

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

Halo Wireless, Inc.,

Complainant,

v.

Craw-Kan Telephone Cooperative, Inc.,

Ellington Telephone Company,

Goodman Telephone Company,

Granby Telephone Company,

Iamo Telephone Company,

Le-Ru Telephone Company,

McDonald County Telephone Company,

Miller Telephone Company,

Ozark Telephone Company,

Rock Port Telephone Company,

Seneca Telephone Company,

Alma Communications Company, d/b/a Alma Telephone Company,

Choctaw Telephone Company;

MoKan Dial, Inc.,

Peace Valley Telephone Company, Inc.,

and,

Southwestern Bell Telephone Company, d/b/a AT&T Missouri

Respondents.

File No: TC-2012-0331

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 Div. of Otelco, Inc.,

and MoKan Dial, Inc.,

Complainants,

v.

Halo Wireless, Inc., and Southwestern Bell Telephone Company,

d/b/a AT&T Missouri,

Respondent.

File No. TO-2012-0035

ORDER REGARDING MOTION TO CONSOLIDATE , MOTION TO DISMISS AND MOTION TO DISMISS AT&T MISSOURI'S COUNTERCLAIM

Issue Date: May 17, 2012

Effective date: May 17, 2012

Background

On May 1, 2012, the Alma Respondents¹ and the Craw-Kan Respondents² (collectively, the "Non-AT&T Respondents") jointly filed a motion to consolidate this action with File Number TO-2012-0035, which is currently being held in abeyance. On May 2, 2012, the Craw-Kan Respondents filed a motion to dismiss, claiming that Halo Wireless, Inc. ("Halo") could not maintain this suit pursuant to Section 351.574, RSMo 2000, because it was administratively dissolved for failure to maintain its Certificate of Authority to operate in Missouri. Also on May 2, 2012, Respondent Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri") filed its answer to Halo's complaint and a counterclaim. Halo filed its response to the two motions and the counterclaim on May 11, 2012. Halo has moved that AT&T Missouri's counterclaim be dismissed.

AT&T Missouri's Counterclaim

AT&T Missouri's counterclaim alleges that Halo breached the interconnection agreement ("ICA") between it and Halo and seeks an order excusing it from further performance under the ICA. AT&T Missouri specifically alleges that Halo is sending it large volumes of traffic that does not originate on a wireless network as a scheme to avoid access charges.

¹ The Alma Respondents are: Alma Communications Company, d/b/a Alma Telephone Company, Choctaw Telephone Company, and MoKan Dial, Inc.

² The Craw-Kan Respondents are: Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Goodman Telephone Company, Granby Telephone Company, Iamo Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Miller Telephone Company, Ozark Telephone Company, Peace Valley Telephone Company, Inc., Rock Port Telephone Company, and Seneca Telephone Company.

Halo's response to the counterclaim is composed four exhibits.³ These exhibits appear to relate to Halo's claim that the traffic sent to AT&T is of the nature of "enhanced services" and thus not subject to access charges.

It is well established legal doctrine that unsworn statements of attorneys or parties, statements in briefs, pleadings, motions, arguments, allegations, or charging documents, as well as articles or exhibits not formally or constructively introduced are not evidence of the facts asserted unless conceded to by the opposing party.⁴ The parties' arguments and unauthenticated exhibits merely demonstrate that there are facts in dispute regarding the counterclaim. Because the counterclaim cannot be ruled upon without record evidence, the Commission will take up the counterclaim at the evidentiary hearing and will issue its decision on the counterclaim in conjunction with the decision on Halo's complaint. Halo's motion to dismiss the counterclaim will be denied.

Non-AT&T Respondents' Motion to Consolidate

File Number TO-2012-0035 was held in abeyance at the Complainants' request while it initiated blocking proceedings pursuant to the Commission's Enhanced Record Exchange Rules ("ERE Rules"). Now, the Non-AT&T Respondents in File Number TC-2012-0331 (Complainants in TO-2012-0035) argue that their allegations in TO-2012-0035, concerning the ICA between Halo and AT&T, involve related questions of law and fact to the instant proceeding and that it would serve administrative economy to join the two

³ It is unclear whether Halo intended to file a cover pleading, or if there was an error with using the Commission's Electronic Information and Filing system ("EFIS"), but only the exhibits appear in EFIS.

⁴ *State ex rel. TWA, Inc. v. David*, 158 S.W.3d 232, 236 (Mo. Banc 2005) (Judge White Dissenting), *citing to*, *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997); *State v. Smith*, 154 S.W.3d 461, 469 (Mo. App. 2005); *Lester v. Sayles*, 850 S.W.2d 858, 864 (Mo. Banc 1993); *State v. Rutter*, 93 S.W.3d 714, 727 (Mo. Banc 2002); *State v. Robinson*, 825 S.W.2d 877, 880 (Mo. App. 1992); *State ex rel. Horn v. Randall*, 275 S.W.2d 758, 763-764 (Mo. App. 1955).

proceedings. Specifically, those allegations claim that the ICA, as implemented, is discriminatory to telecommunications services providers who are not parties to the agreement, and that the ICA is not consistent with the public interest, convenience, or necessity.

