signaling practices, pay them access compensation despite 47 C.F.R. § 20.11(d) or pay transport and termination compensation in the absence of an agreement despite the FCC's holding in the *T-Mobile Order* that "no compensation" is due. *See* Alma Complaint Request for Relief F, I, N, O; BPS Complaint Request for Relief F, H, I, N. Indeed, the complainants assert that the state rule requires *Halo* to request interconnection rather than the other way around.[37] Alma Complaint, Request for Relief F, O; BPS Complaint ¶ 50-51, Request for Relief O. Halo has refused to capitulate to their state-level demands because those demands conflict with binding federal law and the *T-Mobile Order*. Halo brought an FCC complaint against several of the complainants and this issue – along with all the other FCC-exclusive issues – are before the FCC. The complainants have now brought a state-level complaint as a means to collaterally attack Halo's federal authorizations, to avoid the FCC's rules and to litigate their issues before their favorite forum even though the state commission completely lacks subject matter jurisdiction and personal jurisdiction over Halo.

87. Signaling is intrinsically related to "Interconnection" for purposes of §§ 251(a)(1) and (c)(2). It pertains to the way the physical connection "works." Therefore, if Halo and any of the complainants were to enter the § 252 process, the parties' signaling methods and practices, and the content that is populated in the various call control parameters, would be a legitimate open issue for determining the appropriate conditions that will apply for § 251(a)(1) and/or § 251(c)(2) *interconnection*. As noted previously, however, none of the complainants have ever done what is required to enter the § 252 process, however, because not a single one of them has

[37] The FCC expressly recognized and held that CMRS providers had no duty to request interconnection from ILECs under § 252 and that § 252 did not allow ILECs to request interconnection from CMRS providers. That is why the FCC used its separate and independent section 332 authority to allow ILECs to request interconnection and for the first time be able to force initiation of the § 252 process. *T-Mobile Order* ¶¶ 15-16 and associated notes.

"requested interconnection" and "invoked the negotiation and arbitration procedures contained in section 252 of the Act." *See* FCC rule 20.11(e).[38]

88. Further, and more importantly, the complainants want to use "signaling" information – again, an "interconnection" issue – for purposes of "rating" calls that the parties transport and terminate. Their case is largely based on the flatly incorrect proposition that the originating number can lawfully be used as a rating tool for CMRS traffic. This is not proper, particularly with regard to CMRS and IP traffic. FCC rules clearly recognize that the originating number contained in the CPN parameter is not a reliable proxy for actual physical location. That is why the FCC's rules use the base station or POI for originating location.

89. The attempted use of signaling information to rate calls for compensation purposes is also inconsistent with the fundamental distinction between "interconnection" and "compensation." The FCC's "interconnection" definition expressly says that "interconnection" does not include "transport and termination." Intercarrier compensation under § 251(b)(5) and § 252(d)(2) relates to the "transport and termination" of traffic. The complainants' attempt to secure state-level rules relating to signaling (part of interconnection, which is separate from compensation) as a means to overturn the FCC's compensation rules and the FCC's definitions and other rules, creates an unwarranted and unnecessary conflict. In particular, the complainants' attempt to use state-level rules relating to signaling as a means to overturn the FCC's "no compensation" regime from *T-Mobile* and to flip the obligation to "request interconnection" from the complainants over to Halo cannot be allowed. The entire set of demands made by the

[38] The BPS complainants in ¶ 50 misrepresent Halo's position on the date any request that Halo "submit to state arbitration" must be made. Halo has consistently advised the BPS ILECs (and the Alma ILECs) that this request is not a prerequisite for negotiations to begin. The request for consent is only required before any actual state arbitration filing if negotiations do not yield a complete agreement.

complainants in their state complaint are completely pre-empted by federal law. These are FCC-exclusive issues.

