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Witness: J. Scott McPhee
Type of Exhibit: Rebuttal
Sponsoring Party: Southwestern Bell
Telephone Company, d/b/a AT&T
Missouri
Case Nos.: TC-2012-0331
and TO-2012-0035

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

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

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

June 19, 2012


AT&T Exhibit No. 2
Date 6-26-12 Reporter AF
File No. TC - 2012 - 0331

AFFIDAVIT OF J. SCOTT MCPHEE

STATE OF CALIFORNIA)
)
COUNTY OF CONTRA COSTA) SS

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

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



J. Scott McPhee

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

Notary Public

My Commission Expires:

See Attached
Notary Certificate
June 14 / 2012



California Jurat

State of California

County of Contra Costa

} s.s.

Subscribed and sworn to ~~(or affirmed)~~ before me on this 14 day of June, 20 12, by

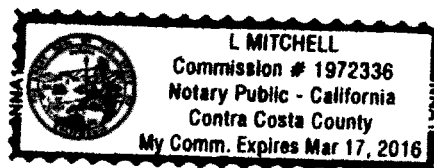
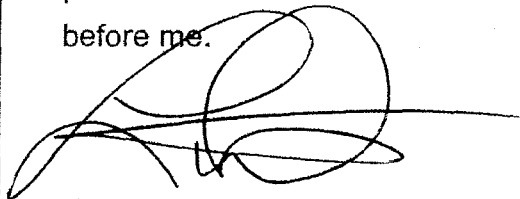
John Scott McPhee

Name of signer (1)

NA

Name of signer (2)

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



L Mitchell

Commission expires March 17, 2016

seal

OPTIONAL INFORMATION

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

DESCRIPTION OF ATTACHED DOCUMENT

This certificate is attached to a document titled/for the purpose of Affidavit containing 1 pages, and dated 6/14/12.

Additional Information

METHOD OF AFFIANT IDENTIFICATION

Proved to me on the basis of satisfactory evidence:

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

Notarial event is detailed in notary journal on:

Page # _____ Entry # _____

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1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME.**

3 A. My name is J. Scott McPhee.

4 **Q. ARE YOU THE SAME SCOTT MCPHEE WHO SUBMITTED DIRECT**
5 **TESTIMONY IN THIS CASE ON JUNE 4, 2012?**

6 A. Yes.

7 **Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?**

8 A. I will respond to certain assertions made by Halo witnesses Russ Wiseman and Robert
9 Johnson that relate to matters I discussed in my direct testimony.

10 **II. HALO'S DELIVERY OF LANDLINE TRAFFIC IN BREACH OF ICA.**

11 **Q. YOU SHOWED IN YOUR DIRECT TESTIMONY THAT THE HALO-AT&T**
12 **MISSOURI INTERCONNECTION AGREEMENT ("ICA") REQUIRES HALO**
13 **TO SEND ONLY WIRELESS-ORIGINATED TRAFFIC TO AT&T MISSOURI.**
14 **DOES HALO DISAGREE WITH THAT?**

15 A. No.

16 **Q. DOES HALO IDENTIFY ANY ACTIONS IT HAS TAKEN TO MAKE SURE IT**
17 **DOES NOT SEND LANDLINE-ORIGINATED TRAFFIC TO AT&T MISSOURI?**

18 A. No. To the contrary, Mr. Wiseman states that "Halo is not in a position to determine
19 where or on what network the call[s] started, and we have not asked our customer [*i.e.*
20 Transcom]."¹

¹ Pre-Filed Testimony of Russ Wiseman on Behalf of Halo Wireless, Inc. ("Wiseman Testimony"), at 61, lines 14-15.

1 **Q. DOES HALO DENY THAT IT HAS BEEN SENDING TRAFFIC TO AT&T**
2 **MISSOURI THAT BEGINS ON LANDLINE EQUIPMENT?**

3 A. No. Mr. Wiseman admits that most calls Halo sends to AT&T Missouri probably started
4 on other networks and that it “would not surprise me if some of them started on the
5 PSTN” (Public Switched Telephone Network).² I read that as Mr. Wiseman’s
6 understated way of admitting that Halo is, in fact, sending AT&T Missouri traffic that
7 originates with landline equipment connected to the PSTN.