In response, Halo makes three arguments. The first is that since the Complainants in File Number TO-2012-0035 requested that case to be held in abeyance, and since the Commission found that request to be proper, the Complainants cannot change their request. Halo's second argument is that the Commission lacks jurisdiction to grant the remedy sought in TO-2012-0035. And Halo's third argument is that adding new issues to File Number TC-2012-0331, which is proceeding on an expedited schedule, would be prejudicial and unworkable.

The Alma Respondents filed a response to Halo's arguments on May 12, 2012. They argue that they did not intend to interject the legal issues in TO-2012-0035 into the procedural schedule of this case, but rather that single hearing could be used to decide both cases. The Alma Respondents further note that any relief ordered in TC-2012-0331 may eliminate the need for additional relief to be ordered in TO-2012-0035, but that if additional relief is requested an evidentiary record will have already been established from which to render a decision.

Halo's arguments are without merit. The Commission granted the request to hold TO-2012-0035 in abeyance simply because it was Complainant's complaint. Holding the complaint in abeyance prejudiced no party and merely froze the action until the parties made a further request. In fact, Halo did not object to the request, but rather chose to assert a challenge to the application of the Commission's ERE rules, which was

procedurally improper because no blocking action had been initiated at the time of the request to hold TO-2012-0035 in abeyance.

The Commission made no decision on any selection of remedies as Halo implies, and there is no procedural or substantive limitation on the Complainants that would prevent them from seeking to reactivate TO-2012-0035. Moreover, if Halo is correct, that the Commission lacks jurisdiction to award the relief requested in TO-2012-0035, then it is difficult to see how making such a summary determination in conjunction with TC-2012-0331 could in any way render the current procedural schedule unworkable or prejudicial.

Commission Rule 4 CSR 240-2.110(3) states:

When pending actions involve related questions of law or fact, the commission may order a joint hearing of any or all the matters at issue, and may make other orders concerning cases before it to avoid unnecessary costs or delay.

The type of traffic that is initiated by Halo and transited to the Non-AT&T Respondents through AT&T Missouri by the terms of the ICA is a central issue in TC-2012-0331. The determination on that issue will help determine if Halo is in violation of the Commission's ERE Rules. Additionally, the Commission will be taking up AT&T Missouri's counterclaim concerning whether Halo has breached the ICA at the evidentiary hearing. Clearly, evidence surrounding the ICA will be adduced at the evidentiary hearing scheduled for TC-2012-0331, and that same evidence could resolve the issues presented in TO-2012-0035.

Because these two matters involve related questions of law and fact, and because evidence regarding the ICA will already be adduced at hearing, the Commission will grant the motion to consolidate Files Numbers TO-2012-0035 and TC-2012-0331. To the extent any party believes that taking evidence on the ICA (which should have already been contemplated by the parties) will require additional time, they may file a motion for a

continuance of the evidentiary hearing and propose any necessary modifications to the procedural schedule.

The Craw-Kan Respondents Motion to Dismiss

The Craw-Kan Respondents have moved to dismiss this action pursuant to Section 351.574.1, RSMo 2000, which provides:

A foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority.

In support of their motion, the Craw-Kan Respondents attach a copy of the August 25, 2010 letter from the Missouri Secretary of State to Halo that administratively dissolves Halo for failure to file a correct and current annual report.

Halo argues that section 351.574.3 and .5, RSMo 2000, allows the Commission to stay the proceeding until its certificate is reinstated, and even without a certificate it is allowed to defend itself in any proceeding in this state. Halo has also produced documentation of completing the requirements for reinstatement of its certificate with the Secretary of State.

Section 351.488.3 provides: "When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." Assuming Halo's application for reinstatement is complete, it would have the effect of erasing the administrative dissolution and there would be no basis to dismiss this action. The Commission will deny the motion to dismiss and will direct Halo to file its Certificate of Authority to transact business in Missouri as soon as it is reinstated.

THE COMMISSION ORDERS THAT:

1. Halo Wireless, Inc.'s motion to dismiss the counterclaim filed by Southwestern Bell Telephone Company, d/b/a AT&T Missouri is denied.
2. The Non-AT&T Respondents' motion to consolidate File Number TC-2012-0331 with File Number TO-2012-0035 is granted. File Number TO-2012-0035 is reactivated. File Number TC-2012-0331 shall be designated as the lead case. All filings in these matters shall be made in File Number TC-2012-0331.
3. The Craw-Kan Respondents' motion to dismiss is denied.
4. Halo Wireless, Inc.'s shall file proof of having reinstated its Certificate of Authority to conduct business in this state immediately upon receipt from Missouri's Secretary of State.
5. Any party that wishes to modify the procedural schedule shall file their request no later than May 24, 2012. Any party wishing to modify the procedural schedule shall schedule a phone conference between all of the parties and the Regulatory Law Judge as soon as is practically possible to address any proposed changes.
6. This order is effective immediately upon issuance.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Harold Stearley, Deputy Chief Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 17th day of May, 2012.