90. These signaling issues, like all the other issues, are already before the FCC in Halo's case against many of the complainants. If and when evidence is ever received by a forum with jurisdiction, the facts will show that Halo is signaling CPN without alteration. The facts will also show that beginning in mid-February Halo continued to signal CPN without alteration, but changed its practices to begin signaling Charge Number as well. The facts will show that Halo's signaling practices are perfectly in accord with all of the FCC's current rules and the practice change in February of 2011 was made in order to be compliant with the FCC's proposed phantom traffic rules, which were released on February 9, 2011. The complainants cannot be heard to protest when Halo is providing more information without altering the content of any information, or that Halo has proactively adjusted its practices to meet even the FCC's proposed rules.

91. If any state rule is construed to require actions inconsistent with the FCC's current rules and to prohibit a carrier from providing more information as a proactive effort to be consistent with the FCC's phantom traffic rules, then that state rule must fall under conflict preemption. The ERE rules do not apply; even if they do they cannot be read to prohibit Halo from following existing and proposed FCC rules, or punish Halo for following FCC rules.

## E. STATE COMMISSIONS LACK JURISDICTION TO CONTEMPLATE WHETHER TO ORDER OR AUTHORIZE BLOCKING OF CMRS OR INTERSTATE TRAFFIC

92. The complainants request an "order" by the commission authorizing them to block Halo traffic. Alma and BPS Request for Relief P. They are asking the state commission to approve blocking of jurisdictionally interstate service, and they seek to deny Halo the benefits of

its *federal* right to interconnection as a CMRS provider. Any state order would be void. Further, any action by the complainants in reliance on such order would result in damages to Halo.

93. Halo's previously filed FCC Complaint (Exhibit 2) raised this issue on pages 8-10. The ILECs' Opposition to Halo's FCC Complaint (Exhibit 3) took the matter up on pages 11-13. Halo's FCC Response to the ILECs' Opposition (Exhibit 4) rebutted the ILECs' claims on pages 2-7. These issues are already before the FCC, and this commission should and must defer.

94. The complainants' current blocking and any additional blocking "approved" by some void order emanating from the commission does and will constitute a violation of federal law and FCC rules. Halo reiterates that the complainants' refusal to use the FCC 20.11(e) remedy, the disputes over whether the BPS complainants' putative efforts were compliant, and the complainants blocking are all FCC-exclusive issues that are already before the FCC.

95. Blocking is an unjust and unreasonable practice under § 201(b). The complainants seek state-level permission to violate § 201(b) of the Communications Act by engaging in the unjust and unreasonable practice of blocking interstate traffic or CMRS traffic without advance permission by the FCC. This is obviously not something a state can or should do. The FCC has ruled that carriers cannot block interstate traffic absent specific FCC authorization and doing so is an unjust and unreasonable practice that violates § 201(b). *See, e.g.*, Declaratory Ruling and Order, *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC Docket No. 07-135, DA 07-2863, ¶¶ 5-6, 22 FCC Rcd 11629 (rel. June 28, 2007);[39] Memorandum Opinion and Order, *Telecommunications Research and Action Center and Consumer Action v. Central Corporation et al.*, File Nos. E-88-104, E-88-

[39] "…call blocking is an unjust and unreasonable practice under section 201(b) of the Act…Specifically, Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way."

105, E-88-106, E-88-107, E-88-108, DA 89-237, ¶¶ 12, 15, 4 FCC Rcd 2157, 2159 (1989) (Common Carrier Bureau).[40] Similarly, no state can grant permission for a LEC to refuse to interconnect (or to disconnect interconnection that exists pursuant to § 332(c)(1)(B)). A LECs' disconnection of a CMRS provider would violate § 201, because § 332(c)(1)(B) rests on and incorporates § 201.

96. Any block would also violate § 201(b) for a separate and different reason. As explained elsewhere, complainants assert that some of the traffic is "wireline originated" "toll" traffic. They claim the right to block passage of this traffic based on state law. The cited state rules and laws do not apply to this set of circumstances, but even if they did, they would be pre-empted given that the much of the traffic is jurisdictionally interstate[41] since it is processed by a base station located in Kansas. *See* BPS Complaint ¶ 57; Alma Complaint ¶ 28 (recognizing Halo Junction City, Kansas base station that serves the Kansas City MTA).