8 **Q. GIVEN THESE ADMISSIONS, HOW CAN HALO CLAIM IT HAS NOT**
9 **BREACHED THE ICA?**

10 A. I don’t think it can. Halo argues, however, that even when calls begin as landline calls,
11 they somehow “originate” again as wireless calls when they pass through Transcom
12 before reaching Halo. More specifically, Halo contends that Transcom is an “Enhanced
13 Service Provider,” or “ESP,” that ESPs are treated as “end users,” and that ESPs are
14 deemed to originate (or re-originate) calls that pass through them. That argument fails,
15 however, for reasons that Mark Neinast and I have discussed in our testimony, some of
16 which I return to below, and that AT&T Missouri will set forth in full in its legal briefs.

17 **Q. MR. WISEMAN SUGGESTS THAT EVEN IF THE COMMISSION CONCLUDES**
18 **THAT HALO IS WRONG, THE COMMISSION SHOULD NOT CONDEMN OR**
19 **PENALIZE HALO FOR MAKING A BUSINESS PLAN THAT HALO BELIEVED**
20 **WAS LAWFUL AT THE TIME.³ HOW DO YOU RESPOND?**

21 A. AT&T Missouri has not asserted a fraud claim against Halo, and is not asking the
22 Commission to penalize Halo, or to decide with what state of mind Halo breached its
23 ICA. AT&T’s only claims in this case are that Halo has, in fact, breached the ICA and

² *Id.* at 61, lines 10-11.

³ *E.g., id.* at 43, lines 12-14.

1 that Halo is liable to AT&T Missouri for the access traffic Halo has delivered to AT&T
2 Missouri. AT&T is asking the Commission to authorize AT&T to discontinue service to
3 Halo under the ICA and to find that Halo is liable for access charges on the access traffic
4 it has delivered. These are not penalties; they are the normal consequences of a material
5 breach of contract such as Halo's.

6 **Q. IN LIGHT OF HALO'S TESTIMONY, DO THE PARTIES STILL DISAGREE**
7 **ABOUT WHETHER TRANSCOM IS AN ESP?**

8 A. Yes. Given the fact that Halo is indisputably sending AT&T Missouri traffic that
9 originated on landline equipment, Halo's only defense is that (1) Transcom is an ESP,
10 and (2) because Transcom is an ESP, all traffic that passes through Transcom actually
11 terminates on Transcom's equipment, which then initiates a further communication – the
12 communication that Halo delivers to AT&T. AT&T continues to maintain that Transcom
13 is not an ESP, and that even if it is, that does not mean it terminates and originates calls,
14 as Halo contends.

15 **Q. HAVE YOU YOURSELF TESTIFIED THAT TRANSCOM IS NOT AN ESP?**

16 A. Only in a very limited way. To the extent that the question whether Transcom is an ESP
17 is a legal question, AT&T will address it primarily in its legal briefs, though Mr. Neinast
18 touches on that subject. To the extent that the question is factual, Mr. Neinast has
19 discussed the pertinent facts. In my direct testimony, I discussed the FCC's Order in
20 *Connect America Fund*, which rejected Halo's theory that calls that originate on landline
21 equipment somehow become wireless calls when they pass through Halo.

1 In addition, I pointed out that Transcom has billed itself as a provider of voice
2 termination services, which is very different than, and inconsistent with, Halo's litigation
3 position that Transcom is an ESP. Specifically, Transcom's website proclaimed:

4 **Voice Termination Service**

5 *This is our core service offering.* Transcom provides termination services
6 throughout the world with a focus on North America.⁴

7 Obviously, the statement that voice termination service is Transcom's core
8 service offering is not consistent with Halo's litigation position that Transcom is an
9 enhanced service provider. In addition, that statement appeared on a Transcom webpage
10 entitled "Products and Services," which made no mention of "enhancements" or audio
11 quality. It is striking, to say the least, that Transcom claims to be an ESP based on
12 purported enhancements to audio quality, but that Transcom's own marketing description
13 of its Products and Services did not mention enhancements or audio quality.

14 This absence of any mention of enhancements in Transcom's marketing
15 description of its Products and Services is consistent with something we learned in the
16 parallel Halo proceedings before the Wisconsin Public Service Commission: None of
17 Transcom's marketing materials (not just its website) and none of Transcom's contracts
18 with its customers made any mention of the supposed "enhancements" that Halo touts in
19 this case. I do not believe enhancements can be an important part of what Transcom is
20 selling its customers when Transcom's marketing materials do not mention the
21 enhancements and, more important, when Transcom's contracts with its customers do not
22 require Transcom to provide enhancements.

⁴ See Schedule JSM-3 to my Direct Testimony (Transcom web pages) (second emphasis added).

1 As I noted in my direct testimony, Halo changed its website after AT&T pointed
2 out in proceedings like this one that Transcom's depiction of itself on the website was
3 inconsistent with its position in these proceedings, but Halo cannot undo the effect of its
4 admissions by erasing them.

5 **Q. IN YOUR DIRECT TESTIMONY, YOU STATED THAT "THE FCC REJECTED**
6 **HALO'S ARGUMENT ABOUT WHERE CALLS ORIGINATE IN ITS . . .**
7 **CONNECT AMERICA ORDER."**⁵ **YOU THEN SAID, BASED ON YOUR**
8 **PARTICIPATION IN PARALLEL CASES WITH HALO IN OTHER STATES,**
9 **THAT IT APPEARS THAT HALO, AFTER SOME INITIAL RESISTANCE,**
10 **NOW ACKNOWLEDGES THAT THE FCC DID INDEED REJECT ITS**
11 **POSITION.⁶ DOES HALO'S TESTIMONY IN THIS CASE CONFIRM THAT?**

12 **A. Yes. Mr. Wiseman states, "We acknowledge that the FCC . . . apparently now believes**
13 **ESPs . . . do not originate calls."**⁷ **When he says this, Mr. Wiseman is admitting that the**
14 **FCC has rejected Halo's theory, because the only basis for Halo's theory that Transcom**
15 **originates the calls that Halo delivers to AT&T was Halo's contention that Transcom is**
16 **an ESP.**

17 **Q. MR. WISEMAN CONTENDS, HOWEVER, THAT THE FCC'S VIEW THAT**
18 **ESPS DO NOT ORIGINATE CALLS IS A DEPARTURE FROM PRIOR**
19 **PRECEDENT, DOESN'T HE?**

20 **A. Yes, he says that the FCC's holding that ESPs do not originate calls is a "reversal of**
21 **course from prior precedent."**⁸

⁵ Direct Testimony of J. Scott McPhee ("McPhee Direct"), at 17, lines 15-16.

⁶ *Id.* at 19, lines 1 - 24.

⁷ Wiseman Testimony at 54, lines 3-4.

⁸ *Id.*

1 **Q. DOES AT&T AGREE?**

2 A. No. Nothing in the FCC’s discussion of Halo (which I quoted at pages 17-18 of my
3 direct testimony) suggests the FCC thought it was departing from prior precedent. On the
4 contrary, it is clear that the FCC was applying its existing rules to Halo’s activity.

5 The FCC’s discussion of Halo comes immediately after paragraph 1004, which
6 reads:

7 The record presents several issues regarding the scope and interpretation
8 of the intraMTA rule. Because the changes we adopt in this Order
9 ***maintain***, during the transition, distinctions in the compensation available
10 under the reciprocal compensation regime and compensation owed under
11 the access regime, ***parties must continue to rely on the intraMTA rule*** to
12 define the scope of LEC-CMRS traffic that falls under the reciprocal
13 compensation regime. We therefore take this opportunity ***to remove any***
14 ***ambiguity regarding the interpretation of the intraMTA rule.*** (Emphasis
15 added.)

16 The FCC was not creating some new rule that would apply only on a going-forward
17 basis. Instead, the FCC expressly stated that it was “removing any ambiguity” regarding
18 the ***existing*** intraMTA rule that “parties must ***continue*** to rely on” during the transition
19 period.

20 The FCC then discussed Halo in the next two paragraphs of its Order (paragraphs
21 1005 and 1006). In that discussion, the FCC stated, “We ***clarify*** that a call is considered
22 to be originated by a CMRS provider for purposes of the intraMTA rule only if the
23 calling party initiating the call has done so through a CMRS provider.”⁹ I read a good
24 many FCC orders, and it is my understanding that when the FCC says it is “clarifying” a
25 point, that means it is making clear a point that was already true – not that it is departing

⁹ *Connect America Fund* ¶ 1006 (emphasis added).