97. Blocking in this situation without advance FCC permission is also a violation of the FCC's rules implementing § 214 of the Communications Act (47 C.F.R. §§ 63.60(b)(5), 63.62(b) and (e) and 63.501). Part 63 rules address a carrier's desire to cease the interchange of traffic with another carrier, and that is precisely what would occur here. Under FCC rules, a carrier that wants to cease interchanging traffic must seek advance permission from the FCC to

[40] "After consideration of the arguments and evidence advanced by the parties to this proceeding, we are persuaded that the practice of call blocking, coupled with a failure to provide adequate consumer information, is unjust and unreasonable in violation of Section 201(b) of the Act…We find that call blocking of telephones presubscribed to the defendant AOS providers or other carriers is an unlawful practice. Accordingly, we order the complainants to discontinue this practice immediately. The complainants must amend their contracts with call aggregators to prohibit call blocking by the call aggregator within thirty days of the effective date of this Order."

[41] Halo is not at this point answering or raising any potential defenses or affirmative defenses. Halo is asserting lack of jurisdiction to decide whether the traffic is "not" interstate. Thus, Halo does not bear any burden of proof. Nor, strictly speaking, can the complainants be given the burden or opportunity to "prove" in this proceeding that the traffic is intrastate. The commission simply cannot consider any of this, for it lacks jurisdiction over the entire question of whether the traffic is "not interstate." In any event, even the complainants acknowledge that under their own theory at least some of the traffic is interstate. This commission cannot authorize blocking of interstate and/or CMRS traffic.

do so, and there are specific showings that must be made. *See, e.g.*, 47 C.F.R. § 63.60(b)(5), § 63.62(b) and (e), § 63.501. In this regard, the applicant must state whether any other carriers consent (§ 63.501(p)).[42] Halo does not so consent.

98. Any decision by the complainants to proceed with blocking under the auspices of a void state order would be a clear violation of these rules. The FCC would probably be interested in knowing what the state commission thinks about the topic, but a void state commission "order" could not possibly immunize the carrier from damages.

99. The state does not have jurisdiction over § 214 or the FCC's rules relating to the interchange of interstate and/or CMRS traffic. Any state order purporting to authorize the blocking of interstate and/or traffic would be void, and provide no basis for immunity if the complainants then proceed to block. While the FCC may consider the state commission's opinion, it has no binding effect. *Gray Lines Tour, supra* 824 F.2d at 815[43]; *Motorola Communications & Electronics, Inc. v. Mississippi Public Service Com*., 515 F. Supp. 793, 795-796 (S.D. Miss. 1979), *aff'd Motorola Communications v. Mississippi Public Service, Comm*.,

[42] The applicant must also give notice to the involved state commission. 47 C.F.R. § 63.71(a). The state commission can presumably become a party to the FCC proceeding and comment on the application. These rules do not contemplate an applicant seeking a state regulator's permission to cease interchange of interstate traffic in the first instance.

[43] "The question, however, is not whether deference should be accorded a decision of the Nevada Commission. The question is one of jurisdiction. The issue which the ICC was called upon to decide was whether the Hoover Dam tours, as conducted by the interstate carriers, were within the scope of the operating authority the carriers held under their ICC certificates. The resolution of that question is within the jurisdiction of the ICC. State regulatory authorities may not assume the power to interpret the boundaries of federally issued certificates or to impose sanctions upon operations assertedly unauthorized by the federal certificate. *Service Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 178-79, 3 L. Ed. 2d 717, 79 S. Ct. 714 (1959). The ICC is entitled to interpret, in the first instance, certificates it has issued. *Service Storage*, 359 U.S. at 177; *see also E.E.O.C. v. Children's Hospital Medical Center of Northern California*, 719 F.2d 1426, 1429 (9th Cir. 1983) ('the question of jurisdiction is, in the first instance, for the agency and not the courts'). The ICC correctly determined that it had jurisdiction to determine whether the Hoover Dam tours as conducted by ACT, Interstate and Happy Time were valid interstate operations within the scope of their ICC-issued certificates. The determination by the ICC that these interstate carriers were operating within the scope of their ICC certificates, notwithstanding the decision of the Nevada Commission, did not violate the policy statements contained within 49 U.S.C. § 10101."