1 from prior precedent. And it was in that same *clarifying* paragraph that the FCC said,
2 “the ‘re-origination’ of a call over a wireless link in the middle of the call path does not
3 convert a wireline-originated call into a CMRS-originated call for purposes of reciprocal
4 compensation, and we disagree with Halo’s contrary position.” Plainly, the FCC did not
5 think it was departing from prior precedent.

6 **Q. IS THERE ANOTHER REASON THAT AT&T BELIEVES THE FCC’S**
7 **REJECTION OF HALO’S POSITION WAS NOT A DEPARTURE FROM PRIOR**
8 **PRECEDENT?**

9 A. Yes. The question whether an ESP is a call originator is a legal question that AT&T will
10 address in its briefs. To give the Commission a general idea of AT&T’s position,
11 however, I am informed by counsel that the FCC has *never* held that an ESP “originates”
12 calls that started elsewhere and end elsewhere and merely pass through the ESP
13 somewhere in the middle. I am further informed by counsel that AT&T Missouri will
14 show in its briefs that:

- 15 • ESPs are treated as end-users *only for the purpose of applying access*
16 *charges*, and treated as end users *only for purposes of the FCC’s access*
17 *charge rules*.
- 18 • An ESP cannot use this limited “end-user” status to claim it “originates”
19 calls that actually began when someone else picked up a phone and dialed
20 a number.
- 21 • The ESP exemption from access charges applies only to the ESP itself, not
22 to any telecommunications carrier that serves the ESP. Thus, even if
23 Transcom were an ESP, Halo cannot claim the benefit of the exemption.
24
25
26

1 **Q. MR. WISEMAN STATES: “WHILE WE ACKNOWLEDGE THAT THEY [THE**
2 **FCC] HELD THAT THIS TRAFFIC DOES NOT ORIGINATE ON HALO’S**
3 **NETWORK ‘FOR PURPOSES OF THE INTRAMTA RULE,’ THAT DOES NOT**
4 **MEAN IT DOES NOT ‘ORIGINATE’ FROM TRANSCOM FOR OTHER**
5 **PURPOSES, INCLUDING THE PROVISION IN THE ICA IN ISSUE IN THIS**
6 **CASE.”¹⁰ IS THAT A PERSUASIVE POINT?**

7 **A.** No. That is one of those statements that at first blush may sound like it makes some
8 sense, but that does not hold up if you give it even a little thought. As I noted above, and
9 as AT&T Missouri will further explain in its legal briefs, the FCC’s exemption of ESPs
10 from access charges is just that – a rule that says ESPs, instead of paying interstate access
11 charges, are treated as end users for purposes of the FCC’s access charge regime, and
12 thus do not pay access charges. The *only* sense in which the rule treats ESPs as end users
13 is by exempting them from access charges; the rule does not deem ESPs originators of all
14 traffic that passes through them. Thus, when the FCC rejected Halo’s contention that
15 Transcom’s presence in the middle of the call meant that the call originated with
16 Transcom for purposes of the intraMTA rule (that is, for purposes of intercarrier
17 compensation), the FCC was rejecting *in its entirety*, and for all purposes, Halo’s view of
18 Transcom as a call originator.

19 **Q. MR. WISEMAN ALSO SUGGESTS THAT THE FCC ACTUALLY DEEMED**
20 **THE TRAFFIC THAT HALO PASSES ON TO ILECS TO BE NON-ACCESS**
21 **TRAFFIC.¹¹ DO YOU AGREE?**

22 **A.** No. It is absolutely clear that in paragraphs 1005 and 1006 of the *Connect America Fund*
23 Order, which I quoted in my direct testimony, the FCC was saying that the traffic that

¹⁰ Wiseman Testimony at 63, lines 8-11. Mr. Johnson makes the same point in his testimony, at 6, lines 23-25. He introduces the point, however, by saying that AT&T Missouri “claim[s], incorrectly, that the FCC has declared Transcom’s traffic to be ‘landline’ traffic and therefore not wirelessly-originated” That simply is not so. AT&T Missouri merely pointed out, accurately, that the FCC disagreed with Halo’s position and stated that landline traffic did not convert to wireless traffic because it traveled over a wireless link in the middle.