648 F.2d 1350 (5th Cir. 1981).[44] The commission has no jurisdiction over the request to investigate Halo and "order" blocking based on the results of any investigation. The entire matter must be dismissed.

## F. THE COMMISSION'S JURISDICTION UNDER STATE LAW

100. The commission is a state regulatory agency organized pursuant to the laws of Missouri.[45] As a state agency, the commission is wholly a creature of statute.[46] Its jurisdiction is limited to the specific persons and issues identified in its enabling legislation.[47] Although the commission's authority and jurisdiction can be modified by judicial interpretations of the enabling legislation, the commission may not expand its jurisdiction unilaterally or address matters or parties beyond the jurisdiction afforded to it by its enabling legislation.[48]

101. In other words, a state agency cannot adjudicate a dispute when it lacks statutory authority to support the assertion of jurisdiction over the specific persons who are involved in the

[44] "This Court, having considered the arguments of the parties, views the Mississippi Public Service Commission's application of Miss.Code § 77-3-3 (1972) to plaintiff Motorola as an illegal attempt to usurp jurisdiction to regulate communication activity that is preempted by the Federal Communications Commission. … The FCC has exclusive jurisdiction to 'classify radio stations … prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class … encourage the larger and more efficient use of radio in the public interest … (and) make such rules and regulations and prescribe such restrictions and conditions … as may be necessary to carry out the provisions of this Act….' 47 U.S.C. § 303(a), (b), (g), (r) (1970)."

[45] *See* Mo. Ann. Stat. § 386.040.

[46] *See State ex rel. Missouri Cable Telecommunications Ass'n v. Missouri Pub. Serv. Comm'n,* 929 S.W.2d 768, 772 (Mo. Ct. App. 1996) (holding the PSC is a "creature of statute and limited thereby"); *See also State ex rel. Util. Consumers' Council of Missouri, Inc. v. Pub. Serv. Comm'n,* 585 S.W.2d 41, 49 (Mo. 1979) (affirming that since " it is purely a creature of statute, the Public Service Commission's powers are limited to those conferred by the above statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted"); and *State ex rel. Kansas City v. Pub. Serv. Comm'n of Missouri*, 301 Mo. 179, 190, 257 S.W. 462, 462 (1923) (concluding "neither convenience, expediency or necessity are proper matters for consideration in the determination of" whether or not an act of the commission" is authorized by the statute).

[47] *See State ex rel. Kansas City*, 257 S.W. at 463; *See also State ex rel. Util. Consumers' Council of Missouri, ,* 585 S.W.2d at 49 .

[48] *See State ex rel. Gulf Transp. Co. v. Pub. Serv. Comm'n of State*, 658 S.W.2d 448 (Mo. Ct. App. 1983) (recognizing Public Service Commission is an "administrative agency with limited jurisdiction and lawfulness of its actions depends entirely on whether it has statutory power and authority to act, and where such authority is lacking, reviewing court may reverse"); *see also Missouri Pub. Serv. Comm'n v. Oneok, Inc.,* 318 S.W.3d 134 (Mo. Ct. App. 2009), reh'g and/or transfer denied (Feb. 2, 2010), opinion adopted and reinstated after retransfer (Sept. 24, 2010) (The "powers necessary or proper" clause of the Public Service Commission Law enables the Commission to carry out the functions specifically delegated to it by the legislature; it is not a license to engage in any conceivable activity for the protection of ratepayers).