¹¹ Wiseman Testimony at 64, line 3 - 64, line 3.

1 Halo was claiming was non-access traffic was in reality access traffic. Indeed, that is the
2 very point the FCC was making. Mr. Wiseman's theory is based on the premise that
3 when the FCC used the term "transiting" in paragraph 1006, it was using it in the same
4 sense as when it later defined transit service, in an entirely separate part of the Order
5 discussing an entirely different issue, as involving "non-access traffic." Based on this, he
6 suggests that Halo's traffic cannot be subject to access charges. Given how clear it is that
7 the FCC was saying in paragraphs 1005 and 1006 that the traffic at issue was access
8 traffic, Halo's suggestion that the FCC meant exactly the opposite based on something
9 the FCC said in an entirely different part of the Order is absurd. Moreover, the primary
10 issue in this case is whether the traffic Halo has been sending to AT&T Missouri is
11 landline-originated, and Halo's argument about the term "transiting" has nothing to do
12 with that point.

13 **Q. MR. WISEMAN SAYS HE EXPECTS THE COURT OF APPEALS FOR THE**
14 **TENTH CIRCUIT WILL REVERSE THE FCC'S *CONNECT AMERICA FUND***
15 **ORDER.¹² HOW DO YOU RESPOND?**

16 A. Needless to say, this Commission should apply the law as it exists today and decline
17 Halo's invitation to speculate about what may or may not happen in a challenge to the
18 FCC's decision. This is particularly appropriate given that in the past, Halo has asserted
19 with great conviction that the FCC would see things Halo's way and that state
20 commissions should not hear AT&T's complaints against it. As the Commission is
21 aware from AT&T Missouri's previous submissions in this docket, the FCC did not see

¹² *Id.* at 64, line 1.

1 things Halo's way, and federal courts across the nation have held that state commissions
2 should hear these complaints.

3 **Q. MR. WISEMAN TESTIFIES THAT THE ICA HAS A "CHANGE OF LAW**
4 **PROVISION," AND THAT HALO INTENDS TO INVOKE IT.¹³ BEFORE YOU**
5 **ADDRESS HALO'S INTENT TO INVOKE CHANGE OF LAW, PLEASE**
6 **EXPLAIN THE CHANGE OF LAW PROVISION TO WHICH MR. WISEMAN**
7 **REFERS.**

8 **A.** Most provisions in virtually any interconnection agreement reflect the law as it existed at
9 the time when the ICA was entered – particularly including the requirements in section
10 251 of the Telecommunications Act of 1996 (interconnection, unbundled elements,
11 resale, collocation, etc.), the FCC's Rules implementing those requirements, and FCC
12 and State Commission orders applying those requirements. Not all ICA provisions
13 reflect the law, because parties are free to depart from the requirements of the 1996 Act
14 when they negotiate an ICA, but most provisions do, either because the parties agree on
15 language that reflects current law or because the parties fail to agree and arbitrate
16 language, in which event the state commission must impose language that reflects current
17 law.

18 The law changes, however – not the 1996 Act itself, but the FCC's implementing
19 Rules and FCC and state commission interpretations of the law. Recognizing that fact,
20 interconnection agreements typically include "change of law" provisions that allow for
21 language in the ICA to be changed if the law on which that language was based changes
22 during the term of the ICA. The change of law provision in the Halo/AT&T Missouri

¹³ *Id.* at 82, lines 1-5.

ICA is entitled "Intervening Law" and appears in Section 14 of the ICA, which is Schedule JSM-4 to my direct testimony.

Q. HOW DO YOU RESPOND TO MR. WISEMAN'S STATEMENT THAT HALO INTENDS TO INVOKE THE CHANGE OF LAW PROVISION IN LIGHT OF THE *CONNECT AMERICA FUND ORDER*?

A. If Halo wants to change the parties' ICA, that can only mean that Halo is not happy with what the ICA says now – carriers do not invoke change of law just because the law changes; they do so only when they do not like the provisions in their existing ICA. It is understandable that Halo does not like its ICA with AT&T Missouri, because Halo, while purporting to carry out its business plan, is methodically breaching that ICA.

If Halo does ask to amend the ICA pursuant to the change of law provision, AT&T will respond as appropriate. That said, the *Connect America Fund Order* did not change the law that led the FCC to reject Halo's argument concerning the origination of traffic that passes through Transcom. The FCC did not create a new rule in that regard, but instead clarified the same rule that has been in effect since the parties entered into the ICA. Beyond that, the FCC's clarification makes clear that Halo's position in this proceeding is, and always has been, wrong.

The important point for present purposes, though, is that this case must be decided under the existing contract language – language that Halo admits is unfavorable to Halo when it states it will seek to amend the ICA.

1 **Q. MR. WISEMAN ALSO SAYS “WE ARE PREPARED TO OPERATE UNDER**
2 **THE FCC’S NEW REGIME . . . BUT WE MUST BE GIVEN A CHANCE TO**
3 **BRING OUR ARRANGEMENTS AND OPERATIONS INTO COMPLIANCE,**
4 **AND THE FULL SET OF FCC RULES MUST BE IMPLEMENTED.”¹⁴ WHAT IS**
5 **YOUR REACTION TO THAT?**

6 **A.** As I have said, AT&T does not think there is anything new about the legal principles that
7 mean that Halo has breached the ICA. And as I understand it, it is for the bankruptcy
8 court to decide if Halo can come up with a workable business plan. In any event, for
9 purposes of this case Halo’s plea seems to me to be just the latest in a very long – and
10 unsuccessful – line of stall tactics. Halo has made many futile attempts to deter this
11 Commission, and other state commissions, from deciding AT&T’s claims,¹⁵ and Mr.
12 Wiseman’s appeal for time to bring its operations into compliance with the law sounds
13 like yet another variation on the same theme. This proceeding does not present the
14 question whether Halo can devise a viable business plan any more than it presents the
15 question whether Halo is entitled to a change in the terms of its ICA. AT&T Missouri
16 respectfully urges the Commission to decide the questions that are presented in this
17 proceeding as promptly as practicable.

¹⁴ Wiseman Testimony at 59, lines 6-9.

¹⁵ Those attempts have included improper removals to federal court, baseless motions to stay and frivolous motions to dismiss, such as the motion Halo filed in this case and that the Commission summarily denied.

1 Q. HALO/TRANSCOM RELY ON RULINGS BY A BANKRUPTCY COURT
2 FINDING TRANSCOM AN ESP IN 2005-2007, AND MR. JOHNSON SAYS THAT
3 AT&T'S WITNESSES "ARGUE, ILLOGICALLY, THAT THIS COMMISSION
4 SHOULD IGNORE FEDERAL COURT RULINGS THAT TRANSCOM IS AN
5 ESP IN FAVOR OF THE TENNESSEE REGULATORY AUTHORITY ('TRA')
6 RULING THAT TRANSCOM IS NOT SIMPLY BECAUSE THE TRA RULING
7 IS NEWER, INSTEAD OF HOLDING THE FEDERAL RULINGS IN THE SAME
8 OR HIGHER DIGNITY."¹⁶ HOW DO YOU RESPOND?

9 A. That is really a subject for the legal briefs, but I will note that AT&T Missouri has not
10 suggested that the Commission should "ignore" the bankruptcy rulings (which Halo calls
11 the "ESP Rulings"). There are powerful reasons for giving more weight to the TRA's
12 decision than to the ESP Rulings, however, not the least of which is that Halo made the
13 same arguments about the ESP Rulings to the TRA that it is making here, and the TRA
14 was not persuaded. The point is *not*, as Mr. Wiseman puts it, that the TRA decision is
15 "newer"; it is that the TRA considered, and rejected, the bankruptcy court finding. The
16 TRA gave detailed and cogent reasons for its determination that Transcom is not an
17 ESP,¹⁷ and its decision was in accord with the decision of the only other state commission
18 that has ruled on the question whether Transcom is an ESP, the Pennsylvania Public
19 Utility Commission ("PPUC").¹⁸

20 The TRA's decision is also more pertinent here than the so-called ESP Rulings
21 because it is, so far, the only decision by any state commission on the precise issue
22 presented here: whether Halo is breaching its ICA with AT&T by delivering landline-

¹⁶ Johnson Testimony at 6, line 26 - 7, line 2.

¹⁷ See Direct Testimony of Mark Neinast on Behalf of AT&T Missouri ("Neinast Direct") at 23, line 13 - 24, line 17.