dispute and over the specific subject matter raised by the dispute. However, under Missouri law, *in personam* jurisdiction over a party generally can be waived.[49] In order for a party to avoid waiver of *in personam* jurisdiction, objections to the tribunal's assertion of such jurisdiction must be timely raised by the relevant party.[50] When objections to the tribunal's subject matter and personal jurisdiction have been raised, the tribunal must determine the relevant jurisdictional facts and make a determination that is has both subject matter and personal jurisdiction before continuing with the proceeding or its rulings are void.[51] The scope of any tribunal's jurisdiction is governed first by the United States Constitution.[52] However, a tribunal's jurisdiction may be further governed by state legislation and judicial interpretation.[53]

102. As noted above, in the context of a state agency, the scope of its jurisdiction is limited by the agency's enabling legislation.[54] Thus, the state agency may assert *in personam* jurisdiction only over the specific classes of persons or entities that are identified by statute, as may be interpreted by the courts.[55] Because an agency's *in personam* jurisdiction is limited by statute, the mere fact that a person has routine contact with an agency is irrelevant to whether

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[49] *See Health Enterprises of Am., Inc. v. Dep't of Soc. Services, State of Mo.*, 668 S.W.2d 185, 187 (Mo. Ct. App. 1984) (affirming that under Missouri law, "unlike personal jurisdiction, subject matter jurisdiction cannot be conferred or waived by agreement of the parties").

[50] *See Flair v. Campbell*, 44 S.W.3d 444, 454 (Mo. Ct. App. 2001) (holding that if a defendant's challenge to the personal jurisdiction of a tribunal is not timely raised in, or prior to, the Defendants' answer to a complaint, it is deemed to have been waived).

[51] *See Beach v. Dir. of Revenue,* 934 S.W.2d 315, 318 (Mo. Ct. App. 1996) (holding that when subject matter jurisdiction is lacking, the "court may take no action other than to exercise its power to dismiss the action".); *Crouch v. Crouch*, 641 S.W.2d 86, 90 (Mo. 1982) (A personal judgment rendered by a court without personal jurisdiction over the defendant is void); *Ogle v. Dir. of Revenue,* 893 S.W.2d 403, 404 (Mo. Ct. App. 1995) (affirming that any action taken by a court "lacking subject matter jurisdiction is null and void").

[52] U.S. CONST. amend. XIV, § 1.

[53] *Missouri Pub. Serv. Comm'n v. Oneok, Inc*., 318 S.W.3d 134, 137 (Mo. Ct. App. 2009) (holding that whether the Commission's actions are lawful "depends directly on whether it has statutory power and authority to act).

[54] *See Oneok, Inc.*, 318 S.W.3d at 137.

[55] *See State ex rel. GS Technologies Operating Co., Inc. v. Pub. Serv. Comm'n of State of Mo*., 116 S.W.3d 680, 696 (Mo. Ct. App. 2003) (affirming that" the Commission has only those powers conferred either expressly or implicitly by statute as necessary to carry out the specifically-granted powers").

that person falls within the class prescribed by statute over which the agency can assert *in personam* jurisdiction.[56]

103. Unlike *in personam* jurisdiction, subject matter jurisdiction cannot be waived by consent of the parties.[57] Subject matter jurisdiction relates to the authority of the tribunal to address the particular issues raised by the dispute.[58] Any party or the tribunal may raise the issue of subject matter jurisdiction at any time.[59] When subject matter jurisdiction is brought into question, the tribunal must assure itself of its subject matter jurisdiction before it addresses any other matters in the proceeding, and if the tribunal finds that it does not have subject matter jurisdiction, then the only authority possessed by the tribunal is that authority necessary to immediately dismiss the action.[60]

104. The jurisdiction of a tribunal is a threshold matter that must be determined at the outset of the proceeding.[61] 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.[62] By filing this Motion, Halo asserts its objections to the commission's assertion of either subject matter or personal jurisdiction over Halo 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" or set up defenses and counterclaims, and no hearing can be held "on the

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[56] *See Oneok, Inc.*, 318 S.W.3d at 137-138.

[57] *See Health Enterprises of Am.*, 668 S.W.2d at 187.