¹⁸ *Id.* at 25, lines 1-12.

1 originated traffic to AT&T. None of the ESP Rulings held that Transcom was an end
2 user, or that calls terminate with or originate with Transcom.

3 The ESP Rulings carry little precedential weight for other reasons as well. The
4 earliest ESP Ruling on which Halo relies was vacated on appeal, and vacated rulings
5 have no preclusive effect. *E.g., Kosinski v. C.I.R.*, 541 F.3d 671, 676-77 (6th Cir. 2008)
6 (collecting cases). And the ESP Ruling that confirmed Transcom's plan of
7 reorganization did not resolve any dispute between parties regarding whether Transcom
8 was an ESP – much less whether all calls that pass through Transcom must be deemed to
9 be wireless-originated – because that point was neither contested in that proceeding nor
10 necessary to the order. Perhaps most important, none of the ESP Rulings says that
11 Transcom somehow originates or re-originates, and changes to wireless, every call that
12 passes through it, for none of the decisions even addresses that issue. Accordingly, the
13 ESP Rulings have little bearing on the matters that are at issue here. If any decision is
14 controlling in this case, it is the FCC's rejection in *Connect America Fund* of precisely
15 the position that Halo asserts here.

16 Finally, the determinations by the Tennessee and Pennsylvania commissions that
17 Transcom is not an ESP also carry more weight than the bankruptcy court finding
18 because state utility commissions are more knowledgeable about these matters than
19 bankruptcy courts are. To be sure, some aspects of this case may be unusual for this
20 Commission, and others, but the basic subject matters – call origination, intercarrier
21 compensation, and even access charge avoidance schemes – are very familiar. For most
22 bankruptcy courts, however, even the most basic telecommunications concepts are Greek.

1 Q. MR. WISEMAN EMPHASIZES THAT SOME OF THE TRAFFIC HALO
2 DELIVERS TO AT&T MISSOURI IS VOIP TRAFFIC.¹⁹ TAKING THAT AS
3 TRUE FOR THE SAKE OF DISCUSSION, WHY IS IT SIGNIFICANT?

4 A. It is not at all significant, at least for purposes of the issues in this docket. Mr.
5 Wiseman's point is that VoIP traffic that is allegedly "originated" or "re-originated" by
6 Transcom and delivered after December 29, 2011, is not subject to access charges. But
7 the only thing that point could possibly bear on is the determination of how much money
8 Halo owes AT&T Missouri in unpaid access charges, and AT&T Missouri has been very
9 clear it is not asking the Commission to make that determination in this case.

10 **III. TERMINATION OF SERVICE TO HALO**

11 Q. MR. WISEMAN TESTIFIES THAT AT&T IS MISTAKEN IN ITS
12 CONTENTION THAT HALO PROVIDES NO VALUE TO COMMUNICATIONS
13 CUSTOMERS, AND THAT HALO IN FACT DOES PROVIDE VALUE AND SO
14 SHOULD NOT BE REMOVED FROM THE MARKETPLACE.²⁰ HOW DO YOU
15 RESPOND?

16 A. I have three responses. *First*, if Halo is materially breaching its contract with AT&T
17 Missouri, which it is, then the law, as I understand it, entitles AT&T Missouri to
18 discontinue performance of the contract, whether or not Halo is providing value to
19 anybody; this is not a policy judgment for the Commission to make based on its
20 assessment of the value Halo provides or does not provide. *Second*, the point that Mr.
21 Neinast made in his direct testimony concerning AT&T Missouri's termination of service
22 to Halo was not that it would be harmless because Halo provides no value; rather, it was
23 that it would not cause any consumers to lose dial tone and would not cause any calls not

¹⁹ Wiseman Testimony at 43, line 19 - 46, line 6.

²⁰ *Id.* at 20, line 7 - 23, line 18.

1 to complete.²¹ *Third*, it does not seem to me that Halo provides any meaningful value to
2 consumers in Missouri. I mention that with some reluctance, because it is not particularly
3 germane to the determinations the Commission must make, but I did not want to let Mr.
4 Wiseman's claim go unchallenged.

5 **Q. WHAT VALUE DOES MR. WISEMAN SAY HALO PROVIDES?**

6 A. Actually, and intriguingly, he does not say that *Halo* provides any value. He has a
7 question that reads "Does Halo provide any value or benefit to the consumers in
8 Missouri?" But in his answer to that question, he contends that *Transcom* provides value;
9 he does not say a word about any benefit provided by Halo, the company of which he is
10 President.²² Even if it was true that *Transcom* provides some value (which I do not
11 believe it does), that does not mean that *Halo* provides any value.

12 **Q. WHAT VALUE DOES MR. WISEMAN SAY TRANSCOM PROVIDES?**

13 A. Here is what Mr. Wiseman says: "[M]ajor providers of communications services
14 voluntarily choose to purchase Transcom's services and incorporate them into the
15 delivery of service to their consumer customers." *Therefore*, Transcom provides a
16 valuable service, "not only to the service providers" who are Transcom's customers, "but,
17 *by extension*, to the service providers' end consumers. Thus, if Transcom, and Halo as
18 one of Transcom's service vendors, are removed from the marketplace, this means that

²¹ See Neinast Direct at 31, line 1 - 33, line 22.

²² Wiseman Testimony at 22, line 6 - 23, line 18.

1 the preferred provider of service to these service providers is taken away, forcing these
2 providers to employ their 'second best' choice, assuming they have such a choice."²³

3 That makes no sense to me, for two primary reasons. First, Halo claims that it is
4 just one of a number of Transcom vendors – vendors that Halo repeatedly describes as
5 multiple and essentially interchangeable.²⁴ If *Transcom* provides value, as Mr. Wiseman
6 claims it does, there is no reason to believe that *Transcom* will disappear merely because
7 AT&T Missouri discontinues service to *Halo*; Transcom can simply move its traffic to its
8 other vendors. Unless, of course, Halo is, contrary to Halo's own representations,
9 indispensable to Transcom because the two companies inextricably engage together in an
10 access charge avoidance scheme that depends on Halo's unique status among Transcom's
11 supposedly multiple vendors.

12 Second, Mr. Wiseman's logic is that the service providers that are Transcom's
13 customers must see value in Transcom because they choose to be Transcom's customers,
14 and if there is value for the service providers, it necessarily follows that there is value
15 ("by extension") for their consumer customers. I am not an economist (and neither is Mr.
16 Wiseman), but that seems like an awfully big stretch. If Transcom is providing any value
17 to its customers, it is the avoidance of access charges. And for every dollar of "benefit"
18 that someone is getting by not paying the applicable access charge, AT&T Missouri loses
19 a dollar. If we assume, along with Mr. Wiseman, that the savings on his side of the
20 ledger somehow wind up benefiting the consumers on that side of the ledger, doesn't the

²³ *Id.* at 22, line 22 – 23, line 5 (emphasis added).

²⁴ *See, e.g.,* Johnson Testimony at 12, lines 13-14; 13, lines 9-22.

1 corresponding loss on the AT&T Missouri side of the ledger have a correspondingly
2 negative effect on AT&T Missouri's consumer customers? As I understand it, the
3 existing intercarrier compensation regime at least attempts to be economically rational, to
4 the ultimate benefit of the consuming public. If that is so, then conduct such as Halo's
5 that distorts or games the system is, one would presume, not beneficial for the consuming
6 public.

7 **Q. MR. WISEMAN CLAIMS THAT "FEDERAL LAW PREEMPTS ANY ATTEMPT**
8 **TO BLOCK HALO'S TRAFFIC" AND THAT "BLOCKING EVEN**
9 **'INTRASTATE' TRAFFIC WILL FRUSTRATE HALO'S *FEDERAL* RIGHT TO**
10 **INTERCONNECTION? DO YOU AGREE WITH THIS CLAIM?**

11 A. No. While I am not a lawyer and cannot speak to the legal issue, Mr. Wiseman's casting
12 the dispute as one over federal interconnection rights is simply an attempt to obscure the
13 real issues. AT&T Missouri seeks to discontinue providing service because Halo has
14 materially breached the ICA by sending landline traffic to AT&T Missouri for
15 termination, and by failing to pay the appropriate access charges associated with that
16 traffic. Disconnection for nonpayment is the traditional remedy telephone companies
17 generally have for addressing nonpayment by any customer, whether by a single line end
18 user or by a carrier like Halo.

19 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

20 A. Yes.