[58] *See In re Marriage of Hendrix*, 183 S.W.3d 582, 588 (Mo. 2006) (affirming that subject matter jurisdiction is a tribunal's statutory authority to hear a particular kind of claim or dispute); *See also United Broth. of Carpenters & Joiners of Am., Dist. Council, of Kansas City & Vicinity v. Indus. Comm'n*, 352 S.W.2d 633, 635 (Mo. 1962) (affirming that it is the sole province of the legislature to establish "such a class of cases, and if none is established the provision that an appeal may be taken to this court is void and of no effect".)

[59] *See State Tax Comm'n v. Admin. Hearing Comm'n,* 641 S.W.2d 69, 72 (Mo. 1982) (stating that "lack of subject matter jurisdiction may be raised at any stage in the proceedings").

[60] *See Beach,* 934 S.W.2d at 318.

[61] *See Id.*

[62] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998).

merits" unless and until the commission has expressly found it does have subject matter jurisdiction over the action and personal jurisdiction over Halo.

105. Similarly, the Supremacy Clause of the United States Constitution[63] and Missouri law require that the Commission examine, as a preliminary matter, whether its exercise of jurisdiction is preempted under federal law before proceeding to the merits of the complainants' state law claims.[64] When, upon examination, the state law invoked conflicts with federal law, the state laws are preempted.[65] Thus, if the federal statute applies, there is no need to determine whether state law has been met.[66] Here, all of the issues raised by the complainants are preempted by Federal law because they fall within the express exclusive jurisdiction of the FCC. Thus, this entire proceeding under state law is preempted and must be dismissed in favor of the FCC.

106. Moreover, this tribunal is also required to examine its own jurisdiction before proceeding because a determination of whether this tribunal lacks jurisdiction and is preempted from acting on complainants' claims is determinative of whether complainants have failed to state a claim for which relief can be granted and whether their claims must be dismissed. Under Missouri law, consideration of a motion to dismiss for failure to state a claim for which relief can be granted must be based solely on the sufficiency of the facts appearing on the face of the petition.[67] The issue is not whether the plaintiff is entitled to a judgment in his favor, rather it is

[63] U.S. Const. art. VI, cl. 2

[64] *See Robertson Properties, Inc. v. Detachment of Territory from Pub. Water Supply Dist. No. 8 of Clay County*, 153 S.W.3d 320, 326 (Mo. Ct. App. 2005)(holding that when faced with a question of whether federal law preempts state law or state action, a tribunal must determine as a preliminary matter whether the letter of the federal law and the Congress' purposes and objectives are being followed).

[65] *See Robertson Properties*, 153 S.W.3d at 326.

[66] *See id*.

[67] *See Rychnovsky v. Cole*, 119 S.W.3d 204, 210 (Mo. Ct. App. 2003).

whether he is entitled to be heard on his claim.[68] Here, this tribunal must dismiss this case as a preliminary matter and before proceeding to examine the merits because the complainants' complaints on their face show that all of the issues raised fall within the exclusive jurisdiction of the FCC and therefore this tribunal cannot grant relief on the claims.

107. The complainants ultimately contend that Halo is not acting pursuant to any federal authorization and is "merely" the complainants' "access customer."[69] This proposition, of course, can only be contemplated *after* a *federal* venue decides that the traffic in issue is "not" CMRS, or is "not" "non-access" under § 20.11(d), two determinations this commission completely lacks jurisdiction to determine. This commission certainly has no jurisdiction or power to "change" or "find an exception" to the FCC's binding rules on when CMRS traffic is subject to § 251(b)(5). Those rules and decisions tightly define and establish the regulatory "origination" point for CMRS traffic: the radio transmitter serving the CMRS customer or the POI, which for all Halo traffic is in the same MTA as the terminating location.[70] The complainants want this state commission to overturn, ignore or add an exception to this rule, but that is not within the commission's power, and the commission cannot grant this relief. In similar vein, the complainants want the state commission to expand the FCC's list of the "limited"

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[68] *See Id. See also Halamicek Brothers, Inc. v. St. Louis County*, 883 S.W.2d 108, 110 (Mo.App. E.D.1994). (affirming that dismissal for failure to state a claim is proper where facts essential to recovery are not pled).

[69] As noted, the complaints repeatedly seek an order that Halo be ordered to compensate them "at the rates contained in their access tariffs." The commission has no jurisdiction over interstate traffic, or over any interstate tariffs. At best, any relief must be limited to intrastate traffic covered by the complainants' intrastate access tariffs. The problem, of course, is that the commission cannot "find" any intrastate traffic because it would have to find the traffic is "not interstate" and the commission lacks the power to decide that question. In any event, the complainants speak to "access rates" without even attempting to prove that their access tariffs apply. They do not, for example, identify the access service they are providing, or demonstrate that the tariffs can actually be read to cover any traffic based on the terms of the tariffs themselves. Halo insists that this issue cannot and should not be reached, but if it is somehow reached Halo will demand that the complainants prove that the arrangements in issue, and the traffic, does fall within the express terms of their intrastate access tariffs.

[70] *Local Competition Order* ¶ 1044 ["…For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party."].

circumstances when a CMRS provider will be deemed to be providing telephone toll, and therefore acting as an IXC.[71] The commission completely lacks any power to overturn FCC rules providing that intraMTA traffic (using the serving base station or POI as the originating point) is *not* telephone toll service subject to access charges, but is instead telephone exchange service subject to § 251(b)(5).

108. Setting aside the significant problem that the commission cannot reach the question of whether Halo is an access customer, and assuming *arguendo* that Halo is somehow occupying "customer" status *vis-à-vis* the complainants, the Missouri legislature did not see fit to turn the commission into a court, or to allow it to award damages payable from a customer to a regulated entity. The commission lacks the power to grant the relief requested in Requests for Relief L, M and N.

109. The commission has said that it has subject matter jurisdiction even when a public utility is attempting to raise a complaint regarding a CMRS provider that is not subject to the commission's regulatory authority.[72] As already indicated, the commission lacks subject matter jurisdiction, however, because it cannot grant the requested relief, and under *federal* law – as

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[71] *See Local Competition Order* ¶ 1043 and note 2485, *supra*.

[72] Order Regarding Subject Matter Jurisdiction, *Northeast Missouri Rural Telephone Company v. Southwestern Bell Telephone Company*, Case No. TC-2002-57 (February 24, 2002), 2002 WL 535137 *2 (Mo.P.S.C.) (notes omitted):

> These cases were all initiated by the filing of complaints. The complaining parties are all telecommunications corporations and incumbent local exchange carriers. The complaining parties are all public utilities within the intendments of Missouri law, subject to regulation by the Missouri Public Service Commission. The respondents are either commercial mobile radio service providers or incumbent local exchange carriers. If the latter, then those respondents are also public utilities for the purposes of Missouri law, subject to regulation by this Commission. If the former, then the respondents are not public utilities and are not subject to regulation by this Commission.
>
> A complaint may be brought before this Commission by 'any corporation or person,' including regulated utilities, against 'any corporation, person, or public utility.' The language is very broad and is clearly intended to extend to entities not subject to Commission regulation. As long as at least one party, whether a petitioner or a respondent, is a public utility, the Commission has jurisdiction under the law. Thus, for example, the Commission has jurisdiction over disputes between public utilities and their customers and often hears such cases. According to the complaints filed in these cases, the respondents are all customers of the petitioners in that they originate or transport traffic intended for termination on the petitioners' networks, to petitioners' subscribers. The Commission has jurisdiction over the dealings of a public utility with its customers.

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

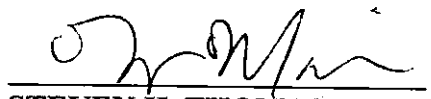
[76] Order Dismissing Complaint, *Gary L. Smith v. Peter J. Lenzenhuber*, Case No. WC-2001-417 (June 13, 2002) 2002 Mo. PSC LEXIS 806 (Mo. PSC 2002).

[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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## 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:

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